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

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA REGARDING DR. PHU TRUONG VU

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

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[1] An appeal was held before a panel of the Council Review Panel ("the Panel") of the College of Physicians & Surgeons of Alberta (the "College") on August 22, 2024, via ZOOM. In attendance were:

Council members:

Dr. Oluseyi Oladele, Regulated Member and Chair of the Panel;
Dr. Richard Buckley, Regulated Member;
Ms. Laurie Steinbach, Public Member;
Ms. Pan Zhang, Public Member.

Also in attendance were:

Mr. Craig Boyer, legal counsel for the Complaints Director;
Dr. Phu Truong Vu, investigated person;
Ms. Megan L. McMahon and Ms. Anika Y. Winn, legal counsel for Dr. Phu Truong Vu;
Ms. Mary Marshall, independent legal counsel to the Panel.

[2] The appeal was conducted in accordance with sections 87 and 89 of the *Health Professions Act* ("HPA"). The appeal is with respect to the Hearing Tribunal's Merits Decision dated August 29, 2022, and the Sanction Decision dated January 26, 2024.

I. PRELIMINARY MATTERS

[3] There were no objections to the composition of the Panel hearing the appeal or the jurisdiction of the Panel to proceed with the appeal.

[4] Counsel for Dr. Vu submitted that the portions of the hearing that were closed before the Hearing Tribunal should remain closed on appeal. The precise portions of the evidence that were closed are described at paragraph 138 of the Merits Decision, and at paragraph 17 of the Sanction Decision. Counsel for the Complaints Director had no objection to those portions being closed and submitted that it would be up to counsel for Dr. Vu to indicate when they may be covered and ask that the appeal hearing close. The appeal proceeded on that basis, and there were no requests to close the appeal at any time.

[5] The parties confirmed that there were no other preliminary or jurisdictional issues.

[6] Documents, submissions and case authorities reviewed and considered by the Panel included:

A. Record of Hearing

Tab 1: Notice of Hearing dated August 18, 2021

Tab 2: **Exhibit 1** – Agreed Exhibit Book (19 Exhibits)

Tab 3: **Exhibit 2** – Curriculum Vitae (Dr. B[redacted]

Tab 4: **Exhibit 3** – Curriculum Vitae (Dr. D[redacted])

Tab 5: **Exhibit 4** – Expert Report (Dr. D[redacted])

Tab 6: Transcript March 16-17, 2022 (Merit Hearing)

Tab 7: Written Submission from Complaints Director (merit)

Tab 8: Authorities to Hearing Brief (Complaints Director)

Tab 9: Written Submission from Dr. Vu (merit)

Tab 10: Transcript May 9, 2022 (continued from March 2022)

Tab 11: Hearing Tribunal Merit Decision August 29, 2022

Tab 12: **Exhibit 5** – Complainant Impact Statement

Tab 13: **Exhibit 6** – Letter from Colleague (Dr. Vu)

Tab 14: **Exhibit 7** – Letter from Colleague (Dr. Vu)

Tab 15: **Exhibit 8** – Letter from Colleague (Dr. Vu)

Tab 16: **Exhibit 9** – Letters of Support (Dr. Vu)

Tab 17: Transcript June 1, 2023 (Sanction Hearing

Tab 18: Written Submissions on Sanction from Complaints Director (Tabs 1 through 23)

Tab 19: Written Submissions on Sanction from Dr. Vu (Tabs 1 through 47)

Tab 20: Hearing Tribunal Sanction Decision January 26, 2024

Tab 21: Notice of Appeal February 21, 2024 (Dr. Vu)

Tab 22: Notice of Cross-Appeal February 16, 2024 (Complaints Director)

B. Dr. Vu's Appellant Written Submissions dated July 11, 2024

Tab 1: *Health Professions Act*, RSA 2000, c H-7

Tab 2: *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98

Tab 3: *Sahi v Alberta Veterinary Medical Association*, 2023 ABCA 368

Tab 4: *Chartered Professional Accountants of Alberta (Complaints Inquiry Committee) v Mathison*, 2024 ABCA 33

Tab 5: *Abouhamra v College of Physicians & Surgeons of Alberta* (April 24, 2019) (AB CPSDC)

Tab 6: *Torbey v College of Physicians & Surgeons of Alberta*, 2018 ABCA 285

Tab 7: *Maritz v College of Physicians & Surgeons of Alberta* (April 1, 2019) (AB CPSDC)

Tab 8: *Zuk v Alberta Dental Association and College*, 2018 ABCA 270

Tab 9: *Al-Naami v College of Physicians & Surgeons of Alberta*, 2021 ABQB 549

Tab 10: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

Tab 11: *R v JMH*, 2011 SCC 45

Tab 12: *Ball v Imperial Resources*, 2010 ABCA 111

Tab 13: *Dunsmuir v New Brunswick*, 2008 SCC 9.

Tab 14: *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699

Tab 15: *Irwin v Alberta Veterinary Medical Assn*, 2015 ABCA 396

Tab 16: *Swart v College of Physicians & Surgeons of Prince Edward Island*, 2014 PECA 20

Tab 17: *College of Physicians & Surgeons of Ontario v Kunynetz*, 2019 ONSC 4300

Tab 18: *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267

Tab 19: *R v Candir*, 2009 ONCA 915

Tab 20: *R v LCJ*, 2019 ABCA 484.

Tab 21: *R v Schell*, 2013 ABCA 4

Tab 22: *R v Evans*, 1993 CarswellBC 495 (SCC)

Tab 23: *R v Martin*, 1997 CarswellBC 1446 (SCC)

Tab 24: *Dow Chemical Canada ULC v NOVA Chemicals Corp*, 2023 ABKB 156

Tab 25: *Smyth v Smyth*, 2021 ABQB 13

Tab 26: *Bafaro v Dowd*, 2008 CarswellOnt 5246 (ONSC)

Tab 27: Sidney N. Lederman, Michelle K. Fuerst and Hamish C. Stewart, eds, Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022)

Tab 28: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42

Tab 29: Cameron Hutchinson, *The Modern Principle of Statutory Interpretation*, 2nd ed (Toronto: LexisNexis Canada Inc. 2022)

Tab 30: *Rizzo & Rizzo Shoes Ltd*., Re, 1998 CarswellOnt 1 (SCC)

Tab 31: "*Bill C-21, An Act to Protect Patients*", Legislative Assembly of Alberta, 29-4 (31 October 2018, 6 November 2018, 8 November 2018) (Hon. Robert E. Wanner)

Tab 32: *Regulated Health Professions Act*, 1991, S.O. 1991, c 18, Schedule 2

Tab 33: Richard Steinecke, *Complete Guide to the Regulated Health Professions Act* (Toronto: Thomson Reuters Canada Ltd., 2024)

Tab 34: *Rosenberg v College of Physicians & Surgeons (Ontario)*, 2006 CarswellOnt 6759 (ONCA)

Tab 35: *College of Physicians & Surgeons of Ontario v Phipps*, 2018 ONCPSD 48

Tab 36: *R v Chase*, (1987) 2 SCR 293 (SCC)

Tab 37: *Fitzpatrick v Alberta College of Physical Therapists*, 2012 ABCA 207.

Tab 38 *R v S(W)*, 1994 CarswellOnt 63 (ONCA)

Tab 39: *Healley v College of Physicians & Surgeons of Alberta* (December 19, 2012) (AB CPSDC)

Tab 40: *Lycka v College of Physicians & Surgeons of Alberta* (March 16, 2020) (AB CPSDC)

Tab 41: *Jaswal v Medical Board (Nfld)*, 1996 CanLII 11630 (NLSC)

Tab 42: Field Law, Bill 21 – *An Act to Protect Patients* – Professional Regulatory Alert, November 2018

Tab 43 *Tanase v The College of Dental Hygienists of Ontario*, 2019 ONSC 5153

Tab 44: *Leering v College of Chiropractors (Ontario)*, 2010 ONCA 87

Tab 45 Alberta Doctor's Digest, Zero tolerance towards sexual abuse or misconduct, November 2018

Tab 46: *B(A) v College of Physicians & Surgeons (Prince Edward Island)*, 2001 PESCTD 75

Tab 47: *Ezema, Re*, 2018 CarswellNS 547 (CPSNS)

Tab 48 *Covant v College of Veterinarians of Ontario*, 2023 ONCA 564

Tab 49: *Alarape, Re*, 2019 CarswellAlta 2926 (AB CPSDC).

Tab 50: *Xiao-Phillips v Law Society of Saskatchewan*, 2024 SKCA 44.

Tab 51: *Canadian Natural Resources Limited v Campbell*, 2018 SKCA 67.

Tab 52: *Hanna v College of Physicians & Surgeons of Saskatchewan*, 1999 CarswellSask 331 (SKQB)

C. Reply Submissions of the Complaints Director of the CPSA dated July 25, 2024

Tab 1: *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 S.C.R. 653; 2019 SCC 65

Tab 2: *Yee v Chartered Professional Accountants of Alberta*, [2020] AJ No 291 (QL); 2020 ABCA 98

Tab 3: *Zuk v Alberta Dental Association and College*, 4 Alta LR (6th) 8; 2020 ABCA 162

Tab 4: *Health Professions Act*, RSA 2000, c H-7

Tab 5: *Regulated Health Professions Act*, 1991, S.O. 1991, c.18

Tab 6: *Warraich, Re*, 2022 MBCA 66

Tab 7: *Alberta (Workers' Compensation Board) v. Appeals Commission*, [2005] AJ No 1012 (QL); 2005 ABCA 276

Tab 8: *Cuthbertson v Rasouli*, [2013] 3 SCR 341; 2013 SCC 53

Tab 9: *R. v Kirkpatrick*, 471 DLR (4th) 440; 2022 SCC 33

Tab 10: *Hanna v College of Physicians and Surgeons (Saskatchewan)*, [1999] SJ No 334, 1999 CanLII 12627 (SK KB)

Tab 11: *Canada 3000 Inc. (Re)*, [2006] 1 S.C.R. 865; 2006 SCC 24

Tab 12: *R. v. Garland*, 2021 ABCA 46; 2021 A.J. No. 145

Tab 13: *Brazeau County v. Drayton Valley*, 2024 ABKB 445

Tab 14: *Strother v Law Society of British Columbia*, 437 DLR (4th) 640; 2018 BCCA 481

Tab 15: CMPA Bulletin, Understanding your rights – The rules of natural justice,

Tab 16: *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] SCJ No 17 (QL); 2001 SCC 52

Tab 17: *Mussani v College of Physicians and Surgeons of Ontario*, 22 Admin LR (4th) 53; [2004] OJ No 5176

Tab 18: *R.A.R. v. College of Physicians and Surgeons of Ontario*, [2006] OJ No 4380; 275 DLR (4th) 275

Tab 19: *Tanase v College of Dental Hygienist of Ontario*, 156 OR (3d) 675; [2021] OJ No 3648

D. Submissions on Cross-Appeal by the Complaints Director of the CPSA dated July 11, 2024.

Tab 1: *Health Professions Act*, RSA 2000, c H-7;

Tab 2: *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98

Tab 3: *Zuk v Alberta Dental Association and College*, 2020 ABCA 162

Tab 4: *Bhardwaj (Re)*, 2020 CanLII 19361 (AB CPSDC)

Tab 5: *Levin (Re),* 2015 CanLII 103209 (AB CPSDC)

Tab 6: *Sazant v College of Physicians and Surgeons of Ontario*, 2011 ONSC 323

Tab 7: *Garbutt (Re)*, 2020 CanLII 65429 (AB CPSDC)

Tab 8: *Postnikoff (Re)*, 2021 CanLII 85309 (AB CPSDC)

Tab 9: Alberta, Legislative Assembly, Hansard, 29th Leg, 4th Sess, Day 43 (31 October 2018)

Tab 10: *Ontario (College of Physicians and Surgeons of Ontario) v Kunynetz*, 2018 ONCPSD 5

Tab 11: *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336

Tab 12: *Charkhandeh v. College of Dental Surgeons of Alberta*, 2024 ABCA 239

Tab 13: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

Tab 14: Beaudoin v British Columbia (Attorney General), 2022 BCCA 427

Tab 15: Paul Daly, "Divided by a Common Concept? Comparing Deference in Canada and the United States" in Administrative Law Matters (10 October 2023) online: https://www.administrativelawmatters.com/blog/2023/10/10/divided-by-a-commonconcept-comparing-deference-in-canada-and-the-united-states/

Tab 16: Paul Daly, "Justice Abella's Administrative Law Jurisprudence: Critical Analysis" in Administrative Law Matters (23 September 2022) online: https://www.administrativelawmatters.com/blog/2022/09/23/justice-abellasadministrative-law-jurisprudence-critical-analysis/

Tab 17: *Alberta College of Physical Therapists v Fitzpatrick*, 2015 ABCA 95

Tab 18: *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313

E. Submissions of the Respondent to Complaints Director's Costs Appeal to Council dated July 25, 2024

Tab 1: *Health Professions Act*, RSA 2000, c H-7

Tab 2: *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98

Tab 3: *Sahi v Alberta Veterinary Medical Association*, 2023 ABCA 368

Tab 4: *Zuk v Alberta Dental Association and College*, 2020 ABCA 162

Tab 5: *Wright v College and Assn. of Registered Nurses of Alberta*, 2012 ABCA 267

Tab 6: *Physiotherapy Alberta College + Association v Sherman* (June 7, 2023) (ABPACA)

Tab 7: *Jinnah v Alberta Dental Associate and College*, 2022 ABCA 336

Tab 8: *Charkhandeh v College of Dental Surgeons of Alberta*, 2024 ABCA 239 (CPSDC)

Tab 9: *College of Physicians & Surgeons of Alberta v Hoffman* (June 10, 2024) (CPSDC)

Tab 10: *C(K) v College of Physical Therapists of Alberta*, 1999 ABCA 253

Tab 11: *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313

Tab 12: *Alberta Powerline General Partner Ltd. v Ward*, 2019 ABSRB 740

Tab 13: *Leontowicz v College of Physicians and Surgeons of Saskatchewan*, 2022 SKQB 98

Tab 14: *Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37

Tab 15: *College of Physiotherapists of Alberta v Gilboa*, 2020 ABPACA 2

Tab 16: *Levin (Re)*, 2015 CarswellAlta 3100 (CPSDC)

Tab 17: *College of Physicians & Surgeons of Nova Scotia and Remirez-Morejon, Re*, 2022 CarswellNS 583 (CPSDC)

Tab 18: *Kunynetz v College of Physicians & Surgeons of Ontario*, 2019 ONSC 4300

Tab 19: *Physiotherapy Alberta College + Association v Kyley Mohrenberger* (June 8, 2022) (ABPACA)

Tab 20: *Alberta College of Occupational Therapists v Kris Nelson* (January 2022) (ACOTDC)

Tab 21: *College of Physicians & Surgeons of Ontario v Frith*, 2002 CarswellOnt 8838 (CPSDC)

Tab 22: *College of Physicians & Surgeons of Ontario v Ali*, 2022 ONPSDT 19

Tab 23: *Tan v Alberta Veterinary Medical Association*, 2022 ABCA 22

Tab 24: *Canada (Minister of Citizenship v Immigration) v Vavilov*, 2019 SCC 65

Tab 25: *Law Society of Upper Canada v Neinsten*, 2010 ONCA 193

Tab 26: *Parmar v Flora*, 2022 ONCA 869

Tab 27: *Hills v Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13

Tab 28: *Murdov v College of Naturopathic Doctors of Alberta*, 2024 ABCA 224

II. BACKGROUND

[7] In a decision dated August 29, 2022 (the "Merits Decision"), the Hearing Tribunal found that the following allegations were proven:

> On November 1, 2017, during an examination of your patient [redacted], you did inappropriately provide commentary along with digital pressure inside the vagina to demonstrate to your patient the point of contact of a penis if the patient were having intercourse using different sexual positions when your patient made no complaint about sexual difficulties and did not request advice from you on that subject.
>
> On February 4, 2020, during an examination of your patient [redacted], you did inappropriately provide commentary along with digital pressure inside the vagina to demonstrate to your patient the point of contact of a penis if the patient were having intercourse using different sexual positions when your patient made no complaint about sexual difficulties and did not request advice from you on that subject.

[8] In the Merits Decision the Hearing Tribunal found that the proven conduct constitutes unprofessional conduct. The Hearing Tribunal found that the conduct in relation to allegation #1 constitutes a breach of the Pre-Bill 21 Standard of Practice.

[9] The Hearing Tribunal found that the proven conduct in relation to allegation #2 constitutes "sexual abuse" pursuant to the HPA.

[10] In a decision dated January 26, 2024 (the "Sanction Decision"), the Hearing Tribunal made the following orders:

1. Dr. Vu's registration and practice permit is hereby cancelled as of the date of the Hearing Tribunal's written decision on sanction, in accordance with s. 82(1.1)(a) of the HPA; and
2. Dr. Vu will pay costs of the investigation and hearing in the amount of $10,000, payable in accordance with a schedule to be agreed to by the Hearings Director. If the parties are unable to agree on a payment schedule, they may, within 60 days of being provided with a copy of the Hearing Tribunal's decision on sanction, remit the matter to the Hearing Tribunal for further consideration regarding the schedule for payment.

III. GROUNDS OF APPEAL

[11] Dr. Vu issued an Amended Notice of Appeal on February 21, 2024. The Amended Notice of Appeal listed the following grounds of appeal:

1. The Hearing Tribunal erred in:
   (a) Its interpretation of "sexual abuse", "sexual nature", "service provided" and "sexualized"';
   (b) Stating the principles of unprofessional conduct, sexual abuse including sexual nature, service provided, and sexualized;
   (c) Analyzing the standards of practice and the HPA;
   (d) Analyzing sexual abuse and sexual boundary standard of practice as defined by failing to apply the correct test or failing to reasonably apply the facts to the test;
   (e) Failing to consider the difference between error of judgment and unprofessional conduct or sexual abuse;
   (f) Finding that a breach of the standard of practice amounted to unprofessional conduct;
   (g) Its assessment of the evidence including undue attribution of weight to evidence from the Complainants or the Complaints Director's Expert's Opinion;
   (h) Finding that Dr. Vu's dyspareunia counselling of patient [redacted] on February 4, 2020, constituted sexual abuse or unprofessional conduct as defined in the HPA; and
   (i) Finding that Dr. Vu's dyspareunia counselling of patient [redacted] on November 1, 2017, constituted a sexual boundary violation under the previous Standard of Practice and unprofessional conduct as defined in the HPA.

2. The Hearing Tribunal erred in making findings of fact or inferences not supported by the evidence including erring in:
   (a) Whether the conduct was sexualized or sexual in nature;
   (b) Interpretation of "service provided" and application of the facts to this term;
   (c) Interpretation of "sexual abuse" and application of facts to this term;
   (d) Interpretation of "sexual misconduct" and application of the facts to this term; and
   (e) Failing to distinguish between a breach of the standard of practice and sexual abuse.
3. As a result of the Hearing Tribunal's errors or unreasonable findings, it erred in finding Dr. Vu guilty of sexual abuse or a sexual boundary violation and these findings should be reversed.
4. The Hearing Tribunal erred in:
   (a) Failing to find it retained the discretion to order Sanction other than cancellation of Dr. Vu's practice permit and registration; and
   (b) Cancelling Dr. Vu's practice permit and registration despite also finding that the reasonable penalty in the circumstances was suspension; and
   (c) Cancelling Dr. Vu's practice permit and registration when such a finding is disproportionate, unreasonable, unfair, a violation of procedural fairness and natural justice, and is an unduly punitive sanction which is not in keeping with the legislature's intention.
5. Dr. Vu asks Council to reconsider the Decisions and set aside the Hearing Tribunal's findings of "sexual abuse", sexual boundary violation, cancellation of his practice permit and registration.

[12] The Complaints Director's Notice of Cross-Appeal was issued on February 16, 2024. The Notice of Cross-Appeal listed the following grounds of appeal:

1. The Hearing Tribunal's determination of costs to be ordered against Dr. Vu was unreasonable having regard to the findings made by the Hearing Tribunal and the body of case law relevant to costs to be ordered in matters involving serious and significant unprofessional conduct.
2. The Hearing Tribunal failed to provide responsive justification for its determination of costs ordered against Dr. Vu having regard to the extensive submissions on costs made by the Complaints Director.

3. The Hearing Tribunal erred in law by failing to consider relevant evidence on the totality of costs of the investigation and hearing or seek clarification and details on costs known to have been incurred before determining the costs ordered against Dr. Vu.

4. The Hearing Tribunal erred in law in relying upon the Hearing Tribunal decision in *Physiotherapy Alberta College + Association v. Sherman* for its determination of costs ordered against Dr. Vu given the conduct of Mr. Sherman was legally, ethically and morally less serious than the gravity of Dr. Vu's conduct as found by the Hearing Tribunal.

IV. PARTIES' SUBMISSIONS ON THE APPEAL

Submissions on Behalf of Dr. Vu

[13] The Complaints Director asserts at paragraphs 60 and 62 in their written submissions that Dr. Vu's conduct was predatory. There was no evidence that it was predatory, and in the sanction decision the Hearing Tribunal explicitly found that Dr. Vu's conduct was not predatory. The Complaints Director asserts at paragraphs 38 and 48 that there was penetration, and there was no such finding by the Hearing Tribunal. Dr. Vu was in the course of an internal pelvic examination. The conduct which is in issue is dyspareunia counselling.

[14] The Complaints Director's submission mischaracterizes the Hearing Tribunal's decision in relation to sanction by stating that the Hearing Tribunal clearly outlined that if the sanction was only for the conduct related to [redacted], it would not have ordered cancellation. The Hearing Tribunal stated in paragraphs 145, 197, and 201 of the sanction decision that the findings in relation to sanction were after assessment on a global basis.

[15] The Complaints Director submits at paragraph 7 that Dr. Vu is attempting to minimize or camouflage his conduct. The Hearing Tribunal found at paragraphs 166 and 167 that Dr. Vu consistently acknowledged what had occurred and its effect on his patients. He was apologetic and remorseful. Dr. Vu is entitled to defend himself.

[16] Regarding the standard of review, the decision of the Court of Appeal in *Yee* sets the foundational principles for the standard of review for the appeal from the decision of the Hearing Tribunal. For findings of fact, *Yee* suggests a deferential standard of review. Inferences from facts should be deferential unless there is an articulable reason to disagree. Questions of law should be reviewed to a standard of correctness. For example, the Panel is entitled to independently examine the issue of whether sexual abuse should be found here to promote uniformity in interpretation of the legislation. The Panel may intervene in cases of procedural unfairness or reasonable apprehension of bias.

[17] The Hearing Tribunal made an error in its interpretation of sexual abuse. The Panel should substitute its own findings if the Hearing Tribunal did not

interpret sexual abuse correctly. If the Hearing Tribunal is found to have failed to afford Dr. Vu a high level of procedural fairness, then the Panel can intervene. Procedural fairness should be reviewed to a standard of correctness. If the Panel finds that there is procedural unfairness, it can substitute its decision and correct that error.

[18] The Hearing Tribunal made an error when it did not apply the modern approach to statutory interpretation, and this is an error which should be corrected on appeal. The modern approach is set out in *Bell ExpressVu* where the court stated that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. The Hearing Tribunal should employ the modern approach to statutory interpretation regardless of whether there is ambiguity. Had the appropriate statutory interpretation been applied, the Hearing Tribunal would have found that Dr. Vu's clinical touching was excluded from sexual abuse. In the alternative, the legislature does not intend to produce absurd consequences. Outcomes can be considered absurd if they are ridiculous, frivolous, extremely unreasonable or inequitable, illogical or incoherent, incompatible with other provisions or with the object of the legislative enactment. There was no way for the Hearing Tribunal to ascertain this without employing the principles of modern statutory interpretation.

[19] Hansard shows that at the time of Bill 21, a physician had been found criminally guilty of sexual offences and then had returned to practice. The legislature wanted to prevent predatory physicians from being able to return to practice and protect patients from physicians who had been criminally convicted of sexual assault. In *Canada 3000*, the Supreme Court of Canada relied on *Hansard* to help interpret the term "owner". The Hearing Tribunal did not use a contextual analysis to interpret what was meant by sexual abuse, appropriate to the service provided, or sexual nature. There are other provisions in the HPA that address such conduct as a violation of the Standard of Practice for informed consent, and a physician's lack of skill, judgment or knowledge. The Hearing Tribunal did not look at all of the sections under the definition of sexual abuse in order to provide context. In the context of the list, it suggests that in some way the patient and physician are sexually connected. The Hansard discussion shows that the legislature intended to focus on sexual assault, criminal activity, and predatory behaviour and to ban relationships with patients. Consent is not relevant. Even if a patient consents to enter into a relationship with a physician, that is not a relevant factor.

[20] Because of the significant outcome, a narrow interpretation of the legislation is appropriate. In Ontario, hearing tribunals have commented when interpreting similar provisions that excessive and unnecessary examinations, that inadvertent examinations, that having a lack of clinical justifications for an examination do not rise to the level of sexual abuse. The service that was provided here is dyspareunia counselling, and that is the clinical touching. Dr. B[redacted]s expert opinion was that it was not indicated and not consented to,

but he did not offer an opinion as to whether the dyspareunia counselling was itself inappropriate.

[21] The Hearing Tribunal did not use modern statutory interpretation when interpreting "sexual nature", and instead used the Merriam-Webster definition. It does not look at the broader legislative framework and consider that the legislation was intended to capture sexual assault by predatory physicians. Because the Hearing Tribunal failed to use modern statutory interpretation, it approached *R v Chase* incorrectly. The Hearing Tribunal looked at the nature of the contact. Pertaining to sex does not make contact sexual.

[22] Regarding the patient [redacted], the Hearing Tribunal used the wrong test to assess whether Dr. Vu's conduct was in violation of the sexual boundary standard. The Hearing Tribunal should have determined what conduct it was intended to address so that the correct test would have been used. The Hearing Tribunal failed to conduct a contextual assessment to determine whether the conduct was sexual. The factors in the sexual boundary standard should be considered to assess whether the conduct was sexualized. This might mean one or all of the factors. At paragraphs 313 to 318 the Hearing Tribunal referenced the Bill 21 test, and it found that the conduct was sexualized because it was unorthodox. There was no evidence to make this finding, and it was the wrong test because it relies on the sexual abuse tests.

[23] Section 1(g) of the sexual boundary standard states that a physician must not sexualize any interaction with a patient through conduct including, but not limited to, using unorthodox examination techniques. The Hearing Tribunal must have found that Dr. Vu's dyspareunia counselling was itself unorthodox, and it had no expert evidence on which to make that finding. This is also inconsistent with paragraph 311 where the Hearing Tribunal said that if sexual advice had been requested or sought by [redacted] or if it was clinically indicated, Dr. Vu's commentary would not constitute a boundary violation. The Hearing Tribunal erred when it failed to give weight to Dr. Vu offering a chaperone, which was declined, providing draping, offering privacy, and narrating his examination. The Hearing Tribunal made a finding that the examination was prolonged when there was no such evidence.

[24] Regarding procedural fairness, the Hearing Tribunal is not bound by the rules of evidence, but it is bound by fairness. There is some interplay between procedural fairness and evidentiary issues. Because Dr. Vu faces a harsh sanction, he should have been afforded procedural protections similar to a judicial proceeding.

[25] The Complaints Director sought to introduce new evidence on redirect examination of Dr. B[redacted], and the Hearing Tribunal should have refused to hear it. Dr. B[redacted] did not give evidence on the standard of care for dyspareunia counselling and whether Dr. Vu's dyspareunia counselling was a breach of the standard of care. A finding that there was anything wrong with Dr. Vu's

dyspareunia counselling apart from consent and indication should be corrected by the Panel.

[26] In *Baker*, the Supreme Court of Canada contemplates that the importance of a decision to an individual is a significant factor when determining the content of procedural fairness. The sanction of a lifetime revocation offends natural justice. *Yee* provides that where the Panel perceives unreasonableness, an error of principle, potential injustice or other sound basis, it is entitled to interfere. The principles of statutory interpretation show that the intent was for a lifetime ban to be only for serious sexual assault or criminal behaviour for predatory physicians. Had the Hearing Tribunal retained discretion, it would have ordered a two-year suspension. It offends natural justice for the Hearing Tribunal to not have any discretion. There is no constitutional challenge or Charter challenge because tribunals do not have the ability to adjudicate them.

Submissions on Behalf of the Complaints Director

[27] The advice given in the CMPA Guide Document at pages 20 and 21 of the Appeal Record is consistent with Dr. B[redacted]'s testimony. Dr. B[redacted] wrote two letters in relation to each patient and gave oral testimony. Dr. B[redacted] said that Dr. Vu's conduct was below the standard of care, inappropriate, and that there was no justification or medical reason to do what he did.

[28] The courts have consistently said that statutory interpretation involves a broad and purposive interpretation of a provision in the totality of the Act. The purpose of the HPA is protecting the public and serving the public interest.

[29] When interpreting "sexual abuse", the exclusion clause states that "sexual nature" does not include any conduct, behaviour or remarks that are appropriate to the service provided. The HPA applies to 30 professions, and the concept of appropriate to the service provided is a broad term which refers to the individual nature of each profession. When determining what service was provided, there should be an objective test in the context of the profession under consideration. The Supreme Court of Canada in *Cuthbertson v Rasouli* states that it is ultimately up to the patient to decide whether or not to agree to treatment. The evidence was clear that the patients understood the pelvic exam, but when the doctor started to use his fingers as a substitute penis for a discussion about different sexual positions, they felt violated. Their bodily integrity and dignity were not respected.

[30] The Hearing Tribunal has the role of hearing evidence, making findings of fact, and then applying those facts to the Standard of Practice and the HPA provisions. These are questions of mixed fact and law. When reviewing questions of mixed fact and law, there is a standard of reasonableness, meaning that deference is afforded to the decision-maker who had the benefit of hearing the evidence, assessing credibility, and making those findings of fact. An appeal body such as the Panel should not re-weigh the

evidence and make different findings of fact just because it may have made a different finding. There is a logical and established basis for the Hearing Tribunal to make their findings. There was an unexpected and unrequested digital penetration, and statements that if the penis is this way or that it will be better on the issue of pain during intercourse. This is something that can be characterized as being of a sexual nature and constituting sexual abuse. Similarly the finding pre-Bill 21 was reasonable in light of previous discipline decisions, the HPA, and the Standard of Practice.

[31] Regarding the admissibility of evidence, section 79(5) of the HPA states that the rules of evidence do not apply, and it is not a question of whether evidence is admissible. Instead, the question is whether or not it is relevant and what is the weight. The Ontario cases cited by Dr. Vu are not applicable because the relevant legislation applies the rules of evidence in their proceedings. The *Kunynetz* decision deals with a situation where the College of Physicians and Surgeons of Ontario did not lead evidence on a lack of clinical justification. In contrast, Dr. B[redacted] in his written opinion and his oral evidence addressed the lack of clinical justification or need or appropriateness of the digital demonstration of penile positioning in the patients' vaginas.

[32] The Supreme Court of Canada decision in *Baker* states that the duty of fairness can rise to the level of fairness of a trial. The HPA by its structure provides a high level of procedural fairness. In *Ocean Port Hotel Ltd* the Supreme Court of Canada held that principles of procedural fairness and natural justice can be modified or overridden by statute. Section 79(5) of the HPA clearly states that the rules of evidence do not apply and are not binding on the Hearing Tribunal.

[33] If the Panel were to adopt the narrow interpretation advocated by Dr. Vu, there would be a protection for physicians who are predatory, provided that they could come up with an explanation or a medical description of what they are doing regardless of patient consent. The narrow approach is not achieving what the legislature intended and what the HPA is structured to do, which is to protect and serve the public interest.

[34] The facts are not in dispute. Dr. Vu did not get any consent from the patients. They did not provide any type of implied consent. They did not complain about pain with intercourse, they were not asking for advice on sexual positions or what they could do to avoid painful intercourse. The Hearing Tribunal's findings were consistent with the evidence that, just because Dr. Vu kept his hand inserted in the patient's vagina, did not make it appropriate or that there was consent for the digital demonstration of penile positions.

Reply Submissions on Behalf of Dr. Vu

[35] There is a distinction between a Hearing Tribunal being required to identify the correct legal test, versus how the Hearing Tribunal applies facts to the

correct legal test. Dr. Vu is arguing that the Hearing Tribunal failed to use the correct legal test for sexual abuse, and then they were unreasonable in their application of the facts to the legal test. The standard of review for law is still correctness.

[36] Section 79(5) of the HPA states that the Hearing Tribunal is not bound by the rules of evidence. The rules of evidence are available if the Hearing Tribunal decides to apply them. Fairness requires a vigorous application of the rules of evidence because of the sanction that must be applied when there is a finding of sexual abuse. Dr. Vu is not raising a constitutional or Charter challenge because it would not be appropriate to raise them before the Hearing Tribunal or Panel. However, the values of proportionality, fairness and justice that are ensconced in the Charter should be applied.

[37] Dr. Vu is not espousing a subjective interpretation of the sexual abuse provisions. *R v Chase* is the appropriate authority to follow once the Hearing Tribunal is interpreting sexual nature, and that is an objective test.

Questions by the Panel

Dr. Vu submitted that the Hearing Tribunal failed to use the correct legal test and that this requires a different standard of review than reasonableness. Are there places where the Panel should not use the reasonableness standard of review?

[38] Counsel for the Complaints Director submitted that the legal test is whether or not the definition of "sexual abuse" was satisfied. The Hearing Tribunal goes through a detailed analysis of whether or not the conduct was clinically appropriate, and whether or not it is of a sexual nature. The argument by Dr. Vu is that "sexual nature" is misinterpreted because it should be construed narrowly. The case law does not support that interpretation. The principles of statutory interpretation are set out in the cases that are identified, and they are the proper cases. The Complaints Director disagrees with how they are being interpreted by Dr. Vu. The Hearing Tribunal did not apply an incorrect legal test. It is a question of mixed fact and law. The question is whether the conclusion is reasonable that the facts found by the Hearing Tribunal can be characterized as sexual abuse.

[39] Reasonableness does not apply to questions of fairness. It is a yes or no answer. In this situation the level of fairness has been met, and the HPA requires it.

[40] Counsel for Dr. Vu submitted that *Yee* states that the Panel is equally well positioned to make necessary findings on questions of law, and as such, there should be no deference afforded to the Hearing Tribunal's findings in that regard. The approach to an interpretation of what is the correct test for sexual abuse required the Hearing Tribunal to use the principles of statutory interpretation. The Hearing Tribunal failed to utilize the principles of modern statutory interpretation and was misdirected in how to understand sexual

abuse. This is a question of law. This is distinct from applying the facts that the Hearing Tribunal found to the test. Principles of statutory interpretation arise in cases where there is no ambiguity. The Alberta Court of Appeal stated in *Garland* that ambiguity only arises where the words of a provision are still reasonably capable of more than one meaning at the end of the modern approach interpretive process. Failure to apply the principles of statutory interpretation attracts a standard of review of correctness.

How should the references in Hansard to sexual assault and predatory behaviour be used to interpret the HPA?

[41] Counsel for the Complaints Director submitted that Hansard is a secondary source, which can provide background information, but cautioned that Hansard should not be treated as definitive, because the discussions of legislation may not accurately reflect the intent of the legislature as a whole and should not define how the legislation is interpreted and applied in context. Legislation should be interpreted using a broad and purposive interpretation. The plain and grammatical language used in the definition of "sexual abuse" is broader than the *Criminal Code* concept of sexual assault.

[42] Counsel for Dr. Vu submitted that Hansard should be used as part of the interpretation of sexual abuse. *Canada 3000* states that Hansard can assist in determining the background and purpose of the legislation.

V. PARTIES' SUBMISSIONS ON THE CROSS-APPEAL

Submissions on Behalf of the Complaints Director

[43] Section 82(1)(j) of the HPA lists all of the expenses that could be ordered against the investigated person after a finding of unprofessional conduct. At the sanction hearing there was an estimate of costs to the end of May, and the figure was about $87,000. This estimate did not include the per diem costs of the Hearing Tribunal members, nor the costs of independent legal counsel to the Hearing Tribunal. Subsequently, when the Hearing Tribunal issued its written decision on sanction in January 2024, the summary of actual costs incurred totaled approximately $120,000. This summary of costs was provided to the Hearings Director. The summary shows that the costs estimate considered by the Hearing Tribunal during the sanction hearing was incomplete and did not reflect the total costs incurred. Case law states that the decision-maker must have a full picture of the total costs to determine what should be ordered against the investigated member. As set out in the decision in *Wright v CARNA* before making its costs decision, the Hearing Tribunal should have had all the relevant information before it. Similarly, in *Fitzpatrick* and *Alsaadi*, the court states that the Hearing Tribunal must look at the total costs of the proceedings when making the decision as to the costs order against the member. In contrast to the estimate of costs figure considered by the Hearing Tribunal at the sanction hearing, the summary of costs shows that the total costs of the two matters and all the days of the hearing came to $120,000. The Complaints Director also expressed the

position that the question of costs is not a typical "evidentiary" issue but is rather an accounting exercise when all information about costs incurred is known.

[44] Accordingly, the Complaints Director submitted that the Hearing Tribunal erred in its approach to costs by relying upon the *Sherman* decision. The Complaints Director argued that the Hearing Tribunal failed to say how they properly considered all the relevant factors in setting the costs, and it is clear the Hearing Tribunal did not have the full picture before them when they made their decision.

Submissions on Behalf of Dr. Vu

[45] Counsel for Dr. Vu began by reviewing the chronology of events. The sanction hearing proceeded on June 1, 2023, and the Complaints Director sought two-thirds of the costs of the investigation and hearing. At that time, the Complaints Director advised that their estimated costs to date were $87,200. The Hearing Tribunal requested further information on costs in the submissions provided by the Complaints Director. The Complaints Director provided the same estimate of costs in the submissions. The Hearing Tribunal's decision was issued on January 26, 2024. The documents that the Complaints Director is now seeking to enter are dated February 13, 2024. The Complaints Director's Notice of Cross-Appeal was filed on February 16, 2024. Dr. Vu was provided with the documents regarding costs on August 21, 2024. These statements of account are evidence, and there has been no ability to challenge or to test the veracity of that evidence. The Panel should consider only evidence that was before the Hearing Tribunal.

[46] The Hearing Tribunal found that substantial costs were not warranted, and they did not require further information on costs to make their decision. The *Fitzpatrick* and *Alsaadi* decisions are not directly applicable because they took a different approach to calculating costs. The Hearing Tribunal found that a lump sum was appropriate.

[47] The standard of review for costs orders is reasonableness because they involve mixed questions of fact and law. The Court of Appeal in *Zuk* stated that a costs award requires consideration of many factors including the outcome of the hearing, the reasons that the complaint arose, the financial burden on the member, and the conduct of the parties at the hearing.

[48] A costs order is a discretionary order that should be reviewed on the grounds of reasonableness. *Jinnah* remains the leading authority for the framework for considering costs in Alberta. There is a two-pronged approach in *Jinnah*. First, the Court of Appeal outlines four different scenarios where compelling reasons could exist to award costs. Second, the Hearing Tribunal must decide what amount of costs should be ordered. The Hearing Tribunal correctly applied this framework. First, they found that the conduct fell into the category of serious unprofessional conduct. They then went on to assess the proper costs award. As set out in *Alsaadi* and *KC*, there are several different

factors that a Hearing Tribunal can consider when assessing costs, including the seriousness of the conduct, the conduct of the parties throughout the proceeding, the financial circumstances of the professional, and what expenses should be allowed. Bill 21 changes the consideration of revocation or suspension, not costs.

[49] The order of costs should not be ordered on a basis of penalty, and they should not be punitive. The purpose of costs is to allow the regulator to recover a portion of their costs if they are the successful party, and the Hearing Tribunal finds such an order to be appropriate. There is no clearer example of delivering a crushing financial blow than an order for costs that pushes a member into bankruptcy.

[50] The idea that conduct considered to be sexual abuse can vary in terms of seriousness is not unique or developed by *Sherman*. It is not a concept relying on outdated notions of sexual abuse. When the seriousness of conduct is being discussed in the consideration of costs, it is a factor coming out of well-established case law on costs. The Hearing Tribunal's decision to award lump sum costs is entirely reasonable.

Reply Submissions on Behalf of the Complaints Director

[51] The Panel's power to order costs is set out in section 82(1)(j) of the *HPA*. The legislature sees the setting of costs to be primarily an accounting function and not an evidentiary function.

Questions by the Panel

Is the Complaints Director submitting that the Hearing Tribunal cannot make an order on costs without knowing the total costs?

[52] Counsel for the Complaints Director submitted that the Hearing Tribunal knew that there were elements that were not reflected, and they did not seek them out. If the Hearing Tribunal had information regarding the total costs incurred and then determined that it was appropriate for Dr. Vu to only pay a portion of the costs incurred, that would have been an approach to costs consistent with the applicable case law. However, making a decision on the basis of an incomplete picture of the total costs incurred, and then subsequently not seeking out all relevant information about the total costs incurred is not a sound process that reflects the requirements of the applicable case law.

[53] Counsel for Dr. Vu submitted that the onus is on the Complaints Director to prove their costs. The Hearing Tribunal determined that substantial costs were not appropriate, and they did not need to seek further information regarding costs.

What direction is the Complaints Director requesting the Panel to make regarding the summary of costs? What is required for the Panel to make an order under section 89(6)?

[54] Counsel for the Complaints Director submitted that the summary of costs at the Hearing Tribunal level is relevant. Solicitor-client privilege attaches to the invoices that a lawyer issues to clients. The invoices to the Hearings Director for independent legal counsel are not provided to the Complaints Director. The total hours could be in a summary of costs. This is an accounting exercise. It is information about the costs in the appeal which is the most germane information to make an order of costs in this appeal. Section 89(6) requires accounting information and is not about evidence or burden of proof. It is about money that has been paid out to cover the invoices for actual expenses incurred. It is not an evidentiary process.

[55] Counsel for Dr. Vu submitted that the statement of account should not be considered by the Panel because it is not relevant and it is unfair and prejudicial. One of the factors in a costs assessment is to consider whether the statement of costs is reasonable. If the Panel finds that the Hearing Tribunal's decision was unreasonable, the proper procedure would be to remit the matter back pursuant to section 89(4) of the HPA to consider new evidence.

What are the options for the Panel regarding the costs decision?

[56] Counsel for the Complaints Director submitted that one of the options would be to make a direction to the Hearing Tribunal that it has to consider the full costs and send this matter back to the Hearing Tribunal. However, counsel noted that remitting the matter back to the Hearing Tribunal would not be practical.

[57] Counsel for Dr. Vu submitted that the most practical and fairest option would be to send the costs decision back to the Hearing Tribunal.

VI. SUMMARY OF THE PANEL'S DECISION

[58] The Panel carefully reviewed and considered the Hearing Tribunal decisions, exhibits, transcripts, written submissions and case authorities of the parties and the oral submissions made at the appeal hearing.

[59] The Panel has the jurisdiction under section 89(5) of the HPA to:

a. make any finding that, in its opinion, should have been made by the hearing tribunal,

b. quash, confirm or vary any finding or order of the hearing tribunal or substitute or make a finding or order of its own,

c. refer the matter back to the hearing tribunal to receive additional evidence for further consideration in accordance with any direction that the council may make, or

d. refer the matter to the hearings director to schedule it for rehearing before another hearing tribunal composed of persons who were not members of the hearing tribunal that heard the matter, to rehear the matter.

[60] The Panel dismisses all of the grounds of Dr. Vu's appeal for the following reasons.

[61] The Panel allows the Complaints Director's cross-appeal and varies the order of the Hearing Tribunal in relation to costs for the following reasons.

VII. FINDINGS AND REASONS

1. Standard of Review

[62] This is an internal appeal, as was the case in *Yee*. In *Yee*, Justice Slatter set out the following guideline at paragraph 35 of his Reasons:

> *[35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:*
>
> *(a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;*
>
> *(b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;*
>
> *(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;*
>
> *(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of*

> *conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: Newton at para 79. It obviously should not disregard the views of the discipline tribunal or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice or another sound basis for intervening, it is entitled to do so;*
>
> *(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;*
>
> *(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.*
>
> *In this case, the Appeal Tribunal erred in applying a universal standard of review of reasonableness, resulting from its overreliance on Dunsmuir. With respect to matters such as the appropriate standard of professional conduct, and the integrity of the discipline process, it should have engaged in a more intensive review.*

[63] The Panel has determined that the standard of review articulated in *Yee* applies to the appeal and cross-appeal.

VIII. FINDINGS AND REASONS OF THE PANEL ON THE APPEAL

[64] Paragraph 94 of the Written Submissions filed on behalf of Dr. Vu states that Dr. Vu appeals the Merits Decision and the Sanction Decision on the following grounds:

a. The Hearing Tribunal erred in its treatment of the expert evidence of Dr. B[redacted].

b. The Hearing Tribunal erred in finding that the dyspareunia counselling Dr. Vu provided to patient [redacted] on February 4, 2020, constituted sexual abuse by incorrectly interpreting the definition of "sexual abuse" and erring in its application of the law to facts.

c. The Hearing Tribunal erred in finding that Dr. Vu's dyspareunia counselling of patient [redacted] on November 1, 2017, constituted a sexual boundary violation by incorrectly interpreting the term "sexualize" and erring in its application of the law to facts.

d. The Hearing Tribunal failed to observe principles of natural justice by unreasonably ordering revocation of Dr. Vu's practice permit and

registration despite finding such an order disproportionate to the conduct at issue.

[65] As such, the Panel used the following categories to address Dr. Vu's grounds of appeal:

- the treatment of Dr. B[redacted]'s expert evidence;
- the finding of "sexual abuse" in relation to patient [redacted];
- the finding of a sexual boundary violation in relation to patient [redacted]; and
- observation of the principles of natural justice.

Treatment of Dr. B[redacted]'s Expert Evidence

[66] Dr. Vu submitted that he was denied procedural fairness because he was entitled to the level of fairness expected in a trial due to the serious nature of the consequences that would result if the Hearing Tribunal made a finding of "sexual abuse".

[67] Section 79(5) of the *HPA* states that evidence may be given before the Hearing Tribunal in any manner that it considers appropriate, and it is not bound by the rules of evidence applicable to judicial proceedings. The Panel agrees with submissions by the Complaints Director that s. 79(5) specifically allows the Hearing Tribunal to admit Dr. B[redacted]s evidence. It was not a mistake of law for the Hearing Tribunal to allow Dr. B[redacted] to answer questions during the hearing.

[68] As stated by the Alberta Court of Appeal in *Wright v CARNA* at paragraph 31, the fairness of the proceedings is not measured based on whether the ruling is "correct" or "reasonable". Instead, these issues are reviewed based on whether the proceedings met the level of fairness required in the circumstances:

> *31 The standard of review for evidentiary rulings can vary depending on the exact nature of the issue. If a tribunal refused to admit or consider evidence that was admittedly relevant and material, that might amount to a breach of the rules of natural justice, resulting in an unfair hearing. In such a case the fairness of the proceedings is not measured based on whether the ruling is "correct" or "reasonable", rather these issues are reviewed based on whether the proceedings met the level of fairness required by law: Hennig v. Institute of Chartered Accountants (Alberta), 2008 ABCA 241 (Alta. C.A.) at para. 12, (2008), 95 Alta. L.R. (4th) 1 (Alta. C.A.); Armstrong v. B.B.F., Local 146, 2010 ABCA 326 (Alta. C.A.) at para. 15, (2010), 35 Alta. L.R. (5th) 238, 493 A.R. 259 (Alta. C.A.).*

[69] The HPA provides for a high level of fairness for any member, requiring that:

- the member knows the case that they have to meet in advance;
- there is an independent and objective decision-maker;
- evidence is given under oath; and
- there is an opportunity to cross-examine witnesses.

[70] The Panel agrees with the submissions provided on behalf of the Complaints Director that the principles of procedural fairness and natural justice may be overridden or modified by statute. Section 79(5) of the HPA explicitly establishes that the Hearing Tribunal is not bound by the rules of law respecting evidence applicable to judicial proceedings. The Panel has concluded that the Hearing Tribunal's decision to admit Dr. B[redacted]'s evidence met the level of fairness required in the circumstances and also complied with the governing provisions in the HPA. The Panel also notes that there was an opportunity to cross-examine Dr. B[redacted] on his opinion, and the Panel did not find support on the record that Dr. Vu's right of cross-examination was unfairly restricted during the hearing. The Panel notes that the Hearing Tribunal thoroughly considered Dr. B[redacted]'s evidence, and explained when it rejected his opinion and the weight that it was assigning to his opinion. These findings are entitled to deference. This ground of appeal is dismissed.

Finding of "Sexual Abuse" in Relation to Patient [redacted]

[71] The Panel finds that the legal test for sexual abuse utilized by the Hearing Tribunal was correct. The Panel further finds that the Hearing Tribunal was reasonable in their application of the facts to the legal test.

[72] The Panel applied the standard of correctness when determining whether the Hearing Tribunal identified the correct legal test. Dr. Vu argued that the Hearing Tribunal should have applied the principles of statutory interpretation when interpreting sexual abuse, and specifically when considering what harm the provisions were intended to address. Dr. Vu's submissions referred to Hansard to provide context for the conclusion that Bill 21 was meant to address a very specific category of physician behaviour.

[73] The decision of the Supreme Court of Canada in *Canada 3000* discussed the use of Hansard when interpreting legislation. The decision concluded that Hansard evidence must be given limited weight, but Hansard can assist in determining the background and purpose of the legislation. The Supreme Court of Canada specifically referred to remarks made by the Minister of Transport when introducing the relevant legislation in the Parliament and used the Minister's comments to draw conclusions about the background and purpose of the applicable statute.

[74] The Panel agrees with submissions that Hansard can assist in determining the background and purpose of legislation. The Panel also notes that the Supreme Court of Canada in *Canada 3000* focused on statements made by

the Minister of Transport when introducing the legislation. In that case, the Minister's comments demonstrated the legislative intent. In this Appeal, to the extent that the Panel was referred to comments by various members of the legislature, the Panel has determined that those comments do not assist the Panel in determining the legislative intent. The Panel carefully reviewed the comments of the Minister of Health when introducing Bill 21 for second reading. There is nothing in those comments that demonstrates Bill 21 was intended to limit the scope of the sexual abuse provisions to sexual assault, criminal activity, and predatory behaviour only. Instead, those comments contemplate a broader scope for the legislation. The Minister of Health stated as follows on October 31, 2018, when introducing Bill 21 for second reading:

> *Ultimately, Albertans give their health care providers their trust, and with that trust must come responsibility and accountability. Albertans must know, without a doubt, that they are in safe hands. They must know that the gift of trust they give to their health care provider will be met with respect and honoured. Our government is taking actions through this bill to ensure Albertans feel safe while accessing their health care services. We have zero tolerance for sexual abuse or sexual misconduct towards patients, and it's a significant betrayal of the public trust.*
>
> *Through the proposed amendments to the Health Professions Act in Bill 21 we are strengthening protection for patients from sexual abuse and sexual misconduct by regulated health professionals in Alberta. We are proposing a number of initiatives through this bill, including imposing mandatory disciplinary penalties for sexual abuse and sexual misconduct, enhancing public transparency by requiring that information about professionals' discipline histories for sexual abuse or sexual misconduct towards patients be published on the college websites indefinitely, and establishing patient relations programs that must include measures for preventing and addressing sexual abuse and sexual misconduct towards patients.*

[75] The Panel has concluded that Hansard does not show that the sexual abuse provisions were intended to only address the narrow situations advocated by Dr. Vu. The Panel agrees that the Hearing Tribunal identified the correct legal test for sexual abuse.

[76] The Panel applied the standard of reasonableness when reviewing questions of mixed fact and law, and when examining the provisions in the HPA and their application to the facts.

[77] There is no specific purpose statement for Bill 21. Overall colleges are governed by the mandate given to them in the HPA. Although there is no preamble or purpose statement in the HPA, s. 3(1) of the HPA specifically provides that a college must carry out its activities and govern its regulated members in a manner that protects and serves the public interest.

[78] Reasons are the means by which a decision-maker communicates the rationale for its decision. The Hearing Tribunal's reasoning process was apparent. The Hearing Tribunal made the following findings in relation to allegation #2 and patient [redacted]:

a. [274] Because Dr. Vu touched [redacted]'s genitals while providing the dyspareunia counselling, it falls within the list of activities described in s. 1(1)(nn.1)(vi). However, such touching only constitutes "sexual abuse" if the touching was of a "sexual nature".

b. [276] Given that [redacted] indicated she wanted to be checked for an STI, it was appropriate for Dr. Vu to conduct a pelvic exam and test her for STIs, and to touch her genitals for that purpose. This was the service sought by [redacted] and the service that ought to have been provided by Dr. Vu. For the reasons already noted above, it was not appropriate for Dr. Vu to extend his examination to continue touching [redacted]'s genitals in order to provide dyspareunia counselling. [redacted] did not attend with complaints of dyspareunia, nor did Dr. Vu ask if she was experiencing dyspareunia. Dr. Vu's decision to proceed with dyspareunia counselling resulted in more prolonged touching of [redacted]'s genitals when such touching was not clinically indicated, not consented to, and was not appropriate to the service being provided.

c. [277] The fact that Dr. Vu already had his fingers inserted into [redacted]'s vagina did not mean that he was authorized to continue with an additional procedure that was not indicated or requested, particularly given the sensitive nature of the touching and the accompanying commentary regarding sexual positions, which occurred while Dr. Vu's fingers were still inserted in [redacted]'s vagina.

d. [294] The Hearing Tribunal finds that the Complaints Director has proven, on a balance of probabilities, that Dr. Vu's conduct constitutes "sexual abuse" as defined in the HPA. Although there is no evidence that Dr. Vu experienced any sexual gratification as a result of the dyspareunia counselling he provided to [redacted], the sexual or carnal nature of the touching would nevertheless be visible to a reasonable observer. Dr. Vu used his fingers to demonstrate the point of contact of the penis in [redacted]'s vagina, while at the same time providing [redacted] with advice about different sexual positions she (and her partner) could use to minimize pain on intercourse. Both the touching and the contemporaneous commentary provided by Dr. Vu pertained to the act of having sex, and in this sense the dyspareunia counselling was clearly of a "sexual nature".

e. [298] Further, the Hearing Tribunal also carefully considered Dr. Vu's stated purpose in carrying out the dyspareunia counselling. Although the Hearing Tribunal found that Dr. Vu believed that his actions benefitted [redacted]., ignorance or naivety is no excuse. Further, the fact that Dr. Vu had a genuine belief that his dyspareunia counselling was

warranted and helpful does not diminish the sexual or carnal nature of the touching, when viewed objectively and considered in conjunction with the other relevant factors. The amendments to the HPA were made in recognition of the power imbalance that exists between physicians and their patients. Physicians have a tremendous amount of knowledge that patients do not have, and patients are required to trust that their physician will take care to only touch them when such touching is warranted. Physicians must take appropriate steps to touch sensitive parts of the body only for purposes that are clinically indicated, and even then, only when they have obtained adequate informed consent. The manner in which Dr. Vu touched [redacted] would be perceived by a reasonable observer as being in sexual in nature. Dr. Vu's conduct was invasive, and had a negative impact on [redacted]. It was not a technical or minor breach of his obligations. Further, Dr. Vu's conduct occurred less than one year after Bill 21 was proclaimed in force, at a time when Dr. Vu ought to have known that his actions were inappropriate. Dr. Vu's ignorance does not serve as a defence.

f. [301] The Hearing Tribunal finds that the Complaints Director has proven allegation #2 on a balance of probabilities, and that Dr. Vu's conduct constitutes "sexual abuse" as defined in the HPA.

g. [319] For the reasons set out above, the Hearing Tribunal finds that the Complaints Director has proven allegations #1 and #2 on a balance of probabilities. The Hearing Tribunal further finds that the conduct in relation to allegation #1 constitutes a breach of the Pre-Bill 21 Standard of Practice, and the conduct in relation to allegation #2 constitutes a breach of the Post-Bill 21 Standard of Practice. Further, the breaches committed by Dr. Vu were not merely technical or trivial; they are sufficient to rise to the level of unprofessional conduct.

h. [320] The Hearing Tribunal is aware of the serious consequences to Dr. Vu as a result of its finding with respect to allegation #2 and has carefully scrutinized all of the evidence and considered the arguments presented on behalf of the parties. Although Dr. Vu did not derive any sexual gratification as a result of the dyspareunia counselling providing to [redacted], and the Hearing Tribunal accepted that Dr. Vu genuinely believed his actions were reasonable, given the definition of "sexual abuse" in the HPA, this is not determinative. Despite Dr. Vu's intentions, a reasonable observer would perceive that the dyspareunia counselling was of a "sexual nature". The factors that support such a finding are set out above and include that the touching was not appropriate to the service provided, the touching involved a sensitive body part, and was accompanied by commentary about sexual activity involving [redacted] and others, the lack of informed consent, and the fact that the conduct occurred in the absence of a chaperone.

[79] The Panel agrees with submissions on behalf of the Complaints Director that the Hearing Tribunal has the role of hearing evidence, making findings of fact, and then applying those facts to the Standard of Practice and the HPA provisions. These are questions of mixed fact and law. When reviewing questions of mixed fact and law there is a standard of reasonableness, meaning that deference is afforded to the decision-maker who had the benefit of hearing the evidence, assessing credibility, and making those findings of fact. An appeal body such as the Panel should not re-weigh the evidence and make different findings of fact just because it may have made a different finding.

[80] The Hearing Tribunal considered the evidence thoroughly when determining the facts in relation to both allegations. Regarding Patient [redacted] the Hearing Tribunal examined the definition of "sexual abuse" in the HPA, analyzed the definition of "sexual nature" and the clarification provided in the Post Bill-21 Standard of Practice, and analyzed whether the touching was "appropriate to the service provided". The Hearing Tribunal appropriately considered applicable case law and the decision in *R v Chase* to aid the interpretation of "sexual nature". The Hearing Tribunal also considered Dr. Vu's belief that his "dyspareunia counselling" had been helpful to other patients and would be helpful to [redacted]. The Hearing Tribunal found that there was no evidence that Dr. Vu thought that his "dyspareunia counselling" was necessary and had adopted the practice because other patients had reported that they found it helpful. Dr. Vu's actions caused great harm to [redacted]. The Hearing Tribunal took into account Dr. Vu's stated intentions and found that they were not determinative given their findings that the touching was not appropriate to the service provided, the touching involved a sensitive body part, and was accompanied by commentary about sexual activity involving [redacted] and another, the lack of informed consent, and the fact that the conduct occurred in the absence of a chaperone. The Panel finds that the Hearing Tribunal's reasons account for the evidence before it, and provide a reasonable chain of analysis.

[81] The Panel concludes that the conclusions of the Hearing Tribunal were reasonable, supported by the facts and applicable standards and law. On this basis, this ground of appeal is dismissed.

Finding of Sexual Boundary Violation in Relation to Patient [redacted]

[82] The test for the determination of what constitutes a boundary violation is set out in the Standard of Practice. The Hearing Tribunal applied the standard of reasonableness when reviewing the Hearing Tribunal's interpretation of the Standard of Practice and the application to the facts as found by the Hearing Tribunal.

[83] The Hearing Tribunal made the following findings in relation to allegation #1 and patient [redacted]:

a. [221] Further, the Hearing Tribunal finds that [redacted]. had not reported any sexual difficulties, including pain on intercourse, to Dr. Vu on November 1, 2017, and there is no evidence that she had reported that she had experienced pain on intercourse at any time previously. The Hearing Tribunal accepts [redacted]'s evidence that during the exam, she advised Dr. Vu that she did not have pain on intercourse.

b. [232] In light of the foregoing, the Hearing Tribunal finds that Dr. Vu provided commentary to [redacted], along with digital pressure, to demonstrate the point of contact of a penis during intercourse using different sexual positions. The Hearing Tribunal further finds that the patient had not made any complaints about sexual difficulties, including pain on intercourse. The purpose of her attendance with Dr. Vu on November 1, 2017, was to determine the cause of the cervical bleeding, and determine whether her IUD was in place.

c. [233] Allegation #1 also alleges that the commentary provided by Dr. Vu during the dyspareunia counselling, along with the digital pressure, was *inappropriate*. Accordingly, in order to find the allegation is factually proven, the Hearing Tribunal must also consider whether the commentary and digital pressure were inappropriate in all of the circumstances.

d. [236] The Hearing Tribunal finds that the dyspareunia counselling, including the use of his digits to demonstrate the point of contact of the penis, while at the same time discussing sexual positions that the patient could be in to avoid pain, was inappropriate. Regardless of whether [redacted] was at risk of developing dyspareunia at some point in the future (due to a short vaginal canal or low-lying cervix) she was not having pain on intercourse at the time she came to see Dr. Vu on November 1, 2017. Nor did she have any history of dyspareunia. It was inappropriate for Dr. Vu to assume that [redacted] was interested in dyspareunia counselling, particularly given the invasive nature of the counselling, which included a digital demonstration and advice about sexual positions, while his fingers were inserted in her vagina.

e. [241] Patients who attend for sensitive examinations are in an extremely vulnerable position. A patient who consents to an internal vaginal exam does not provide the physician with carte blanche to undertake other assessments or procedures, or to provide advice on matters not directly relevant to the reason for the patient's attendance. Dr. Vu, in providing dyspareunia counselling, chose to expand the services he was asked to provide, and give extra advice and perform additional procedures on matters that were neither requested nor specifically indicated, as there was no complaint of dyspareunia (nor did Dr. Vu even ask about this). By providing extra

> advice and engaging in extra procedures, Dr. Vu effectively prolonged the duration of time his fingers were inserted in [redacted]'s vagina. [redacted]. understandably felt shocked and scared. The Hearing Tribunal agrees with Dr. B[redacted] that the dyspareunia counselling was an unnecessary invasion of the patient of a personal and sensitive nature.

[84] The Hearing Tribunal considered the evidence thoroughly when determining the facts. Regarding Patient [redacted] the Hearing Tribunal examined the Pre-Bill 21 Standard of Practice and considered what constitutes "sexualizing" an interaction with the patient. The Hearing Tribunal concluded that Dr. Vu sexualized his interaction by making sexualized comments, failing to obtain informed consent, and using unorthodox examination techniques including inappropriate touching of [redacted]'s genitalia. As such, Dr. Vu's actions constituted a boundary violation and a breach of the Pre-Bill 21 Standard of Practice. The Panel finds that the Hearing Tribunal's findings of fact and the inferences to be drawn from those facts should be afforded deference. The Hearing Tribunal's finding that Dr. Vu's treatment of patient [redacted]. on November 1, 2017, constituted a sexual boundary violation was reasonable, supported by the facts and applicable standards and law. The Panel finds that the Hearing Tribunal's reasons account for the evidence before it and provide a reasonable chain of analysis. Consequently, this ground of appeal is dismissed.

Observation of the Principles of Natural Justice

[85] The Panel has determined that the Hearing Tribunal did not fail to observe the principles of natural justice, and this ground of appeal is dismissed for the reasons that follow. The legislature made a deliberate decision to remove discretion from a Hearing Tribunal when the finding is sexual abuse. There is a mandatory penalty. This is an option that is open to the legislature. Colleges are required to act in the public interest. It is clear from the comments made by the Minister of Health during second reading of Bill 21 that the policy intent was to safeguard the public by removing discretion.

[86] When the Hearing Tribunal imposes a legislated mandatory penalty, this does not offend natural justice or result in unfairness. The fact that the Hearing Tribunal may have discussed a penalty if Bill 21 was not in place does not affect this conclusion. Further, the Panel notes that the provisions regarding mandatory penalties have been in force since 2019. It is not clear how the law and sanctions would have evolved if mandatory penalties were not in place, and it is not useful to hypothesize and speculate about what penalties could be contemplated if a different legislative regime was in place. There are comments in case law about recognition that previous penalties were insufficient, including the Ontario Superior Court of Justice's decision in *Peirovy* cited by the Hearing Tribunal. Section 82 of the HPA clearly states the penalties that are available following a finding of unprofessional conduct. For these reasons, the Panel finds that the imposition of a mandatory penalty did not result in unfairness or a lack of natural justice.

[87] The Panel further rejects the submission on behalf of Dr. Vu that the imposition of the mandatory penalty will produce an absurd result. As noted in *Tanase v. College of Dental Hygienists of Ontario:*

> *[7] Revocation of the appellant's certificate of registration is an extremely serious penalty, but it is not absurd. It follows from the Ontario Legislature's decision that sexual abuse in the regulated health professions is better prevented by establishing a bright-line rule prohibiting sexual relationships – an approach that provides clear guidance to those governed by the rule – than by a standard pursuant to which the nature and quality of sexual relationships between practitioners and patients would have to be evaluated to determine whether discipline was warranted in particular circumstances. This decision to adopt this rule was open to the Legislature and must be respected by this court.*

[88] Similarly, the decision to adopt a mandatory penalty was open to the Alberta legislature and must be respected by the Hearing Tribunal and the Panel. The Hearing Tribunal made an order that was mandated under the HPA following a finding of sexual abuse. The Panel dismisses the ground of appeal that the Hearing Tribunal failed to observe principles of natural justice by unreasonably ordering revocation of Dr. Vu's practice permit.

IX. FINDINGS AND REASONS OF THE PANEL ON THE CROSS-APPEAL

[89] The Panel finds that the Hearing Tribunal erred in law by relying upon the decision in *Physiotherapy Alberta College + Association v Sherman* for its determination of costs ordered against Dr. Vu for the reasons that follow. This ground of appeal is sustained by the Panel.

[90] The Panel agrees that sexual abuse or a sexual boundary violation is serious unprofessional conduct and falls within one of the exceptions set out in the Alberta Court of Appeal in *Jinnah*. The calculation of what costs should be ordered is the second step after the Hearing Tribunal determines whether costs should be ordered at all in the circumstances.

[91] The Panel notes that the seriousness of the sexual abuse informed the basis for the costs award in *Sherman*, and that *Sherman* was used as a justification by the Hearing Tribunal in the Sanction Decision. The Hearing Tribunal states at paragraph 246 of the Sanction Decision that a lump sum costs award of $10,000 is comparable to the amount ordered to be paid in the *Sherman* case, and a detailed accounting of costs is not required. In *Sherman*, the seriousness of the sexual abuse was considered when determining what costs should be paid by the member. Specifically, the Hearing Tribunal in *Sherman* notes as follows:

> *[38] The Hearing Tribunal considered the seriousness of the conduct. As noted previously, sexual abuse of any kind is serious, however, there are varying levels of severity. …Absent the changes to the*

> *legislation, the Hearing Tribunal would not have ordered the cancellation of his practice permit and registration in the circumstances of this case.*
>
> *[42] After considering all of the circumstances of the case and the relevant decisions of the Court of Appeal of Alberta, the Hearing Tribunal determined that 10% of the Statement of Costs presented by the Complaints Director, capped at $13,000, was appropriate and reasonable.*

[92] The legislature has determined that sexual abuse falls at the most serious end of the spectrum of unprofessional conduct, and that the penalty should always be revocation. The harm of sexual abuse can be profound for the patient, those close to them, and the confidence of the public in physicians. The harm to patients can be lifelong. For these reasons and others, the strongest penalties are imposed for sexual abuse in order to deter misconduct and protect the public. As such the Hearing Tribunal's assessment of the seriousness of the sexual abuse when calculating costs is an inappropriate or irrelevant consideration. The Panel agrees with submissions put forward by the Complaints Director that an assessment of the seriousness of the type of sexual abuse when determining costs does not adequately take into account the legislative scheme put forward in Bill 21, and the harm that is done to patients as a result of sexual abuse. The impact statements that were put forward by [redacted]. and [redacted] show that they suffered extensive harm as a result of Dr. Vu's actions.

[93] The Panel has concluded that the Hearing Tribunal has erred in law, and this ground of appeal put forward by the Complaints Director is sustained. As a result it is not necessary to address the other grounds of appeal put forward by the Complaints Director regarding the cross-appeal and the assessment of costs.

[94] The Panel carefully considered the powers that it has under section 89(5) of the HPA. As well, the Panel considered section 82(1)(j) of the HPA, which provides as follows:

> ***82(1)****If the hearing tribunal decides that the conduct of an investigated person constitutes unprofessional conduct, the hearing tribunal may make one or more of the following orders:*
>
> *(j) direct, subject to any regulations under section 134(a), that the investigated person pay within the time set in the order all or part of the expenses of, costs of and fees related to the investigation or hearing or both, including but not restricted to*
>
> *(i) the expenses of an expert who assessed and provided a written report on the subject-matter of the complaint,*

> *(ii) legal expenses and legal fees for legal services provided to the college, complaints director and hearing tribunal,*
>
> *(iii) travelling expenses and a daily allowance, as determined by the council, for the complaints director, the investigator and the members of the hearing tribunal who are not public members,*
>
> *(iv) witness fees, expert witness fees and expenses of witnesses and expert witnesses,*
>
> *(v) the costs of creating a record of the proceedings and transcripts and of serving notices and documents, and*
>
> *(vi) any other expenses of the college directly attributable to the investigation or hearing or both;*

[95] The Panel is aware that it could send this matter back to the Hearing Tribunal with directions pursuant to section 89(5)(c) of the HPA. However, the Panel is also empowered to act pursuant to section 89(5)(b) of the HPA and determine the costs using the principles in *Alsaadi* and *K.C. v. College of Physical Therapists of Alberta*, which include a consideration of whether it should be the full or partial amount of the expenses, whether the final amount is a reasonable number, the seriousness of the charges, and the conduct of the parties. The Panel has determined that it is not necessary to return the issue of costs to the Hearing Tribunal because the determination of costs does not require the admission of evidence and fact-finding. Instead, the Panel agrees with submissions on behalf of the Complaints Director that the question of what was spent by the College for the investigation and hearing is an issue of accounting.

[96] The charges are very serious and have resulted in the penalty of revocation. Dr. Vu is entitled to vigorously defend himself. The onus is on the Complaints Director to prove the charges, and the College must spend funds to investigate allegations of sexual abuse and bring them forward to a Hearing Tribunal. The Complaints Director was successful in proving the allegations that were before the Hearing Tribunal. The College has a duty to act in the public interest and enforce the HPA.

[97] The Panel reviewed the decisions referenced by the Complaints Director including the decisions in *Bhardwaj*, *Levin*, *Garbutt*, and *Postnikoff*. The Panel also reviewed the decision in *Sazant v College of Physicians and Surgeons of Ontario*. All of these decisions support a substantial costs award and the Complaints Director's submission for two-thirds of the costs. The Panel did not consider it necessary to undergo a detailed analysis of the costs in the manner suggested on behalf of Dr. Vu and instead took a broader approach to costs and accepted the submission presented by the Complaints Director in paragraph 8 of their submission on cross-appeal that, once the Hearing Tribunal issued its written decision on sanction on January 26, 2024, the

College's costs totaled approximately $120,000. In this situation, two-thirds of the costs would result in an order for payment of costs in the amount of $80,000 approximately.

[98] The Panel expressly considered that an award of costs should not deliver a crushing financial blow. Dr. Vu presented evidence regarding his financial circumstances, and that evidence was summarized in the Sanction Decision at paragraphs 80 to 85. After considering all of the circumstances and the relevant decisions of the Court of Appeal of Alberta, the Panel has determined that 51 percent of the College's total costs is appropriate and reasonable in the circumstances when all relevant factors are considered.

X. ORDERS OF THE PANEL

[99] All grounds of Dr. Vu's appeal are dismissed.

[100] The Complaints Director's appeal is allowed and the Panel varies the order regarding costs.

[101] The Panel upholds the Hearing Tribunal's finding of unprofessional conduct and orders:

a. Dr. Vu's registration and practice permit is hereby cancelled as of the date of the Hearing Tribunal's written decision on sanction, in accordance with s. 82(1.1)(a) of the HPA; and

b. Dr. Vu will pay 51% of the costs of the investigation and hearing, payable in accordance with a schedule to be agreed to by the Hearings Director.

[102] The issue of costs of the appeal was not addressed in the submissions of the parties. The parties may provide brief written submissions on costs for the Panel's consideration within 30 days of receipt of the Panel's decision.

Signed on behalf of the Council Appeals panel by its Chair:

Dr. Oluseyi Oladele

Dated this 26th day of November, 2024.