COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
RSA 2000, c. H-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. PHU TRUONG VU

DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA REGARDING SANCTIONS
January 26, 2024

I. INTRODUCTION

1. 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 [COMPLAINANT 1], 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 [COMPLAINANT 2], 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.

2. The Hearing Tribunal reconvened the hearing via videoconference on June 1, 2023 for a sanction hearing in order to determine what orders to make under section 82 of the *Health Professions* Act ("HPA"). The members of the Hearing Tribunal were:

   Dr. Douglas Faulder of Edmonton as Chair;
   Dr. Eric Wasylenko of Okotoks;
   Ms. June MacGregor of Edmonton (public member);
   Ms. Archana Chaudhary of Edmonton (public member).

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

4. Appearances:

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

   Dr. Phu Truong Vu;
   Ms. Megan McMahon and Ms. Anika Winn, legal counsel for Dr. Vu.

5. Following the sanction hearing, counsel for the Complaints Director provided a written submission on sanction, dated June 23, 2023. Dr. Vu provided a written submission on sanction, dated July 20, 2023. The Hearing Tribunal then met *in camera* to consider what orders to make in accordance with s. 82 of the HPA.

II. PRELIMINARY MATTERS

6. There were no objections to the composition or jurisdiction of the Hearing Tribunal to proceed.

7. At the outset of the sanction hearing, Ms. McMahon indicated that Dr. Vu was seeking an order to close the sanction hearing to the public in accordance with s. 78(1)(a)(i) of the HPA, because of probable prejudice to a civil action or prosecution of an offence. Ms. McMahon indicated that [COMPLAINANT 1] has commenced a civil action against Dr. Vu and having an open hearing would be prejudicial to Dr. Vu in light of the potential use of transcripts and evidence in the civil proceeding.

8. Mr. Boyer submitted, on behalf of the Complaints Director, that the hearing on the merits ("Merits Hearing") was open to the public, and at this stage the evidence will consist of an impact statement from [COMPLAINANT 1] Since anyone can apply to obtain the transcripts of the merits hearing, it is difficult to see how closing the hearing is required at this stage.

9. Ms. McMahon noted that the Merits Hearing was not open to the public in its entirety, and that portions of the hearing were closed around some of Dr. Vu's sensitive personal and financial information. Dr. Vu was not aware of the civil claim filed by [COMPLAINANT 1] until after the Merits Hearing had concluded, so it was not an issue that could have been addressed at that time.

10. Ms. McMahon further submitted that s. 78(1)(i) of the HPA does not require the Hearing Tribunal to balance the desirability of having open hearings, given that the section merely says that the hearing can be closed if there is probable prejudice to a civil action. In this case there is probable prejudice given the nature of the impact statements, which are not subject to cross-examination.

11. Ms. McMahon further clarified that the order sought under s. 78(1)(i) of the HPA included an order excluding the complainants from attending the hearing, given the prejudice that could result if they were present, including their ability to request the transcripts of the sanction hearing in accordance with s. 85(2) of the HPA, unless they were excluded from attending.

12. Following a short adjournment, Ms. Haymond, on behalf of the Hearing Tribunal, indicated that the Hearing Tribunal was considering proceeding with the hearing with all the observers present, which would permit the observers (including the complainants) to hear the evidence. However, the Hearing Tribunal could consider after hearing the testimony whether to retroactively close the hearing (or portions of it) pursuant to s. 78(1)(a) of the HPA. The Hearing Tribunal would be in a better position to assess potential prejudice after hearing the evidence, and if the hearing was closed retroactively, this

would accomplish Dr. Vu's objective, since the transcripts would not be available to [COMPLAINANT 1] in that case.

13. Ms. McMahon submitted on behalf of Dr. Vu that there were significant concerns with the complainants and public attending, given the nature of the potential evidence in the impact statement, and therefore it was unclear whether the public would fully appreciate a retroactive closing of the hearing. Further, [COMPLAINANT 1]'s lawyer was present at the hearing, and this raised additional concerns regarding potential attempts to use [COMPLAINANT 1]'s impact statement in the context of the civil action.

14. Mr. Boyer submitted that on the issue of probable prejudice, there is a case called *Spectra Architectural Group v. St. Michael's Extended Care* that stands for the proposition that a finding in a professional regulatory matter can be considered in a civil action, but it does not prove negligence.

15. He further submitted that in this case, the patient's impact statements are relevant to sanction, and the impact on the patient is one of the *Jaswal* factors to be considered.

16. The Complaints Director would not object to Dr. Vu's testimony being *in camera* if he wants to give evidence about his personal situation or financial impact. However, [COMPLAINANT 1] and [COMPLAINANT 2] do not want to provide their evidence *in camera* and given the differences between a civil action and professional regulatory proceeding, there is insufficient evidence of probable prejudice to warrant closing the remainder of the hearing to the public in this case.

17. The Hearing Tribunal adjourned to deliberate regarding Dr. Vu's application to close the sanction hearing. Following its deliberations, the Hearing Tribunal notified the parties that it was prepared to close the portion of the hearing where Dr. Vu provides his testimony, including the exclusion of the complainants. However, the Hearing Tribunal denied the application to close the remainder of the hearing. Nevertheless, the Hearing Tribunal ruled that if any evidence is given that is prejudicial to the civil action, it was prepared to hear arguments to retroactively close that part of the hearing, which would effectively limit the complainant's access to the transcripts in accordance with s. 85 of the HPA.

18. The Hearing Tribunal does not agree with the submissions on behalf of Dr. Vu that there is no need to engage in balancing the public's interest in transparency when there is evidence of probable prejudice arising from a civil action. Although s. 78(1)(a) does not expressly reference the weighing and balancing of competing interests, the wording of s. 78 makes it clear that there is a presumption that hearings are open to the public. In all cases where there is an application to close the hearing, the Hearing Tribunal must weigh the presumption of transparency against the specific interest sought to be protected by closing the hearing. Where there is "probable prejudice" to a civil action, this would strongly suggest that the interests in transparency are

outweighed by the member's interests. However, the Hearing Tribunal does not agree that the interests in transparency are not a factor to be considered at all.

19. In this case, Dr. Vu sought to exclude both the public and the complainants from attending the sanction hearing, because [COMPLAINANT 1] has filed a civil claim. The Hearing Tribunal was not prepared to exclude the public or complainants from the entirety of the sanction phase of the hearing, as this would contravene the presumption that hearings are open to the public, and the even stronger presumption that complainants are entitled to attend the hearing, absent exceptional circumstances.

20. Although counsel for Dr. Vu objected to the portion of the hearing where the complainants provided their impact statements being open to the public, the Hearing Tribunal was not prepared to close the hearing. Patients who are subject to sexual abuse or sexual misconduct have the right to make an impact statement, and it is important for complainants who wish to explain how the incident has impacted them to have the ability to do so in a public forum. While the Hearing Tribunal did not find Dr. Vu's application to close the hearing to be an attempt to silence the complainants, holding that portion of the hearing in private could give rise to the impression that their statements are not important, and this would send the wrong message.

21. Further, the fact that [COMPLAINANT 1] has initiated a civil claim is not sufficient to establish "probable prejudice". While [COMPLAINANT 1] was affirmed before providing her impact statement, cross-examination of [COMPLAINANT 1] was not conducted, and would not have been appropriate. Although [COMPLAINANT 1]'s impact statement included a description of the impact that Dr. Vu's action had on her, even if it is admitted in the context of the civil proceedings, in those proceedings if damages are sought, [COMPLAINANT 1] will have the onus of establishing damages, including causation. While it is for the civil court to determine whether and how the impact statement factors into that assessment, the admission of the impact statement in these proceedings, in a public forum, is unlikely to cause "probable prejudice" as contemplated by s. 78(1)(a) of the HPA.

22. In the circumstances, the Hearing Tribunal determined that probable prejudice was not established, and that the presumption of transparency should <u>not</u> be overridden so as to exclude the public, including the complainants, from attending the hearing.

23. Although the Hearing Tribunal was not prepared to close the entire sanction phase of the hearing, the Hearing Tribunal did close the portion of the hearing where Dr. Vu provided his testimony, on the basis that his testimony would include potentially sensitive and confidential personal information, including financial information relevant to the issue of costs. Given the sensitive nature of this information, this portion of the hearing was also closed to the complainants.

24. While the Hearing Tribunal agreed to close the portion of the sanction hearing involved Dr. Vu's testimony, members of the public will nevertheless be able to obtain a copy of the Hearing Tribunal's decision in accordance with s. 85 of the HPA (subject to redactions if deemed appropriate). However, neither the complainants nor the public will be able to access the transcripts or the portion of the hearing that was closed. This strikes the appropriate balance between the desire for transparency and protection of Dr. Vu's sensitive personal and financial information.

25. Following the conclusion of the sanction phase of the hearing, neither party made a retroactive application to close any additional portion of the hearing. Accordingly, no further orders pursuant to s. 78(3) of the HPA were made.

III. EVIDENCE

26. The following documents were marked as Exhibits during the sanction hearing:

Exhibit 5	Impact Statement of [COMPLAINANT 1];
Exhibit 6	Letter from Nurse [LPN1], dated April 30, 2020;
Exhibit 7	Letter from Nurse [LPN2], dated April 21, 2020;
Exhibit 8	Bundle of Letters of Support for Dr. Vu.

Evidence on Behalf of the Complaints Director

27. The Complaints Director called four witnesses to provide evidence: [COMPLAINANT 1], [COMPLAINANT 2], [LPN1], and [LPN2].

[COMPLAINANT 1]

28. [COMPLAINANT 1] provided an impact statement, both in writing and verbally (Exhibit 5) in accordance with s. 81.1(2) of the HPA, which provides that, following a finding of sexual abuse or sexual misconduct, the Hearing Tribunal must provide the patient with an opportunity to make an impact statement describing the impact that the sexual abuse or sexual misconduct had on them.

29. [COMPLAINANT 1] indicated that Dr. Vu was someone she had trusted for years, and the incident has been devastating. She lost trust in someone who was supposed to care for her medical needs. She felt isolated, mentally distressed, depressed, anxious and exhausted. [COMPLAINANT 1] described having flashbacks and intrusive thoughts, which have affected her interpersonal and intimate relationships. She felt emotionally and physically exhausted, and diminished joy and excitement.

30. She further indicated that the incident shook her trust in people, especially the medical profession, and she has had significant trepidation seeing male

doctors. She had a mole removal scheduled not long after the incident but could not attend the appointment because she felt panicked at the thought of being touched by a male doctor.

31. [COMPLAINANT 1] stated that she will never get back the time or emotional resources that she has spent in mental, physical, and emotional torment because of what happened to her when she attended Dr. Vu in 2017.

[COMPLAINANT 2]

32. Prior to [COMPLAINANT 2] providing her impact statement, Ms. McMahon submitted that she was seeking to have some portions of [COMPLAINANT 2]'s impact statement excluded. Ms. McMahon referenced a written submission provided on behalf of Dr. Vu in regard to admissibility of victim impact statements and submitted that portions of [COMPLAINANT 2]'s statement were inadmissible because there were assertions of facts that were unproven and beyond [COMPLAINANT 2]'s own experience. Further, the statement contained inflammatory and prejudicial language, and made recommendations on penalty, all of which is beyond the scope of a proper impact statement.

33. Mr. Boyer also indicated he had provided a brief of law regarding impact statements but proposed that the Hearing Tribunal should hear [COMPLAINANT 2]'s statement, and then hear submissions with respect to admissibility of the statement afterward.

34. Ms. McMahon objected to having the statement entered into the record, since if [COMPLAINANT 2] is permitted to make a statement addressing matters that are not properly to be included in a statement, then the impermissible portion of the statement becomes part of the public record.

35. After hearing from the parties, the Hearing Tribunal determined that it would hear [COMPLAINANT 2]'s statement and would determine both admissibility and weight after hearing her statement. The Hearing Tribunal reiterated that it would consider a retroactive application to seal the statement or render it non-public after hearing from [COMPLAINANT 2]

36. [COMPLAINANT 2] then provided her statement. She indicated that when she attended with Dr. Vu in February of 2020, she was in a vulnerable state, having lost her father and her grandmother two years prior.

37. [COMPLAINANT 2] stated that the past three years have been the most challenging she has experienced in every arena: physical, emotional, and financial. [COMPLAINANT 2] felt that her trust was broken by someone in a position of authority, which in turn impacted her ability to trust others. Although the incident involved a violation of her body, the impacts were far reaching, affecting her mental and emotional state, and creating a tidal wave of destruction.

38. She also stated that sexual abuse impacts the core foundation of safety, security, and trust which can affect many areas of a person's life, including their relationships. In [COMPLAINANT 2]'s case, the incident led to an intensified feeling of isolation, given the pandemic and lockdowns that occurred shortly after the incident.

39. [COMPLAINANT 2] indicated that there were many additional impacts that she attributed to the incident, including physical impacts, such as loss of weight due to stress and anxiety. In addition, she indicated that there were additional impacts on her, including a disruption of her ability to work or function confidently, and further downstream effects, including loss of housing, loss of financial security, and impacts on her business.

[LPN1]

40. [LPN1] is a licensed practical nurse who worked with Dr. Vu at Brentwood Medical Clinic in Calgary. [LPN1] stated that she had acted as a chaperone for Dr. Vu and had never seen him do a digital demonstration with his hand inserted in the vagina of a patient while giving instructions on the positioning of the penis during intercourse.

41. On cross-examination, [LPN1] confirmed that Dr. Vu did not have a "primary" nurse who acted as a chaperone; whoever was available at the time would serve as chaperone if a chaperone was requested. The other nurse who was available to serve as a chaperone was [RN1].

42. The Hearing Tribunal asked [LPN1] how many times she had been a chaperone for Dr. Vu. Although she was unsure, she thought it was around 100 times.

43. [LPN1]'s letter dated April 30, 2020, where she described Dr. Vu as having "upstanding moral character" was marked as Exhibit 6.

[LPN2]

44. [LPN2] was a licensed practical nurse for 33 years, before she retired in April of 2020. [LPN2] worked with Dr. Vu at [redacted] Medical Clinic in Calgary. [LPN2] stated that she had acted as a chaperone for Dr. Vu during sensitive exams somewhere between 20-50 times. She stated that she had never observed or heard Dr. Vu, while conducting a pelvic examination with his hand inserted in a patient's vagina, giving a digital demonstration and verbal description of the position of the penis during sexual intercourse.

45. On cross-examination, [LPN2] confirmed that she had previously written a letter of support on behalf of Dr. Vu, which was marked as Exhibit 7.

46. [LPN2] also testified that she was not the main person who acted as a chaperone, and that there were others who acted in that capacity, including [RN1], [LPN1], and [redacted].

Admissibility of [COMPLAINANT 2]'s Impact Statement

47. Following the conclusion of the evidence on behalf of the Complaints Director, the Hearing Tribunal indicated that it was prepared to hear submissions regarding the admissibility of [COMPLAINANT 2]'s Impact Statement.

48. Ms. McMahon referenced the written brief provided on behalf of Dr. Vu, and the cases referenced in the brief stand for the proposition that an impact statement should speak to the harm suffered as a result of Dr. Vu's conduct. An impact statement should not contain criticisms of the offender, assertions as to the facts, or recommendations regarding severity of the punishment.

49. [COMPLAINANT 2]'s statement addressed processes and bodies over which Dr. Vu has no control, including the College and the government. As such, these references should not be included in an impact statement.

50. The impact statement also included commentary about sexual abuse that is not specific to [COMPLAINANT 2]'s own experience, which is improper.

51. Further, [COMPLAINANT 2] makes broad assertions with respect to matters that could not reasonably be attributed to Dr. Vu, including housing and food challenges, for which Dr. Vu cannot be held responsible. Similarly, [COMPLAINANT 2]'s comments about the conduct of her bank subjecting her to audits, and the monetary harm she has experienced, are not sufficiently connected to the incident to be included in an impact statement. Further, inflammatory statements made about Dr. Vu, including her reference to female patients who are survivors of Dr. Vu's "predatory" actions, improperly refer to facts that have not been proven.

52. Given that there are multiple statements that should not properly be included in an impact statement, as was the case in *Pilarski (Re)*, 2016 ONCPSD 41, the entirety of [COMPLAINANT 2]'s patient impact statement should be excluded on the basis that it is inadmissible.

53. Mr. Boyer submitted that [COMPLAINANT 2]'s statement addressed the losses that she had suffered prior to her attendance with Dr. Vu in February of 2020, and the impact that the incident had on her due to the fact she was already in a vulnerable state. Although the Hearing Tribunal has no authority to award compensation to [COMPLAINANT 2] for financial losses she alleges that she suffered as a result of Dr. Vu's conduct, [COMPLAINANT 2]'s statement properly addresses all of the harms she alleges she has suffered, including emotional, physical and financial harm.

54. To the extent that any of [COMPLAINANT 2]'s comments went beyond what should be included in an impact statement, the Hearing Tribunal can give it the appropriate weight, or can disregard it. However, to refuse to admit it would result in effectively silencing [COMPLAINANT 2], which is inconsistent with the purpose of s. 81.1(2), which is to give complainants a voice in the process.

55. In reply, Ms. McMahon submitted on behalf of Dr. Vu that there was no attempt to silence [COMPLAINANT 2] He is instead trying to defend himself from the most significant charges that any physician can face. Although [COMPLAINANT 2] was entitled to make an impact statement, her comments exceed what is permissible and it is for that reason that Dr. Vu objected to the admissibility of the statement.

56. After hearing submissions from both parties with respect to admissibility of [COMPLAINANT 2]'s statement, the Hearing Tribunal adjourned to consider the objection on behalf of Dr. Vu. The Hearing Tribunal determined that it would accept [COMPLAINANT 2]'s impact statement. However, it would give diminished or no weight to some of the statements made by [COMPLAINANT 2], where the statements went beyond the bounds of what should normally be included in an impact statement.

57. Proceedings before the Hearing Tribunal are administrative law proceedings. Nevertheless, the Hearing Tribunal agrees with both parties that criminal law jurisprudence regarding admissibility of impact statements provides helpful guidance regarding the contents of a patient impact statement in proceedings under Part 4 of the HPA. As noted in *R. v. Gabriel*, 1999 CanLII 15050 (ONSC), impact statements should only contain relevant information, and should be focused on the harm done, or the loss suffered by the victim, arising from the commission of the offence. Attempts to introduce new facts that are unproven are not permitted, nor are criticisms of the offender. Furthermore, recommendations regarding penalty must be avoided.

58. Some of the statements made by [COMPLAINANT 2] were phrased as general statements about the impacts of sexual abuse. For example, [COMPLAINANT 2] stated that "sexual abuse shocks and dysregulates the nervous system, throwing the physical and emotional body into a state of survival". While at first glance it may appear that [COMPLAINANT 2] was making a general statement, she then stated, "the sexual abuse in 2020 disrupted my ability to not only work or to function confidently, and it was followed by the loss of full-time employment three days before my three months' probation, leaving me with no financial security." While the first sentence was phrased as a general statement, it is clear that where [COMPLAINANT 2] provided general statements, the statements were intended to refer to her own experience following the incident with Dr. Vu. Another example where [COMPLAINANT 2] appeared to make a general statement was when she stated, "the thing about trauma, especially when it comes to sexual abuse, is that it disrupts your core foundation of safety, security and trust." Although [COMPLAINANT

2]'s statement appeared to be about the general impacts of trauma, it is evident from reviewing the entirety of her statement that [COMPLAINANT 2] was commenting that the impacts she suffered are consistent with the impact of sexual abuse more generally. Accordingly, although it would have been preferable for the statement to have been written without reference to generalities, the Hearing Tribunal does not find the general descriptions to be improper in this case.

59. [COMPLAINANT 2] also testified regarding the impacts that she felt occurred as a result of the conduct of Dr. Vu. She explained that she was already struggling and in a vulnerable state prior to the sexual abuse, following the loss of her father and grandmother two years previously. She explained that the incident with Dr. Vu had an impact on her at a time when she was already in a vulnerable state and suggested that Dr. Vu's actions created further turbulence and downstream effects. In particular, [COMPLAINANT 2] indicated that the emotional impacts she suffered led to the loss of her job and the loss of her housing, which in turn forced her to seek financial support from the government, which was initially denied.

60. The Hearing Tribunal notes that patients are permitted to indicate the impacts they believe they have suffered as a result of the incident. While [COMPLAINANT 2] felt that there were many downstream impacts as a result of Dr. Vu's actions and in that respect her statement was not improper, the Hearing Tribunal is not in a position to assess causation of the multiple impacts suffered by [COMPLAINANT 2], which she feels are attributable to the actions of Dr. Vu. While [COMPLAINANT 2]'s statement that she suffered significant emotional and psychological harm as a result of the sexual abuse is accepted and is of value in determining sanction, the Hearing Tribunal gives no weight to the other impacts allegedly suffered by [COMPLAINANT 2], as it is not in a position to determine causation.

61. In her statement [COMPLAINANT 2] also indicated that Dr. Vu should be held accountable for his actions, including financial, and requested that the Hearing Tribunal "balance the scale." Submissions regarding penalty are beyond the proper scope of an impact statement, and the Hearing Tribunal gives no weight to this aspect of [COMPLAINANT 2]'s statement.

62. Although Dr. Vu cited several cases in support of his submission that the Hearing Tribunal should find [COMPLAINANT 2]'s statement to be inadmissible in its entirety, or should redact certain portions of the impact statement because it was inadmissible, the Hearing Tribunal did not find the circumstances here to be similar, and found that the concerns raised by Dr. Vu could be addressed by giving those portions of the statement that go beyond what should normally be included in an impact statement the appropriate weight.

63. For example, in *Pilarski (Re),* the Discipline Committee found a physician guilty of accepting gifts from an elderly patient during home visits, including

jewelry and money. At the hearing, the Discipline Committee agreed to hear an impact statement by the adult child of the patient that addressed the patient's health, which was not an issue previously in evidence before the Discipline Committee. The Discipline Committee refused to admit the statement, on the basis that the entirety of the statement went beyond what would be admissible.

64. Additionally, in *Pilarski*, the allegations did not involve sexual abuse, and accordingly, the patient did not have a statutory right to make an impact statement. *Pilarski* is therefore distinguishable from the circumstances in this case, given that s. 81.1(2) clearly provides both [COMPLAINANT 1] and [COMPLAINANT 2] with the right to make an impact statement, either verbal or in writing. Further, as noted above, the Hearing Tribunal does not agree that the majority of [COMPLAINANT 2]'s impact statement is improper. The Hearing Tribunal understood the majority of her statement to be addressing the impacts or losses she feels she has suffered from the incident, all of which is appropriate.

65. In the circumstances, [COMPLAINANT 2]'s impact statement is admissible. However, as noted above the Hearing Tribunal will give no weight or limited weight to portions of the statement.

Evidence on Behalf of Dr. Vu

66. Dr. Vu called [RN1] and Dr. D[redacted] to provide evidence on his behalf, and also testified on his own behalf.

[RN1]

67. [RN1] became a Registered Nurse in March of 2020. Prior to that she was an LPN. She worked at [redacted] Family Medical Clinic from 2016-2020. [RN1] confirmed that she wrote a letter on behalf of Dr. Vu, dated May 19, 2020 (Exhibit 8). In the letter, [RN1] stated that she had assisted Dr. Vu with female examinations on many occasions, and there was no incident she deemed as being inappropriate. The letter also states that Dr. Vu would inform patients "if there is any pain during intercourse, it is because the penis is putting pressure against the cervix".

68. On cross-examination, [RN1] indicated she was unsure if the discussion about pain during intercourse occurred because the patient had reported pain, as she was not present for the first part of the appointment, and only attended for the exam. She was also unsure how many times she had attended as a chaperone for Dr. Vu. On further questioning by the Hearing Tribunal, she indicated that she thought she may have been present for 20 or 30 sensitive examinations.

Dr. D[redacted]

69. Dr. D[redacted] was qualified to provide expert testimony during the merits portion of hearing and was also qualified as a forensic psychologist in relation to risk assessment.

70. Dr. D[redacted] provided testimony regarding the expert report he previously provided, dated March 3, 2022, which was entered as an exhibit during the Merits Hearing.

71. Dr. D[redacted] confirmed that it is still his opinion that Dr. Vu is rated as a low risk of recidivism on standard evaluation methods. He testified that his opinion is based on his meetings with Dr. Vu, the tests administered, and standard principles that go towards risk. Dr. D[redacted] stated that there is nothing in his evaluation that suggests any proclivities or mental health concerns that raise Dr. Vu's risk. While there is no ability to say someone is at "no risk" of re-offending, it is improbable that Dr. Vu will engage in similar conduct in the future, given what he has learned from the experience and given his recognition that although harm was not intended, his conduct had harmed his patients.

Dr. Vu

72. At the outset of Dr. Vu's testimony, the Hearing Tribunal agreed to mark a bundle of letters submitted in support of Dr. Vu as Exhibit 9.

73. Prior to Dr. Vu's testimony, the Hearing Tribunal directed anyone attending the hearing who was not a party to excuse themselves, in accordance with the Hearing Tribunal's prior direction following the application to close the hearing.

74. [redacted]

75. [redacted]

76. [redacted]

77. [redacted]

[redacted]

78. [redacted]

79. [redacted]

80. [redacted]

81. [redacted]

82. [redacted]

83. [redacted]

84. [redacted]

[redacted]

85. [redacted]

IV. SUBMISSIONS OF THE PARTIES

Submissions on Behalf of the Complaints Director

86. Mr. Boyer submitted on behalf of the Complaints Director that because the conduct referred to in allegation #1 does not constitute "sexual abuse", the Hearing Tribunal must undertake an analysis of the *Jaswal* factors and determine what orders to impose. Although the finding of unprofessional conduct in relation to allegation #1 does not require cancellation, the Complaints Director submitted that cancellation was consistent with changing societal norms, citing *College of Physicians and Surgeons of Ontario v. Peirovy*, [2018] O.J. No. 2341; 2018 ONCA 420 in support of this principle.

87. With respect to allegation #2, Mr. Boyer submitted that because the Hearing Tribunal found Dr. Vu's conduct to constitute sexual abuse in relation to allegation #2, s. 82(1.1) is applicable, and mandates cancellation of Dr. Vu's practice permit and registration, together with any other orders deemed appropriate by the Hearing Tribunal.

88. Although Dr. Vu claimed that he was only trying to help his patients, this was not supported by other evidence, including the fact that Dr. Vu admitted he would not provide similar treatment to a male patient during a rectal examination unless requested, that both [LPN1] and [LPN2] had never seen him provide "dyspareunia counselling", and that both [COMPLAINANT 1] and [COMPLAINANT 2] described Dr. Vu as dissuading them from asking for a chaperone to be present.

89. Dr. Vu's conduct in this case was reprehensible because he treated [COMPLAINANT 1] and [COMPLAINANT 2] as having no agency over their bodies, his conduct significantly damaged their trust in doctors, and they suffered significant emotional, physical, and psychological impacts.

90. Further, Dr. Vu's conduct damages the public's trust in the medical profession, and the sanctions must make it clear that the conduct is outside the range of acceptable conduct.

91. In the circumstances, counsel for the Complaints Director submitted that cancellation is not only mandated, but is appropriate and is supported by the caselaw. In particular, cancellation is supported by the decisions in cases including *Bhardwaj (Re), Levin (Re), Sazant v. College of Physicians and*

Surgeons of Ontario, *Garbutt (Re)*, and *Postnikoff (Re)*. These matters all pre-dated the mandatory cancellations provisions, but the discipline tribunals nevertheless found that cancellation was warranted based on what would now constitute sexual abuse.

92. With respect to costs, Mr. Boyer indicated that costs to the end of May 2023 (not including the costs of independent legal counsel) total approximately $87,200.00. He indicated that the Complaints Director was seeking a costs order of 2/3 of the total costs of the investigation and hearing, in accordance with s. 82(1)(j), which provides the Hearing Tribunal with authority to order costs.

93. Mr. Boyer submitted that the Alberta Court of Appeal's decision in *Jinnah v. Alberta Dental Assn.*, which addresses the authority to order costs, is premised on principles that are contrary to established case law (including the Supreme Court of Canada's decision in *Pearlman v. Manitoba Law Society Judicial Committee*) where the Court held that legislation providing authority to order costs does not create a reasonable apprehension of bias~~)~~ nor is it inappropriate for a member found guilty of misconduct to be required to provide the regulator with reimbursement of direct costs incurred.

94. In addition, Mr. Boyer submitted that the decision in *Jinnah* is inconsistent with numerous cases from other jurisdictions, where the courts have upheld costs orders against professionals, even where the amounts are significant.

95. Mr. Boyer also submitted that in *Jinnah* the Court failed to discuss other Court of Appeal decisions where significant costs orders against professionals were upheld, including: *Erdmann v. Institute of Chartered Accountants of Alberta*, *Ironside v. Alberta Securities Commission;* and *College of Physicians and Surgeons of Alberta v. Ali.*

96. Further, the facts in *Jinnah* were somewhat unique, given that there were total costs of $187,000 arising from a two-day hearing.

97. In this case, the costs incurred to date in the amount of $87,200 (not including legal fees for independent legal counsel) are reasonable and are consistent with the costs upheld by the Alberta Court of Appeal in *Alberta College of Physical Therapists v. Fitzpatrick*, where the Court found that average costs for an investigation and full day of hearing are about $23,000.00. The known costs in this case are consistent with the Court's decision in *Fitzpatrick.*

98. Mr. Boyer submitted that requiring Dr. Vu to pay 2/3 of the costs of the investigation and hearing is appropriate in this case.

Submissions on Behalf of Dr. Vu

99. Ms. McMahon submitted on behalf of Dr. Vu that notwithstanding the mandatory cancellation provisions, the Hearing Tribunal should nevertheless carefully consider the factors in *Jaswal,* and that based on those factors, revocation is not the appropriate penalty in this case. In particular:

a) Nature and gravity of proven allegations:

100. Although a finding of sexual abuse is a serious matter, there is a spectrum of conduct and varying degrees of sexual boundary violations. Sexual coercion and violence, similar to that which occurred in the *Bhardwaj* case, is on the most serious end of the spectrum. While the Tribunal found that Dr. Vu's conduct was not clinically indicated, he was operating under a genuine but misguided belief that he was providing a beneficial service.

101. The fact that Dr. Vu had not provided similar counselling to male patients did not make his conduct more serious. Similarly, the evidence provided by two nurses that they had never seen Dr. Vu provide dyspareunia counselling did not elevate the seriousness of the conduct, given that [RN1], who was the primary nurse, had seen him engage in such counselling on previous occasions.

102. The conduct in issue should be considered to be on the lower end of seriousness of potential sexual abuse allegations, due to its clinical nature, and lack of sexual or mal-intent.

b) Age and experience:

103. Dr. Vu became a member of the College in 2014. This is not a case involving a senior or experienced physician, and accordingly age is not an aggravating factor. Given that Dr. Vu was new to the profession, his age and experience should be considered a mitigating factor.

c) Prior complaints or convictions:

104. Dr. Vu had no prior complaints or convictions, and he had no knowledge of [COMPLAINANT 1]'s complaint at the time he carried out [COMPLAINANT 2]'s examination. Sanction cannot be increased when the first offence is not known to the registrant at the time the second offence occurs.

d) Age and mental condition of the patients:

105. There is no evidence that the patients' ages or mental condition should attract a more serious sanction. Both were in their mid-twenties at the time, and Dr. Vu had no knowledge of their prior mental condition. This situation is distinguishable from a number of the cases cited on behalf of the Complaints Director, including *Delacruz, Bhardwaj,* and *Phipps.*

e) Number of times offence occurred:

106. Dr. Vu's conduct occurred on one occasion with [COMPLAINANT 1] and once with [COMPLAINANT 2] Further, he only provided dyspareunia advice to patients undergoing pelvic examinations if they presented with one of three specific conditions. Accordingly, this factor is neutral or mitigating.

f) Role of Dr. Vu in acknowledging what occurred:

107. Dr. Vu has consistently acknowledged what occurred and its effect on patients. He has been apologetic and remorseful in his testimony. Dr. Vu's testimony is consistent with Dr. D[redacted]'s testimony, that he is at a low risk of re-offending. This is a mitigating factor that must be taken in account.

g) Whether Dr. Vu has already suffered other penalties:

108. Dr. Vu has already suffered serious penalties. It has impacted his health, and he has been on medication to treat panic attacks. He practiced under a chaperone for a number of months, before he was suspended in August of 2022. The financial impacts have been considerable, and he is now facing a civil action.

h) Impact of the incident on [COMPLAINANT 1] and [COMPLAINANT 2]:

109. The Hearing Tribunal must give appropriate weight to the impact statements provided by [COMPLAINANT 2] and [COMPLAINANT 1], which go beyond the permissible scope. Some of their evidence is untested and unreliable, and this should be reflected when weighing their evidence. This is not an attempt to "silence the victims", and comments regarding the impermissible components of the statements should not be taken as such.

110. The statement by [COMPLAINANT 2] referenced other processes and bodies, over which Dr. Vu has no control (including her comments about the CPSA, banks, and other institutional bodies). [COMPLAINANT 2] further blamed Dr. Vu for events that his conduct could not have caused, including the pandemic, loss of pets, unemployment, food and housing insecurity, and illness. Further, [COMPLAINANT 2] spoke about the effects of sexual abuse generally, not about her own experience. Accordingly, [COMPLAINANT 2]'s statement should be disregarded, or some portions should be given no weight.

111. With respect to [COMPLAINANT 1], some portions of her statement are appropriate, however she provided information about her mental and physical health without any substantiating evidence, and less weight should be given to this evidence.

112. Further, [COMPLAINANT 1] has an ongoing civil action, and her conduct in her civil suit raises serious concerns about her motivation for providing an impact statement, as well as the reliability of the statement.

113. Although counsel for the Complaints Director submitted that the impact on [COMPLAINANT 2] and [COMPLAINANT 1] was an aggravating factor, their statements alone are insufficient to establish that they have suffered significant and lasting emotional and psychological trauma.

i) Mitigating circumstances:

114. Counsel for Dr. Vu submitted that there are a number of mitigating circumstances that must be taken into account, including Dr. Vu's cooperation throughout the investigation and the hearing, his acknowledgement of the conduct, compliance with the previous chaperone condition, his conduct throughout the hearing that reduced time and expense, the letters of support written by nurses who worked with him, and the letters of support from patients and colleagues.

115. Further, Dr. D[redacted] testified he is at a low risk of re-offending, which is also a mitigating factor.

116. The novelty of the charges is also a mitigating factor. The HPA does not provide a definition of what constitutes conduct of a "sexual nature", and in that sense this was a novel case.

j) Need to promote deterrence and maintain public confidence in the profession:

117. Deterrence is achieved when risk is minimized. Given Dr. D[redacted]'s evidence, cancellation is not necessary to promote deterrence or to maintain public confidence in the medical profession.

118. Integrity of the profession is served by sanctioning conduct in a way that is fair and reasonable. Permanent revocation is not warranted and may have a chilling effect on the willingness of physicians to perform sensitive exams.

k) Degree to which the conduct was outside of the range of permitted conduct:

119. The conduct in issue here was not intended to be captured by Bill 21, which was intended to govern intentional conduct and criminal conduct. There is no discussion in *Hansard* of any discussions about Bill 21 that indicate it was designed to address the unintentional conduct that is at issue here.

120. Further, Dr. Vu's conduct was not found to be a marked departure from the range of permitted conduct, which has been described as conduct that displays culpability of a gross or aggravated nature, rather than mere failure

to exercise ordinary care. Given the Hearing Tribunal's findings that Dr. Vu held a sincere but misguided belief that he was providing helpful advice, the conduct should have attracted a three-month suspension, as was the case in *Malette.*

l) Range of sanctions in similar cases:

121. There are a number of cases that support that the appropriate sanction is a shorter period of suspension. For example, in *Malette*, the physician was treating a patient who had loss of libido and sensation in the genital area. While performing an exam, Dr. Malette palpated the patient's genitals and asked if it was a similar sensation as that experienced during intercourse. Dr. Malette was suspended for three months.

122. In *Gilboa,* a physiotherapist was suspended for 18 months after purposefully allowing his clothed penis to come into contact with two clients' hands while providing physiotherapy treatment.

123. In *Delacruz*, a physician was suspended for 6 months after being found guilty of inappropriately examining a 16-year-old female's breasts, buttocks, and labia.

124. Other cases referred to included *Szoda* (2 month suspension for moving a patient's bra and shirt to examine her chest without adequate explanation); *Sherman (*mandatory revocation ordered for entering into a consensual relationship post-Bill 21, Tribunal found conduct on the lower end of the spectrum because would not have constituted sexual abuse if they had waited another 60 days); *Phipps* (14 month suspension after showing 11 patients naked photographs, making remarks of a sexual nature, and becoming sexually aroused in the presence of two of the patients).

125. Counsel for Dr. Vu also submitted that the cases relied on by the Complaints Director to support cancellation were distinguishable. For example, both Dr. Nqumayo and Dr. Levin were criminally convicted of multiple counts of sexual assault.

126. Based on the assessment of the *Jaswal* factors, counsel for Dr. Vu submitted that the appropriate sanction would be a suspension of 18 months, with the usual terms and conditions on return to practice. This would be a harsher sanction than that ordered in the *Malette* case, where the conduct was nearly identical and only attracted a suspension of three months.

121. Dr. Vu also made submissions on costs, noting that the references to "expenses" sought by the Complaints Director must have been an error, and that they were referring to costs.

122. Dr. Vu submitted that based on the Court of Appeal's framework in *Jinnah*, the Hearing Tribunal should exercise its discretion to refrain from ordering costs, and that the presumption against costs has not been rebutted.

123. In *Jinnah*, the Court held that the member should only be required to pay costs if compelling circumstances exist, and identified four categories of cases where costs may be ordered: where the member has engaged in serious unprofessional conduct like sexual assault; where the member is a serial offender; where there is evidence of failure to cooperate; or where the member engages in hearing misconduct.

124. Where the case involves a novel interpretation of a new or ambiguous statute, or where the case concerns a matter of public interest and the parties have acted in good faith, then no costs should be ordered.

125. With regard to the seriousness of the conduct, *Jinnah* describes sexual assault or fraud as examples. There is no such behavior or intent here, and Dr. Vu could not have known that his conduct constitutes sexual abuse.

126. The other categories articulated in *Jinnah* do not apply here, as Dr. Vu is not a serial offender, was cooperative with the College, and did not engage in hearing misconduct.

127. Further, the novelty of this case weighs against a costs order. At the time of the hearing, there were no Alberta decisions on "sexual abuse", and there are still no other decisions arising in the clinical context. The Tribunal's decision reflects that the issues were not simple or straightforward, and costs are not warranted in this case.

128. If the Tribunal determines that a costs order is appropriate, the amount of costs ordered must be reasonable. Further, the courts have held that a costs order should not deliver a "crushing financial blow."

129. It was reasonable in this case for Dr. Vu to defend himself against the charges, given the impact of the allegations. Further, there was no indication that Dr. Vu unreasonably delayed or lengthened the proceedings.

130. Regarding the amount of costs incurred, counsel for Dr. Vu submitted that Dr. Vu was unable to assess the reasonableness of the amounts, because no supporting documentation on costs or even a statement was provided. The estimate of costs to the end of May 2023 is exorbitant, and requiring Dr. Vu to pay it is unreasonable, punitive and would serve a crushing financial blow.

131. In recent decisions where health professionals were found guilty of sexual abuse, a low percentage of costs was ordered, in recognition of the impact that revocation has on the member's ability to earn a livelihood. For example, in *Mohrenberger*, a physical therapist was only ordered to pay $5000.00 in costs following a finding of sexual abuse, in light of the serious financial consequences she faced. In *Nelson,* an occupational therapist was

ordered to pay 50% of the costs of the hearing to a maximum of $12,000, after being found guilty of sexual abuse based on a consensual relationship with a patient. Both cases were decided prior to *Jinnah*.

132. In *Sherman,* decided following the decision in *Jinnah,* the Hearing Tribunal ordered Sherman to pay 10% of the costs of the investigation and hearing, to a maximum of $13,000, following a finding of sexual abuse. While the Hearing Tribunal stated that they had no discretion to order any penalty lesser than revocation, the Hearing Tribunal ordered a small percentage of costs based on the novelty of the case, and the fact that Mr. Sherman's registration had been cancelled, such that a costs order would deliver a crushing financial blow.

133. In this case, Dr. Vu's ability to earn a livelihood has been severely impacted, and the costs sought by the Complaints Director would serve a crushing financial blow and are not warranted. In the alternative, costs of 10% to a maximum of $2000 would be appropriate.

134. Further, Dr. Vu submitted that the costs estimate of $87,200 appears to capture some costs associated with Dr. Vu's appeal of the merits decision. Although, since no details were provided, it is difficult to know what costs are encompassed in this amount. The burden of proof remains with the Complaints Director to justify a costs order, and the Complaints Director has not provided sufficient details in connection with costs, despite a request for further details being made by the Hearing Tribunal previously.

135. In summary, counsel for Dr. Vu submitted that if the Hearing Tribunal determines that mandatory revocation must be ordered, in the alternative, it should state what sanction it would have ordered had cancellation not be required. A suspension of 18 months applied retroactively would be appropriate, together with terms and conditions for return to practice. Regarding costs, a costs order should not be made, or in the alternative costs of 10% should be ordered to a maximum of $2000.00.

V. ORDERS

143. The Hearing Tribunal carefully considered the evidence, and the oral and written submissions of the parties, and hereby makes 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.

VI. REASONS FOR ORDERS

Cancellation

144. Allegation #2 arises from treatment provided by Dr. Vu to [COMPLAINANT 2] on February 4, 2020, which occurred following the amendments to the HPA that came into force effective April 1, 2019. As a result of those amendments, following a finding of sexual abuse, the Hearing Tribunal must cancel the regulated member's practice permit, as provided for in s. 82(1.1). By amending the legislation, the legislature removed the Hearing Tribunal's discretion to impose a lesser or different penalty. Accordingly, although counsel for Dr. Vu submitted that cancellation was not warranted in this case, Dr. Vu's practice permit and cancellation are hereby cancelled immediately.

Penalty if Cancellation Was Not Mandatory

145. Although Dr. Vu's practice permit is hereby cancelled in accordance with s. 82(1.1), Dr. Vu has submitted that the Hearing Tribunal should indicate the penalty that would have been ordered, had cancellation not been mandatory. The Hearing Tribunal is prepared to do so. As such, the Hearing Tribunal has considered the orders it would have made had both allegations been proven and had the conduct in both cases occurred prior to April 1, 2019. That is, the Hearing Tribunal has considered what the penalty would have been ordered on a global basis, had s. 82(1.1) not been in force.

146. While the Hearing Tribunal would not have cancelled Dr. Vu's registration and practice permit, the Hearing Tribunal would have suspended Dr. Vu's practice permit for a period of two years. In addition, the Hearing Tribunal would have ordered completion of a boundaries course, the requirement for a chaperone for sensitive examinations, and a period of supervision and mentorship following return to practice.

147. In determining what the appropriate orders would have been, the Hearing Tribunal has considered the factors set out by the Court in *Jaswal v. Newfoundland,* a decision frequently cited by discipline tribunals at the sanction phase of a hearing. The Hearing Tribunal's consideration of the *Jaswal* factors is set out below.

a) Nature and Gravity of Proven Allegations

147. Dr. Vu was found to have engaged in "sexual abuse" as defined in s. 1(nn.1) of the HPA while providing treatment to [COMPLAINANT 2], and was found to have breached the College's standard of practice addressing Boundary Violations, in relation to treatment provided to [COMPLAINANT 1]

148. In both cases, the Hearing Tribunal accepted Dr. Vu's evidence that his intent in providing dyspareunia counselling to both [COMPLAINANT 2] and [COMPLAINANT 1] was to assist them in understanding how to avoid pain on intercourse, a common problem reported by his patients. However, the conduct was nevertheless found to be "sexual in nature" given several factors, including that Dr. Vu's actions were not appropriate to the service being provided. Importantly, Dr. Vu's conduct, although described as "dyspareunia counselling", involved using his fingers to touch the patient's vaginas, to demonstrate the point of contact of the penis, while at the same time, providing advice on sexual positions that could be engaged in to minimize pain on sexual intercourse. This occurred despite the fact that neither [COMPLAINANT 2] nor [COMPLAINANT 1] had reported pain on intercourse or sought advice from Dr. Vu on this topic.

149. The Hearing Tribunal in its Merits Decision found that despite Dr. Vu's explanation for his conduct, the conduct in relation to [COMPLAINANT 1] was a boundary violation, and the conduct in relation to [COMPLAINANT 2] constituted sexual abuse, in accordance with the definition of sexual abuse in the HPA. The breaches were not considered to be mere technicalities, given the context in which the conduct occurred, that included prolonging the contact with intimate body parts to provide dyspareunia counselling that was not clinically indicated. The reasons for those findings are outlined in detail in the Merits Decision.

150. Patients who seek medical attention from physicians necessarily must place their trust in their medical providers and are entitled to assume that treatment that is provided is clinically indicated. Patients who are undergoing sensitive examinations do not expect physicians to abuse that trust by engaging in touching of intimate body parts, or providing advice about what sexual positions are less likely to cause pain on intercourse, for reasons that are not indicated. While Dr. Vu had a reason to conduct pelvic examinations on both [COMPLAINANT 1] and [COMPLAINANT 2], as noted in the Merits Decision, he prolonged the duration of the vaginal examination by providing unrequested advice about different sexual positions to avoid pain. This was an abuse of the trust that both [COMPLAINANT 1] and [COMPLAINANT 2] placed in him, and the Hearing Tribunal finds that the proven conduct is serious.

151. Although the conduct is serious, the Hearing Tribunal recognizes that there is a spectrum of conduct that could potentially constitute a boundary violation or sexual abuse pursuant to the HPA. For example, sexual intercourse between a physician and their patient that is consensual in nature, where there is no remaining power imbalance between the physician and the patient, and that occurs 364 days after the physician ceased providing services to the patient (i.e. just before they cease to be a "patient" for the purposes of the applicable standard) is far less serious than sexually assaulting a patient by forcibly having sex with them. Although in both instances, the conduct would constitute "sexual abuse" and would therefore

result in mandatory cancellation, a consensual sexual relationship just prior to the expiry of the one-year period outlined in the College's Standard of Practice on Boundary Violations: Sexual is obviously less serious than a sexual assault perpetrated on a patient.

152. The conduct in issue in this case constitutes sexual abuse in relation to [COMPLAINANT 2] and constitutes a boundary violation for [COMPLAINANT 1], in reference to the applicable legislation in force at the time of the offences and is by its nature serious. However, as noted above, sexual abuse and boundary violations exist on a spectrum. The Hearing Tribunal finds that in the context of a complaint involving allegations of sexual abuse or boundary violations, Dr. Vu's conduct is not on the most serious end of the spectrum, nor is it the least serious end of the spectrum - it falls somewhere between those ends of the spectrum, and closer to the mid-range.

153. While the Complaints Director cited a number of cases where physicians were found guilty of sexual abuse, some of the cases cited are of limited assistance, as the conduct was on the most serious end of the spectrum. For example, in *Levin (Re),* Dr. Levin was struck from the register after being convicted criminally of sexual assault after engaging in masturbation and stroking of a number of psychiatric patients. The Hearing Tribunal finds that Dr. Vu's conduct is clearly distinguishable. While there was no clinical indication to provide dyspareunia counselling, there was clinical indication for Dr. Vu to perform pelvic examinations on both [COMPLAINANT 2] and [COMPLAINANT 1]

154. The Complaints Director also relies on *Bhardwaj (Re)*. In that case, Dr. Bhardwaj was a family physician who admitted to having sexual involvement with four of his patients. He had also prescribed opioids to one of those patients, who displayed clear signs of addiction. Dr. Vu's conduct is not similar, and Dr. Bhardwaj's conduct is more serious than Dr. Vu's.

155. On the other hand, the Hearing Tribunal does not find that cases such as *Sherman*, 2023 ABPACA2, cited on behalf of Dr. Vu, are helpful in determining the severity of Dr. Vu's actions. Sherman, a physiotherapist, was found to have engaged in sexual abuse when he entered into a sexual relationship with a former patient. While the sexual relationship was found to constitute sexual abuse, there was no indication that Sherman engaged in non-consensual touching that was not clinically indicated, as was the case here. Dr. Vu's actions are more serious than Sherman's were.

156. Although the Complaints Director submitted that Dr. Vu's conduct in performing the treatments in the absence of a chaperone indicated that the conduct was more serious, the Hearing Tribunal found, in the Merits Decision, that it was Dr. Vu's practice to offer a chaperone to all patients, including [COMPLAINANT 2] and [COMPLAINANT 1]

157. Further, the Complaints Director submitted that Dr. Vu's conduct was more serious, given the evidence provided by both [LPN1] and [LPN2], neither of whom had ever seen Dr. Vu engage specifically in dyspareunia counselling. While their evidence on this point was clear, [RN1]'s evidence was that Dr. Vu would inform the patient that if there is any pain during intercourse, it is because the penis was putting pressure against the cervix. Although [RN1]'s evidence was not entirely consistent with the evidence given by Dr. Vu regarding what he said while providing dyspareunia counselling, her testimony suggests that there were occasions where painful intercourse was discussed during the course of a pelvic examination. Accordingly, the fact that [LPN1] or [LPN2] had never heard this advice being provided was not indicative that the conduct was more serious, as suggested on behalf of the Complaints Director.

158. The Hearing Tribunal finds that although Dr. Vu's conduct was serious, the circumstances in which it occurred are distinguishable from many of the cases cited by both parties. The Hearing Tribunal found there was no sexual intent on the part of Dr. Vu. The Hearing Tribunal finds that in the context of sexual abuse or boundary violations, the seriousness of Dr. Vu's conduct fell somewhere in the middle.

159. Nevertheless, any finding of sexual abuse or a boundary violation involving inappropriate touching is serious, given its impact on the patients, and the violation of trust that occurs even where there was no sexual intent. The nature of the conduct in this case is an aggravating factor, that merits a significant penalty.

b) Age and Experience of Dr. Vu

160. Counsel for Dr. Vu submitted that Dr. Vu was a relatively new physician at the time the conduct occurred, and that his lack of experience should be considered a mitigating factor.

161. The Hearing Tribunal does not agree that Dr. Vu's age or inexperience is a mitigating factor in this case, nor is it an aggravating factor. All physicians, regardless of the number of years in practice, should understand that they are not permitted to engage in touching of an intimate nature, where such touching is not clinically indicated, and informed consent was not obtained. This knowledge is critical to the role of a physician and is not something that needs to be learned over time. Accordingly, Dr. Vu's lack of experience does not mitigate his conduct in this case, and this is a neutral factor.

c) Previous Character and Prior Complaints or Convictions

162. There were no prior complaints or convictions concerning Dr. Vu. This is a mitigating factor.

d) Age and Mental Condition of the Patients

163. Most patients who attend with a physician for the purpose of a sensitive intimate examination can be considered to be vulnerable. There is inherent vulnerability when a patient allows another person, by virtue of their profession, to touch or probe their body, while partially undressed. This vulnerability is further highlighted by the fact that physicians may have access to the most intimate and sensitive information about their patients. All of this occurs in circumstances where there is a significant disparity in knowledge and power.

164. While [COMPLAINANT 2] and [COMPLAINANT 1] were vulnerable due to the imbalance in power and the sensitive nature of the treatment, both were in their 20's at the time the incidents occurred, well into adulthood. Therefore, their age is a neutral factor. Further, there was no indication that either suffered from a medical condition that would have been known to Dr. Vu at the time. Therefore, this is also a neutral factor.

e) Number of Times the Offence Occurred

165. The proven conduct was not an isolated incident, having occurred on two occasions in both 2017 and 2020. Further, Dr. Vu clearly testified that the dyspareunia counselling he provided was part of his standard practice, that he provided in three specific circumstances when he felt it would benefit patients. This factor is slightly aggravating given that the proven conduct occurred twice and was not a discrete incident.

f) Role of the Physician in Acknowledging What Occurred

166. Although the hearing proceeded as a contested hearing, Dr. Vu has the right to contest the allegations and the fact that he did not make admissions cannot be treated as an aggravating factor. Given the unique issues in this case, which focused on determining whether the conduct was of a "sexual nature" so as to constitute sexual abuse, it is not surprising that the hearing was contested. This is especially so given that a finding of sexual abuse results in automatic cancellation.

167. While Dr. Vu chose to contest the allegations, throughout the proceedings he acknowledged that he had engaged in dyspareunia counselling, and his conduct in that regard was admitted. Further, he acknowledged that his conduct was detrimental to both [COMPLAINANT 2] and [COMPLAINANT 1], and that had he known it would be detrimental, he would not have undertaken that conduct. He also stated that if he was permitted to return to practice, he would not repeat the conduct in the future. Dr. Vu's acknowledgement is consistent with Dr. D[redacted]'s testimony that Dr. Vu expressed remorse and is a mitigating factor for the purposes of sanction.

g) Whether the Physician Has Suffered Other Serious Financial Consequences

168. The impact of the complaints on Dr. Vu has been significant. Dr. Vu was initially required to practice under a chaperone when the complaints were made. Effective August 29, 2022, the date the Merits Decision was issued, his practice permit was suspended. He has been unable to secure employment, and his ability to earn any income has been severely impacted. The suspension of Dr. Vu's practice permit is a mitigating factor that must be taken into account.

169. Dr. Vu also submits that the existence of a concurrent civil claim is also a mitigating factor. The Hearing Tribunal does not agree. To date, there have been no findings of civil liability against Dr. Vu, nor has any damages award been issued by the courts. Accordingly, the existence of a civil claim is not a mitigating factor in this case.

h) Impact of the Incident on the Patient

170. The Hearing Tribunal carefully considered the testimony given by both [COMPLAINANT 2] and [COMPLAINANT 1] during the hearing, as well as their patient impact statements. The Hearing Tribunal finds based on their testimony in the Merits Hearing, and their patient impact statements, that Dr. Vu's conduct had a significant and detrimental impact on both of them.

171. During the hearing on the merits, [COMPLAINANT 1] testified that she felt very unsafe after she left the Clinic following her appointment with Dr. Vu. In her impact statement, [COMPLAINANT 1] reported that the incident caused her to lose trust in the person who was supposed to care for her medical needs, and that this has affected her connections with people and has given her anxiety around medical appointments she never experienced before. She has felt isolated, depressed, and worthless, and indicates that she suffers from near constant anxiety and stress. She has flashbacks, and given her previous trust in Dr. Vu, feels that anyone could be a potential assailant. She described cancelling an appointment for a mole removal as she could not experience a male doctor touching her. [COMPLAINANT 1] described other impacts that the incident had on her, including additional health issues such as dizzy spells, as well as negative impacts on her business.

172. [COMPLAINANT 2] also described the impact that the incidents had on her. During the hearing, she testified that while Dr. Vu was conducting the exam, she felt frozen on the table and felt violated by him, given his position of power. When providing her impact statement, [COMPLAINANT 2] indicated that the sexual abuse interrupted her ability to function confidently, and had physical, emotional, and financial impacts on her. She explained that it caused her to feel isolated and this was amplified given the isolation and disconnection that occurred as a result of the pandemic only one month after

the incident. [COMPLAINANT 2] also stated that her trust and safety was broken by a person in authority, which in turn impacted her trust and safety in other institutions. She described the impact as a violation of her physical body, transpiring to the mental and emotional. [COMPLAINANT 2] also felt that the incident had a number of downstream impacts on her, including an impact on her financial security, food security, and physical health.

173. The Hearing Tribunal accepts that both [COMPLAINANT 1] and [COMPLAINANT 2] felt violated as a result of Dr. Vu's actions, and that his actions have impacted them negatively. Not only have they been affected emotionally, but both also experienced a loss of trust in others in a position of authority. Notably, [COMPLAINANT 1] stated that she cancelled a medical appointment with a male physician as she was concerned that he may be an assailant. The impacts reported by [COMPLAINANT 1] and [COMPLAINANT 2] are consistent with the Hearing Tribunal's Merits Decision, finding that Dr. Vu's actions violated [COMPLAINANT 1] and [COMPLAINANT 2]'s sexual integrity.

174. While counsel for Dr. Vu submitted that there was no other evidence to corroborate the statements made by [COMPLAINANT 1] and [COMPLAINANT 2], the Hearing Tribunal rejects the suggestion that psychological and emotional impacts of sexual abuse or a boundary violation must be corroborated by independent evidence. The HPA permits the patients to make an impact statement, and there is no requirement for independent corroboration of the type of emotional and psychological impacts reported by [COMPLAINANT 1] and [COMPLAINANT 2] Furthermore, the psychological impacts they suffered, including a loss of trust in the profession, are not surprising, given the nature of Dr. Vu's conduct and the circumstances in which it occurred, which is described in full in the Merits Decision. The impact on both patients was severe and is an aggravating factor that must be taken into account.

175. While both [COMPLAINANT 1] and [COMPLAINANT 2] reported other subsequent impacts, including financial impacts, the Hearing Tribunal has no authority to order compensation to be paid to [COMPLAINANT 1] or [COMPLAINANT 2], it can only consider the impact on them in determining what orders to make pursuant to s. 82.

176. Further, the Hearing Tribunal is aware that [COMPLAINANT 1] has initiated a civil claim against Dr. Vu. Accordingly, it is not appropriate for the Hearing Tribunal to make any findings regarding financial or other compensable losses either [COMPLAINANT 1] or [COMPLAINANT 2] may have suffered. Such a determination is not necessary or appropriate in these proceedings, since the Hearing Tribunal has no ability to provide remedies for such losses, even if they were proven. As such, the Hearing Tribunal has not made any determination with respect to financial losses that may have been suffered, and in the case of [COMPLAINANT 1], those issues are better dealt with in the context of the civil proceedings.

177. While the Hearing Tribunal took into account the patient impact statements by [COMPLAINANT 2] and [COMPLAINANT 1] for the reasons as set out above at paragraphs 56-65, the Hearing Tribunal gave no or limited weight to the statements made by [COMPLAINANT 1] and [COMPLAINANT 2] alleging financial harm. Similarly, no weight was given to the statements by [COMPLAINANT 2] regarding any sanctions that should be imposed on Dr. Vu, as this is beyond the scope of a proper patient impact statement.

i) Presence or Absence of Mitigating Circumstances

178. Dr. Vu was cooperative throughout the investigation and the hearing and did not engage in any conduct that unnecessarily prolonged the proceedings. Further, the Hearing Tribunal accepted that Dr. Vu did not have any sexual intent and is at low risk of recidivism. In addition, he provided a number of letters of support, including from former patients and colleagues with whom he previously worked. The Hearing Tribunal finds that these are mitigating factors that must be taken into account.

179. Although counsel for Dr. Vu submitted that the novelty of these charges is a mitigating factor, the Hearing Tribunal does not agree. The Hearing Tribunal was clear in the Merits Decision that Dr. Vu's conduct was unacceptable, and that his naivete or lack of knowledge was not a justifiable excuse. There was nothing novel about the Hearing Tribunal's finding that Dr. Vu's conduct was not justified. The only novel issue that arose was whether, in the circumstances, Dr. Vu's conduct constituted sexual abuse as that term is defined in the HPA. While the novelty of that issue is something the Hearing Tribunal has considered when considering submissions on costs, it is not a mitigating factor that should be taken into account in determining penalty, including whether cancellation or a lengthy suspension is warranted.

j) Need to Promote Deterrence and Need to Maintain Public Confidence in the Profession

180. The Hearing Tribunal finds that specific deterrence is a significant consideration in this case, and any order issued by the Hearing Tribunal must deter Dr. Vu from engaging in similar conduct in the future.

181. Of equal importance is the need to deter other members of the profession from engaging in similar conduct. Physicians cannot be ignorant of the requirements to ensure that sensitive examinations are only conducted when the examination is clinically indicated and must ensure that informed consent is obtained prior to performing a sensitive examination. Dr. Vu did not adhere to these expectations, and in the circumstances the dyspareunia counselling he provided was determined to be of a sexual nature, despite Dr. Vu's lack of intent. The orders made by the Hearing Tribunal must reflect the seriousness of the conduct and must reinforce the absolute necessity for

physicians to have a solid indication and obtain informed consent before undertaking sensitive examinations.

182. The Hearing Tribunal considered the evidence given by Dr. Vu during the sanction hearing, that other physicians have reported that they will stop doing sensitive examinations given the risks of being found to have engaged in sexual abuse. While the Hearing Tribunal understands that significant penalty orders can potentially have a chilling effect, had Dr. Vu obtained informed consent prior to engaging in the dyspareunia counselling, and had he refrained from providing treatment that was not clinically indicated, the unprofessional conduct would not have occurred. While greater caution is warranted when engaging in sensitive examinations, examinations that are indicated and consented to will not be found to constitute sexual abuse, or to constitute unprofessional conduct.

183. In addition to deterrence, the Hearing Tribunal is mindful that sanctions must be ordered that ensure the public's confidence in the profession is maintained. Dr. Vu's conduct fell below the required standards and impacted both [COMPLAINANT 1] and [COMPLAINANT 2]'s trust in the medical profession. Given the circumstances, including the invasive nature of the examination, and the commentary that accompanied the examination, a significant penalty is warranted to ensure that the public have confidence in the College's discipline process.

k) Degree to Which the Conduct was Outside of the Range of Permitted Conduct

184. Although the Hearing Tribunal agrees that whether or not Dr. Vu's conduct is conduct of a "sexual nature" that constitutes "sexual abuse" as defined in the HPA is a novel issue, the Hearing Tribunal finds that Dr. Vu's conduct fell outside of the range of conduct permitted and is not acceptable. Dr. Vu's conduct was not "on the line". It fell below the standards expected of a responsible physician, and Dr. Vu's ignorance or naivete does not justify his actions. Whether or not the conduct constitutes sexual abuse or not is a separate issue, but even if Dr. Vu's conduct did not constitute sexual abuse, it was inappropriate and not simply a matter of poor judgement.

185. The Hearing Tribunal has also considered the submissions on behalf of Dr. Vu that the conduct that occurred here was not intended to be captured by Bill 21, and that this should serve as a mitigating factor. Given that sexual abuse includes touching of a "sexual nature" and given the Hearing Tribunal's findings that intent is not required in order to find that conduct is of a "sexual nature", the Hearing Tribunal does not agree that that this is not the type of conduct intended to be captured, nor does the Hearing Tribunal agree that this is a mitigating factor.

l) Range of Sentence in Similar Cases

186. Both parties provided a range of cases to support their submissions regarding penalty, in the event that cancellation was not mandated as a result of s. 82(1.1). Counsel for the Complaints Director submitted that cancellation would have been warranted in any event, whereas counsel for Dr. Vu submitted that an 18-month suspension, together with conditions for return to practice, would have been appropriate.

187. The Hearing Tribunal has reviewed the caselaw submitted and finds that there is considerable variation with respect to the facts in the cases referred to by both parties. None of the cases provided are directly similar to the findings in this case.

188. Counsel for the Complaints Director cited several cases in support of cancellation. As noted above, the conduct in both *Levin* and *Bhardwaj* is not similar, and those cases would not support cancellation in this case, even if s. 82(1.1) did not apply. Similarly, *Postnikoff* and *Garbutt* both dealt with allegations based on inappropriate sexual relationships with patients. While both cases involved boundary violations, the facts are not similar to the conduct that Dr. Vu engaged in in this case.

189. Counsel for the Complaints Director also cited the Ontario Superior Court's decision in *Ontario v. Peirovy*, 2017 ONSC, where the discipline tribunal found that Dr. Peirovy conducted inappropriate examinations of female patients, including cupping and touching the breasts of four different patients while using a stethoscope. The discipline tribunal ordered a six-month suspension. The Superior Court overturned the suspension and ordered revocation, finding that a six-month suspension was inappropriate, and that the tribunal erred in following prior precedents, since the sanction was wholly unfit.

190. The Superior Court's finding was overturned on further appeal. Although the Court of Appeal held that Dr. Peirovy's conduct was "reprehensible", the Court of Appeal held that the Superior Court should have exercised deference when reviewing the discipline tribunal's decision, and restored the six-month suspension imposed by the discipline tribunal.

191. While the Court of Appeal's decision in *Peirovy* focuses on issues around standard of review, it is difficult to rely on *Peirovy* to support an order for revocation, given that the Court of Appeal quashed the Superior Court's decision ordering revocation, and upheld the discipline tribunal's initial penalty that included a 6-month suspension. Nevertheless, the Hearing Tribunal takes note of the comments made by the Superior Court regarding the need for significant sanctions in sexual abuse cases, and these comments are discussed further below.

192. The Hearing Tribunal has also considered the cases cited on behalf of Dr. Vu. As noted above, the decision in *Pilarski* is not similar to the facts in this case.

193. Dr. Vu's counsel provided a number of additional authorities, all of which provided varying periods of suspension for various types of sexual misconduct or abuse. Although not all the cases cited on behalf of Dr. Vu are referenced, the cases below exemplify the types of cases referred to, and the range of sentences imposed:

- *Ontario (College of Physiotherapists) v. Ontario v. Trambulo*, 2019 ONCPO 25: A physiotherapist was suspended for 12 months after admitting to touching a patient near her breast, on her upper and inner thigh and kissing or putting his mouth near her vagina.

- *Delacruz (Re),* 2012 CarswellAlta 2505: A physician was suspended for 6 months following a finding relating to allegations of sexual misconduct, including conducting inappropriate examinations of one patient's breasts, buttocks and labia.

- *Khumree (Re)*: A physician was suspended for 6 months suspension after Dr. Khumree was found to have engaged in a sexual relationship with a patient he was treating.

- *CPSO v. Malette,* 2020 ONSCPSD 2: A physician was suspended for three months following an admission of unprofessional conduct including brushing a patient's cheek with his lips, and while palpating her genitals, asked her to compare the loss of sensation she was experiencing to loss of sensation she reported during intercourse with her husband.

- *Ontario (College of Physicians and Surgeons of Ontario) v. Szozda*, 2019 ONSCPSD 14: A physician was suspended for two months after ask~~ed~~ing a patient whether she had a boyfriend and made other comments to the patient. While performing a pelvic examination, he also commented on the number of fingers he was able to insert and did not give her sufficient privacy while changing.

- *Ontario (College of Physicians and Surgeons of Ontario) v. Phipps*, 2019 ONSPSD 45: A physician was suspended for 14 months following findings of sexual abuse, that included showing naked pictures of himself to eleven female patients, becoming sexually aroused during visits with two patients, making remarks of a sexual nature, and touching a patient with an erect penis during an examination.

194. Counsel for Dr. Vu submits that Dr. Vu's conduct is most similar to the conduct of Dr. Malette, which resulted in a three-month suspension. The Hearing Tribunal does not agree and finds that the conduct is not factually similar. In that case, the patient sought treatment from Dr. Malette for loss

of libido and loss of sensation in her genital area. During Dr. Malette's examination, he palpated her clitoris, and asked the patient to compare the loss of sensation she was experiencing during the examination to the loss of sensation during intercourse, without adequately explaining the purpose of the examination or his question. Dr. Malette also hugged the patient on a number of occasions.

195. There is no indication in the discipline tribunal's decision in *Malette* that palpation of the patient's clitoris was not indicated, given that she specifically sought treatment from Dr. Malette for loss of libido and loss of sensation. This is very different from the circumstances of the treatment provided by Dr. Vu to [COMPLAINANT 2] and [COMPLAINANT 1], neither of whom complained about any sexual dysfunction or sought advice from Dr. Vu arising from pain on intercourse.

196. The legislature, when passing Bill 21, effectively removed the Hearing Tribunal's discretion to determine an appropriate penalty following a finding of sexual abuse. As such, the severity of the conduct, and the other factors referenced in *Jaswal,* are no longer helpful and the penalty is the same regardless of the facts, or the seriousness of the conduct that occurred.

197. Having considered the submissions of the parties, the cases cited by both parties, and the *Jaswal* factors, the Hearing Tribunal would not have ordered cancellation in this case absent the mandatory cancellation requirements in s. 82(1.1) of the HPA. While Dr. Vu's conduct is very serious, there is a range of conduct that falls within the definition of "sexual abuse", and Dr. Vu's conduct was somewhere in the middle.

198. The Hearing Tribunal found that Dr. Vu did not derive any sexual gratification from his actions, and accepted his explanation that he believed that his dyspareunia counselling was helpful to his patients. While this does not serve as an excuse for his actions, nor does it undermine the Hearing Tribunal's findings that he engaged in sexual abuse, it is a factor that the Hearing Tribunal would have taken into account, absent the requirement for mandatory cancellation.

199. In addition, there are other mitigating factors that the Hearing Tribunal would have taken into account, including Dr. Vu's cooperation during the investigation and hearing, his admission of the factual elements of the allegations, and his prior unblemished record. In addition, there were several letters of support from both colleagues and patients that also speak to Dr. Vu's character and are important mitigating factors.

200. Further, the Hearing Tribunal accepts the opinion of Dr. D[redacted] that Dr. Vu is at low risk of reoffending and accepts Dr. Vu's evidence that he has learned from his mistakes and would not repeat them in the future. Further, the Hearing Tribunal accepts Dr. Vu's expression of sincere regret that his actions, which he intended to be therapeutically appropriate, were instead

significantly harmful. These are also mitigating factors that the Hearing Tribunal would have taken into account.

201. Given these factors, and in light of its findings set out in the Merits Decision, the Hearing Tribunal would not have exercised discretion to cancel Dr. Vu's registration, had that discretion been available to the Tribunal.

202. While the Hearing Tribunal would not have cancelled Dr. Vu's registration and practice permit, the Hearing Tribunal finds that a significant period of suspension for a period of two years would have been warranted.

203. The Hearing Tribunal has reviewed the caselaw submitted by both parties. While there are many previous decisions supporting a suspension in the range of 2 to 12 months, the Hearing Tribunal finds that a suspension in this range would be inappropriate in this case, and that a lengthier period of suspension of two years would have been appropriate.

204. While there is no evidence that Dr. Vu's conduct was motivated by sexual intent, as noted in the Merits Decision, he effectively prolonged the duration of the time his fingers were inserted in patient [COMPLAINANT 1] and [COMPLAINANT 2]'s vaginas and extended the touching when it was not clinically indicated, while at the same time providing advice about sexual positions that would alleviate pain on intercourse. As noted earlier when addressing the *Jaswal* factors with respect to Dr. Vu's age and experience, all physicians, regardless of the number of years in practice, should understand that they are not permitted to engage in touching of an intimate nature, where such touching is not clinically indicated and informed consent was not obtained.

205. The Hearing Tribunal accepts that both [COMPLAINANT 1] and [COMPLAINANT 2] felt violated by Dr. Vu's actions, and this is understandable given the context in which the conduct occurred. The impact on both patients is an aggravating factor, and despite the mitigating factors discussed above, this weighs heavily in favor of a lengthy period of suspension.

206. The need for a penalty that achieves general deterrence is also a factor that must be considered. Physicians who conduct sensitive examinations or provide advice on sensitive topics must ensure that the treatment is clinically indicated. If there is a clinical indication, then such conduct will not be found to be conduct of a "sexual nature." In this case, Dr. Vu conducted an examination to address an issue that neither patient complained of, in a way that was reasonably interpreted by both patients, and is objectively viewed, as being of a sexual nature. Consistent with Dr. Bell's testimony, Dr. Vu's dyspareunia counselling does not meet the standard of care, nor was there any evidence to suggest that it was an acceptable practice. In the circumstances, it is not surprising that Dr. Vu's conduct falls below the standards of the profession. A penalty aimed at ensuring that physicians

respect their patient's boundaries, and do not (even unintentionally) violate their patient's sexual integrity is required. This is especially the case given the significant power imbalance inherent in the physician-patient relationship, and the trust that patients must necessarily place in physicians.

207. Further, a lengthy suspension should not impact the decision on the part of other physicians to conduct sensitive examinations, provided that they are medically indicated, and that consent is obtained.

208. Although counsel for Dr. Vu stated that the public reaction to the sentence issued by the CPSA's Hearing Tribunal in the case concerning Dr. Taher is what led to the introduction of the sexual abuse provisions in the HPA, and that may in fact be the case, sanctions levied against health professionals for many years were relatively light. While there are some examples of health professionals having their practice permits permanently cancelled following findings of sexual misconduct or sexual abuse, the cases provided on behalf of Dr. Vu demonstrate that health professionals have often been able to continue in practice after serving relatively short suspensions, despite engaging in violations that would, by today's standards, be considered very serious. The decisions in *Szoda*, *Delacruz* and *Trambulo* are good examples. It is difficult to understand how the public could have confidence in the physiotherapy profession following the 12-month suspension issued to the physiotherapist in *Trambulo* after he kissed a patient at or near their vagina during an examination. It is similarly difficult to understand how the public could have confidence in the medical profession after Szoda was given only a two-month suspension for his conduct.

209. While the Superior Court of Justice's decision in *Peirovy* was overturned by the Ontario Court of Appeal, and accordingly the Hearing Tribunal does not rely on it to support an order for cancellation, the Hearing Tribunal finds the comments made by the Court compelling:

> [37] In the space of a few months the Respondent sexually abused four young women. The misconduct had significant consequences for each of them, which are documented in their impact statements. These statements also document the serious effect the offences had for the profession. These women have lost much of their trust in doctors, especially male doctors. A short suspension is clearly inadequate to deter others and to contribute meaningfully to the eradication of sexual abuse in the profession.
>
> [38] The main justification given by the Committee and the Respondent for the penalty imposed is that it is in line with similar penalties that have been imposed in similar cases. The Respondent referred us to *Le*, [2010] OCPSD No. 10;*Marks*,2012 ONCPSD 13; *Li,*[1996] OCPSD No. 12;*Maharajh*, [2013] OCPSD No. 30;*Rakem*,2014 ONCPSD 25; *Lee*, [2010] OCPSD No. 8; and *Sharma* [2004] OCPSD No. 31. The facts of these cases are base. It is depressing to review them. They do little to encourage confidence in the Committee's approach to eradicating sexual

> abuse in the profession. Consistency in the imposition of sentence is a proper consideration, but a litany of clearly unfit penalties does not justify the penalty imposed in the present case. The penalty imposed in the present case was clearly unfit. It was inadequate to protect the public and vindicate the integrity of the profession.
>
> [39] Public confidence in the profession is not a "shifting standard." Rather I think that community tolerance for sexual abuse by doctors has lessened. The public's confidence in the medical profession demands more from the disciplinary process than recent sexual abuse discipline cases suggest. In the case of sexual touching of breasts of multiple female patients under pretense of a medical exam, I would expect the Committee to be debating whether to revoke the member's registration or impose a suspension measured in years, as opposed to months.

210. While Dr. Vu's conduct differs from that of Dr. Peirovy's, the Court's concerns that previous sanctions imposed following a finding of sexual abuse were insufficient to recognize the seriousness of sexual abuse and sexual misconduct are equally applicable here. While the Hearing Tribunal would not have cancelled Dr. Vu's registration and practice permit, it would have issued a suspension in excess of the periods of suspension referred to in the cases provided on behalf of Dr. Vu. The previous decisions do not reflect the severity of the conduct, including the detrimental impact that such conduct has on patients. Nor do the previous decisions fully recognize the seriousness of the conduct considering the power imbalance that is inherent in a physician-patient relationship. A more significant period of suspension, coupled with remedial measures, would have been ordered, had the Hearing Tribunal's discretion not been constrained as a result of s. 81(1.1) of the HPA.

211. As such, the Hearing Tribunal would have ordered a suspension of two years, which is a penalty that exceeds the sanction ordered in the cases cited on behalf of Dr. Vu but is less than cancellation mandated by the HPA.

212. If mandatory cancellation was not warranted, the Hearing Tribunal would also have required mandatory education, such as completion of the PROBE course prior to a return to practice, a condition requiring a chaperone for all sensitive examinations, and potentially other supervision, mentorship and monitoring for a period of time.

Costs

213. Mr. Boyer, on behalf of the Complaints Director, sought an order requiring Dr. Vu to pay 2/3 of the costs of the investigation and hearing. Mr. Boyer indicated in the written submissions provided on behalf of the Complaints Director that costs up to May 30, 2023 totaled $87,200. However, this did not account for the fees for independent legal counsel.

214. Ms. McMahon submitted on behalf of Dr. Vu, that an order for 10% of the costs should be made to a maximum of $2000.00.

a) Framework for Determining Costs

215. In *Jinnah v. Alberta Dental Association and College*, 2022 ABCA 336, the Court of Appeal considered an appeal on behalf of Dr. Jinnah of the Hearing Tribunal's decision finding her guilty of three allegations of unprofessional conduct. The Hearing Tribunal ordered Dr. Jinnah to pay costs of the hearing in the amount of $50,000. On appeal, the Panel varied the costs order, ordering Dr. Jinnah to pay $37,500 in costs, and also ordered her to pay ¼ of the costs of the appeal.

216. The Court of Appeal quashed the orders with respect to costs and remitted it to the Panel for further consideration. The Court, citing its earlier decision in *K.C. v. College of Physical Therapists of Alberta*, held that the purpose of costs is to fully or partially indemnify the College for its costs and expenses, and noted that although fines are intended to be punitive, costs should not be.

217. The Court of Appeal noted its concerns that a default approach to ordering costs often resulted in very high costs orders, and adopted the following passage from *Alsaadi v. Alberta College of Pharmacy*:

> A more deliberate approach to calculating the expenses that will be payable is necessary. Factors such as those described in *KC* should be kept in mind. A hearing tribunal should first consider whether a costs award is warranted at all. If so, then the next step is to consider how to calculate the amount. What expenses should be included? Should it be the full or partial amount of the included expenses? Is the final amount a reasonable number? In other words, a hearing tribunal should be considering all the factors set out in *KC,* in exercising its discretion whether to award costs, and on what basis. And of course, it should provide a justification for its decision.

218. In *Alsaadi,* the Court quashed one of the findings of unprofessional conduct. While Alsaadi had been ordered to pay $120,000 in costs, representing 60% of the costs of the hearing, the Court of Appeal reduced the amount of costs to $100,000, payable over a period of ten years, and held that he should not be responsible for any costs of the appeal.

219. Notwithstanding the fact that the Court in *Alsaadi* upheld a significant costs order against the registrant, and despite a number of other decisions of the Court of Appeal upholding significant costs orders following findings of unprofessional conduct, the Court of Appeal in *Jinnah* suggests that hearing tribunals should start from the presumption that costs will <u>not</u> be ordered, and that the presumption that the profession as a whole should bear the costs in most cases makes sense. The Court held that this presumption is warranted for a number of reasons, including that costs are an inevitable part of self-regulation, and the fact that all members of the College benefit from the privilege of being part of a self-regulated profession.

220. Although the Court held that there is a presumption that costs should not be ordered, Justice Wakeling, writing for the Majority, stated that costs can be ordered if there are "compelling reasons", consisting of one or more of the following:

1. Whether the registrant engages in "serious unprofessional conduct";
2. When there is evidence that the registrant is a "serial offender";
3. Where the registrant fails to cooperate with the College's investigators and forces the College to expend more resources than necessary;
4. Where the registrant engages in hearing misconduct.

222. The Court's rationale for determining costs may be ordered in the scenarios above is linked to its finding that where a member knows or should have known that their conduct was completely unjustifiable, costs are not inappropriate.

223. The Court of Appeal held once the Hearing Tribunal finds that costs are justified, it must then go onto determine what proportion of costs should be borne by the member, if any. The Court of Appeal did not articulate any new tests for determining the amount of costs to be paid but, citing *Alsaadi* and *K.C. v. College of Physical Therapists of Alberta,* suggested that a deliberate approach to determining the amount of costs must be undertaken. This includes a consideration of what expenses should be included, whether it should be the full or partial amount of the included expenses, whether the final amount is a reasonable number, the seriousness of the charges, and the conduct of the parties.

224. In the case of Dr. Vu, Mr. Boyer submitted on behalf of the Complaints Director that the decision in *Jinnah* is inconsistent with prior caselaw and should therefore be approached with caution. The Hearing Tribunal agrees that the presumption that no costs should be ordered is curious, given that the legislature has entrusted hearing tribunals with discretion to make costs orders, in accordance with their authority in s. 82(1)(j) of the HPA. Had the legislature intended hearing tribunals to start with the presumption articulated in *Jinnah* that costs will not be ordered, it could have drafted the legislation to make that clear. The decision in *Jinnah* appears to constrain the Hearing Tribunal's discretion in a manner that is inconsistent with its statutory authority.

225. Further, it is difficult to reconcile the presumption against costs set out in *Jinnah* with other jurisprudence from the Alberta Court of Appeal where costs orders, in some cases significant, were ordered including: *Alsaadi, K.C. v. College of Physical Therapists of Alberta, Ironside v. Alberta (Securities Commission),* [2009] A.J. No. 376 (C.A.); and *College of Physicians & Surgeons Alberta v. Ali*, [2017] A.J. No. 1419 (C.A.). The Alberta jurisprudence is consistent with many of the cases cited on behalf of the Complaints Director, where courts in other jurisdictions have interpreted

similar legislation as giving discipline tribunals broad authority to determine whether costs should be ordered and if so in what amount.

226. Despite the concerns noted on behalf of the Complaints Director in regard to the *Jinnah* decision, including its implications for discipline tribunals regulated under the HPA, the Hearing Tribunal is not in a position to disregard *Jinnah*, and must treat it and other Court of Appeal decisions addressing costs as binding. To the extent that *Jinnah* creates uncertainty or appears to be inconsistent with other binding jurisprudence, the courts may provide clarity in future decisions.

227. In the instant case, the Hearing Tribunal adopts the following framework when considering whether costs should be ordered against Dr. Vu:

1. Whether the Hearing Tribunal should exercise its discretion to order costs against Dr. Vu given its findings, including whether the circumstances fall into one of the four categories outlined in *Jinnah*; and
2. If so, what amount of costs should be ordered, in consideration of:
    a. The seriousness of the conduct;
    b. What expenses should form part of the total costs;
    c. Whether the expenses that should form the total costs are reasonable; and
    d. The conduct of the parties.

Whether the Hearing Tribunal Should Order Costs at All

228. In *Jinnah*, the Court of Appeal outlined four circumstances in which the presumption against costs would be overridden. Although there were two charges against Dr. Vu alleging sexual abuse, and in some circumstances this may suggest that a member is a "serial offender", based on a repeated pattern of conduct, the Hearing Tribunal finds that is not the case here. While Dr. Vu testified that he performed dyspareunia counselling on patients in three circumstances (where the patient has a history of dyspareunia, a short vaginal canal, or a low-lying cervix), and as such there was a possibility that he provided similar treatment to other patients, the number of allegations against Dr. Vu that were before the Hearing Tribunal was limited to two. Further, while it is likely that dyspareunia counselling was provided on other occasions, no evidence was led regarding the number of times this occurred. In addition, this is not a situation where Dr. Vu repeated the conduct after being made aware of complaints regarding his conduct. Accordingly, based on the evidence presented, Dr. Vu is not a "serial offender" as contemplated in *Jinnah*.

229. Further, Dr. Vu was cooperative during the course of the investigation, and there was no conduct that occurred during the hearing that created delays, or unnecessarily protracted the proceedings.

230. However, the Hearing Tribunal finds that the proven allegations against Dr. Vu constituted serious breaches of conduct expected of a physician, such that the presumption of no costs is overridden, and a costs order is warranted.

231. In *Jinnah*, the Court stated the following regarding what would constitute serious "unprofessional conduct":

> [141] First, a dentist who engages in serious unprofessional conduct[191] – for example, a sexual assault on a patient,[192] a fraud perpetrated on an insurer,[193] the performance of a dental procedure while suspended or the performance of a dental procedure in a manner that is a marked departure from the ordinary standard of care[194] – can justifiably be ordered to indemnify the College for a substantial portion or all of its expenses in prosecuting a complaint. A dentist guilty of breaches of this magnitude *must have known* that such behavior is completely unacceptable and constitutes unprofessional conduct. It is not unfair or unprincipled to require a dentist who knowingly commits serious unprofessional conduct to pay a substantial portion or all the costs the regulator incurs in prosecuting a complaint.

232. Although the Court provided several examples of what would constitute "serious unprofessional conduct" so as to warrant a costs order, the Hearing Tribunal does not believe that the Court intended to create closed categories or to restrict the circumstances where costs are ordered to the specific examples provided. This would be inconsistent with the Court of Appeal's earlier jurisprudence in cases such as *K.C. v. College of Physical Therapists of Alberta,* where the Court also referenced the seriousness of the conduct as a factor, without providing any further constraints regarding what type of conduct is serious enough to justify costs.

233. Whether or not conduct is sufficiently serious to justify costs is a matter to be determined by the Hearing Tribunal, which is comprised equally of public members and members of the profession. The Hearing Tribunal, who has familiarity regarding the standards applicable to the profession, is in the best position to assess the seriousness of the proven allegations when determining whether a costs order is warranted. The Hearing Tribunal does not interpret *Jinnah* to foreclose the Hearing Tribunal from performing this assessment. Rather, the Court cautions hearing tribunals that the assessment must be performed.

234. While the allegations against Dr. Vu do not arise from criminal charges of sexual assault, and as such do not fit squarely within the examples provided by the Court in *Jinnah*, the Hearing Tribunal nevertheless finds that Dr. Vu's conduct constitutes "serious unprofessional conduct" so as to justify a costs order.

228. While there is a spectrum of conduct that could constitute "sexual abuse", in most cases an allegation of sexual abuse will be sufficiently serious so as to

warrant a costs order. Although as indicated above, Dr. Vu's conduct was not on the most serious end of the spectrum in regard to the various types of conduct that may fall within the definition, his conduct violated the sexual integrity of both [COMPLAINANT 2] and [COMPLAINANT 1] While the Hearing Tribunal found that Dr. Vu did not have any sexual intent, the Hearing Tribunal noted the following in the Merits Decision (p. 55):

> Even if Dr. Vu naively believed that he was providing helpful assistance, his beliefs were misguided and demonstrate a complete lack of understanding regarding the sensitive personal nature of the services he was providing.

229. Further, the Hearing Tribunal found that the dyspareunia counselling was not clinically indicated, was not appropriate to the service being provided, and that Dr. Vu did not obtain informed consent from either [COMPLAINANT 1] or [COMPLAINANT 2], neither of whom sought treatment for dyspareunia, all of which were factors that were influential in the Hearing Tribunal's determination that the conduct was of a "sexual nature" so as to constitute sexual abuse.

230. In the circumstances, the Hearing Tribunal finds that the proven allegations against Dr. Vu constitute "serious unprofessional conduct" such that a costs order is warranted.

The Amount of Costs

231. In determining the appropriate amount of costs, the Hearing Tribunal must consider several factors, including: the seriousness of the charges, reasonableness of the amounts, whether any costs incurred by the College should be excluded, the conduct of the parties, and the impact of the costs order on the member, including whether the costs order will deliver a "crushing financial blow".

232. As indicated above, Dr. Vu's conduct is serious, and as such a costs order is warranted.

233. The Hearing Tribunal has also considered the reasonableness of the total amount of costs incurred. Counsel for the Complaints Director stated in their written submissions that the known costs of the investigation and hearing to the end of May 2023 (not including the costs of independent legal counsel for the Hearing Tribunal) was approximately $87,200.00. The Complaints Director submits that the total costs are reasonable, referring to the Court's decision in *Alberta College of Physical Therapists v. Fitzpatrick*, [2015] A.J. No. 261, where the Court stated (at para. 8) that daily hearing costs of $23,000 are not unreasonable.

234. Counsel for Dr. Vu submits that it cannot properly assess the reasonableness of the costs, given that the Complaints Director has not provided any information to substantiate the costs incurred.

235. Where the Complaints Director seeks an order for costs, information should be provided to the Tribunal consisting of a Statement of Costs that provides a detailed breakdown of the costs incurred. Where the Complaints Director is also seeking a costs order that includes the fees charged by independent legal counsel, those fees should also be included in the breakdown of costs. This would assist the Hearing Tribunal in assessing the reasonableness of the amount of costs incurred and would also permit counsel for the member to make submissions regarding the reasonableness of the amounts.

236. There may be circumstances where in order to demonstrate the reasonableness of the costs incurred, an examination of the invoices themselves may be warranted. Where such a suggestion is made, the Hearing Tribunal could consider the request, having regard to the privilege that attaches to the description of legal services provided, and issues regarding privilege can be addressed by the parties before a determination is made.

237. Ms. McMahon submits on behalf of Dr. Vu that the costs estimate to the end of May, 2023 is "exorbitant". While the Hearing Tribunal does not have a specific breakdown of the costs, the Hearing Tribunal does not find that the costs estimate is exorbitant, having regard to a number of factors, including: the length of the hearing, which occurred over the course of four days (March 16, 17, May 9, June 1), the evidence introduced, including two expert witnesses, and the legal issues that arose, including an application to close the hearing, and an application to exclude the patient impact statements. Further, the issues in the hearing were complex, involving an interpretation of whether Dr. Vu's conduct was of a "sexual nature". Both parties made a number of written submissions, and a large volume of case law was provided. While this was necessary and the information was helpful to the Hearing Tribunal, total costs for expenses incurred (excluding fees for independent legal counsel) to the end of May 2023 in the amount of $87,200 do not appear to be unreasonable given the issues and the circumstances.

238. Counsel for the Complaints Director did not provide information regarding the amount of fees incurred by the College for independent legal counsel for the Hearing Tribunal. A costs order that includes the fees for counsel for the Complaints Director, as well as for independent legal counsel, may be appropriate depending on the circumstances. A costs order including fees for both counsel is permitted in accordance with s. 82(1)(j) of the HPA, and where a member is found to have engaged in unprofessional conduct, the costs would not have been incurred but for the member's conduct. Where the conduct is proven, and falls within one of the categories referred to in *Jinnah* where costs may be appropriate, then costs of both counsels, or a portion of those costs, may reasonably be borne by the member.

239. In the present case, the assistance provided by independent legal counsel was extensive, helpful, and necessary, given the complex legal issues that arose during the hearing.

240. While it would not have been inappropriate to include fees for independent legal counsel in the assessment of costs, the Hearing Tribunal agrees with the submissions on behalf of Dr. Vu that some of the issues in this case were novel and complex legal issues, being one of the first cases in Alberta to consider allegations arising from sexual abuse during the course of treatment following the passage of Bill 21. The Hearing Tribunal was required to interpret what constitutes conduct of a "sexual nature" as referenced in the HPA, and to address a number of other important legal issues, including whether the sanction hearing should be closed to the public, and admissibility of the patient impact statements.

241. While this decision is not intended to serve as a precedent whereby expenses incurred for independent legal counsel fees are excluded from costs orders, given the novel issues that arose in this case, the Hearing Tribunal has not factored in the fees for independent legal counsel in the overall costs.

242. As such, the Hearing Tribunal will base its decision on the information provided by the Complaints Director, which is that costs up until the end of May (i.e. prior to the sanction hearing) were $87,200.00. The Hearing Tribunal understands that additional costs have been incurred on behalf of the Complaints Director for steps taken following the sanction hearing, including the preparation of written submissions, and accordingly the final costs (exclusive of independent legal counsel's fees) will be higher.

243. With respect to the total amount of costs ordered in this case, the Hearing Tribunal considered the evidence provided by Dr. Vu regarding his financial circumstances, and the impact that the proceedings have had on his ability to earn a livelihood. Dr. Vu described his difficulty securing employment, considering the public nature of the proceedings, and the resulting financial hardship. While the costs incurred by the College are not unreasonable, the impact on Dr. Vu is a factor that must be considered in determining what proportion of the costs incurred, if any, should be payable by Dr. Vu.

244. The Hearing Tribunal also considered the fact that Dr. Vu was cooperative during the course of the investigation, that he admitted having engaged in the conduct, and that there was no conduct during the hearing that unnecessarily increased the costs. While Dr. Vu did not admit that his conduct constituted sexual abuse, it was not unreasonable for Dr. Vu to dispute the allegations, claiming that the conduct was not of a "sexual nature."

245. Finally, the Hearing Tribunal has also considered that as a result of the finding of sexual abuse, Dr. Vu's practice permit and registration is

automatically cancelled. This is a severe punishment, mandated by the legislature, in excess of what the Hearing Tribunal would have ordered absent the mandatory cancellation provisions in the HPA.

246. The serious nature of Dr. Vu's conduct warrants some award of costs. However, a substantial costs order of the magnitude sought on behalf of the Complaints Director was not warranted in this particular case, given the severity of the mandatory sanctions against Dr. Vu, his inability to earn a living, and the novel issues raised in this case including whether Dr. Vu's conduct was of a "sexual nature." In considering these factors, the Hearing Tribunal has ordered a lump sum costs order in the amount of $10,000.00. This is comparable to the amount ordered to be paid in the *Sherman* case. As such, the Hearing Tribunal does not require a detailed accounting of costs incurred from the Complaints Director, notwithstanding that a detailed accounting may be required when a substantial costs order is sought in other cases.

228. Given Dr. Vu's financial circumstances, his ability to pay can be taken into account in further consultations with the Hearings Director in determining an appropriate payment schedule. This will ensure that the costs order does not deliver a crushing financial blow.

229. The Hearing Tribunal wishes to emphasize that its decision on costs is not intended to create a binding precedent in sexual abuse cases, or any other cases where the member has provided evidence of financial difficulties, as was the case here. Larger costs orders, including costs based on a full recovery basis, may be appropriate in other cases, and will depend on the circumstances.

Signed on behalf of the Hearing Tribunal by the Chair:

Dr. Douglas Faulder

Dated this 26th day of January, 2024.