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

October 18, 2024

I. INTRODUCTION

1. The Hearing Tribunal held a hearing into the conduct of Dr. Phu Truong Vu from December 11-14, 2023. The Tribunal received written submissions from the parties on January 15, February 2 and February 12, 2024 and met to deliberate on March 8, 2024.

2. The members of the Hearing Tribunal were:

   Ms. Naz Mellick, Chair and public member;
   Dr. Randall Sargent;
   Dr. Don Yee; and
   Mr. Glen Buick, public member.

3. Appearances:

   Mr. Craig Boyer, legal counsel for the Complaints Director;
   Dr. Gordon Giddings, Complaints Director;
   Ms. Megan McMahon, legal counsel for Dr. Vu;
   Ms. Anika Winn, legal counsel for Dr. Vu;
   Dr. Phu Vu.

   Mr. Gregory Sim acted as independent legal counsel for the Hearing Tribunal.

II. PRELIMINARY MATTERS

4. An application by Dr. Vu to adjourn this hearing pending the outcome of his appeal of an earlier Hearing Tribunal decision was dismissed by the Hearing Tribunal on November 24, 2023 with written reasons issued on December 15, 2023.

5. Dr. Vu submitted a notice of appeal to the Council of the College and applied for a stay of the Hearing Tribunal's denial of his adjournment request on November 24, 2023. On December 6, 2023, the College's Registrar Dr. M[redacted] issued a decision under section 86(1) of the *Health Professions Act*, RSA 2000, c H-7 ("HPA") denying the request for a stay.

6. Dr. Vu subsequently applied to the Alberta Court of King's Bench and then the Alberta Court of Appeal for an urgent stay of the hearing. The Court of Appeal denied the application for a stay on the morning of December 11, 2023, before the hearing commenced.

7. At the commencement of the hearing Dr. Vu objected to proceeding pending his appeal from the denial of his application for an adjournment, but he acknowledged that the Court of Appeal had declined to order a stay. Dr. Vu indicated he was objecting for the record but would proceed with the hearing.

8. Neither party objected to the composition of the Hearing Tribunal. There were no applications to close the entirety of the hearing to the public. The

Complaints Director indicated that the patient may request that the portion of the hearing in which she testifies be closed.

III. CHARGES

9. The Notice of Hearing listed the following allegations against Dr. Vu:

IT IS CHARGED:

1. On or about November 5, 2018, during an examination of your patient, [redacted],[1] you did one or more of the following:
    a. inappropriately use the phrase "let's check under the hood" or words to that effect before you inspected your patient's genitalia;
    b. Fail to have an adequate consent discussion with your patient regarding the use of non-invasive or self-collection methods for testing for sexually transmitted infections;
    c. Conduct a bimanual pelvic examination when it was not medically indicated.

2. On or about August 15, 2019, during an examination of your patient, [redacted] you did one or more of the following:
    a. Conduct a speculum and bimanual pelvic examination when it was not medically indicated;
    b. Fail to have an adequate consent discussion with your patient regarding the use of non-invasive or self-collection methods for testing for sexually transmitted infections.

3. On or about December 11, 2019, during an examination of your patient, [redacted], you did one or more of the following;
    a. inappropriately examine your patient's lymph nodes near her vagina without wearing gloves;
    b. Fail to have an adequate consent discussion with your patient regarding the use of non-invasive or self-collection methods for testing for sexually transmitted infections;

4. On or about February 12, 2020, during an examination of your patient, [redacted], you did one or more of the following;
    a. Conduct a speculum and bimanual pelvic examination when it was not medically indicated;

[1] The patient's name has been replaced by initials throughout this decision.

b. Fail to have an adequate consent discussion with your patient regarding the use of non-invasive or self-collection methods for testing for sexually transmitted infections;

c. Inappropriately comment to your patient about the size of her clitoris;

d. Inappropriately touch your patient's clitoris when it was not medically indicated;

e. Inappropriately pressed your finger on your patient's G-spot;

f. 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 had made no complaint about sexual difficulties and did not request advice from you on that subject;

ALL OF WHICH is contrary to the Standards of Practice, including the Boundary Violations: Sexual Standard of Practice and the standard of care required in the circumstance and thereby constitutes unprofessional conduct under the *Health Professions Act*, RSA 2000, c H-7.

IV. EVIDENCE

10. The following exhibits were entered into evidence during the hearing:

Exhibit 1:	Agreed Exhibit Book
Exhibit 2:	Notice of Hearing
Exhibit 3:	Complaint
Exhibit 4:	Expert Report of Dr. R[redacted], redacted
Exhibit 5:	SOGC August 2019 No. 385 Indications for Pelvic Examination
Exhibit 6:	Curriculum Vitae for Dr. Phu Truong Vu
Exhibit 7:	Guide to Physical Examination and History Taking
Exhibit 8:	The Gynecological Examination
Exhibit 9:	UpToDate Pelvic Inflammatory Disease Clinical
Exhibit 10:	CFP article, Recommendations on routine screening pelvic examination, Canadian Task Force on Preventative Health Care
Exhibit 11:	Canadian Task Force on Preventive Health Care Guidelines: Recommendations on routine screening pelvic examination

11. The following witnesses testified during the hearing:

- Ms. B[redacted] G[redacted], Associate Complaints Director;

- Ms. [redacted], Complainant;
- Ms. [redacted], patient;
- Dr. C[redacted] R[redacted];
- Ms. [redacted], LPN;
- Ms. [redacted], LPN;
- Ms. [redacted], LPN;
- Dr. Phu Troung Vu.

Ms. B[redacted] G[redacted]

12. Ms. G[redacted] testified that she is an Associate Complaints Director for the College and managed the complaint process that led to the hearing. Ms. G[redacted] identified an earlier Notice of Hearing signed September 1, 2022 with hearing dates scheduled in April 2023. The Hearing Tribunal confirmed the September 1, 2022 Notice of Hearing was before us when we considered Dr. Vu's application to adjourn this hearing and then overruled Dr. Vu's objection to the relevance of this Notice of Hearing with written reasons to follow. The September 1, 2022 Notice of Hearing was relevant for the Hearing Tribunal's consideration of the preliminary adjournment application and demonstrates that the hearing was first scheduled to proceed in April 2023 and was adjourned once to the current dates. The September 1, 2022 Notice of Hearing was marked as Exhibit 2.

13. Ms. G[redacted] also identified a complaint form submitted to the College by Ms. [redacted], social worker, on behalf of her client, [redacted], and signed August 31, 2021. The Hearing Tribunal marked the complaint form as Exhibit 3 after confirming with the parties that it could be admitted to prove that the complaint was received by the College. The complaint form was not admitted to prove its substance.

Ms. [redacted]

14. Ms. [redacted] is a Registered Social Worker and a member of the College of Social Workers of Alberta. She works at [redacted] Primary Care Network in [redacted] where she saw [redacted] as a client. Ms. [redacted] identified her own signature and [redacted]'s signature on the complaint form that Ms. [redacted] sent to the College.

15. The Hearing Tribunal then considered Dr. Vu's objections to Ms. [redacted] testifying about the substance of the complaint. Dr. Vu objected that Ms. [redacted]'s testimony would:

    i. Exceed the limited purpose for which the complaint was admitted into evidence and not be relevant to an issue in the hearing;

    ii. Be entirely based on hearsay and would have the effect of being a prior consistent statement; and

iii. Include opinion evidence on the ultimate issue.

16. Dr. Vu submitted that due to the high degree of procedural fairness owed to him, the Hearing Tribunal should apply the rules of evidence applicable to judicial proceedings and exclude irrelevant testimony, hearsay evidence, prior consistent statements and opinion evidence unless an established exception is met.

17. The Hearing Tribunal decided to hear Ms. [redacted]'s testimony with reasons to be provided in its written decision. Dr. Vu is entitled to a high degree of procedural fairness in this hearing, but the Hearing Tribunal did not believe that hearing Ms. [redacted]'s testimony would compromise fairness. Ms. [redacted] would testify under affirmation, and she could be cross-examined so there would be nothing procedurally unfair about hearing her testimony.

18. The Hearing Tribunal found that Ms. [redacted]'s testimony would be relevant. She authored the complaint, and she could explain what led her to make it. Ms. [redacted]'s testimony would be second-hand, and therefore hearsay because she was not present for [redacted]'s encounters with Dr. Vu, but that does not make the testimony irrelevant.

19. To the extent Ms. [redacted]'s testimony would be hearsay and a prior consistent statement, the Hearing Tribunal is not bound by the rules of law respecting evidence applicable to judicial proceedings. The Hearing Tribunal may receive evidence in any manner that it considers appropriate.[2] The Hearing Tribunal can consider the extent to which Ms. [redacted]'s testimony is based on what [redacted] told her and determine how much weight, if any, to place on Ms. [redacted]'s testimony. The Tribunal understood that [redacted] would be testifying next in the hearing and would give direct testimony about the alleged events.

20. Some of Ms. [redacted]'s statements in the complaint were statements of her opinion. The Hearing Tribunal determined that we would not rely on Ms. [redacted]'s statements of opinion to determine whether the alleged conduct occurred and whether it would be unprofessional conduct within the meaning of the HPA.

21. Ms. [redacted] then continued her testimony. She said that she submitted the complaint solely based on what [redacted] had disclosed to her, and based on her duty to report conduct by another healthcare professional that she felt would be unprofessional or unethical. The Hearing Tribunal dismissed a further objection that Ms. [redacted]'s testimony was a statement of opinion for the reasons expressed above.

22. In cross-examination, Ms. [redacted] acknowledged that her role includes advocating for her patients. She agreed she was not present for any

[2] HPA, s. 79(5)

encounters between [redacted] and Dr. Vu and had no direct knowledge of what happened. She based the complaint on what [redacted] told her, referring to her own consultation notes of June 29 and August 3, 2023 that were made 16 months after the alleged encounters. She accessed no other sources of information. She did not assess the accuracy of [redacted]'s disclosures to her or attempt to verify them.

[redacted]

23. Before calling [redacted], Mr. Boyer advised the Hearing Tribunal that [redacted] had asked to give her testimony in a closed portion of the hearing. He explained that her testimony would deal with very sensitive personal health matters. On behalf of Dr. Vu, Ms. McMahon took no position on the request.

24. The HPA provides that a hearing is open to the public unless the Hearing Tribunal holds the hearing, or part of it, in private on its own motion or on the application of any person.[3] The HPA lists several possible reasons to hold portions of a hearing in private, including because not disclosing a person's confidential personal or health information outweighs the desirability of having the hearing open to the public. The Tribunal can also hold part of a hearing in private because of "other reasons satisfactory" to the Tribunal.

25. The Hearing Tribunal reviewed the allegations in the Notice of Hearing and was satisfied that [redacted]'s testimony would cover very sensitive personal health-related matters. The desirability of not disclosing this information to the public outweighs the desirability of holding this portion of the hearing in public. The Tribunal therefore directed that the hearing be closed to the public for the duration of [redacted]'s testimony.

26. [redacted]

27. [redacted]

[3] HPA s. 78(1)

[redacted][4]

28. [redacted]

29. [redacted]

30. [redacted]

[redacted]

31. [redacted]

32. [redacted]

33. [redacted]

[4] HPA s. 79(5)

[redacted]

34. [redacted]

35. [redacted]

[redacted]

36. [redacted]

[redacted]

37. [redacted]

[redacted]

38. [redacted]

[redacted]

39. [redacted]

[redacted]

40. [redacted]

[redacted]

41. [redacted]

42. [redacted]

43. [redacted]

[redacted]

44. [redacted]

45. [redacted]

[redacted]

46. [redacted]

47. [redacted]

48. [redacted].

49. [redacted]

50. [redacted]

51. [redacted]

52. The remainder of the hearing was open to the public.

Dr. C[redacted] R[redacted]

53. The Complaints Director called Dr. R[redacted] as an expert in family medicine. Dr. R[redacted] completed medical school in 1987. She completed her residency in family medicine and obtained Certification in the College of

Family Physicians of Canada in 1989. She then practiced full-time at a family medical practice including obstetrics and gynecology in [redacted], Alberta until 2012.

54. Since 2012, Dr. R[redacted] has practiced as a locum physician, mostly in [redacted], while remaining an active member of the [redacted] General Hospital medical staff and also doing quality and safety work, including as a Practice Visitor for the College's Continuing Competence program and as a Multi-Source Feedback Facilitator for the College. She is paid for this work but on a contract basis.

55. Since becoming a locum physician Dr. R[redacted] has continued to train medical learners. She has taught medical students, family medicine residents and some nurse practitioners since 1992. She holds academic appointments as an Associate Clinical Professor in the Department of Family Medicine at the University of [redacted] and as an Assistant Clinical Professor in the Department of Family Medicine at the University of [redacted].

56. Dr. Vu did not contest Dr. R[redacted]'s qualifications as an expert in the area of family medicine, but reserved the ability to argue that her evidence should receive limited weight. The Hearing Tribunal accepted Dr. R[redacted] as qualified to testify in the area of family medicine.

57. Dr. R[redacted] prepared a written expert opinion statement that was entered into evidence as Exhibit 4, with a redaction agreed upon by the Complaints Director and Dr. Vu. Dr. R[redacted]'s testimony reviewed all four of Dr. Vu's appointments with [redacted].

58. Dr. R[redacted] opined that examinations related to STI concerns vary depending on the nature of the concern and whether the patient is symptomatic. In this case, Dr. Vu's examination of [redacted] on four occasions involved a visual inspection of the external genitalia, speculum examination of the vagina and cervix, and bimanual examination.

59. Dr. R[redacted] said that visual inspection of external genitalia and palpation of the inguinal lymph nodes would be standard practice for STI screening if the patient has symptoms related to external genitalia or to assess for lesions that may be non-painful and therefore asymptomatic. A speculum examination for collection of swabs for STI screening in asymptomatic women is optional depending on patient preference. Non-invasive and patient-collected swabs for STIs are acceptable in asymptomatic women and have been shown to have equal sensitivity as physician-collected samples. Dr. R[redacted] said that it did not appear that self-collection was offered to [redacted] but Dr. R[redacted] acknowledged in cross-examination that many family physicians were not offering self-swabbing between 2018 and 2020. Dr. R[redacted] said that pelvic examination, including visual inspection, speculum examination and bimanual examination, is required in the presence of symptoms to rule out pelvic inflammatory disease ("PID") or tubo-ovarian

abscess. Dr. R[redacted] said she has never seen asymptomatic pelvic inflammatory disease.

60. Dr. R[redacted] referred to an August 2019 Society of Obstetricians and Gynecologists of Canada guideline on the use of pelvic examinations in her written expert opinion statement. The guideline was marked as Exhibit 5 and included a recommendation for patients with symptoms to be offered pelvic examinations including visual inspection, speculum examination, and bimanual examinations to rule out PID or tubo-ovarian abscess. When asked during cross-examination about the application of the 2019 SOGC guideline to a family physician like Dr. Vu, Dr. R[redacted] explained that there are also Canadian Task Force on Preventative Health Care guidelines for all family physicians to access on indications for pelvic examinations. Dr. R[redacted] referred to a 2014 review that led to recommendations against routine screening pelvic examinations.

61. During re-direct examination, Dr. R[redacted] was asked whether a patient's autonomy and agency over their body is a factor to be considered in determining the need or propriety of pelvic examinations. The Hearing Tribunal overruled an objection that the question did not arise from anything asked on cross-examination, as Dr. R[redacted] was asked about indications for pelvic exams during cross-examination. Dr. R[redacted] agreed that patient autonomy and agency is an important factor.

62. Dr. R[redacted] opined that since [redacted] presented on November 5, 2018 with concerns about a lesion on her vulva, STI screening and being unable to feel her IUD string, Dr. Vu's visual inspection and speculum examination were appropriate. Dr. R[redacted] said that indications for a bimanual exam were not apparent on this date, since [redacted] was not complaining of any pain. During her testimony she clarified that the bimanual exam was not necessary on this date.

63. At [redacted]'s August 15, 2019 appointment with Dr. Vu, she presented with concerns about a painful spot on her labia but she was otherwise asymptomatic. Dr. R[redacted] opined that a visual inspection was indicated but the speculum and bimanual examination may not have been needed. During her testimony she clarified that the bimanual exam was not indicated and she did not understand the reason for Dr. Vu to have done it.

64. At [redacted]'s December 11, 2019 appointment, she was complaining of pelvic discomfort and vaginal discharge. These symptoms warranted further examination so all of the aspects of Dr. Vu's examination, including the speculum exam and bimanual exam were appropriate on December 11, 2019.

65. [redacted] was noted to be asymptomatic on February 12, 2020 and she was requesting STI screening due to having a new sexual partner. Dr. R[redacted] opined that the speculum exam may have been indicated, but the bimanual

examination was not. She wrote that she could not determine whether Dr. Vu had obtained [redacted]'s informed consent. Non-invasive or self-collected vaginal swabs should have been offered to [redacted] instead of the speculum exam and the bimanual exam. There were no good reasons to do these invasive examinations when less invasive methods were available and could have been suggested to [redacted].

66. Dr. R[redacted] reviewed Dr. Vu's response to the complaint and his acknowledgment that he may have counselled [redacted] regarding her "short vaginal canal", advised her that the cervix being hit during intercourse could cause dyspareunia (pain during sexual intercourse) and identified areas to the right, left and anterior to her cervix that could help avoid her cervix being hit. Dr. [redacted] questioned Dr. Vu's mention of "short vaginal canal" explaining that there is no medical definition of this. She said that it would be virtually impossible for Dr. Vu to determine from a pelvic exam whether this would be an issue for [redacted] during intercourse. The vagina has significant elasticity and lengthens during arousal. She also wrote that the uterus is a mobile organ and trauma and dyspareunia are not the norm. She wrote that it is highly unlikely that a nulliparous patient at [redacted]'s age would have any prolapse and noted that Dr. Vu said he did not chart his observation of [redacted]'s "short vaginal canal" as it is a normal finding.

67. Dr. R[redacted] said that this type of counselling about sexual positioning and pathologizing normal variation would not be considered standard practice in an asymptomatic patient presenting for STI testing. She said that Dr. Vu might have counselled [redacted] about the advantages of using condoms, but discussing sexual positioning with this young female patient, especially in the absence of a chaperone would not be the expected standard for professionalism and awareness of boundaries. Physicians need to be particularly diligent not to sexualize any aspects of their examinations. Dr. R[redacted] said that it was not appropriate for Dr. Vu to offer sexual advice to [redacted]. [redacted] was not complaining of pain on intercourse or asking for advice on sexual positions.

68. It was similarly inappropriate to comment on [redacted]'s clitoris, or to touch her clitoris or to identify any part of her vagina as her "G-spot". The Hearing Tribunal overruled an objection to a question during Dr. R[redacted]s re-direct examination about whether narration by the physician would change her opinion. Dr. R[redacted] had been asked about physicians narrating during sensitive examinations to reduce surprise and discomfort.

69. The Hearing Tribunal asked Dr. R[redacted] to comment on Dr. Vu's testimony that he would sometimes have to retract the clitoral hood to visualize the clitoris. Dr. R[redacted] said that it is not standard practice to retract the clitoral hood. She said that most women would find that extremely painful, so it is not routinely done.

[redacted], LPN

70. Ms. [redacted] testified that she is a Licensed Practical Nurse and worked at the [redacted] Medical Clinic, including with Dr. Vu, between 2012 or 2013 and 2020, before returning to school to study perioperative nursing. Ms. [redacted] identified her April 30, 2020 letter providing her observations of Dr. Vu in physician-patient interactions, as part of Exhibit 1.

71. Ms. [redacted] said she had served as a patient chaperone with Dr. Vu approximately 100 times, but she had no recollection of [redacted]. She had observed him taking swabs for STI testing, but she said she was not in the rooms for Dr. Vu's discussions with the patients. She had no formal training on the indications for a pelvic examination. She had never observed Dr. Vu demonstrate to a patient with his hand in her vagina where the penis would go during sexual intercourse. She never observed him touch or comment on a patient's clitoris or "G-spot" during an examination. She had never heard him say "let's check under the hood" with reference to a patient's genitalia.

72. Ms. [redacted] agreed the [redacted] Medical Clinic had some doctors who did not perform sensitive female examination, but Dr. [redacted] ran a well-women's clinic and female patients could attend with her if they wanted. There were signs throughout the Clinic about Dr. [redacted]'s clinic. She described Dr. Vu's care during female pelvic examinations and her role to observe and assist him. Ms. [redacted] confirmed that Dr. Vu was well-liked by patients, he took steps to maintain their privacy and dignity and she was not aware of any concerns about him.

[redacted], LPN

73. Ms. [redacted] was also a Licensed Practical Nurse who worked at the [redacted] Medical Clinic with Dr. Vu and chaperoned patients with him for a number of years until 2020. She estimated she had chaperoned approximately 20-40 patients with Dr. Vu, including for STI swabs. She had no formal training in the indications for pelvic exams. Ms. [redacted] would not be present for Dr. Vu's discussions with patients, so she did not know what he discussed to obtain consent. She would come into the room when the patient was ready to be examined and had requested a chaperone. Ms. [redacted] described Dr. Vu's typical practice for a female pelvic examination. She denied ever hearing him make inappropriate comments. She denied seeing Dr. Vu demonstrate to a patient the location of a penis during sexual intercourse or demonstrate or describe the location of the "G-spot". She had never seen him palpate or comment on a patient's clitoris or heard him say "let's check under the hood."

74. Ms. [redacted] agreed that at least one of the Clinic's male doctors, Dr. [redacted], did not do sensitive female examinations. Dr. [redacted] ran a well-women's clinic for female patients who might prefer to see a female physician for sensitive examinations and sexual health matters. Clinic

patients were aware of it. There were signs around the Clinic and it was popular. Ms. [redacted] identified a copy of her April 21, 2020 reference letter for Dr. Vu as part of Exhibit 1. She said that Dr. Vu was friendly and respectful and she always enjoyed working with him. She had no concerns with him.

[redacted], LPN

75. Ms. [redacted] was also a Licensed Practical Nurse at the [redacted] Medical Clinic and acted as a chaperone for patients with Dr. Vu. She identified a copy of her May 19, 2020 reference letter for Dr. Vu that was part of Exhibit 1.

76. Ms. [redacted] worked with Dr. Vu at the [redacted] Clinic from 2016 until 2020, when she became a Registered Nurse and left for a different job. She estimated that she had acted as a chaperone for "20 plus" patients of Dr. Vu's, including for the collection of swabs for STI testing. She had no formal training on indications for pelvic examinations.

77. Ms. [redacted] agreed that Dr. [redacted] ran a well-women's clinic that female patients at the Clinic were aware they could choose to attend.

78. She explained that Dr. Vu had instructed her to bring patients to the examination room and to ask if they wanted a complete physical with a pelvic exam and if necessary, swabs for yeast infection or STIs. If the patient confirmed that they were there for a sensitive examination Ms. [redacted] would prepare the necessary gown and drapes. Dr. Vu would then come into the room and speak to the patient. Ms. [redacted] was not present for these discussions between Dr. Vu and the patient. Dr. Vu would then step out so the patient could undress. Dr. Vu and Ms. [redacted] or one of her colleagues would go in to assist him during the exam.

79. Ms. [redacted] said she enjoyed working with Dr. Vu. He was friendly and respectful with the patients and took steps to maintain their privacy and dignity. She denied ever seeing Dr. Vu do anything that concerned her. She did say that she had heard Dr. Vu volunteer to patients that pain during intercourse could be caused by the penis putting pressure on the cervix. She had also heard him describing the position of a penis during sexual intercourse to a patient during a pelvic exam, but she could not see what doing Vu was doing with his hands at the time. She had never heard Dr. Vu tell a patient about the location of her "G-spot" or seen him palpate the "G-spot". She had never heard him comment on the size of a patient's clitoris. She did say that she had heard Dr. Vu say "let's look under the hood" to a patient two or three times, but she did not know what he meant. She assumed he was referring to part of his external exam because it was before using the speculum. Ms. [redacted]'s letter described Dr. Vu's examinations as "routine" and said that he "follows the same pattern for all of his patients". Ms. [redacted] acknowledged that it had been several years so she may not remember everything that Dr. Vu said in every appointment.

Dr. Phu Truong Vu

80. Dr. Vu attended medical school in Australia before completing his residency in family medicine through Dalhousie University in 2012. He testified that he did not do any rotations in Alberta Health Services facilities, or any rotations in rural, emergency, acute or long-term care.

81. After residency, Dr. Vu practiced as a civilian family physician at CFB Gagetown in New Brunswick from 2012 until 2014 when he moved to Calgary, Alberta. He then practiced at the [redacted] Family Medical Centre in Calgary until 2020 and at the [redacted] Medical Clinic until his practice permit was suspended by the College on August 29, 2022. A copy of Dr. Vu's resume was marked as Exhibit 6.

82. Dr. Vu is a member of the College of Physicians and Surgeons of Alberta, holds Certification with the College of Family Physicians of Canada ("CCFP") and is a member of the Canadian Medical Association ("CMA"), the Alberta Medical Association and the Canadian Medical Protective Association. He is not a member of the Society of Obstetricians and Gynecologists of Canada ("SOGC").

83. Dr. Vu testified that he maintained his medical knowledge by attending an annual weeklong Family Medicine Forum in 2015 and 2016, and since 2017 he has attended St. Paul's Hospital's annual family medicine program. He also reviews CCFP and CMA publications, including the Canadian Medical Association Journal, but he denied ever seeing an update about not performing screening pelvic exams in asymptomatic women. He does not review SOGC publications or publications from other professions.

84. Dr. Vu described the [redacted] Medical Clinic as a family practice with about 1,600 patients. The patient population included a large group of elderly people, but most of the patients were younger, newly graduated workers or post-secondary students. There were four physicians on the family medicine side of the clinic, including himself. The Clinic also saw walk-in patients and Dr. [redacted] ran a well-women's clinic two days per week. Dr. Vu said that he never conferred with the other doctors at the Clinic; they didn't communicate very often during the day. He said he never conferred with Dr. [redacted] because they had opposite shifts and shared an exam room.

85. Dr. Vu said that when a female patient would come in worried about STIs he would discuss options for urine testing, pelvic exam with vaginal swabs, and serum (blood) STI testing. Dr. Vu said he would advise patients that vaginal swabs are the "gold standard" because they are more effective in catching chlamydia and gonorrhea and they permitted him to test for other things, but urine testing was good too. He said he based this on his medical school and residency training where it was ingrained in him that swabs were the gold standard. He said UptoDate articles on chlamydia and gonorrhea also

recommended swabs and the requisitions from the Calgary Laboratory Service indicated that swabs were the preferred method of collection.

86. Dr. Vu said that he would always discuss the exam to be completed with his patient and elicit their consent prior to proceeding. He would always offer to bring a chaperone into the room if the patient wanted them. For female patients it was always an option for them to see Dr. [redacted] for sensitive female examinations, or if they just preferred to see a female doctor. Dr. Vu said he told all new female patients of the option for them to attend Dr. [redacted]'s clinic. There was also advertising around the Clinic for Dr. [redacted]'s clinic.

87. Dr. Vu said he was taught to always do a bimanual examination when checking a female patient for STIs. He said he would be looking for tenderness and masses that could be signs of a STI or of the more complex pelvic inflammatory disease ("PID"). Dr. Vu said that PID is a serious infection of the pelvis that can affect the fundus, fallopian tubes and ovaries. Chlamydia and gonorrhea are two main causes of PID. It typically presents with lower abdominal pain, fever, vaginal discharge, or bleeding, but PID symptoms can be mild, or the patient may be asymptomatic. There are a number of ways to test for PID, but if it is suspected, or if the physician is concerned it is best to do a bimanual exam to check for tenderness of the cervix, uterus or ovaries.

88. In cross-examination, Dr. Vu said he was not aware of a March 2016 CCFP publication entitled "Recommendations on routine screening pelvic examination" or a Canadian Task Force on Preventive Health Care Guideline with the same title when he was caring for [redacted]. He said they weren't mentioned at the annual conferences he attended and the College had never told him that he had to follow them. He learned about them after the complaint was made. The publications adopted a 2014 guideline by the American College of Physicians on the use of pelvic examinations to screen for PID, among other conditions. The strong recommendation was not to perform routine pelvic examinations to screen for PID in asymptomatic women because the risks of harm of screening pelvic exams outweighed any benefits. These were entered as Exhibits 10 and 11.

89. Dr. Vu identified his November 1, 2021 letter in response to the complaint along with [redacted]'s patient chart, two articles on the clinical manifestations of chlamydia and gonorrhea and the reference letters from Ms. [redacted], Ms. [redacted] and Ms. [redacted]. He said he had no recollection of [redacted] and did not recognize her when she testified.

<u>November 5, 2018 Appointment</u>

90. Dr. Vu's written response to the complaint said that he first met [redacted] as a walk-in patient on November 5, 2018. In his testimony, Dr. Vu said that [redacted] attended the clinic complaining of a lesion on her left vulva and she wanted

an STI check. [redacted] was sexually active and had unprotected intercourse. Dr. Vu said he would have discussed the option to see Dr. [redacted], but if [redacted] didn't want to do that he would have proceeded to help her. He would have offered her three options for STI testing: urine, vaginal swabs, and serum testing. Dr. Vu said that he didn't offer the option for [redacted] to collect the swabs herself because he didn't know that self-swabbing was an option until he started reading about it. No one at the [redacted] Medical Clinic was offering self-swabbing to patients at that time.

91. Dr. Vu said that at this November 5, 2018 visit he did a pelvic exam so [redacted] must have chosen the vaginal swabs and serum testing. Dr. Vu noted that he had charted that a chaperone was present for the exam, [redacted], LPN. Dr. Vu first conducted an external exam of [redacted]'s pelvis, palpated her inguinal lymph nodes for signs of infection, and examined her for lesions, ulcers and warts. [redacted] had been worried that a lesion on her vulva could be genital herpes, but Dr. Vu noted that the lesion was folliculitis and he reassured her that it was not a sign of herpes. Dr. Vu next used a speculum to view [redacted]'s cervix and the IUD string, to check for any discharge or odor, and to collect the swabs. The third portion of the pelvic exam was to use gloved fingers to conduct a bimanual exam by palpating [redacted]'s cervix and adnexal region for tenderness and any masses.

92. Dr. Vu said that the indications for the speculum exam and the bimanual exam were to view [redacted]'s cervix and check the IUD string. He said it was also to get good vaginal swabs and he was taught to always complete a bimanual exam due to the risk factors for PID, even though [redacted] was asymptomatic. In this case [redacted]'s risk factors were that she was sexually active and had previously had unprotected sexual intercourse. She also had an IUD.

93. Dr. Vu denied that he would have said "let's check under the hood". He said that if he cannot see the clitoris, he will tell the patient that to view it he would need to retract the clitoral hood. This is so that he can visualize the clitoris for anything abnormal. He said he obtains the patient's consent before proceeding. Dr. Vu denied commenting on the size of patients' genitals or ever telling a patient that she had a small clitoris.

94. Following the November 5, 2018 appointment Dr. Vu called [redacted] on the phone on November 12, 2018 to advise her of the swab results, which were negative for STIs but positive for bacterial vaginosis. Dr. Vu advised [redacted] that no action was required since she was asymptomatic. He advised her to return if she becomes symptomatic. [redacted] told Dr. Vu she was booked for the serum blood testing the following week.

<u>August 15, 2019</u>

95. [redacted] attended with Dr. Vu for an appointment on August 15, 2019. She was asymptomatic except for a painful spot on her left labia. She was sexually active and wanted STI testing to make sure there was nothing wrong.

96. Dr. Vu had no independent recollection of this visit but he said he would have gone through the same options with [redacted]. Dr. Vu again did a pelvic exam so [redacted] must have opted for vaginal swabs and serum testing. Dr. Vu documented that Ms. [redacted] was present as a chaperone for his examinations. He diagnosed the spot on [redacted]'s labia as dermatitis. He conducted the speculum exam and took the swabs and then did the bimanual exam to rule out any signs of infection or any masses. Dr. Vu again said he was always taught that there is the potential for a patient to have PID if they have risk factors. Dr. Vu documented the bimanual exam as normal.

97. Dr. Vu telephoned [redacted] with the swab test results on August 20, 2019. The swabs were negative for STIs but were again positive for bacterial vaginosis. Dr. Vu documented that [redacted] complained of no vaginal discharge or any odor. He again advised [redacted] that no action was required since she was asymptomatic. He advised her to return if she became symptomatic.

<u>December 11, 2019</u>

98. Dr. Vu saw [redacted] on December 11, 2019. She was again seeking an STI check. She'd had no sexual partners since November 24, 2019 but she complained of pelvic discomfort with vaginal discharge and odor and she thought it might be related to bacterial vaginosis. [redacted] had seen another doctor at the Clinic, Dr. [redacted], on November 25, 2019, who prescribed a topical gel for bacterial vaginosis and requisitioned a urine test for STIs.

99. Dr. Vu documented that [redacted] declined a chaperone on this occasion. He proceeded with the pelvic examination as he said he would have been worried about an STI with those symptoms and he would have recommended vaginal swabs and serum testing. His external examination was normal. He wore gloves and said he did not think he could have forgotten to palpate [redacted]'s inguinal lymph nodes and do it later as his exam is very structured. He conducted a speculum examination noting a moderate greyish, brown discharge and took the swabs. He then proceeded with the bimanual exam and noted no tenderness or masses.

<u>February 12, 2020</u>

100. Dr. Vu then addressed the complaint about his care of [redacted] on February 12, 2020. Dr. Vu's written response to the complaint said he did not have a specific recollection of this visit, so he was relying on his treatment notes and his usual practice.

101. [redacted] was requesting STI testing because she had a new boyfriend. She was asymptomatic but she had a friend who was also asymptomatic and had been diagnosed with an STI. Dr. Vu reviewed with her the options including urine testing, vaginal swabs, and serum testing. Dr. Vu wrote that he explained to [redacted] that vaginal swabs are the gold standard, but urine testing is

good too and is used by the Sexual Health Clinic. ■ wanted "full" STI testing and due to her history of bacterial vaginosis, he recommended vaginal swabs.

102. Dr. Vu testified that with ■'s history of bacterial vaginosis, multiple sex partners and unprotected intercourse he would have assumed her risk of PID was higher and warranted the full pelvic exam including the bimanual exam even though she was asymptomatic.

103. ■ consented to the examination with vaginal swabs, but Dr. Vu wrote that he discussed the use of a chaperone for the examination before proceeding. ■ declined a chaperone and Dr. Vu documented this. Dr. Vu's response stated that he left the room so ■ could change into the gown and cover herself and he then re-entered the room. He advised he would begin the pelvic examination with an external inspection and palpation, speculum examination and the taking of the swabs, and then the bimanual exam. He said he obtained ■'s consent to this and then proceeded.

104. Dr. Vu said that he narrated during his exam to educate ■ and to reduce the possibility of surprise. The external pelvic region was inspected for any lesions, warts or ulcers. Dr. Vu said he then palpated the inguinal regions for any abnormal lymph nodes or nodules.

105. Dr. Vu wrote that he proceeded with the speculum examination and swabs. He inspected the health of ■'s cervix. He said he would have visualized the IUD string because ■ had an IUD but he omitted to make a note about this observation. He then took swabs for chlamydia, gonorrhea, trichomonas, bacterial vaginosis and yeast.

106. Dr. Vu wrote that he then did an internal bimanual exam. He said he used gloved digits to palpate ■'s cervix to ensure there was no cervical motion tenderness and the adnexal regions were palpated to ensure no adnexal tenderness or masses. Dr. Vu wrote that the anatomy of the pelvic region was reviewed and counselling was provided. He said it was here that he may have noted that ■ had a "short vaginal canal and provided counselling to avoid dyspareunia".

107. Dr. Vu explained in his response to the complaint that it was his practice at the time for patients with "low lying cervix (short vaginal canal), dyspareunia or prolapsed uterus who are undergoing internal pelvic exam" to provide counselling on the patients' anatomy and how to prevent dyspareunia "including sexual positions" that he said could prevent it. Dr. Vu said he developed this practice during his residency and when he began practicing in Calgary because a lot of his patients were asking about dyspareunia. Dr. Vu doesn't have any particular training around this topic, so he said he did his own literature search. He determined that there was a lot of material about dyspareunia and a lot of potential causes, but he put together an information package of "low lying fruit" that he could discuss with patients in a short

amount of time. He found this was well-received by patients, so he incorporated an oral version of the information as part of his pelvic examinations for patients who he found to have low lying cervix, short vaginal canal or prolapsed cervix.

108. Dr. Vu wrote in his response that he would narrate when he identified the location of the cervix, that the cervix being hit during intercourse could cause trauma or dyspareunia and identify areas to the right, left and anterior to the cervix that could help avoid the cervix being hit. Dr. Vu said he did not recall in this case, but he expected that he would have provided this counselling for [redacted] because he found that she had a "low lying cervix (short vaginal canal)" when he performed the bimanual exam. He also said that he does not typically chart a finding of a short vaginal canal, as this is a normal finding.

109. During his testimony at the hearing, Dr. Vu said he would ask patients if they had dyspareunia and then ask if they would like education on pelvic anatomy and how to prevent it. He said he would give this education whether there was a chaperone present or not, but he does not chart giving this advice because he does not chart all of the advice that he gives. He therefore could not say whether he had previously counselled [redacted] about dyspareunia.

110. Dr. Vu expanded on his definition of a "short vaginal canal" in his testimony. He said that when doing a pelvic exam if he feels the cervix is 1½" from the vaginal opening he would call it a short vaginal canal. Dr. Vu said he knows the vagina is elastic and can elongate up to four times its normal size. He said this means the cervix can move up to 6" away, and since the average penis is approximately 5" in length the cervix could still be traumatized during intercourse. Dr. Vu also said that where a cervix lies can change throughout the month, up and down, left and right.

111. Dr. Vu denied telling [redacted] that she had a small clitoris or touching her clitoris. He said he may during an external exam be unable to fully observe a patient's clitoris. He would then need to retract the clitoral hood to view it. It was ingrained in him that when doing a pelvic exam he should conduct a thorough external examination including visualizing all of the external anatomy. Dr. Vu added in his testimony that after seeing the complaint he did some research of his own. He referred to an educational booklet from the University of Calgary called *The Gynecological Examination* which he said talked about visualization of the clitoris and this was entered as Exhibit 8. Dr. Vu also referred to *Bates' Guide to Physical Examination and History Taking*, which he said talks about the importance of examining the clitoris. This was entered as Exhibit 7. Dr. Vu said that these materials supported performing bimanual examinations in asymptomatic patients due to the risk of PID, despite what Dr. R[redacted] had said in her evidence. Dr. Vu also referred to an UpToDate article called *Pelvic Inflammatory Disease: Clinical Manifestations and Diagnosis* dated 2023 which was entered as Exhibit 9. Dr. Vu said the article supported that PID can develop over weeks and months without showing any symptoms. It can lead to inflammation,

scarring and even infertility, but the PID might only be diagnosed retroactively.

112. Dr. Vu's written response to the complaint denied using language like "G-spot". In his testimony he added that the "G-spot" is not a real thing and no one can pinpoint where it would be. He said he would narrate the location of the cervix and areas within the vagina to avoid hitting the cervix and potentially causing dyspareunia. He denied telling [redacted] how to have more pleasurable sex or how to increase her confidence and said he would only have told her how to avoid pain. Dr. Vu said that his examination and the information he provided to [redacted] on February 12, 2020 were appropriate and consistent with his colleagues and the literature. He wrote that none of his comments were intended to be sexual.

113. Dr. Vu testified that after his February 12, 2020 appointment with [redacted] he had two phone calls with her. [redacted] had spoken with Dr. [redacted] on April 28, 2020 about a COVID-19 test result and felt that she seemed upset. Dr. Vu said Dr. [redacted] left a note for Dr. Vu, but it was misplaced in the early mayhem of the COVID-19 pandemic and Dr. Vu didn't find it until May 11. He then called [redacted] to ask how she was doing. Dr. Vu's chart note from May 11 documented that [redacted] was back living with her parents after being laid off at work. He documented that she was suffering some stress from moving back home.

114. Dr. Vu spoke with [redacted] again by phone on August 8, 2020 about a recent COVID-19 test result. [redacted] requested the test so that she could start school again.

115. Dr. Vu wrote in his response to the complaint that after reviewing current medical literature including teaching tools from the Cumming School of Medicine on breast and pelvic examinations, he had reconsidered the communications he provides to patients. Dr. Vu wrote that he would stop identifying the patient's anatomy during internal pelvic examinations to assist in explaining how to avoid dyspareunia. He would only provide sexual health counselling to patients who have indicated they wish to be provided with this information and only after obtaining express consent, documenting it and only providing it after the patient's examination has been completed. Dr. Vu also said that going forward he would make a notation in the patient's chart when this counselling and information has been provided.

116. Dr. Vu's response also referred to UpToDate articles on the clinical manifestations and diagnosis of chlamydia and gonorrhea. He said that both articles stated that the preferred method of sample collection is vaginal swab, whether clinically or self-collected. He said the chlamydia article also states that a first catch urine specimen is acceptable but might detect up to 10% fewer infections. Dr. Vu said that in the future he would provide patients with the option for self-swabbing.

V. SUBMISSIONS

Complaints Director's Submissions

117. The Complaints Director provided written submissions dated January 15, 2024. The Complaints Director submitted that the Hearing Tribunal must make findings of fact, determine the standard against which the conduct found to have occurred is judged, and determine whether the conduct is above or below the standard of conduct and amounts to unprofessional conduct.

118. The Complaints Director's submissions then reviewed the key aspects of the witnesses' evidence and submitted that the Hearing Tribunal would need to assess and make findings of credibility. The Complaints Director referred to *Faryna v. Chorny*, [1951] B.C.J. No. 152 where the BC Court of Appeal described a test for credibility.

119. While Dr. Vu disputes the allegations, he had no recollection of [redacted] or providing her with medical care so he relied on what he said was his standard practice. He called no expert evidence to support his conduct as being appropriate given the presenting history and symptoms at of [redacted]'s visits. The Complaints Director said that in essence Dr. Vu relied on ignorance as his defense. Dr. Vu relied on what he had learned in medical school and residency by 2012 and referred to articles or extracts from texts based on his own research, but he said he was not aware of the 2016 practice guidelines against screening pelvic examinations for asymptomatic women.

120. In contrast, Dr. R[redacted]'s expert evidence demonstrated that Dr. Vu's comments and conduct were not medically necessary and were inappropriate. It amounted to unprofessional conduct as demonstrated in similar past cases.

121. The Complaints Director next argued that Dr. Vu's conduct towards [redacted] on February 12, 2020 was "of a sexual nature" and constituted "sexual abuse" as defined by the HPA. The Complaints Director outlined the definitions of "sexual abuse" and "sexual nature" in sections 1(1)(nn.1) and (nn.3) of the HPA and then referred to *R. v. Chase*, [1987] S.C.J. No. 57 in which the Supreme Court of Canada held that the criminal offence of sexual assault required proof only of general intent, and not specific intent for sexual gratification. The Court described objective factors to assess whether an accused's conduct was sexual in nature:

a) Was the sexual integrity of the victim violated?

b) Is there a sexual or carnal context to the assault visible to the reasonable observer?

c) What part of the body was touched?

d) What was the nature of the contact?

e) What was the situation in which it occurred?

f) What words or gestures accompanied the act?

122. The Complaints Director submitted that the totality of these factors could be used to determine whether conduct is "of a sexual nature" under the HPA and they weigh heavily in favor of concluding that Dr. Vu's conduct was of a sexual nature. The Complaints Director submitted that Dr. Vu told [redacted] he was palpating her "G-spot" while providing a demonstration with his fingers of penile position in different sexual positions. This can only be reasonably characterized as being "of a sexual nature" given the patient's testimony of what occurred and the expert evidence that it was not clinically appropriate.

123. The Complaints Director submitted that Dr. Vu's provision of unnecessary and inappropriate medical procedures and exams demonstrated a lack of skill or judgment due to self-imposed ignorance of the current practice standards and was unprofessional.

124. The Complaints Director submitted that the allegations that Dr. Vu commented "let's check under the hood" (allegation 1(a)), that he examined [redacted]'s lymph nodes without gloves (allegation 3(a)), and that he inappropriately touched [redacted]'s clitoris (allegation 4(d)) were not proven to have fallen below the minimum standard of care so as to be found to be unprofessional conduct, or to have occurred as alleged. It was also open to the Hearing Tribunal to find that Dr. Vu had sufficient consent discussions with [redacted] about methods for STI testing so the Hearing Tribunal could find those allegations not proven.

125. The Complaints Director maintained that the allegations of improper pelvic examinations on November 5, 2018, August 15, 2019 and February 12, 2020 were proven and fell below the standard of care and were unprofessional conduct. Dr. Vu's "sexual anatomy lesson" on February 12, 2020 was also inappropriate, unprofessional and amounted to "sexual abuse" under the HPA.

<u>Dr. Vu's Submissions</u>

126. Dr. Vu provided written submissions dated February 2, 2024. He submitted that the Complaints Director had failed to prove the factual basis for the allegations on the balance of probabilities standard of proof with clear, cogent and convincing evidence, or that the conduct, even if true, would breach the standard of care or the standards of practice thereby amounting to unprofessional conduct. There is no onus on Dr. Vu to prove a clinical justification for his impugned conduct.

127. Dr. Vu asserted that the Complaints Director had conceded that allegations 1(a) and (b), 2(b), 3(a) and (b) and 4(b) and (d) were not proven in their

written submissions. That left only allegations 1(c), 2(a), 4(c), (e) and (f) to be determined by the Hearing Tribunal.

128. Dr. Vu then submitted that the Notice of Hearing asserts only that Dr. Vu's conduct breached the Standards of Practice, including the Boundary Violations: Sexual Standard of Practice and the standard of care required in the circumstance and thereby constitutes unprofessional conduct under the HPA. The Notice of Hearing does not specify which standards were breached except the Boundary Violations: Sexual Standard of Practice. It does not specifically allege sexual abuse or sexual misconduct.

129. Dr. Vu submitted that given the allegations in the Notice of Hearing, the Complaints Director has the onus to prove the standard of care required of a family physician between 2018 and 2020 for speculum and bimanual pelvic examinations and whether there were appropriate indications for those exams on November 5, 2018, August 15, 2019, and February 12, 2020. The Complaints Director also bears the onus to prove the required standard of care for describing a patient's clitoris, for applying digital pressure inside the vagina with associated commentary and whether Dr. Vu breached those standards. The Notice of Hearing does not specifically allege that any of Dr. Vu's conduct amounts to sexual abuse, so it is not open to the Hearing Tribunal to make a finding of sexual abuse.

130. Dr. Vu submitted that the Hearing Tribunal must carefully assess each witness' credibility and the reliability of their evidence. There is no formula, but a number of factors may be applied. Credibility refers to the witness' sincerity and willingness to speak the truth, while reliability is about their ability to accurately observe, recall and recount the events. The witness' honesty is assessed along with the reliability or trustworthiness of their evidence, referring to *CPSO v. Yaghini*, 2016 ONCPSD 52 at paragraph 61.

131. Dr. Vu commented on the credibility and reliability of [redacted]'s evidence. He suggested that [redacted]'s memory and recall were poor and lacked independence from outside influences, like Ms. [redacted] who wrote the complaint and which contained errors. She testified that she did not recall her appointments at the [redacted] Medical Clinic, or at which appointment things happened; she could not deny making certain statements. She acknowledged during cross-examination that Dr. Vu explained things, obtained her consent and gave her advice that she had not described in her direct testimony. She acknowledged distracting herself and not paying attention during some of the appointments. Dr. Vu submitted that [redacted]s evidence is affected by hindsight, unreliable and should not be given any weight.

132. Dr. Vu's submissions next commented on his own credibility and reliability. He said that his testimony was forthright, consistent and honest, even when it was not in his interests. His evidence was consistent with his contemporaneous medical charting. He has no independent recollection of his appointments with [redacted] and he did not chart providing counselling, but he

has never denied that he provided the counselling. Rather, he disputed that his care was substandard or provided for anything but a medical purpose. Dr. Vu offered [redacted] privacy, chaperones, obtained her consent and provided running commentary on his care all to avoid misunderstandings. He did not comment on comfort or pleasure when counselling [redacted] on her anatomy or sexual matters. His evidence should be preferred.

133. Dr. Vu's submissions summarized the witnesses' testimony and then reviewed the HPA's definition of unprofessional conduct. He submitted that not all mistakes, errors, or isolated breaches of standards amount to unprofessional conduct. Physicians are not to be judged in hindsight against a standard of perfection. Whether a physician's conduct amounts to unprofessional conduct requires a contextual analysis of the conduct. To establish a breach of the standard of care and unprofessional conduct, the Complaints Director must prove on a balance of probabilities that Dr. Vu departed culpably from the normal standards of skill, judgment or knowledge of an average reasonable physician in the similar circumstances, similar communities, and the same field at the material times. In this case that would be an average, reasonable family physician practicing between 2018 to 2020. This is an objective test.

134. Dr. Vu next discussed Dr. R[redacted]'s expert opinion evidence. He submitted that while Dr. R[redacted] was properly qualified in the area of family practice, there are significant concerns with her qualifications that demonstrate that little weight should be attributed to her opinion. Dr. Vu submitted that there were also deficiencies in the foundation of Dr. R[redacted]'s opinion, including the sources she relied upon.

135. Dr. Vu reviewed Dr. R[redacted]'s qualifications as set out in her *curriculum vitae* and as described in her testimony. Dr. Vu submitted that she retired from practice in 2012 and was not in a family medical practice in an urban centre like Calgary during the relevant time from 2018 to 2020. Dr. Vu also submitted that since 2013 Dr. R[redacted] had been focused on quality improvement and working towards a "gold standard". Her opinions were reflective of what she would do in a similar situation, and not what the standard of care requires a reasonably family physician to do. Dr. Vu also submitted that Dr. R[redacted]'s opinion may not be objective, due to her work with the College and her working relationship with the Complaints Director Dr. H[redacted]. Dr. Vu said that Dr. R[redacted] would have a vested interest in preparing a report favorable to the College.

136. Dr. Vu then suggested that Dr. R[redacted] did not specifically look for literature about the standards of practice at the time of Dr. Vu's appointments with [redacted], but instead applied today's knowledge and standards. She did not do an extensive literature review. She formed her own opinions and then looked for literature to support them. She relied on authorities that were not relevant, authoritative or accessible to family physicians practicing in Alberta. She referred to guidance documents for STI clinics and

Registered Nurses instead of for family physicians, and to documents that only British Columbia physicians would have access to. She referred to SOGC bulletin 385 that was published in August of 2019, after some of Dr. Vu's appointments with [redacted], and which contradicted her opinion on the indications for screening bimanual exams for asymptomatic women. She conceded in cross-examination that there is no good evidence one way or another about whether patients should be offered a pelvic exam except for cervical cancer screening. Dr. Vu submitted that Dr. R[redacted]'s opinions are not evidence of the standard of care applicable to a family physician like Dr. Vu.

137. Dr. Vu submitted that while the Canadian Task Force on Preventative Health Care recommendations on routine screening pelvic examinations were put to Dr. Vu in cross-examination, it was not put to Dr. R[redacted] or cited by her. It cannot be used to bolster Dr. R[redacted]'s opinion or considered authoritative: *Cambie Surgeries Corp. v. BC (Medical Services Commission)*, 2016 BCSC 1739 at para 11.

138. Dr. Vu then submitted that his treatment of [redacted] met the standard of care. He submitted that in relation to the speculum examinations he informed [redacted] of her options for STI testing and she chose vaginal swabbing. This procedure necessarily required a speculum examination. Dr. R[redacted]'s opinion that the speculum exams were not appropriate was based on her assumption that Dr. Vu should have offered [redacted] urine testing or self-swabbing as most patients prefer non-invasive methods. However, Dr. R[redacted] acknowledged that Dr. Vu's response to the complaint said that he did offer [redacted] non-invasive testing options. She still selected vaginal swabs. Dr. R[redacted] also acknowledged that many family physicians were not offering self-swabbing at the time.

139. With respect to the bimanual exams, Dr. R[redacted] and Dr. Vu disagreed about whether they were medically indicated on November 5, 2018, August 15, 2019 and February 12, 2020. Dr. R[redacted] opined that bimanual exams should not be performed in asymptomatic women. Dr. Vu said that Dr. R[redacted]'s opinion was only that a bimanual exam may not have been indicated and the articles she relied on were unclear. Whether to do a bimanual exam was an exercise of clinical judgment according to the SOGC article and it was not contrary to the standard of care, or unprofessional for Dr. Vu to perform them. The Canadian Task Force on Preventative Health Care article was not referenced in Dr. R[redacted]'s report and Dr. Vu was not familiar with it at the time he was caring for [redacted]. Dr. Vu said this article should be disregarded as there is no evidence that it is authoritative or that it was guidance for family physicians at the time.

140. Dr. Vu said he did bimanual exams because that's how he was trained to complete a standard pelvic exam. He was trained to assess for abnormalities such as cervical, fundus or ovarian tenderness or masses. A bimanual exam can also assess for PID which he said can be present in asymptomatic women or present with mild symptoms. Dr. Vu said that [redacted] had several risk

factors for PID. Dr. Vu offered [redacted] STI testing options and she chose vaginal swabs. Dr. Vu had described that process as involving a speculum exam, swabs and a bimanual exam and [redacted] had consented.

141. Dr. Vu also submitted that his counselling of [redacted] about sexual anatomy and positioning was not contrary to the standard of care or unprofessional. It was at most an error of judgment. Dr. R[redacted]'s opinion only said that this type of counselling about sexual positioning and pathologizing normal variation would not be considered standard practice in an asymptomatic patient presenting for STI testing. It was Dr. R[redacted]'s personal opinion that patients did not need this counselling if they were asymptomatic or that it should take place if the patient has symptoms and only once the patient is fully clothed. She was not enunciating the requisite standard of care for all similarly situated family physicians.

142. Dr. Vu next addressed the application of the "sexual abuse" provisions of the HPA and its definitions of "sexual abuse" and "sexual nature". To be found guilty of sexual abuse, Dr. Vu's conduct would have to have been inappropriate for the service he was providing and of a "sexual nature". He submitted that if the sexual counselling that he provided to [redacted] was appropriate to the service he was providing, then it could not be of a "sexual nature" or constitute "sexual abuse" under the HPA. Even if the Hearing Tribunal finds that his counselling was inappropriate, it was still not of a "sexual nature".

143. Like the Complaints Director, Dr. Vu also referred to the Supreme Court of Canada's decision in *R. v. Chase* to determine whether conduct was of a "sexual nature". He referred to several additional factors considered by other hearing tribunals:

    a) Whether consent was provided for a treatment or examination?

    b) Whether the service was requested by the patient or there was clinical indication for the contact?

    c) Whether the touch was accidental or incidental to the treatment?

    d) How the care is best described, e.g., unjustifiable, inappropriate, unnecessarily aggressive, overly diligent, routine, thorough or comprehensive?

    e) Whether the physician was under a misguided or clearly mistaken belief on the necessity of care in the patient's best interests?

    f) Whether care was taken to respect the privacy and integrity of the patient, such as privacy to undress, appropriate draping/gowns, as minimally intrusive as possible?

    g) Whether there were comments unrelated to a medical purpose or sexualized in nature? Discussions can be on sexually related topics without being of a sexualized character or nature. Whether the

comments were incorrectly perceived to be of a sexual nature by the patient?

h) Whether there is any evidence of demonstrable arousal or sexual gratification? Whether there was sexual intent, motivation or purpose?

i) Whether there is a drastic difference in events provided by the patient and physician or denial of events by the physician?

144. Dr. Vu referred to *CPSO v. Chung*, 2014 ONCPSD 7, a case in which a physician was found not guilty of sexual abuse. The tribunal in that case distinguished between clinical care that was unjustifiable, inappropriate and unnecessarily aggressive such as repeated vaginal exams, and conduct that would be of a sexual nature. The Tribunal considered that all of Dr. Chung's exams occurred in the clinical setting, there was no evidence of touching outside the spectrum of a clinical exam, there were no requests or comments of a sexual nature, no sexual gestures or threats or coercion, and no evidence of sexual intent or gratification on behalf of Dr. Chung. The tribunal found Dr. Chung's conduct was misguided, but he had genuinely believed that all of his examinations were necessary and in the best interests of his patients.

145. Dr. Vu also referred to *CPSO v. Malette*, 2020 ONCPSD 2, where the tribunal emphasized that touching of a clinical nature is not comparable to sexual touching. The patient had complained of a loss of sensation in her genitals. The physician performed a bimanual exam, palpated the patients' genitals and asked her to compare the sensation she was experiencing during his examination with the loss of sensation during intercourse. The physician admitted to unprofessional conduct and the CPSA withdrew an allegation of sexual abuse. The tribunal held that it was inappropriate for the physician to compare clinical touching to touching of a sexual nature by a romantic partner, but clinical touching is distinct from sexual touching.

146. Dr. Vu also referred to *CMTO v. Gudov*, 2020 ONCMTO 29, where a massage therapist was alleged to have committed sexual abuse for treating a patient's buttocks. The treatment was not appropriate to the service initially requested by the patient, but there were clinical indications to treat the patient's lower back and buttocks. The tribunal held that given the severity of a finding of sexual abuse, they would have to be persuaded that the touching was of a "sexual or carnal context…to the reasonable observer". There was no evidence of sexual intent or purpose and no other factors to support that the treatment was of a sexual nature.

147. Dr. Vu referred to *CPSO v. Leung*, 2019 CarswellOnt 21404 where a physician was found to have breached the standard of care and failed to obtain informed consent for multiple rectal examinations, but he was not guilty of sexual abuse. He also referred to *CPSO v. Noza*, 2019 ONCPSD 19, where a physician pleaded no contest to an allegation of unprofessional conduct and the College withdrew an allegation of sexual abuse. The

physician had performed a vaginal exam on a patient for the first time without explaining the reason for the exam, what it would involve, obtaining informed consent, offering a chaperone, providing a drape or gown, and documenting the exam.

148. Dr. Vu submitted that at all times his care was clinically indicated, appropriate to the service being provided and not of a sexual nature. There was no opinion from Dr. R[redacted] or other evidence that his dyspareunia counselling was itself inappropriate, so he said it was appropriate to the service being provided, namely sexual health counselling. He counselled patients like [redacted] about avoiding dyspareunia based on clinical indications. The Complaints Director carries the burden to prove a lack of clinical justification for the service and the evidence fell short. Any doubts should be resolved in favor of Dr. Vu. He offered [redacted] a chaperone and she had the option to see Dr. [redacted] for sensitive female exams if she wanted. He narrated his exams to educate [redacted], provide her with comfort and prevent any surprises, and he obtained her acknowledgement before moving to the next section of his exams.

149. Even if the Hearing Tribunal finds that Dr. Vu's conduct was inappropriate for the service provided, his conduct was still not of a sexual nature when the factors from *R. v. Chase* and the cases described above are applied. Dr. Vu had clinical indications to perform bimanual exams. He reviewed the STI testing options with [redacted] and she chose vaginal swabs which he had told her included a speculum exam and bimanual exam. Dr. Vu offered [redacted] a chaperone but she declined. He offered her privacy and respected her integrity by leaving the room while she disrobed and by providing appropriate draping. He provided a running commentary throughout his examinations. He provided dyspareunia counselling which was itself appropriate during the appropriate and indicated bimanual exam. He did not carry out the bimanual exam for the purpose of the dyspareunia counselling. His dyspareunia counselling was partly on a sexual topic but it was not sexualized. There was no comparison of Dr. Vu's palpation during the bimanual exam to a sexual partner and no request by Dr. Vu for the patient to make that comparison. There was no reference to pleasure or comfort and no evidence of sexual intention, motivation or purpose.

150. Dr. Vu then submitted that his case was distinguishable from the cases referenced by the Complaints Director in his submissions.

<u>Complaints Director's Reply Submissions</u>

151. The Complaints Director clarified his submissions that the allegations 1(a), 3(a) and 4(d) had not been proven. The remaining allegations were for the Hearing Tribunal to determine.

152. The Complaints Director responded to Dr. Vu's suggestion that the Notice of Hearing made no allegation of "sexual abuse" and that he was unaware of

the allegation of sexual abuse. The Complaints Director submitted that Dr. Vu's suggestion was disingenuous and ignored that the Notice of Hearing refers to the College's Standard of Practice – Boundary Violation: Sexual, which expressly deals with the issue of sexual abuse. In addition, on November 14, 2023, Dr. Vu made written submissions in support of his request to adjourn this hearing. His submissions stated that allegation 4(f) in the Notice of Hearing in this case was worded identically to allegations in the first hearing. Dr. Vu wrote that the first hearing was the first time in which clinical conduct with a patient was "alleged to be sexual abuse or sexual misconduct". Dr. Vu therefore knew for many months that the conduct in the Notice of Hearing for this case alleged conduct amounting to sexual abuse. He sought no particulars from the Complaints Director.

153. The Complaints Director responded to Dr. Vu's submissions that "unprofessional conduct" is distinct from "sexual abuse". The Complaints Director submitted that "sexual abuse" is a subset of "unprofessional conduct".

154. The Complaints Director also responded to Dr. Vu's submission that the Hearing Tribunal could not consider the Canadian Taskforce on Preventative Health Care guidelines on routine screening pelvic examinations (Exhibits 10 and 11). The Complaints Director submitted that rules of evidence applicable in court do not bind the Hearing Tribunal, due to section 79(5) of the HPA. Further, Dr. Vu confirmed he was aware of the guidelines when he testified, although he did not raise them himself.

155. The Complaints Director then described the cases referenced in Dr. Vu's submissions and explained that they could be distinguished.

VI. DECISION

156. The Hearing Tribunal has found the following allegations proven: 1(b), 1(c), 2(a), 2(b), 4(a), 4(b), 4(c), 4(e) and 4(f).

157. The Hearing Tribunal has found the following allegations not proven: 1(a), 3(a), 3(b), 4(d).

VII. DECISION WITH REASONS

[redacted]'s Credibility and Reliability

158. In this case the complaint was submitted to the College by Ms. [redacted], after [redacted] disclosed to her what had happened. We have placed no weight on the description of Dr. Vu's conduct in the complaint authored by Ms. [redacted]. The complaint was not admitted into evidence as proof of its contents. [redacted] did sign the complaint form, but we have instead relied on [redacted]s testimony about her interactions with Dr. Vu.

159. The Hearing Tribunal assessed the credibility and reliability of [redacted]'s testimony. [redacted] is a young woman. She was only 18 when she first encountered Dr. Vu as a walk-in patient at the [redacted] Medical Clinic. Her testimony before the Hearing Tribunal was given four years later, when she was 23 years old. [redacted] acknowledged that there were some details about her interactions with Dr. Vu that she did not remember. This is unsurprising; patients generally do not make contemporaneous notes about appointments with doctors. They often rely on their recollections. [redacted] did recall additional details during cross-examination, when counsel for Dr. Vu put specific propositions to her. This too is unsurprising. The fact that [redacted] did not describe all of the same details in her direct examination that Dr. Vu would think important to raise during cross-examination is to be expected.

160. [redacted] was firm in her recollection of other details, such as Dr. Vu's advice that vaginal swabs were the "gold standard" for STI testing, the lack of any separate discussion of informed consent for bimanual exams or informed consent for sexual anatomy and sexual position counselling during the bimanual exam, his descriptions of her clitoris and her "G-spot", his comments about sexual positions during the bimanual exam, and that she had not expressed any questions or concerns about pain during sexual intercourse or about sexual positions. The Hearing Tribunal found it unsurprising that [redacted] had a clear recollection of these very significant, and likely traumatic details of her interactions with Dr. Vu. The Hearing Tribunal did not find it significant that [redacted] said that her friend accompanied her to the November 5, 2018 appointment or that she had tried to distract herself with her cell phone during the February 12, 2020 appointment.

161. [redacted] was apparently very trusting of Dr. Vu. This was clear to the Hearing Tribunal from all of the descriptions of her appointments with him. She went to Dr. Vu for medical advice and she did what he said. This remained evident in her demeanor while testifying at the hearing. For example, she testified that she really didn't know why Dr. Vu performed a bimanual exam whenever she saw him. She didn't think it was part of the STI screening so she didn't think Dr. Vu had ever told her why he was doing it or asked her if she would consent. She recognizes that she might have declined the bimanual exam, but she didn't think about it because she thought it was just what was supposed to be happening. The Hearing Tribunal considered that [redacted]'s demeanor was forthright, sincere and she had nothing to gain by testifying. There was nothing about [redacted]'s testimony or her interactions with Dr. Vu that caused us to doubt its credibility or reliability.

<u>Dr. Vu's Credibility and Reliability</u>

162. Dr. Vu appeared quite nervous when he testified. This is understandable and the Hearing Tribunal has not drawn any conclusions from his nervousness at the hearing. The Tribunal did have other concerns about the credibility and reliability of Dr. Vu's evidence.

163. Dr. Vu said he had no recollection of ■ or any recollection of his appointments with her; he said he didn't recognize her when he saw her testify at the hearing. Dr. Vu could only rely on his chart notes and what he said were his standard practices. Yet Dr. Vu said that he doesn't chart all of the care or all of the counselling he provides to patients. The Tribunal understands that physicians cannot document everything they say or do, but Dr. Vu's charting omits any mention of things that the Tribunal felt to be very important. The Tribunal found it difficult to accept that Dr. Vu said he determined ■ to have a low-lying cervix, or short vaginal canal and that this would have led him to provide sexual anatomy and dyspareunia counselling, but he made no chart note of either his findings or about providing the counselling. Dr. Vu said he made no chart note because a low-lying cervix or short vaginal canal is a "normal finding". It is unclear why something that is "normal" would cause Dr. Vu to provide extra counselling. The lack of any charting about Dr. Vu's findings and reasoning on these aspects of his care caused us to question Dr. Vu's evidence.

164. Dr. Vu was sure of some things. He testified that he was sure he did not use the term "G-spot" during his bimanual examination of ■ on February 12, 2020. He said that if he had provided ■ with counselling about the "G-spot", it would only have been if she asked him about the "G-spot". Then he would have had a short discussion with ■ about the theoretical G-spot and he would have documented that. This is difficult to reconcile with Dr. Vu's testimony that he doesn't chart all of the care or counselling that he provides to patients and this is why there is no mention in his chart of sexual anatomy and dyspareunia counselling.

165. Dr. Vu also relied on his concern that ■'s history of multiple sexual partners put her at risk of PID as an indication to perform bimanual exams. Dr. Vu mentioned this concern in his testimony at the hearing, but there were no notations in his chart that ■ ever reported having multiple sexual partners. The charting indicates that she was sexually active, but the only reference to her having more than one partner was on February 12, 2020 when Dr. Vu charted that ■ "started sexual relations with new boyfriend and both decided they should get tested". There was no indication of ■ ever having multiple sexual partners in an overlapping timeframe. In response to a question from the Tribunal, Dr. Vu could not say whether he had ever asked ■ if she had multiple sexual partners. He offered that if she had told him she did, then he would have documented it.

166. Dr. Vu's attempt to explain what he meant by a "short vaginal canal" also caused the Tribunal to question his credibility and the reliability of his evidence. Dr. Vu testified that he would classify a patient as having a "short vaginal canal" if he felt that her cervix was 1½" from the vaginal opening. Dr. Vu also testified that he knows that where a patient's cervix lies can change throughout the month, up and down, left and right. The Tribunal found it difficult to accept Dr. Vu's evidence that he found ■ to have a "short vaginal canal" based on his bimanual examination on February 12, 2020 and

that this led him to provide sexual anatomy and dyspareunia counselling without considering that the location of [redacted]'s cervix might be different on a different date.

167. Dr. Vu's description of how he came to provide sexual anatomy and dyspareunia counselling and the format that he used also caused us concern. Dr. Vu said that he developed this practice during his residency and when he began practicing in Calgary because he said that a lot of his patients asked about dyspareunia. Dr. Vu has no particular training in the topic, so he did his own literature search. He said he determined there was a lot of material on the topic and a lot of potential causes, so he put together an information package to give to patients. He said he found this was well-received by patients, so he incorporated an oral version of the information into his pelvic examinations of patients who he found to have short vaginal canals. There was no suggestion from [redacted] or from Dr. Vu, that Dr. Vu had offered [redacted] any information package about dyspareunia to supplement the oral counselling he provided to her on February 12, 2020. If Dr. Vu had developed an information package on dyspareunia that he had found to be well-received by patients, it is difficult to understand why he would not offer to provide it to a patient who he felt would benefit from such counselling.

168. Dr. Vu's testimony that he developed this practice because "a lot" of patients were asking about dyspareunia was also difficult to reconcile with his evidence that he gave the advice "not often enough" that it coincided with when a chaperone would be present.

Allegation 1(a)

169. Allegation 1(a) alleged that during the November 5, 2018 appointment, Dr. Vu inappropriately used the phrase "let's check under the hood" before inspecting [redacted]'s genitals. [redacted] testified that she recalled Dr. Vu saying exactly that phrase. It stuck in her mind. She acknowledged that Dr. Vu was talking about the tissue over her clitoris which she now understands is called the clitoral hood. Dr. Vu denied using that specific phrase. He said that if he is unable to see the clitoris, he will tell the patient that he needs to retract the clitoral hood in order to view it. Nurse [redacted] testified that she had heard Dr. Vu say "let's check under the hood" to a patient on two or three occasions when she was acting as a chaperone. She said she had no idea what he was referring to.

170. The Complaints Director submitted that the evidence was insufficient to find this allegation proven. The Hearing Tribunal believes that Dr. Vu said something to the effect of "let's check under the hood", but the evidence is insufficient to find that Dr. Vu's conduct rose to the level of unprofessional conduct. Physicians should be careful to avoid any language that could be construed as slang in their interactions with patients, particularly when performing sensitive genital examinations.

Allegation 1(b)

171. Allegation 1(b) alleged that at the November 5, 2018 appointment, Dr. Vu failed to have an adequate consent discussion with [redacted] regarding the use of non-invasive or self-collection methods for testing for sexually transmitted infections.

172. [redacted] was a walk-in patient on November 5, 2018. She had never met Dr. Vu before. [redacted] had gone to the Clinic because she was concerned about a lesion on her vulva and she wanted an STI check. She was also concerned that she could not feel the string from her IUD. Dr. Vu's charting was consistent with this and indicated that [redacted] had reported having unprotected intercourse in the past.

173. Dr. Vu did not record anything in his chart about discussing STI testing options with [redacted]. There is no mention of any discussion around consent to STI testing, a visual examination, urine testing, a speculum exam with swabs, a bimanual exam, or serum STI testing. In his response to the complaint and in his testimony, Dr. Vu could only rely on what he believes he would have done. He said he would have discussed the option for [redacted] to see Dr. [redacted], but if [redacted] didn't want to do that then he would have proceeded to help her. He said he would have offered her options for urine testing, vaginal swabs which involved a speculum examination in order for him to collect them, and serum testing. Dr. Vu said he would not have offered [redacted] the option of collecting the swabs herself as he was not aware of that option at the time. Dr. Vu noted that according to his chart he performed a pelvic exam on November 5, 2018, so he said [redacted] must have consented to the vaginal swabs with speculum exam.

174. Dr. Vu did not describe any discussion with [redacted] about a bimanual examination or why it would be part of the STI testing. He said he was taught to always do a bimanual exam when checking for STIs to look for tenderness or masses that could be signs of an STI, or signs of the more complex PID, even when the patient is asymptomatic. In this case he said that [redacted] had risk factors for PID because she was sexually active, she had previously had unprotected intercourse, and she had an IUD.

175. [redacted] testified that she remembered Dr. Vu discussing STI testing options with her on November 5, 2018. She said he mentioned options for urine testing, vaginal swabs which involved a speculum examination for Dr. Vu to collect the swabs, and serum testing. [redacted] said that Dr. Vu told her the vaginal swabs with speculum examination would be the most effective, or "gold standard" testing method as they could detect a greater number of possible infections including bacterial vaginosis, so she consented to the swabs and speculum examination. Dr. Vu did not explain to [redacted] that a bimanual examination would also be included or why it would be needed.

176. [redacted] said that Dr. Vu always performed a bimanual examination when she had STI testing. She thought it was a routine precaution and she really didn't know why it was done every time. She said she didn't think it was part of the STI screening, so she didn't think that Dr. Vu had told her why he was doing it or that he had given her the option to have the exam or not. She said she recognizes that she could have refused that part of the exam, but she didn't think about it because she thought the bimanual exam was just what was supposed to be happening. She said that Dr. Vu performed the bimanual exam immediately after removing the speculum. He narrated what he was feeling as he was performing the exam and told her he was checking her cervix and ovaries for tenderness or masses.

177. The Hearing Tribunal finds that on November 5, 2018, Dr. Vu described several options for STI testing. He described urine testing, vaginal swabs involving a speculum examination in order for him to collect them, and serum testing as options. Dr. Vu acknowledged that he did not offer [redacted] the option to collect the swabs herself, but he said he was unaware of this option at the time. Dr. Vu said that no one at the [redacted] Medical Clinic was offering patients the option to self-collect vaginal swabs at that time. In her evidence, Dr. R[redacted] acknowledged that many family physicians were not offering self-collection of swabs at that time, between 2018 and 2020.

178. The Hearing Tribunal finds that Dr. Vu did not explain to [redacted] why a bimanual exam should be part of the STI testing. He did not explain to [redacted] that she could choose to have STI testing with vaginal swabs but without having a bimanual exam. He did not obtain [redacted]'s consent to the bimanual exam before proceeding with it. [redacted] came to understand that Dr. Vu was checking for tenderness or masses, but only by hearing Dr. Vu's narration during the bimanual exam. Dr. Vu did not tell [redacted] that STIs can lead to tenderness or masses in her internal organs, or to the more complex PID. Dr. Vu may have believed that a bimanual exam should always be part of an STI check, but it is a distinct and invasive procedure that requires the patient's consent before proceeding. Dr. R[redacted] testified that all aspects of a pelvic examination should be discussed with patients.

179. [redacted] was 18 years old and a new patient when Dr. Vu saw her on November 5, 2018. Dr. Vu did have a chaperone with him in the exam room on November 5, 2018, but the Hearing Tribunal found it very concerning that Dr. Vu performed a highly invasive bimanual examination of [redacted]'s vagina, cervix and adnexal region without a detailed discussion with her of the reasons for performing the bimanual exam as part of the STI check, a detailed discussion of [redacted]'s consent to the bimanual exam and at least some documentation of that discussion and [redacted]'s consent. Dr. Vu failed to have an adequate consent discussion with [redacted] about the option to have STI testing without undergoing the invasive bimanual exam.

180. The Notice of Hearing states that all of Dr. Vu's alleged conduct was contrary to the Standards of Practice and the standard of care required in the

circumstance and thereby constitutes unprofessional conduct under the HPA. Dr. Vu's conduct in this allegation 1(b) fell below the expected standards of skill and judgment in the provision of professional services. He contravened the standard of care and committed unprofessional conduct as defined in section 1(1)(pp)(i) of the HPA. Given the highly sensitive and invasive nature of a bimanual exam, the Hearing Tribunal finds that Dr. Vu's conduct was unprofessional conduct.

Allegation 1(c)

181. Allegation 1(c) alleged that on November 5, 2018 Dr. Vu conducted a bimanual pelvic examination when it was not medically indicated.

182. Dr. R[redacted]'s evidence was that since [redacted] presented on November 5, 2018 with concerns about a lesion on her vulva, a request for STI screening and being unable to feel her IUD string, Dr. Vu's external visual inspection of [redacted]'s genitals and the speculum examination were appropriate. Dr. R[redacted] opined that there was no medical indication for a bimanual examination on November 5, 2018. In her written opinion, she stated that the indication for bimanual examination was not apparent. In her testimony at the hearing, she clarified that the bimanual exam was not indicated and not necessary since [redacted] was not complaining of any symptoms.

183. Dr. Vu testified that he was taught to always do a bimanual exam when checking for STIs to look for tenderness or masses that could be signs of an STI, or signs of the more complex PID, even when the patient is asymptomatic. He said that when he saw [redacted] on November 5, 2018, she had risk factors for PID because she was sexually active, she had previously had unprotected intercourse, and she had an IUD. Dr. Vu's chart documents that [redacted] was sexually active, that she had previously had unprotected intercourse, and that she had an IUD, but there is no mention of any concern about risk factors for PID. The chart documents that [redacted] wanted an STI check and she was concerned about a lesion on her labia that Dr. Vu diagnosed as folliculitis by looking at it. There was no suggestion that [redacted] was experiencing any other symptoms. Dr. Vu documented that [redacted] had "nil vaginal discharge or odor" and there was no mention of any pain, bleeding or other concerns.

184. Dr. Vu testified that he did his own research after seeing the complaint. He introduced several exhibits that he said supported performing bimanual examinations in asymptomatic patients due to the risk of PID.

185. Exhibit 7 was an excerpt from the *Bates' Guide to Physical Examination and History Taking*. This document listed indications for a full pelvic examination on an adolescent patient. Exhibit 7 stated "Indications for a pelvic examination during adolescence include menstrual abnormalities such as amenorrhea, excessive bleeding, or dysmenorrhea; unexplained abdominal pain; vaginal discharge; the prescription of contraceptives; bacteriologic and cytologic studies in a sexually active girl; and the patient's own desire for

assessment". This document did not discuss specific indications for the bimanual exam portion of a full pelvic examination. It did not support performing a bimanual exam in an asymptomatic patient who had not requested it.

186. Exhibit 8 was an educational booklet from the University of Calgary called *The Gynecological Examination*. Exhibit 8 described how medical students should perform gynecological examinations, but it did not address indications to perform examinations.

187. Exhibit 9 was an UpToDate article called *Pelvic Inflammatory Disease: Clinical Manifestations and Diagnosis*. Dr. Vu suggested that this article supports that PID can develop over weeks and months without showing symptoms and can lead to serious complications. The article does say that PID's "presentation is typically acute over several days, but a more indolent presentation over weeks to months can also occur." It later states that an "indolent presentation of PID with low-grade fever, weight loss, and abdominal pain has been reported following pelvic infection due to actinomycosis and tuberculosis."

188. Under the heading "Evaluation", Exhibit 9 states that the "possibility of PID should be considered in any sexually active female patient who presents with lower abdominal pain and pelvic discomfort". It then lists a number of tests that should always be performed for females suspected of having PID, including a pregnancy test to rule out ectopic pregnancy and complications of an intrauterine pregnancy, HIV screening and serologic testing for syphilis. The article expressly states that the "value in conducting a pelvic examination in an asymptomatic adolescent has been questioned and received some attention by professional associations. However, in an adolescent presenting with lower abdominal pain and vaginal discharge (spotting or bleeding), a presumptive diagnosis of cervicitis and PID salpingitis cannot be made without a pelvic examination". The article does not support conducting bimanual examinations in asymptomatic adolescent patients.

189. During cross-examination, Dr. Vu was asked about a research article entitled *Recommendations on routine screening pelvic examination* published in the College of Family Physicians of Canada's journal *Canadian Family Physician* in March of 2016. Dr. Vu identified the journal article and acknowledged that it was about the Canadian Task Force of Preventative Health Care ("CTFPHC") adopting a guideline from the American College of Physicians. The article was marked as Exhibit 10. The article stated that the CTFPHC recommends against performing screening pelvic examinations for PID in asymptomatic women. Dr. Vu said he was not aware of the CTFPHC's adoption of the guideline at the time because it was not discussed at the Family Medicine Forum that he attended in 2016. He said he became aware of the CTFPHC's adoption of the guideline after he learned of the complaint, but he acknowledged that he had not mentioned it in his evidence in chief. Dr. Vu

was also shown the CTFPHC Guideline document entitled *Recommendations on routine screening pelvic examination* that was the subject of the article and confirmed he was now familiar with it. The CTFPHC Guideline document was marked as Exhibit 11.

190. The Hearing Tribunal accepts Dr. R[redacted]'s evidence that a bimanual examination was not indicated or necessary for [redacted] on November 5, 2018. [redacted] presented with a concern about a visible lesion on her vulva, being unable to feel her IUD string and with a request for STI screening. Dr. Vu's visual inspection of [redacted]'s genitals was appropriate to assess the lesion and the speculum examination was appropriate to check for the IUD string and to collect the STI swabs. [redacted] had no symptoms or concerns that called for an invasive bimanual examination of her vagina, cervix and adnexal region.

191. The Hearing Tribunal considered Dr. Vu's arguments that Dr. R[redacted]'s opinion should receive limited weight. Dr. Vu argued that Dr. R[redacted] had retired from family practice in 2012. Dr. R[redacted] continued to practice as a locum physician and remained an active member of the [redacted] General Hospital medical staff after 2012. Dr. Vu argued that Dr. R[redacted] did not practice in a major centre like Calgary. The standard of care for a family physician practicing in a major centre like Calgary would not be less rigorous than in a rural setting like [redacted]. Dr. Vu argued that Dr. R[redacted] has most recently been focused on quality improvement initiatives and she testified as to what she would do rather than what the standard of care requires. Dr. R[redacted]e's evidence described expected standards of medical practice, not what she would do herself. Dr. Vu argued that Dr. R[redacted]'s work with the College undermines her objectivity. The Hearing Tribunal did not believe that Dr. R[redacted]'s roles as a Practice Visitor for the College's Continuing Competence Program and as a Multi-Source Feedback Facilitator for the College undermined the objectivity of her opinion. Dr. R[redacted] testified that those are contracted roles. She is not an employee of the College. Dr. Vu criticized the literature that Dr. R[redacted] referenced in her opinion. None of the literature provided by Dr. Vu undermined the parts of Dr. R[redacted]'s opinion on which we have relied in this decision.

192. The Hearing Tribunal did not accept Dr. Vu's evidence that the bimanual exam was appropriate to check for signs of STIs or of the more complex PID in an asymptomatic patient like [redacted] in November of 2018. Dr. Vu may have come to believe this during his medical training in Australia or during his residency in New Brunswick, but it was not the expected standard of care in Alberta in 2018.

193. Dr. Vu testified that he was a member of the College of Family Physicians of Canada. He would have received copies of its journal, *Canadian Family Physician*, but he said he would only review copies of the journal when he had time for it. Dr. Vu said that he was not aware of the CTFPHC guidelines (Exhibit 11) or the *Canadian Family Physician* journal article about those guidelines when they were published in March of 2016 (Exhibit 10) because

they were not presented at the annual conference he attended in the fall of 2016. Dr. Vu relied instead on literature that he said he had located after learning of the complaint, but Dr. Vu's literature did not support performing a bimanual exam in an asymptomatic adolescent female patient. The literature expressly said that the value of a pelvic examination in an asymptomatic adolescent patient has been questioned. It stated that PID should be considered in any sexually active female patient who presents with lower abdominal pain and pelvic discomfort. [redacted] had no such symptoms on November 5, 2018. Further, Dr. Vu's chart notes do not indicate that he was concerned about PID or that he was checking for signs of STIs or PID when performing the bimanual exam.

194. Subjecting a patient to an examination or a test that is not indicated in the circumstances may not always contravene the College's standards of practice or the standard of care required in the circumstances and amount to unprofessional conduct. In this case, Dr. Vu performed a bimanual examination that was not indicated or necessary on an asymptomatic 18-year-old patient who he was seeing for the first time. A bimanual exam is a highly invasive and sensitive examination. Dr. Vu's conduct in this allegation 1(c) fell below the expected standards of skill and judgment in the provision of professional services. He contravened the standard of care and committed unprofessional conduct as defined in section 1(1)(pp)(i) of the HPA. Given the highly invasive and sensitive nature of the exam, the Hearing Tribunal finds that Dr. Vu's conduct was unprofessional conduct.

Allegation 2(a)

195. Allegation 2(a) alleged that on or about August 15, 2019, during his examination of [redacted], Dr. Vu conducted a speculum and bimanual pelvic examination when it was not medically indicated.

196. Dr. Vu's patient chart indicates that he saw [redacted] on August 15, 2019. She was concerned about a painful spot on her labia and wanted to ensure it was nothing abnormal. Dr. Vu wrote that [redacted] was sexually active and requesting STI testing, but she was asymptomatic.

197. Dr. Vu had a chaperone present on August 15, 2019. He conducted a visual inspection of [redacted]'s external genitalia and charted his observation of dermatitis. He then proceeded with a speculum exam during which he collected swabs for STI testing and charted that she had "nil discharge or odor". There was no indication in the chart that [redacted] was suffering from any pain, discomfort or any other symptoms or that Dr. Vu was concerned about any risk factors for PID. Dr. Vu proceeded to perform a bimanual exam and charted that [redacted] had no cervical or adnexal tenderness or masses.

198. Dr. R[redacted]'s evidence at the hearing was that the bimanual exam was not indicated on August 15, 2019 and she did not understand Dr. Vu's reason to have done it. The Hearing Tribunal accepts Dr. R[redacted]'s evidence that a

bimanual exam was not indicated for ■ on August 15, 2019. Dr. Vu's decision to perform the bimanual exam was unprofessional conduct for the same reasons described under allegation 1(c), above. His use of the speculum to collect swabs for STI testing was not inappropriate.

Allegation 2(b)

199. Allegation 2(b) alleged that Dr. Vu failed to have an adequate consent discussion with ■ regarding the use of non-invasive or self-collection methods for testing for STIs on August 15, 2019.

200. ■ said that she didn't quite remember this visit. She believed it was for a painful spot on her labia and that she would have requested STI testing. ■ said that Dr. Vu always performed a bimanual examination when she had STI testing. She thought it was a routine precaution and she really didn't know why it was done every time. She said she didn't think it was part of the STI screening, so she didn't think that Dr. Vu had told her why he was doing it or that he had given her the option to have the exam or not. She said she recognizes that she could have refused that part of the exam, but she didn't think about it because she thought the bimanual exam was just what was supposed to be happening.

201. Dr. Vu had no independent recollection of this visit either, but he said he would have gone through the same testing options with ■ as on November 5, 2018. Dr. Vu did not record anything in his chart about discussing STI testing options with ■ on August 15, 2019. There is no mention of any discussion around consent to STI testing, a visual examination, urine testing, a speculum exam with swabs, a bimanual exam, or serum STI testing. There is nothing documented about risk factors or any concern about PID. Dr. Vu did not describe any discussion with ■ about a bimanual examination or why it would be part of the STI testing on this occasion.

202. The Hearing Tribunal finds that on August 15, 2019, Dr. Vu offered ■ options for STI testing, but as previously, he did not explain to ■ why the bimanual exam should be part of the STI testing. He did not explain to ■ that she could choose to have STI testing with vaginal swabs but without having a bimanual exam.

203. The Hearing Tribunal again found it concerning that Dr. Vu performed a highly invasive bimanual examination of ■'s vagina, cervix and adnexal region without a detailed discussion with her of the reasons for performing the bimanual exam as part of the STI check, a detailed discussion of ■'s consent to the bimanual exam and at least some documentation of that discussion and ■'s consent. Dr. Vu failed to have an adequate consent discussion with ■ about the option to have STI testing without undergoing the bimanual exam. Dr. Vu's conduct was unprofessional conduct for the same reasons as in our discussion of allegation 1(b), above.

Allegation 3(a)

204. Allegation 3(a) alleged that at a December 11, 2019 appointment, Dr. Vu inappropriately examined [redacted]'s lymph nodes near her vagina without wearing gloves.

205. [redacted] testified that she saw Dr. Vu on December 11, 2019 as she was experiencing pelvic discomfort and vaginal discharge. She was concerned that her symptoms could be related to bacterial vaginosis. [redacted] said that Dr. Vu examined her, then conducted a speculum examination with vaginal swabs, and then conducted a bimanual exam. [redacted] said that after Dr. Vu completed the bimanual exam and had removed his gloves, he said he had forgotten to check [redacted]'s lymph nodes in her groin. While [redacted] was leaning back on her elbows Dr. Vu proceeded to touch her lymph nodes without gloves on.

206. Dr. Vu had no recollection of his appointments with [redacted], so he could only rely on his patient chart and his usual practice. Dr. Vu's chart note for December 11, 2019 is consistent with [redacted]'s testimony about her presenting concerns. Dr. Vu said that his practice for conducting examinations is very structured. He wears gloves for his exams and he did not think he could have forgotten to palpate [redacted]'s inguinal lymph nodes and do it later.

207. Dr. R[redacted]'s evidence was that visual inspection of the external genitalia and palpation of the inguinal lymph nodes would be standard practice for STI screening for a symptomatic patient. Dr. R[redacted]'s opinion did not address whether the standard of care requires a physician to wear gloves when performing external palpation.

208. The Complaints Director submitted that allegation 3(b) was not proven on the evidence. The Hearing Tribunal finds that even if Dr. Vu had removed his gloves before palpating [redacted]'s inguinal lymph nodes, the evidence does not establish a breach of the standard of care or unprofessional conduct on Dr. Vu's part. Allegation 3(a) is therefore not proven.

Allegation 3(b)

209. Allegation 3(b) alleged that Dr. Vu failed to have an adequate discussion with [redacted] about the use of non-invasive or self-collection methods for STI testing on December 11, 2019.

210. Dr. R[redacted]'s evidence was that [redacted]'s complaints of pelvic discomfort and vaginal discharge on December 11, 2019 meant that a speculum exam and bimanual exam were both indicated. The Hearing Tribunal continues to believe that Dr. Vu should have had a detailed discussion with [redacted] about the reasons for the bimanual exam, a detailed discussion of her consent to the exam and at least some documentation of that discussion and [redacted]'s consent. It was not necessary for Dr. Vu to explain that [redacted] could have STI testing without an invasive bimanual exam on December 11, 2019. The evidence

did not demonstrate that Dr. Vu failed to adequately discuss non-invasive options on December 11, 2019. Allegation 3(b) is therefore not proven.

Allegation 4(a)

211. Allegation 4(a) alleged that Dr. Vu saw [redacted] on February 12, 2020 and conducted a speculum and bimanual examination when it was not medically indicated.

212. [redacted] testified that she recalled her February 12, 2020 visit with Dr. Vu. [redacted] said she saw Dr. Vu on February 12, 2020 to request an ADHD assessment and to request an STI check as she had a new boyfriend.

213. Dr. Vu testified that he had no recollection of the visit, so he relied on his chart notes and his usual practice. Dr. Vu charted that [redacted] presented for an STI check as she had started sexual relations with a new partner and had decided to get tested. Dr. Vu also charted that [redacted] was asymptomatic.

214. Dr. Vu examined [redacted] and charted a normal external exam, "nil abnormal discharge or odor", that she had a normal cervical exam, that he collected swabs and that he conducted a bimanual exam with normal results. There was no indication in Dr. Vu's chart of any concern about any symptoms or risk factors for PID.

215. Dr. R[redacted]'s evidence was that the speculum and bimanual examination were not indicated on February 12, 2020 because [redacted] was noted to be asymptomatic. She was requesting STI screening only due to having a new sexual partner. The Hearing Tribunal accepts Dr. R[redacted]'s evidence that a bimanual exam was not indicated for [redacted] on February 12, 2020. Allegation 4(a) is factually proven and Dr. Vu's decision to perform the bimanual exam was unprofessional conduct for the same reasons described under allegation 1(c), above. Dr. Vu's use of the speculum to collect STI swabs was not shown to have been inappropriate.

Allegation 4(b)

216. Allegation 4(b) alleged that during the February 12, 2020 examination, Dr. Vu failed to have an adequate consent discussion with [redacted] regarding the use of non-invasive or self-collection methods for testing for STIs.

217. [redacted] testified that Dr. Vu had asked her if she would like to have a chaperone in the room and she said it was up to him. Dr. Vu then proceeded with the STI testing. As in the previous appointments, he inserted a speculum and took vaginal swabs. He then performed a bimanual examination and described what he was feeling. [redacted] said that Dr. Vu was providing more detail on this occasion than previously.

218. As above, ■ said that Dr. Vu always performed a bimanual examination when she had STI testing. She thought it was a routine precaution and she really didn't know why it was done every time. She said she didn't think it was part of the STI screening, so she didn't think that Dr. Vu had told her why he was doing it or that he had given her the option to have the exam or not. She said she recognizes that she could have refused that part of the exam, but she didn't think about it because she thought the bimanual exam was just what was supposed to be happening.

219. Dr. Vu again relied on his chart notes and his usual practice. Dr. Vu's chart notes were consistent with ■'s recollection of her reasons for making the appointment. Dr. Vu did not record anything in his chart about discussing STI testing options with ■ on February 12, 2020. There was no mention of any discussion around consent to STI testing, a visual examination, urine testing, a speculum exam with swabs, a bimanual exam, or serum STI testing. There was nothing documented about risk factors or any concern about PID. Dr. Vu charted that ■ had "nil abnormal discharge or odor" and her external exam was normal. There was no indication that ■ was suffering from any pain, discomfort or other symptoms. Dr. Vu did not document any discussion with ■ about a bimanual examination or why it would be part of the STI testing on this occasion. He documented that he performed a bimanual exam which found no tenderness or masses.

220. The Hearing Tribunal finds that on February 12 2020, Dr. Vu did not explain to ■ why the bimanual exam should be part of the STI testing. He did not explain to ■ that she could choose to have STI testing with vaginal swabs but without having a bimanual exam.

221. The Hearing Tribunal again found it concerning that Dr. Vu performed this highly invasive bimanual examination without a detailed discussion with ■ of the reasons for performing it as part of the STI check, a detailed discussion of ■'s consent to the bimanual exam and at least some documentation of that discussion and ■'s consent. Dr. Vu failed to have an adequate consent discussion with ■ about the option to have STI testing without undergoing the invasive bimanual exam. Dr. Vu's conduct was unprofessional conduct for the same reasons as in our discussion of allegation 1(b) and 2(b), above.

<u>Allegation 4(c)</u>

222. Allegation 4(c) alleged that at the February 12, 2020 appointment, Dr. Vu inappropriately commented on the size of ■'s clitoris.

223. ■ testified that during Dr. Vu's examination he told her that she had a small clitoris. ■ reacted in shock and asked Dr. Vu if that was a bad thing. She said he told her no, and then asked if she wanted him to tell her about her physical anatomy. ■ did not know what to say.

224. Dr. Vu could only rely on his chart notes and his usual practice. There is no notation in Dr. Vu's chart about the size of [redacted]'s clitoris or anything out of the ordinary in his external examination of [redacted]'s genitals. Dr. Vu denied that he would have told her she had a small clitoris.

225. The Hearing Tribunal has considered the evidence of both [redacted] and Dr. Vu. We accept [redacted]'s evidence that Dr. Vu commented on the size of her clitoris on February 12, 2020. We preferred [redacted]'s testimony that she heard Dr. Vu make the comment over Dr. Vu's testimony that he would not have made that comment. This was [redacted]'s fourth appointment with Dr. Vu and the fourth time he had examined her external genitalia, but the first time she said he commented on the size of her clitoris. [redacted] said she was shocked by Dr. Vu's comment. We accept that this would have been very upsetting and memorable for [redacted]. Dr. Vu had no independent recollection of the visit. He said he had no recollection of [redacted] at all when she testified. He could only rely on what was documented in his chart and his usual practice.

226. The Hearing Tribunal considered [redacted]'s testimony that Dr. Vu's comment about the size of her clitoris led to him describing her physical anatomy. [redacted] said that when Dr. Vu offered to describe her anatomy, she didn't know what to say. He told her that he does this for women to make them more confident and he then began to describe her anatomy, including her vaginal canal and her cervix. Dr. Vu's comment on the size of [redacted]'s clitoris was a segue into the sexual anatomy and sexual position counselling that he acknowledged that he may have provided to [redacted]. The Hearing Tribunal finds it more likely than not that Dr. Vu did comment to [redacted] on the size of [redacted]'s clitoris by referring to it as small.

227. Dr. R[redacted] gave the opinion that pathologizing normal variation is not standard practice when examining an asymptomatic patient presenting for STI testing. Dr. R[redacted] added in her testimony that it was inappropriate for Dr. Vu to comment on [redacted]'s clitoris. We accept that it was inappropriate for Dr. Vu to volunteer a comment about the size of [redacted]'s clitoris. [redacted] had expressed no concerns about her genitals on February 12, 2020. She had not asked Dr. Vu for counselling about her genitals. Dr. Vu's conduct fell below the expected standards of skill and judgment in the provision of professional services. He thereby contravened the standard of care and committed unprofessional conduct as defined in section 1(1)(pp)(i) of the HPA. Physicians should not volunteer comments about any part of their patients' bodies, but Dr. Vu ought to have known that characterizing [redacted]'s clitoris as "small" would be demeaning and likely to make her feel insecure.

<u>Allegation 4(d)</u>

228. Allegation 4(d) alleged that Dr. Vu inappropriately touched [redacted]'s clitoris on February 12, 2020 when it was not medically indicated.

229. [redacted] denied that Dr. Vu touched her clitoris during his examination on February 12, 2020. She said he was touching things, but she described it as a "lifting to look". In cross-examination, [redacted] recalled that Dr. Vu had told her he could not visualize the clitoris so he would retract the clitoral hood.

230. Dr. Vu testified that if he cannot see a patient's clitoris, then he will tell the patient that he would need to retract the clitoral hood to check for abnormalities. Dr. R[redacted] commented on Dr. Vu's testimony. She said that it is not standard practice to retract the clitoral hood as most women would find this extremely painful.

231. The Complaints Director submitted that this allegation 4(d) was not proven. The Hearing Tribunal agrees. The evidence suggests that Dr. Vu touched or moved [redacted]s clitoral hood, but not that he touched her clitoris directly.

Allegations 4(e) and (f)

232. Allegation 4(e) alleged that during his examination of [redacted] on February 12, 2020, Dr. Vu inappropriately pressed his fingers on [redacted]'s "G-spot". Allegation 4(f) alleged that he inappropriately provided commentary along with digital pressure inside [redacted]'s vagina to demonstrate the point of contact of a penis if [redacted] were having intercourse using different sexual positions when [redacted] had made no complaint about sexual difficulties and did not request advice on that subject.

233. [redacted] testified that Dr. Vu was describing her physical anatomy while his fingers were inside of her vagina. He told her that she had a shallow vaginal canal and described the locations of her posterior and anterior cervix. She said Dr. Vu then pressed on a spot inside her vagina with his fingers and told her it was her "G-spot". He pressed inside her vagina repeatedly while describing sexual positions that [redacted]s boyfriend should try to make his penis press on that spot. [redacted] said that Dr. Vu was describing what her boyfriend could do to make intercourse "feel better". He was not telling her how to avoid pain during intercourse. [redacted] said she found this embarrassing and uncomfortable. She did not believe she had expressed any concerns to Dr. Vu about pain during intercourse or any other sexual concerns. She said Dr. Vu may have said that he commonly sees women complaining of pain on intercourse. She had not asked for any advice about sexual positions.

234. Dr. Vu had no recollection so he relied on his chart notes and his usual practice. Dr. Vu's chart makes no mention of providing sexual anatomy or sexual position counselling, but he acknowledged that he may have provided it. Dr. Vu's practice at the time for patients that he found to have a low-lying cervix, short vaginal canal, dyspareunia or prolapsed uterus was to provide sexual anatomy and sexual position counselling. Dr. Vu said that he included counselling about sexual positions that he said could prevent dyspareunia. Dr. Vu would narrate as he identified the location of the patient's cervix. He would explain that the cervix being hit during intercourse could cause trauma

or dyspareunia, and he would identify areas to the right, left and anterior to the cervix that could help avoid the cervix being hit. Dr. Vu denied using the term "G-spot". He said the "G-spot" is not a real thing so no one can pinpoint where it would be. He also denied telling [redacted] how to increase her confidence or how to have more pleasurable intercourse. He said he would only have told her how to avoid pain.

235. The Hearing Tribunal accepts [redacted]'s evidence and prefers it over Dr. Vu's. Their evidence was largely consistent, except for the use of the term "G-spot" and whether Dr. Vu was describing how to make intercourse feel better or how to avoid pain. The Tribunal accepts that [redacted] recalled Dr. Vu's words and actions, while Dr. Vu had no actual recollection of the visit. He could only rely on his chart and what he believed he would have said or done according to his usual practice at the time.

236. The Tribunal finds that Dr. Vu did press on a spot inside [redacted]'s vagina with his fingers while describing the spot as [redacted]'s "G-spot". Dr. Vu also pressed his fingers inside [redacted]'s vagina to demonstrate the point of contact of a penis during intercourse while describing sexual positions that her boyfriend could do so that his penis would press on the "G-spot" to make intercourse feel better. The Tribunal finds that [redacted] had not expressed any concerns about sexual difficulties or requested any advice from Dr. Vu on the subject.

237. Dr. R[redacted]'s evidence was that the counseling Dr. Vu described providing was not standard practice for an asymptomatic patient like [redacted] presenting for STI testing. Discussing sexual positioning with a young female patient, especially in the absence of a chaperone, would not meet the expected standard for professionalism and awareness of boundaries. Physicians need to be careful not to sexualize any aspects of their examinations. It was not appropriate for Dr. Vu to identify any part of [redacted]'s vagina as her "G-spot" or to offer her any sexual advice as she had not complained of any pain on intercourse or asked for any sexual advice.

238. The Hearing Tribunal accepted Dr. R[redacted]'s evidence about the expected standard of professionalism and awareness of patient boundaries. Dr. Vu was caring for a young female patient. There was no chaperone or any other third party in the room. Dr. Vu's conduct simulated the positioning of a penis during sexual intercourse. [redacted] understandably felt embarrassed, uncomfortable and wanted it to end. Dr. Vu's conduct failed to meet the expected standard and was inappropriate. It represented a lack of skill or judgment in the provision of professional services. It contravened the standard of care and constituted unprofessional conduct as defined in section 1(1)(pp)(i) of the HPA.

<u>Sexual Nature and Sexual Abuse</u>

239. The Complaints Director submitted that Dr. Vu's conduct was of a "sexual nature" and constituted "sexual abuse" as those terms are defined by the

HPA. Dr. Vu submitted that the Notice of Hearing does not allege that any of his conduct was of a "sexual nature" or that it was "sexual abuse", so it is not open for the Hearing Tribunal to make findings that his conduct was of a "sexual nature" or that it amounted to "sexual abuse".

240. The Notice of Hearing lists four allegations and then states that all of the alleged conduct is contrary to the Standards of Practice, including the Boundary Violations: Sexual standard of practice and the standard of care required in the circumstances and thereby constitutes unprofessional conduct under the HPA.

241. The Standard of Practice entitled Boundary Violations: Sexual was an exhibit. It begins with an introduction that says, "This Standard of Practice addresses Sexual Abuse and Sexual Misconduct." It recites definitions, including the HPA definitions of "sexual abuse", "sexual misconduct" and "sexual nature". The definition of "sexual abuse" states that it includes touching of a sexual nature of a patient's genitals by a regulated member. The definition of "sexual nature" states that it does not include conduct, behaviour or remarks that are appropriate to the service provided. It says that touching of a patient's body by a regulated member does not constitute sexual abuse if the touching is appropriate to the service being provided, but it cautions that written or explicit oral consent should be in place and documented whenever an examination involves touching the patient.

242. The Hearing Tribunal finds that Dr. Vu received adequate notice that he was alleged to have breached the College's Boundary Violations: Sexual standard of practice and that his conduct amounted to either sexual abuse or sexual misconduct.

243. The Hearing Tribunal also finds that Dr. Vu was aware prior to this hearing beginning that the Complaints Director would be asserting that his conduct amounted to sexual abuse. In a written submission dated November 14, 2023, Dr. Vu applied to this Hearing Tribunal to adjourn the December 2023 hearing dates. Dr. Vu asserted that he was the investigated member in an earlier hearing, in which some of the allegations were identical to allegation 4(f) against him in this hearing and arose from the same standard of practice. Dr. Vu's submission stated:

> Dr. Vu's first hearing was the first case in Alberta where clinical conduct with a patient was alleged to be sexual abuse or sexual misconduct. There was no prior case and no legal principles for the specific language utilized in the legislation. It is unknown if the correct legal principles were applied at the first hearing because the appeal has not been heard.[5]

[5] Written argument of Dr. Vu – application to adjourn, dated November 14, 2023 at paras. 5, 28.

244. The Hearing Tribunal next considered whether Dr Vu's conduct described in allegations 4(e) and (f) met the definition of "sexual abuse" in the HPA. The HPA section 1(1)(nn.1) defines "sexual abuse" to mean the threatened, attempted or actual conduct of a regulated member towards a patient that is of a sexual nature and includes any of the following conduct:[6]

(i) sexual intercourse between a regulated member and a patient of that regulated member;
(ii) genital to genital, genital to anal, oral to genital, or oral to anal contact between a regulated member and a patient of that regulated member;
(iii) masturbation of a regulated member by, or in the presence of, a patient of that regulated member;
(iv) masturbation of a regulated member's patient by that regulated member;
(v) encouraging a regulated member's patient to masturbate in the presence of that regulated member;
(vi) touching of a sexual nature of a patient's genitals, anus, breasts or buttocks by a regulated member;

245. In this case subsection (vi) is relevant. Dr. Vu touched [redacted]'s genitals. That touching would meet the definition of "sexual abuse" if the touching was of a "sexual nature". The HPA defines "sexual nature" by exception, by stating that "sexual nature" does not include any conduct, behaviour or remarks that are appropriate to the service provided.[7]

246. The Hearing Tribunal considered whether Dr. Vu's conduct on February 12, 2020 was appropriate for the services he was providing. Dr. Vu submitted that the sexual anatomy and sexual position counselling that he provided was not contrary to the standard of care or unprofessional. He said that it was at most an error of judgment. Dr. R[redacted]'s expert evidence said that this type of counselling would not be considered standard practice in an asymptomatic patient presenting for STI testing.

247. Dr. R[redacted] also testified that discussing sexual positions with a young, female patient, especially in the absence of a chaperone, would not meet the expected standards for professionalism and boundaries. The Hearing Tribunal concluded above that Dr. Vu's conduct failed to meet the expected standard of care and was inappropriate. It was inappropriate to identify any part of [redacted]'s anatomy as her "G-spot" and to press on it with his fingers inside of her vagina. It was inappropriate to give advice about sexual positions by using his fingers to demonstrate the point of contact of a penis with her vagina and cervix during intercourse. This was likely to be demeaning and embarrassing for [redacted]. None of this conduct, behaviour or the remarks by Dr. Vu were appropriate to the service being provided. [redacted] had gone to see Dr. Vu for an STI check. She had not complained of pain during intercourse or

[6] HPA s. 1(1)(nn.1)
[7] HPA s. 1(1)(nn.3)

requested any sexual anatomy or sexual position counselling. She had not asked for any demonstration of how a penis would contact her internal anatomy during intercourse.

248. The Hearing Tribunal next considered how to interpret the term "sexual nature" in the definition of sexual abuse. Both the Complaints Director and Dr. Vu referred to *R. v. Chase*,[8] in which the Supreme Court of Canada discussed the characteristics of a "sexual assault" in section 246.1 of the *Criminal Code*. The Supreme Court held that the intent or purpose of a person committing an assault is only one factor in assessing whether the assault is sexual in nature. The Court described several objective factors to assess whether an accused's conduct was sexual in nature:

a) Was the sexual integrity of the victim violated?

b) Is there a sexual or carnal context to the assault visible to the reasonable observer?

c) What part of the body was touched?

d) What was the nature of the contact?

e) What was the situation in which it occurred?

f) What words or gestures accompanied the act?

249. Dr. Vu referred to several additional factors from similar cases:

g) Whether consent was provided for a treatment or examination?

h) Whether the service was requested by the patient or whether there was clinical indication for the contact?

i) Whether the touch was accidental or incidental to the treatment?

j) How the care is best described, ex. unjustifiable, inappropriate, unnecessarily aggressive, overly diligent, routine, thorough or comprehensive?

k) Whether the physician was under a misguided or clearly mistaken belief on the necessity of care in the patient's best interests?

l) Whether care was taken to respect the privacy and integrity of the patient, such as privacy to undress, appropriate draping/gowns, as minimally intrusive as possible?

m) Whether there were comments unrelated to a medical purpose or sexualized in nature? Discussions can be on sexually related topics without being of a sexualized character or nature. Whether the comments were incorrectly perceived to be of a sexual nature by the patient?

[8] *R. v. Chase*, [1987] S.C.J. No. 57

n) Whether there is any evidence of demonstrable arousal or sexual gratification? Whether there was sexual intent, motivation or purpose?

o) Whether there is a drastic difference in events provided by the patient and physician or denial of events by the physician?

250. The Hearing Tribunal has applied several of these factors and concluded that Dr. Vu's conduct on February 12, 2020 was of a "sexual nature" as defined by the HPA.

251. As above, we have found that [redacted] went to see Dr. Vu for an STI check. Dr. Vu may have believed that the "gold standard" for STI checks involved an external genital exam, a speculum exam with vaginal swabs and a bimanual exam, but he did not explain to [redacted] why the bimanual exam should be part of the STI testing. He did not explain to [redacted] that she could have STI testing without a bimanual exam. He did not have [redacted]'s consent for the bimanual exam or for the sexual anatomy and sexual position counselling that he proceeded to give.

252. There was no evidence that Dr. Vu denied [redacted] privacy to undress and gown, or that she was not appropriately draped for any of the examinations.

253. [redacted] had not expressed any concerns about her genitals, any concerns about pain during intercourse or asked for any advice about sexual positions. Dr. Vu claimed there was a clinical indication for the sexual anatomy and sexual position counselling because he found [redacted] to have a low-lying cervix, but he also said this was a "normal finding" and he didn't record it in [redacted]'s chart. We accepted Dr. R[redacted]'s evidence that there was no clinical indication for the bimanual exam on February 12, 2020 and that Dr. Vu's counselling was inappropriate.

254. Dr. Vu narrated what he was doing while he was doing it. His conduct was not accidental or incidental. It was deliberate. He may have believed he was helping, but his conduct was unjustifiable and inappropriate.

255. Dr. Vu commented unnecessarily and inappropriately on the size of [redacted]'s clitoris. This led into his description of her sexual anatomy, including his inappropriate description of her "G-spot" while he pressed his fingers inside her vagina. He then used his fingers to inappropriately demonstrate the point of contact of a penis with her vagina and cervix during intercourse using different sexual positions. He described sexual positions [redacted]'s boyfriend could try so that his penis would press on her "G-spot". This was not a clinical discussion that a physician might have with a patient who has concerns about their sexual anatomy and function. [redacted] was in an extremely vulnerable position on the examining table with her legs in the stirrups. She was disrobed and draped from the waist down while Dr. Vu's fingers were still inside her vagina. Dr. Vu commented on her clitoris, her "G-spot" and used his fingers to simulate the position of a penis during sexual intercourse for a 19-year-old female patient who had not expressed any such concerns.

256. Dr. Vu's conduct and his comments sexualized his interaction with [redacted], unlike in the *Chung*, *Malette*, *Gudov*, *Leung* and *Noze* cases discussed above. [redacted]'s sexual integrity was violated.

257. On February 12, 2020, Dr. Vu engaged in touching of a sexual nature of his patient [redacted]'s genitals. The Hearing Tribunal finds that Dr. Vu's conduct met the definition of "sexual abuse" in the HPA and contravened the College's Boundaries Violations: Sexual standard of practice. The standard of practice prohibits physicians from engaging in any sexual conduct with a patient. Dr Vu's breach of the standard of practice was egregious unprofessional conduct based in part on sexual abuse.

258. The Hearing Tribunal understands that Dr. Vu is already suspended from practice, but the HPA requires us to order the suspension of Dr. Vu's practice permit until we make orders pursuant to section 82 of the HPA.[9] Dr. Vu's practice permit is therefore suspended pending our determination of orders under section 82.

VIII. ORDERS

259. The Hearing Tribunal will receive submissions on the appropriate orders to be imposed on Dr. Vu. The Complaints Director and Dr. Vu may make submissions in writing or the Tribunal will consider requests from either party for a further oral hearing to determine orders. The complainant, [redacted] must be offered the opportunity to present any written or oral statement describing the impact that Dr. Vu's sexual abuse has had on her.[10]

Signed on behalf of the Hearing Tribunal by the Chair:

Ms. Naz Mellick

Dated this 18th day of October, 2024.

[9] HPA, s. 81.1(1)
[10] HPA, s. 81.1(2)