In the Court of Appeal of Alberta

Citation: Alsaadi v Alberta College of Pharmacy, 2021 ABCA 313

Date: 20210917
Docket: 2003-0102-AC
Registry: Edmonton

Between:

Basel Alsaadi

Appellant

- and -

Alberta College of Pharmacy and the Appeal Panel of Council of the Alberta College of Pharmacy

Respondents

The Court:

The Honourable Justice Jack Watson
The Honourable Justice Frans Slatter
The Honourable Justice Ritu Khullar

Memorandum of Judgment of
The Honourable Justice Watson and The Honourable Justice Slatter

Memorandum of Judgment of The Honourable Justice Khullar
Concurring in the Result

Appeal from the Decision by
The Panel of Council of the Alberta College of Pharmacy

Memorandum of Judgment

The Majority:

[1] The appellant pharmacist appeals a finding of professional misconduct made against him by the Alberta College of Pharmacy and the sanctions that were imposed.

Facts

[2] At the time of the underlying events, the appellant had only recently been admitted as a member of the College of Pharmacy, and was working in various private pharmacies, and also at the Grey Nuns Hospital in Edmonton. In order to discharge his responsibilities, the appellant had been given password protected access to Netcare, the Alberta Health Services electronic database. The appellant was found guilty of professional misconduct, primarily relating to misuse of his access to that database.

[3] In 2014, the Pharmacy Manager at the Grey Nuns Hospital received a complaint about unauthorized access to medical records, identified what appeared to be unauthorized and unjustified Netcare access by the appellant, and reported the matter to the College.

[4] The College commenced an investigation, which included interviewing the appellant. As a result of that investigation, eight allegations of misconduct were made against the appellant and sent to hearing. Six of the eight allegations related to over 700 instances of unauthorized access to records of care of numerous persons over an extended period of time, without the prior knowledge or consent of the patients, and where there was no professional reason for the appellant to access those records. Another allegation was that the appellant failed to create proper records of care when he accessed the database. The appellant admitted guilt or was found guilty of the bulk of those charges, and those findings are not the subject of appeal.

[5] The seventh allegation arose out of the appellant's attempt, after the investigation was started, to have two of the persons whose records were accessed confirm that they were in fact the appellant's patients at the time he accessed their medical records. This misconduct was characterized as a failure to cooperate:

> 7. Displayed conduct not consistent with the ethical requirement of honesty and the duty to comply with and cooperate with an investigator as displayed in your reported conversation with SW and your text messages with BD in which you sought to have both individuals sign letters indicating that you had provided pharmacy services to them.

The appellant was found guilty of the allegation respecting SW (but not BD), and that is also not the subject of appeal.

[6] The appellant's substantive appeal is limited to findings of guilt on five further allegations which were added to count #7 in the middle of the hearing:

> The ethical requirement of honesty and duty to comply with and cooperate with the Investigator and Complaints Director was also breached in the following manner:
>
> a. Failing throughout the investigation and up to November 6, 2017, to advise the Complaints Director and the Investigator of the actions taken by BM, on April 19, 2014, at SDM [Shoppers Drug Mart] #319.
>
> b. Responding to questions from the investigator on July 15, 2015, about the access to Netcare on April 19, 2014, as follows:
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> > I asked Basel about accessing people on April 29, 2014, while working at Shoppers Drug Mart #319 using his Grey Nuns access code. Basel stated that all of these people were work related but may not have been patients at the drugstore. Some may have been patients where he was providing counselling. However, my investigation showed that some of these people accessed stated that Basel did not act as their pharmacist, did not fill prescriptions for them, nor have any reasons to access their health records.
> >
> > I mentioned to Basel that he said in his response to Mr. Krempien that some of these patients may have been access by another staff member using Basel's code. I told Basel that my understanding, after talking to [an] associate at Shoppers Drug Mart #319, was that he was the only pharmacist working at that time. Basel told me he would have been working alone and now realizes that someone else couldn't have accessed Netcare using his code during these shifts.
>
> c. By responding to the Complaints Director in his response letter of April 26, 2015, and stating
>
> > 4) Patients accessed under any of Netcare access sites may have been accessed by individuals other than myself.
> >
> > a. Patients' files could have been accessed using my Netcare login without my knowledge by other individuals who have access to a computer terminal on which I am logged into Netcare.

b. In some instances, it is possible that I had forgotten to log out of Netcare after the completion of my shift at a certain site, and other pharmacy staff may have had access to my Netcare login.

These scenarios would result in a log that shows patients being accessed at a particular site where they are not receiving treatment. This would rightfully be alarming to the Network Administrator of that site. I can assure you, however, that all of the patients I have access under any of the access site listed on my Netcare ID are indeed my patients, and I have cared for them within my scope of practice.

For the patients listed in the March 6th, 2016, letter addressed to me, I have attempted to contact some of the names I recognize, explained the situation, and have obtained letter from these patients. There are a few patients however, that I have not been able to contact:

IA (I do not recognize this name)

AD (A patient of mine, unable to contact, no records available)

JME (A patient at SDM 346)

AMH (A patient at SDM 346)

SAK (I do not recognize this name)

HRR (I do not recognize this name)

MS (A patient at SDM 346)

DL (I do not recognize this name)

HEM (A patient of mine, unable to contact, no records available)

Although I may have a personal relationship with some of the patients listed in the letter (i.e. Family members, friends, acquaintances), I have always attempted to maintain a professional relationship when providing services to these patients.

d. By providing the Complaints Director a letter from BLD stating that he had been her pharmacist since July 13, 2013, and had been providing her with pharmacy services to the full scope of his practice.

> e. The admission made on July 27, 2017, regarding DL on the admission of unprofessional conduct (Exhibit 23), made after the hearings on July 18-20, 2017.

The appellant challenges the decision to amend the notice of the hearing by adding these additional allegations in the middle of the hearing, and further argues that the subject of these allegations does not disclose professional misconduct.

[7] The background to the five new allegations is central to this appeal. The first three added allegations relate to Netcare access to the records of four persons (BM, BLD, HM, and DL) on the evening of April 19, 2014, at Shoppers Drug Mart #319. The appellant was working at that location on that date, and his Netcare account was used to access the records of the four persons. As set out in new allegation 7(c), the appellant had replied to the Complaints Director that he may have left his Netcare account open and unattended that evening, enabling third parties to access the files. As set out in new allegation 7(b), when interviewed about 2.5 months later, the appellant responded that another employee may have accessed this information through his Netcare account. However, it turned out that the appellant was the only pharmacist working at that time, and the appellant acknowledged that "someone else couldn't have accessed Netcare using his code during these shifts".

[8] These three allegations of failing to honestly cooperate with the Investigator arose when the appellant testified during the hearing on November 6, 2017, (the date mentioned in new allegation 7(a)) that the Netcare access in question may have been by a friend of his, BM. The appellant said BM had visited him in the pharmacy that evening. Three of the persons whose files were accessed (BLD, HM, and DL) were known to BM and the fourth was BM's own file. The appellant had a recording of a November 1, 2014, telephone conversation in which he alleged BM acknowledged having accessed the Netcare records. The appellant did not call BM as a witness, and the Hearing Tribunal did not accept the appellant's evidence about the involvement of BM, calling it "implausible" and uncorroborated. The Hearing Tribunal concluded: ". . . it is more probable than not, that Mr. Alsaadi accessed these records, whether in concert with BM or not".

[9] The Complaints Director took the issue to another level, arguing that this constituted a "failure to cooperate". Not only should the appellant's evidence about the involvement of BM be rejected, his advancement of this defence was a separate form of misconduct. The specific argument of the Complaints Director was that the appellant should have advised the investigator of the potential involvement of BM much earlier and should have disclosed the telephone recording prior to the commencement of the hearing. The telephone call was recorded on November 1, 2014, yet the appellant did not mention BM in his letter of April 26, 2015, or his interview on July 16, 2015.

[10] The fourth new allegation was related and concerned access to the file of BLD, who was BM's girlfriend. On April 21, 2015, (shortly before his response letter of April 26, 2015) the appellant gave the Complaints Director a letter from BLD, confirming that the appellant was her pharmacist and that he had her consent to access her file. However, during the hearing, the

appellant testified that it was actually BM who accessed BLD's file. The Complaints Director argued that the appellant misled the investigator by not disclosing the role of BM and implying that the appellant himself had accessed BLD's file but with consent.

[11] The final new allegation 7(e) related to inconsistent positions taken by the appellant with respect to access to the file of DL. On November 6, 2017, the appellant entered in evidence the recording of the telephone call with BM, in which BM was said to acknowledge accessing the Netcare files in issue, including DL's file. The next day, November 7, 2017, the appellant tendered a lengthy written Admission of Unprofessional Conduct (Exhibit 23). This narrative document, which was obviously prepared by the appellant himself, acknowledged the importance of the security of health information and apologized to the complainants. The document then went on to admit a significant number of the charges with respect to a number of persons. It included an admission of count 1 with respect to DL. This included an admission that he accessed DL's file without authority and that no record of care could be found. During cross-examination, it was put to him that his previous evidence about BM was inconsistent with his admission of responsibility. The appellant testified that the admission was in error, but he did accept responsibility if someone else accessed Netcare using his access: "solely based on the logs, I accept responsibility of the inappropriate access of her records". The Hearing Panel held that the appellant's "ethical duty of honesty with his professional regulators during the investigation extends to his conduct during the hearing". The appellant had "flip-flopped during the hearing, giving evidence and making admissions that were irreconcilable", and this constituted unprofessional conduct.

[12] The Hearing Tribunal held a separate hearing with respect to sanctions and costs: see *infra*, paras. 49 ff.

[13] The appellant belatedly retained counsel and appealed to a Panel of Council of the Alberta College of Pharmacy. The appeal was limited to the new particulars added to count #7 and the sanction. The Panel of Council rejected the appellant's argument that particulars should not have been added in the middle of the hearing, finding that this was authorized by s. 79(3) of the *Act*: see *infra*, paras. 24-27. Any other interpretation "would render section 79(3) of the HPA meaningless". Further, there was no unfairness in adding particulars in this case, because the appellant was given a one-month adjournment and knew the case he had to meet.

[14] The Panel of Council rejected the argument that the Hearing Tribunal's findings about the involvement of BM were illogical. The Hearing Tribunal never made a finding on whether BM was or was not involved, and accordingly there were no inconsistent findings. The Panel of Council reviewed the sanctions imposed and found them to be reasonable. This further appeal followed.

Issues and Standards of Review

[15] Since there is a direct right of appeal to this Court from findings of professional misconduct, the ordinary appellate standards of review apply: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para. 49. The application of that standard to

professional disciplinary matters has been previously outlined in decisions like ***Al-Ghamdi v College of Physicians and Surgeons of Alberta***, 2020 ABCA 71 at paras. 9-11 and ***Yee v Chartered Professional Accountants of Alberta***, 2020 ABCA 98 at paras. 29-30.

[16] Sanctions in professional disciplinary matters involve mixed questions of fact and law and engage the professional judgment of the governing bodies, and they are therefore reviewed for reasonableness: ***Zuk v Alberta Dental Ass'n and College***, 2020 ABCA 162 at para. 15. By analogy to the standard of review applied to sanctions generally, sanctions in professional misconduct cases should not be disturbed on appeal unless the sanction is demonstrably unfit or based on an error in principle: ***Jaswal v Newfoundland Medical Board*** (1996), 138 Nfld & PEIR 181 at paras. 33-34, 42 Admin LR (2d) 233; ***Byun v Alberta Dental Ass'n and College***, 2021 ABCA 272 at para. 36, citing ***Groia v Law Society of Upper Canada***, 2018 SCC 27 at para. 43, [2018] 1 SCR 772. Decisions on the costs of hearings are also reviewed for reasonableness: ***Zuk*** at para. 16.

[17] The issues raised in this appeal are:

a) Can the Hearing Tribunal permit the Complaints Director to add new allegations to the Notice of Hearing during the hearing?

b) Did the new complaints added to previous complaint #7 disclose conduct that is appropriately prosecuted as professional misconduct?

c) Where the sanctions imposed on the appellant reasonable?

Adding New Particulars or Complaints

[18] During the middle of the hearing, the Complaints Director identified what were thought to be further acts of professional misconduct and applied to add them to the Notice of Hearing. They were characterized as "further particulars" of existing complaint #7, which alleged a failure to cooperate and to be honest during the investigation.

[19] There is perhaps a fine line between adding particulars to an existing complaint and bring forward an entirely new complaint. In this case, the original complaint #7 was very generically worded: "Displayed conduct not consistent with the ethical requirement of honesty and the duty to comply with and cooperate with an investigator". Particulars were then given of two incidents: "your reported conversation with SW and your text messages with BD in which you sought to have both individuals sign letters indicating that you had provided pharmacy services to them".

[20] While the added allegations may have been further instances of non-cooperation, they were different in character from the particulars originally given. Where further specific allegations are added to a very general existing allegation like "failure to cooperate", but which are of a different character from the other particulars, they are better seen as fresh allegations, not particulars. In

either event, fairness to the professional being disciplined is a key consideration as to whether amendments to the Notice of Hearing should be allowed during the hearing.

[21] As the appellant points out, the system of professional discipline in the *Health Professions Act*, RSA 2000, c. H-7 is highly structured:

(a) a written complaint is received, or is generated internally: s. 54 and 56.

(b) the complaints director investigates the complaint: s. 55(2)(d)

(c) the member is given the name of the investigator and "reasonable particulars of the complaint": s. 61(1)(b).

(d) the investigator submits his or her report to the complaints director: s. 66.

(e) the complaints director may dismiss the complaint, or refer the matter to the hearings director: s. 66(3).

(f) the hearings director schedules the hearing, and must give the member "reasonable particulars of the subject matter of the hearing" at least 30 days before the hearing: s. 77(a).

The issue of particulars is specifically addressed at two stages: when the member is given notice of the complaint and again when he or she is given notice of the hearing. If the investigator intends to expand the scope of the investigation, further particulars should be given to the member before the investigation is completed: ***MacLeod v Alberta College of Social Workers***, 2018 ABCA 13 at para. 13.

[22] Misconduct proceedings can have severe consequences for a professional, and the statutory provisions must be interpreted and applied with that in mind: ***Henderson v College of Physicians and Surgeons of Ontario*** (2003), 65 OR (3d) 146 at paras. 26, 33, 228 DLR (4th) 598. They should not, however, be regarded as "jurisdictional" in nature, as were the provisions in ***Henderson***: see ***Vavilov*** at paras. 67, 109.

[23] While the *Act* does not preclude amending the notice of hearing, it is clear that adding complaints or particulars bypasses certain of its provisions. The opportunity to investigate is truncated. The notice given to the member of the complaint only occurs after the hearing has already been scheduled, not when the complaint is made. Further, the member is deprived of the 30 days' notice of particulars required before the hearing commences. That is not to say that notices of hearing can never be amended, even at the hearing, but regard must be had to the effect it has on the entire process and particularly on fairness to the member subject to discipline. Correcting clerical errors or details in the notice of hearing is one thing, but adding entirely new allegations will seldom be appropriate.

[24] The Hearing Tribunal accepted the argument of the Complaints Director that the addition of particulars was authorized by s. 79(3) of the *Act*:

> 79(1) If the hearing tribunal is advised by counsel acting on behalf of the tribunal at a hearing, that counsel may not lead or present evidence at the hearing on behalf of the college nor be the counsel of the complaints director.
>
> (2) The hearing tribunal may request an expert to assess and prepare a written report on any matter that in the opinion of the hearing tribunal is relevant to the subject-matter of the hearing.
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> (3) The hearing tribunal may hear evidence on any other matter that arises in the course of a hearing, but the hearing tribunal must give the investigated person notice of its intention to hear the evidence and on the request of the investigated person must grant an adjournment before hearing the evidence.
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> (4) If the hearing tribunal is of the opinion that a separate hearing is required with respect to a matter described in subsection (3), the hearing tribunal may
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> (a) refer the matter as a complaint to the complaints director under section 54, or
>
> (b) refer the matter to the hearings director under section 69 for a hearing.
>
> (5) Evidence may be given before the hearing tribunal in any manner that it considers appropriate, and it is not bound by the rules of law respecting evidence applicable to judicial hearings.
>
> (6) Despite section 72(1), if the investigated person does not appear at a hearing and there is proof that the investigated person has been given a notice to attend the hearing tribunal may
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> (a) proceed with the hearing in the absence of the investigated person, and
>
> (b) act or decide on the matter being heard in the absence of the investigated person.

However, read in context, s. 79(3) does not deal with the contents of the notice of hearing or the addition of particulars to it. "Hearing evidence" is not the same thing as "adding new allegations".

[25] One rule of professional discipline is that the professional cannot be found guilty of any misconduct other than that specifically set out within the four corners of the notice of hearing: ***MacLeod*** at paras. 24, 29; ***Visconti v College of Physicians and Surgeons of Alberta***, 2010 ABCA

250 at paras. 11-12, 482 AR 244, 31 Alta LR (5th) 1. Section 79(3) is the recognition of a qualification to that rule, namely that evidence of events other than those forming the basis of the charges can be relevant to the charges that are included within the four corners of the notice of hearing. It is not, however, intended to allow the addition of new allegations in the middle of the hearing.

[26] Section 79(4) does enable the hearing tribunal to direct a fresh hearing of new misconduct that comes to light, and that is the fair and appropriate process to deal with such newly discovered facts. It is significant that this provision allows the hearing tribunal to refer the matter back to the complaints director to be dealt with as a new complaint "under section 54", the threshold of the complaints procedure. That would then trigger the need for an investigation and the provisions that require that particulars be provided. Alternatively, it does allow some truncation of the process by referring the matter to the hearings director under section 69 for a hearing. What it does not appear to contemplate is adding fresh allegations to the existing hearing. If anything, s. 79(4) implies that whole new allegations should not be added to an existing notice of hearing once the hearing has commenced but rather should be dealt with under s. 54 or s. 69.

[27] Section 79 must be read in context. It deals with procedure at the hearing. Section 79(1) deals with conflicts of interest of counsel, and s. 79(6) deals with nonappearance by the professional. The balance of this section all deals with questions of "evidence". For example, s. 79(2) deals with expert evidence. Section 79(3) deals with evidence of other undesirable or unacceptable conduct. That would include what is sometimes called "similar fact evidence", or "uncharged bad character evidence", that is evidence outside the four corners of the allegations that is relevant to an issue: ***MacLeod*** at para. 30. Such evidence is sometimes admissible to prove knowledge or intention of the accused professional, or some other relevant fact, where its probative value exceeds its prejudicial effect. Further, evidence about collateral facts is often introduced in support of aggravation or mitigation of the appropriate sanction.

[28] In resolving this appeal, it is not necessary to decide whether s. 79(3) permits adding new allegations once the hearing has commenced. Even if possible, adding entirely new allegations in the middle of the hearing is generally undesirable and inappropriate and can easily become unfair to the member being charged, particularly when the new allegations are unrelated to the previous particulars. To repeat, this is not to say that a notice of hearing can never be amended or that particulars cannot be added. Further issues arise when the allegations of misconduct relate to the way the member has defended himself to the original allegations, as discussed in the next section of these reasons.

<u>Misconduct Related to the Conduct of the Defence</u>

[29] A member charged with professional misconduct is entitled to a fair opportunity to make full answer and defence to the charges. The way that the defence is conducted will rarely be the proper subject of further disciplinary complaints. The member may deny responsibility but be found guilty at a hearing. The member may initially deny responsibility but later change course

and admit guilt, right up to the time that a decision is made: s. 70. None of that is considered to be further misconduct. The admission of guilt is a mitigating factor in setting a sanction, but the failure to admit guilt is neither aggravating, nor is it usually considered an appropriate subject of a separate allegation of misconduct.

[30] A member may give testimony at the hearing that is not believed. He or she may provide explanations or justifications that are not considered to be consistent with the standards of the profession. The member may rationalize his or her conduct. The consequences are that the member may be found guilty of the allegations of professional misconduct, but the way the defence is conducted is not considered to generate discrete acts of misconduct. Making answer and defence to professional charges is not itself discreditable conduct, even if the defence is unsuccessful.

[31] The substance of count #7 was a breach of the "ethical requirement of honesty and duty to comply with and cooperate with the Investigator and Complaints Director". Sections 66 and 69 of the *Act* set a clear boundary between the investigation and the commencement of the hearing process. It is inconsistent to extend the "requirement of honesty and duty to cooperate during the investigation" to the hearing itself, as suggested by the Hearing Tribunal. It also undermines the appellant's fair opportunity to advance his defence. A person subject to disciplinary proceedings is not required to watch over his or her shoulder in this way while answering the charges. This is particularly true of a self-represented party like the appellant, who presented an inconsistent and disorganized defence.

[32] Obviously, misleading the tribunal, giving false evidence, or failing to be frank are unacceptable. There is the possibility of a charge of "dishonesty" arising out of professional misconduct proceedings or perjury if false evidence is given under oath. Further disciplinary proceedings can follow for a professional who seeks to rebuff discipline proceedings with contrived, corrupt or dishonest defences. While the context of police disciplinary proceedings is different, because of the central role of police officers in upholding the law, one can compare ***Toy v Edmonton Police Service***, 2018 ABCA 37 at paras. 40, 67-69, 66 Alta LR (6th) 205 and ***Quaidoo v Edmonton Police Service***, 2015 ABCA 381 at para. 50, 32 Alta LR (6th) 30.

[33] This is not to say that a professional should inevitably be separately charged because an unsuccessful defence was advanced. As pointed out in ***Quaidoo*** at para. 50, "There is a difference between calling upon the prosecution to make its case, and actively advancing falsehoods" through an active "pattern of dissembling" and then maintaining that "cover story for an extended period of time and right into the witness box". However, a professional whose defence is rejected or evidence is disbelieved is not automatically guilty of a discrete breach of the ethical requirement of honesty or candour merely as a result of the failed defence.

[34] For present purposes, the key point is that for good reasons of fundamental fairness, the proceedings in ***Toy*** and ***Quaidoo*** were pursued separately from the original complaints. The defence of the original charges can be compromised if at the hearing the professional also has to justify the defence being advanced. For example, in this case, during the cross-examination of the

appellant, counsel for the Complaints Director asked him why he had put certain questions to one of the witnesses. This contributed to the further allegations being added to count #7. It was a line of questioning that would not have been possible if the appellant had been represented by counsel, and it was inherently prejudicial. It is essential that professionals charged with unprofessional conduct arising from actions or statements in the course of defending themselves be allowed to defend those charges on the basis of their knowledge and state of mind at the time.

[35] For good reason, it is unprecedented, in the middle of the hearing on the original charges, to add new charges relating to the way the defence is being conducted. First, doing so treats the new misconduct as aggravations of the initial allegations. There is no logic to doing so. They are discrete events, on their face. Second, such an approach conscripts the defending professional into immediately justifying the conduct which, as said, may have a non-inculpatory explanation. The approach turns the hearing process and the burden of proof completely around. Third, such an approach in effect makes the hearing tribunal, which should be acting as an impartial adjudicator, both a prosecutor and an eyewitness.

[36] Furthermore, the way the defence was conducted, including giving testimony that was not believed, does not justify a more severe sanction for the underlying offence: ***College of Physicians and Surgeons of Ontario v Gillen*** (1993), 13 OR (3d) 385 at p. 386 (CA); ***Alberta Union of Provincial Employees v Alberta***, 2019 ABCA 411 at para. 46, 100 Alta LR (6th) 213; ***R. v Sawchyn*** (1981), 30 AR 314 at paras. 30-32, 60 CCC (2d) 200 (CA); ***R. v Ambrose***, 2000 ABCA 264 at paras. 9, 72-74, 84, 85 Alta LR (3d) 82, 271 AR 164; ***Law Society of Alberta v Beaver***, 2021 ABCA 163 at para. 55. In this case, the Hearing Tribunal's perception of the seriousness of the appellant's conduct in mounting his defence directly led to a more severe sanction being imposed on the original charges.

[37] In this case, the appellant clearly engaged in multiple instances of inappropriate access to the Netcare database. When confronted with his misconduct, he made a number of other bad decisions. He attempted to rationalize what he had done and claim consent or authority when he had none. He tried to get some of the patients involved to acknowledge that he had a legitimate basis for accessing their medical records. Rather than admitting his responsibility, he stood on his right to require that the College hold a hearing. He gave conflicting evidence at that hearing, and ended up admitting many of the allegations along the way. However, none of how the defence was conducted should be the subject of separate counts of misconduct, particularly counts to be dealt with at the same hearing.

[38] One profoundly bad mistake the appellant made was to attempt to represent himself at the hearing. Professionals who are charged with misconduct and decide to represent themselves must accept the consequences. However, the tribunal must be sensitive to the position of a self-represented party. Adding particulars in the middle of a hearing is seldom appropriate, and that is particularly so when the professional is self-represented. Further, when the added instances

of misconduct relate to the way the professional has conducted his defence, the prospect of unfairness looms.

[39] The findings of misconduct here were questionable for related reasons.

[40] New allegations 7(a), (b), (c), and (d) all related to the asserted involvement of BM in accessing the Netcare database. The Hearing Tribunal's findings with respect to the involvement of BM were equivocal. Despite the circumstantial evidence, the Hearing Tribunal found the appellant's evidence on this topic to be "implausible". While it was satisfied on a balance of probabilities that the appellant had accessed the files in question, it did not definitively decide "whether [that access was] in concert with BM or not". The Panel of Council rejected the appellant's argument that the Hearing Tribunal had found that BM was not involved:

> 99. . . . However, that is not the finding made. The Hearing Tribunal found that it was more probable than not that Mr. Alsaadi accessed the records and made no finding of whether or not BM was involved.

As the appellant points out, this interpretation cannot logically support the findings of misconduct.

[41] Whether or not the appellant was responsible for professional misconduct consisting of unauthorized access to medical records did not depend on whether BM was involved. If the appellant carelessly left his Netcare account open and unattended, permitting a third party to access the database, that in itself could amount to professional misconduct. The appellant admitted that in Exhibit 23. The same, however, is not true of the allegation respecting the "ethical requirement of honesty" or a "failure to cooperate" with the investigator. The alleged misconduct is said to be the failure to tell the investigator about the involvement of BM. But if BM was not involved, then the appellant was being criticized for failing to tell the investigator about something that never happened.

[42] On the other hand, if BM was involved, then the appellant's failure to reveal his involvement to the investigator amounted to a failure to disclose potentially explanatory circumstances. As the Hearing Tribunal noted, late disclosure by the appellant complicated the hearing, but that was something that could be addressed in costs. Even if it could properly be characterized as a lack of cooperation amounting to professional misconduct, the failure to reveal potentially explanatory circumstances is significantly less serious. While he did not name BM, the appellant's letter of April 26, 2015, did raise the possibility of third-party access using his password. In either event, it was unreasonable for the Hearing Tribunal to make a finding of misconduct on allegations 7(a), (b), (c), and (d) without making a definitive finding of whether BM was in fact involved.

[43] The Hearing Tribunal's treatment of new allegation 7(e) was particularly strict. The general and generic admission that the appellant tendered in the lengthy Exhibit 23 respecting access to DL's files, if read literally, was clearly inconsistent with his testimony about the involvement of

BM. When confronted with the inconsistency, the appellant testified: "I do not know why I would include it in this document actually", and "This should not be included in any admission, because that would be an instance of me admitting something I did not do". The Hearing Tribunal reasoned:

> . . . Yet, later on, Mr. Alsaadi he goes on to say, "I say, I will, however, accept responsibility of inappropriate access of her record solely based on her statement that I have never acted as a pharmacist or provided pharmaceutical services to her and the recorded logs indicating my credentials. So just solely based on the logs, I accept responsibility of the appropriate access of her records . . .".
>
> . . . Mr. Alsaadi had an ethical duty of honesty, and the Hearing Tribunal finds this was breached by Mr. Alsaadi by entering the Admission of Unprofessional Conduct dated July 27, 2017, (Exhibit 23) and admitting to allegation 1 with respect to patient DL when he believed that BM had accessed DL's Netcare records and not him, and when he had already adduced evidence through his testimony and the November 1, 2014, telephone recording (Exhibit 21). Mr. Alsaadi flip-flop during the hearing, giving evidence and making admissions that were irreconcilable. Mr. Alsaadi's ethical duty of honesty with his professional regulator during the investigation extends to his conduct during the hearing. Mr. Alsaadi's irreconcilable evidence and admissions about the events of April 19, 2014, fly in the face of his obligations as a regulated member of the College. The Hearing Tribunal finds this conduct serious and that it constitutes unprofessional conduct. Having found Mr. Alsaadi to have breached his ethical duty of honesty, the Hearing Tribunal declines to consider whether Mr. Alsaadi's conduct was also non-compliant or uncooperative with the Investigator and Complaints Director.

In short, the Hearing Tribunal was not willing to consider the possibility that the self-represented appellant may have erred when drafting the general admission in Exhibit 23.

[44] The appellant's explanation was plausible, but not only was it dismissed out of hand by the Hearing Tribunal, it was treated as a separate form of misconduct. The Hearing Tribunal was entitled to disbelieve the appellant or conclude that his explanations did not meet legal or professional standards. However, turning the rejection of the appellant's defence into further disciplinary charges in the same hearing, based on a "breach of an ethical duty of honesty" arising out of that very same hearing, is inconsistent with Canadian concepts of fairness and due process.

[45] Further, the Hearing Tribunal fairly read the new allegations in count 7(e) as being a failure to be honest with and cooperate with the Complaints Director during the investigation. Therefore, finding misconduct in the appellant's conduct at the hearing was inconsistent with the principle that misconduct must fall within the four corners of the notice of hearing: *supra*, para. 25. In addition, as previously noted (*supra*, para. 31), the finding that the "ethical duty of honesty with his professional regulator during the investigation extends to his conduct during the hearing" is

inconsistent with the structure of the *Act*, which clearly distinguishes between the investigation and the hearing.

[46] The statute draws the distinction between the investigatory stage and the hearing for good reasons, which would be undermined by the Hearing Tribunal's interpretation of s. 79(4). The complaints director and the hearing tribunal "play different, but complementary, roles" in professional discipline: ***Pharmascience Inc v Binet***, 2006 SCC 48 at para. 42, [2006] 2 SCR 513. It is vital to keep those roles separate as the hearing tribunal must be seen to have an unprejudiced and impartial mind. An appearance of close proximity or alliance of purpose between the prosecuting arm of the professional body and the hearing arm may trigger a concern about institutional bias which otherwise does not exist merely because the same overall body houses those distinct functions: compare ***Workum v Alberta Securities Commission***, 2010 ABCA 405 at paras. 36-37, 41 Alta LR (5th) 48, 493 AR 1. Where a hearing panel is persuaded by the prosecutor in the middle of the hearing to add charges arising from how the hearing is going, and then convicts on them, that vital distinction between the two functions is blurred.

[47] In summary, the duty to cooperate with an investigation does not extend to the conduct of the defence at the hearing. The investigation and hearing are distinct processes. Merely providing "inaccurate answers", or providing a response to the allegations that was contradictory and incomplete, would not generally amount to a failure to cooperate or necessarily dishonesty. Accuracy, cooperation, and honesty are different concepts. While an actual intent to impede the investigation would not be necessary, there must be something more than merely providing incomplete or inaccurate answers. Further, it cannot be that every time a professional testifies, but is not believed, he or she has also "failed to cooperate with the investigation". For all these reasons, it was inappropriate to add the additional allegations to count #7, particularly when the amendment was done in the middle of the hearing.

Conclusion on the Appeal Respecting the New Allegations

[48] In summary, even if further particulars of existing allegations can be added to a notice of hearing, that should only be done with caution once the hearing has commenced. In this matter, it was unreasonable for the Hearing Tribunal to allow the Complaints Director to add the new allegations. These new allegations were different in character from the existing ones and arose out of the way that the self-represented appellant presented his defence. An aspect of unfairness arose that could not be cured by the adjournment given. The appeal from the findings of misconduct on the new allegations added to count #7 is allowed.

The Sanctions Appeal

[49] The appellant also appeals the sanctions that were imposed on him by the Hearing Tribunal and subsequently confirmed by the Panel of Council.

[50] At the sanctions hearing, the Complaints Director argued that the conduct of the appellant was very serious and justified stern sanctions. The appellant's misconduct involved a breach of the privacy of a number of patients and was troubling in both its volumes and the types of health care records that were accessed. An aggravating factor was that the appellant's misconduct continued even after the investigation had commenced. The Complaints Director argued that the appellant's failure to cooperate during the investigation, as reflected in the new allegations added to count #7, was particularly serious.

[51] Mitigating circumstances were that the appellant was a relatively new pharmacist, and he had no prior disciplinary record. However, the Complaints Director argued that he did not show insight into the gravity of the allegations or the seriousness of his misconduct.

[52] While the appellant had voluntarily withdrawn from practice, and resigned his position with the Grey Nuns Hospital, the Complaints Director argued that these collateral consequences should not be taken into consideration. Further, it was not relevant that the appellant had pleaded guilty to an offence under the *Health Information Act*, RSA 2000 c. H-5, based on the same facts, resulting in his loss of access to Netcare. For that offence, he was sentenced to house arrest and served three months of house arrest before that sentence was found to be unlawful and replaced with a fine.

[53] The Complaints Director emphasized the need for specific and general deterrence, because he argued the appellant did not understand that his conduct was unacceptable and unprofessional. The sanction should indicate to other members of the profession and the public that the College would not tolerate this type of conduct. Self-regulation by the profession required that members fully cooperate with investigations. The Complaints Director submitted that the appellant's registration should be cancelled, as he had shown himself to be "ungovernable". In the alternative, the Complaints Director referred to the sanctions that had been imposed in other cases.

[54] The appellant argued in reply that he had reviewed the decision of the Hearing Tribunal and that he took those findings extremely seriously, and he understood his professional obligations. He had in fact admitted a number of the allegations against him. He argued that a finding of unprofessional conduct is itself significant, and that a reprimand was a serious sanction. He noted that there was no allegation of lack of skill or harm to a patient. The appellant also referred to the sanctions imposed in other similar cases.

[55] The appellant expressed an intention and desire to return to the profession. He argued that he had already suffered considerable penalties, such as those inherent in the hearing process itself. He argued that no further specific deterrence was necessary but agreed that a short suspension would be appropriate for general deterrence. While the appellant admitted that he had breached the privacy of patients, he noted that he had not acted with malice, republished that information, or made any attempt to misuse it. That distinguished some of the other cases referred to. He proposed a one-month suspension, a reprimand, and other collateral orders.

[56] The Hearing Tribunal rejected the argument that the appellant was ungovernable, although it "seriously considered ordering cancellation", as there were "indicia of ungovernability". Otherwise, it largely accepted the submissions of the Complaints Director as to the seriousness of the charges. The Hearing Tribunal emphasized the importance of privacy in health care records, and that access to those records engaged significant ethical and legal responsibilities. The appellant's offences involved a breach of trust and undermined the ability of the profession to self-regulate. The Hearing Tribunal was particularly concerned that the appellant lacked "understanding of the privilege of access to health information and his duties with respect to access during the findings hearing". An aggravating factor was that the appellant's conduct continued even after the investigation was started.

[57] The Hearing Tribunal recognized as mitigating the appellant's inexperience as a relatively new practitioner, the absence of any prior findings of misconduct, and the collateral consequences of his conviction under the *Health Information Act* and his loss of employment at the Grey Nuns Hospital. The Hearing Tribunal recognized that the appellant alleged he was suffering from depression and anxiety, but noted that there was no evidence this caused the conduct in question.

[58] The Hearing Tribunal found the conduct of the appellant during the investigation to be "particularly troubling". He actively misled the Complaints Director and the investigator. The Hearing Tribunal found the inconsistent admissions of responsibility which were the subject of new allegations 7(d) and (e), to be "conduct of an extremely serious nature" deserving to be "severely sanctioned": see *supra*, paras. 7-11. As the Hearing Tribunal recounted:

> Mr. Alsaadi made a series of bad decisions through the investigation and hearing which compounded and increased the severity of the allegations he faced. As a result of Mr. Alsaadi's conduct during the hearing, the Hearing Tribunal heard and allowed an application to add particulars to allegation 7. These additional particulars were found proven and increased the scope of and severity of Mr. Alsaadi's proven unprofessional conduct.

As previously set out in these reasons, the amendments to add particulars should not have been permitted, and it was improper to regard the way the defence was conducted as aggravating.

[59] The Hearing Tribunal imposed the following sanctions:

(a) A three-year suspension from the date of the sanctions decision. This was said to be a "severe sanction", longer than the four-month suspension imposed in the *Songgadan* case, (complaint #1538, June 7, 2011). It was equivalent to the time the appellant would have to wait before applying for readmission if his registration had been cancelled, and it was necessary to confirm the high public expectations of privacy of personal health information.

(b) A $10,000 fine for the allegations respecting inappropriate access to Netcare. While this was the maximum fine available, and more than the $4,000 fine in the 2011 *Songgadan* case, the importance of privacy in health care information was greater than it was 10 years ago.

(c) A further $10,000 fine for the allegations of failure to cooperate (count #7). This was also the maximum fine, but was "warranted due to the gravity of this type of conduct".

(d) A $2,000 fine for the failure to keep records of care "to indicate the inappropriateness and seriousness of this conduct as well as for precedents in general deterrence".

(e) Completion of the PROBE: Ethics & Boundaries Program-Canada course.

(f) A requirement to give notice to the College when the appellant commences work for five years after the expiry of the suspension.

(g) A requirement to give any new employer a copy of the decisions of the Hearing Committee for five years after the expiry of the suspension.

(h) A prohibition from serving as a licensee of a pharmacy for five years after the expiry of the suspension.

(i) Direct supervision for 500 hours, followed by indirect supervision for a further 500 hours, by a supervisor who would review the appellant's access to Netcare every two months.

The appellant was required to pay the fines within 180 days of the sanctions decision, and he was required to pay over 10 years the costs of the hearing, to a maximum of $120,000.

[60] The Panel of Council dismissed the appellant's appeal from the sanctions, concluding that "the Hearing Tribunal considered the appropriate factors and that its decision is reasonable".

[61] As previously noted, sanctions imposed in professional discipline cases are entitled to deference on appeal. The sanctions imposed should not be disturbed unless they are demonstrably unfit or based on an error of law or principle. In this case, the Hearing Tribunal overemphasized the need for deterrence and denunciation, and imposed an excessively punitive sanction. It erred in concluding that the appellant was on the border of "ungovernability" and in allowing the perceived seriousness of the new allegations added to count #7 to affect the overall sanction. Appellate intervention is accordingly required.

[62] Further, since the findings of guilt on the additional allegations added to count #7 must be set aside, the penalty for those infractions also must be set aside.

Denunciation and Deterrence

[63] The Hearing Tribunal stated that its sanction was intended to be ". . . onerous, severe, and punitive, reflecting the seriousness of the conduct, with the intention to serve notice to the profession and the public that such conduct is not acceptable, and will not be tolerated". While denunciation, deterrence, and punishment are legitimate factors in setting a sanction for professional misconduct, in this case, the severity of the sanction is disproportionate to the appellant's conduct. The sanction, overall, is demonstrably unfit and therefore unreasonable.

[64] The sanctity of private healthcare information is obviously an important consideration. Healthcare professionals who have access to that information have a duty not to misuse it or access it unless medically necessary. However, the appellant's conduct did not involve any risk of harm to any patient, did not demonstrate any lack of pharmaceutical skill, did not involve sexual misconduct or fraud, and did not involve any misuse of drugs. The appellant did not profit or gain from his conduct. While the appellant accessed information without consent or a valid medical reason, he did not act out of malice and made no further use of that information, which distinguishes this case from others. The appellant's misconduct was serious, but it must be assessed objectively.

[65] Denunciation and deterrence are legitimate factors in setting a sanction, but the ultimate sanction must be measured, proportionate, and reasonable. General deterrence does not justify imposing a sanction which is unreasonably harsh for the individual being sanctioned. The imposition of the maximum available fine on two of the counts was in itself significantly punitive. Once those objectives were met, it was unreasonable to impose other sanctions merely because they would also act as a deterrent. Layering on yet further punitive components resulted in an unfit sanction. A professional tribunal is entitled to commence its analysis by determining what it considers to be a fit and just sanction on each count, but the tribunal should also give consideration to the overall impact of the combined suspensions, practice restrictions, and fines to ensure that the global sanction is proportional to the culpability of the professional.

[66] As noted, the specific sanction imposed for the new particulars in counts 7(a), (b), (c), (d), and (e) must be set aside with the conviction for those counts, but the Hearing Tribunal's view of the seriousness of those new allegations also influenced the severity of the global sanction. In its reasons, the Hearing Tribunal blended the seriousness of the misuse of the Netcare system with the appellant's conduct during the investigation and the hearing.

[67] The Hearing Tribunal recognized that collateral consequences of the disciplinary proceedings were relevant to the appropriate sanction but failed to give appropriate weight to them. There are two such collateral consequences here: charges laid against the appellant under the *Health Information Act*, which resulted in house arrest, a fine and the loss of the appellant's Netcare privileges, and his lengthy withdrawal from the profession during these proceedings. These kinds of collateral consequences can mitigate the need for denunciation and general

deterrence: A. Manson, The Law of Sentencing (Toronto: Irwin Law, 2001) at pp. 136-37, cited with approval in ***R. v Pham***, 2013 SCC 15 at para. 12, [2013] 1 SCR 739.

[68] The Complaints Director argued that the appellant's registration should be cancelled, because he was ungovernable. While expressing serious reservations, neither the Hearing Tribunal nor the Panel of Council accepted this submission. A professional can be said to be ungovernable if he or she fails to accept the authority of the professional organization or intimates that he or she is not bound by rules and standards of the profession. Although there are some troubling aspects of the way the appellant rationalized his behaviour and defended the allegations, the record does not show ungovernability. The appellant engaged with the investigator and the Complaints Director. He submitted written responses to them and participated in five interviews. He then participated fully in a lengthy hearing on the charges. He ultimately admitted a number of the charges against himself and accepted responsibility for what he had done. While his defence was unsuccessful, and he showed a serious lack of appreciation of the limits on accessing the Netcare database, this record as a whole does not suggest that he is "ungovernable". The Hearing Tribunal overemphasized any indicia of ungovernability in setting the sanctions.

[69] Another mitigating factor in this case is that the appellant admitted a number of the allegations against him. This shows an acceptance of responsibility and counters the argument that the appellant did not appreciate the nature of his misconduct.

Suspension

[70] Both parties referred to other cases where professionals had improperly accessed health care information. Many of them resulted in reprimands or short suspensions or fines. In no other case was a suspension approaching three years imposed, even in cases where the private health care data was not only accessed but misused. Preventing a professional from practicing for three years involves a significant financial and personal penalty and imposes a significant stigma on the professional.

[71] The three-year suspension imposed in this case is demonstrably unfit. It is excessive in its length, and it fails to observe that the appellant has already been excluded from the profession for many years. He voluntarily withdrew from practice in October 2016 and allowed his registration to lapse in 2017. It is unrealistic to think that this was not a consequence of the charges of misconduct made against him. The hearing concluded in December 2017, generating a decision in August 2018. By the time the sanctions were imposed in May 2019, he had already been excluded from the profession for 2½ years. The appeal to the Panel of Council was another year later. The three-year suspension imposed by the Hearing Tribunal, commencing on the date of the sanctions decision in May 2019, would have the effect of excluding the appellant from the profession until May 2022, which is 5½ years after he voluntarily withdrew from practice. Some of the limits placed on the appellant's practice will not expire until 2027.

[72] The Complaints Director argues that the lengthy suspension was to ensure that the appellant has "a period of suspension for reflection and self-improvement". If that was the purpose, it has been amply served by the passage of time since the events underlying the charges.

[73] While the Hearing Tribunal recognized that collateral consequences were relevant, it failed to give a reasonable amount of weight to them. The suspension was excessive. Having regard to the fines imposed by the Hearing Tribunal, and the collateral consequence of the proceedings, the suspension should have been in the order of six months, and it has already effectively been served by the appellant.

Fines

[74] The Hearing Tribunal imposed the maximum $10,000 fine for the unprofessional conduct related to the inappropriate access to Netcare and a further maximum $10,000 fine for the failure to cooperate with the investigation. The latter fine must be varied, because it was based largely on the conviction for the allegations added to count #7.

[75] In this case, the maximum fine for the offences related to improper access to health records is stern but not demonstrably unfit. While the maximum fine should not routinely be imposed, in this case, there were over 700 incidences of access to the private health information of numerous patients. Rather than setting a separate fine for each of the counts that related to Netcare access, the Hearing Tribunal imposed this one global fine. The appellant's misconduct continued even after the investigation was launched. The imposition of the maximum fine for these related allegations, however, should have been regarded as largely exhausting the need for denunciation and deterrence.

[76] The Hearing Tribunal justified the second maximum fine of $10,000 based on the seriousness of the new allegations added to count #7 during the hearing. The appellant argues that it was disproportionate in and of itself, but since those additional findings of misconduct have been set aside, the fine must be varied. The only remaining allegation in count #7 was soliciting a letter from SW, and this fine should be reduced to $1,000.

[77] The Hearing Tribunal imposed the $2,000 fine for the failure to keep records of care "to indicate the inappropriateness and seriousness of this conduct as well as for precedents and general deterrence", because "pharmacy records of care are a critical component in the provision of health care, not only in meeting medico-legal requirements, but also in the provision of individual patient care and the quality of care". However, while the appellant had admitted a failure to keep some records, the core allegations were that the appellant's access to the Netcare files was unauthorized and unjustified. The appellant had no professional connection to many of the patients whose files he accessed, and his explanation was that he did so "out of curiosity". Since he was not providing any patient care at all, it is difficult to see how his failure to keep records was a "critical component" of their medical care or how it had any relationship to the quality of their care. If he

had kept a record, it would presumably have said “no care given - just looked at the records out of curiosity”. The sanction is disconnected from the offence.

[78] The fine for failure to keep records overemphasized denunciation and deterrence. As the appellant argued, improper record-keeping generally results in a short suspension or a reprimand. In this particular case, no patient was placed at any risk. When considered with the other aspects of the sanctions imposed, the fine is unfit and should be reduced to $100.

Restrictions on Practice

[79] The Hearing Tribunal imposed a number of restrictions on the appellant should he obtain employment as a pharmacist. They are generally justified to promote the rehabilitation of the appellant and in the public interest.

[80] The Hearing Tribunal directed that if the appellant returns to practice, he must practice under direct supervision for 500 hours and indirect supervision for a further 500 hours. The Hearing Tribunal acknowledged that there were no concerns regarding the appellant’s competence. The purpose of this sanction was said to be “specific deterrence and ensuring the protection of the public”. As previously noted, the Hearing Tribunal overemphasized deterrence in setting the sanction. Further, requiring the appellant’s practice to be supervised is legitimately directed to protecting the public, but it is not an appropriate mechanism if it is intended to be merely punitive.

[81] A penalty is unreasonable if it is unrelated to the wrongdoing found to have been committed: ***Adamo v College of Physicians and Surgeons of Ontario*** (2007), 223 OAC 175 at para. 40 (Div Ct). The requirement of direct supervision is disconnected from the appellant’s misconduct. The record discloses that a person who has a Netcare password can access the database from anywhere in the world. Requiring the appellant to be under direct supervision for 500 hours while he is at work will not protect the public if the appellant has failed to learn the importance of privacy in health care records. The protection of the public is to be found in the order that he be indirectly supervised, and that the supervisor review his Netcare log every two months and report any concerns. Accordingly, the requirement of direct supervision for 500 hours should be removed from the sanction. The requirement for indirect supervision for 500 hours is confirmed.

Summary on the Sanctions

[82] In summary, the sanctions imposed were unreasonably punitive and disproportionate to the appellant’s misconduct. They were out of step with other sanctions that have been imposed and overemphasized denunciation and deterrence. In almost all cases, this Court would remit the sanctions back to the Hearing Tribunal for reconsideration, but these proceedings have now been going on for many years. Considering the lapse of time, the efficient use of public and private resources, judicial economy, and the need to address general principles, this case is an exception. Accordingly, in order to provide some finality to the parties, the Court will vary the sanctions: see ***Vavilov*** at para. 142. The period of suspension is reduced to six months, commencing on the date

the sanctions decision was released. The fine for failure to maintain records is reduced to $100. The fine with respect to count #7 is reduced to $1,000. The requirement for direct supervision for 500 hours is deleted. The sanctions imposed are otherwise confirmed.

Costs

[83] The Hearing Tribunal ordered the appellant to pay costs of the hearing, to a maximum of $120,000, representing approximately 60% of the actual costs. The Panel of Council directed that he pay a further $15,000 of costs of the appeal.

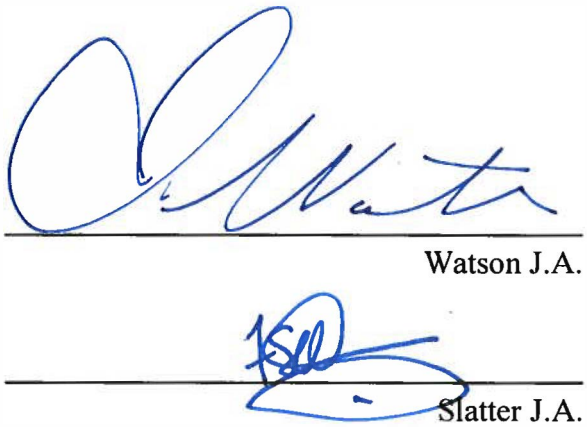
[84] The inappropriate addition of further allegations to previous count #7 undoubtedly complicated the hearing and triggered a one-month adjournment. In the circumstances, the appellant's responsibility for the costs of the hearing should be reduced to $100,000, payable as directed by the Hearing Tribunal. The appellant's appeal to the Panel of Council should have been allowed, and the appellant should not be responsible for any costs of that appeal. The appellant is entitled to a credit for the cost of preparing the appeal record: s. 92(1)(d).

Conclusion

[85] In conclusion, the appeal is allowed. The findings of misconduct relating to the new allegations added to count #7 are set aside. The sanctions imposed on the appellant, and the orders that he pay costs, are varied as set out in these reasons.

Appeal heard on June 8, 2021

Memorandum filed at Edmonton, Alberta
this 17th day of September, 2021



Watson J.A.

Slatter J.A.

Khullar J.A. (Concurring in the Result):

I Introduction

[86] I agree with the reasoning and conclusions of the majority, subject to some brief comments on s 79(3) of the *Health Professions Act*, RSA 2000, c H-7 (*HPA*). In addition, in these reasons I offer some observations about costs arising from professional disciplinary proceedings, and remind tribunals of factors that they should consider when exercising their discretion to award costs.

II s 79(3) of the Health Professions Act

[87] At paragraphs 24 – 28 the majority discuss the interpretation of s 79(3), though they do note it is not necessary to decide its meaning in order to resolve this appeal. I agree that the interpretation of s 79(3) is not determinative of this appeal. Nevertheless, I think it is important to articulate another interpretation of the section. I conclude that s 79(3) permits a hearing tribunal to add an allegation to the charges against a professional mid-hearing, but it is a power to be used sparingly.

[88] It is helpful to keep in mind the structure of the *HPA*. Part 4 of the *HPA* deals with professional conduct and extends from ss 54 – 96.2. There are six Divisions under this section: Complaint Process, Alternative Complaint Resolution, Investigations, Hearings and Decisions, Appeals, and General. Division 4, Hearings and Decisions, is then subdivided into three subtopics. Sections 77-79 fall within Hearings. Section 77 is entitled "College duties in respect of hearing"; s 78 addresses "Access to hearing"; and s 79 is labelled "Tribunal at hearing". While headings are not determinative, they do indicate that s 79 addresses more than evidentiary issues. It addresses a variety of different procedural issues that engage the role of the hearing tribunal. And this is borne out in the language of s 79 which is repeated below for ease of reference:

> 79(1) If the hearing tribunal is advised by counsel acting on behalf of the tribunal at a hearing, that counsel may not lead or present evidence at the hearing on behalf of the college nor be the counsel of the complaints director.
>
> (2) The hearing tribunal may request an expert to assess and prepare a written report on any matter that in the opinion of the hearing tribunal is relevant to the subject-matter of the hearing.
>
> (3) The hearing tribunal may hear evidence on any other matter that arises in the course of a hearing, but the hearing tribunal must give the investigated person notice of its intention to hear the evidence and on the request of the investigated person must grant an adjournment before hearing the evidence.

> (4) If the hearing tribunal is of the opinion that a separate hearing is required with respect to a matter described in subsection (3), the hearing tribunal may
>
> (a) refer the matter as a complaint to the complaints director under section 54, or
>
> (b) refer the matter to the hearings director under section 69 for a hearing.
>
> (5) Evidence may be given before the hearing tribunal in any manner that it considers appropriate, and it is not bound by the rules of law respecting evidence applicable to judicial hearings.
>
> (6) Despite section 72(1), if the investigated person does not appear at a hearing and there is proof that the investigated person has been given a notice to attend the hearing tribunal may
>
> (a) proceed with the hearing in the absence of the investigated person, and
>
> (b) act or decide on the matter being heard in the absence of the investigated person.

[89] Section 79 address different issues regarding the role of a hearing tribunal at a hearing:

- s 79(1) permits a hearing tribunal to retain its own counsel, then puts limits around the role of that counsel;
- s 79(2) permits a hearing tribunal to retain an expert;
- s 79(5) states that a hearing tribunal is not bound by the law of evidence applicable in judicial proceedings; and
- s 79(6) permits a hearing tribunal to proceed in the absence of the professional if there is proof of service on the professional.

[90] Sections 79(3) and (4) need to be read together and address what a hearing tribunal can do when evidence related to a new issue or "any other matter" arises during the course of a hearing. This refers to any matter that is not already before a hearing tribunal, namely matters not included in the allegations and particulars identified in the notice of hearing. When a hearing tribunal hears evidence relating to some other matter which might give rise to an allegation of unprofessional conduct, it has three options if it wants to address this other matter:

- give notice to the professional, and an adjournment if requested, but hear the evidence in relation to the new matter in a new allegation against the professional within the same proceeding (s 79(3));

- refer the matter to the hearings director to be addressed in a new hearing, bypassing the complaints and investigation stage (s 79(4)(b)); or

- refer the matter to the complaints director to be addressed as a new complaint starting the process over from the beginning (s 79(4)(a)).

[91] How a hearing tribunal chooses to proceed will no doubt be determined by the circumstances and content of the new, other, matter giving rise to the new allegation which comes to light during the course of the hearing.

[92] I do agree with majority, however, that a hearing tribunal must be cautious in choosing the first option, namely adding a new allegation within the same hearing, because of the serious risk of unfairness to the professional in proceeding this way: majority reasons at paras 23 and 28. It is a power to be exercised rarely, and ought not to have been exercised in this case.

III Costs

[93] The issue of costs was not explicitly argued on this appeal, but I think it is timely and useful to revisit the principles that apply in awarding costs in proceedings under the *HPA*.

[94] This Court's approach to costs in the disciplinary process of self-regulated professions was set out in *KC v College of Physical Therapists of Alberta,* 1999 ABCA 253 at para 94:

> The fact that the ***Act*** and ***Regulation*** permit the recovery of all hearing and appeal costs does not mean that they must be ordered in every case. Costs are discretionary, with the discretion to be exercised judicially. … Costs awarded on a full indemnity basis should not be the default, nor, in the case of mixed success, should costs be a straight mathematical calculation based on the number of convictions divided by the number of charges. In addition to success or failure, a discipline committee awarding costs must consider such factors as the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts. Costs are not a penalty, and should not be awarded on that basis. When the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny: … If costs awarded routinely are exorbitant they may deny an investigated person a fair chance to dispute allegations of professional misconduct: … Costs are often treated as an afterthought and an inevitability in professional discipline matters under the *Health Professions Act*.

[95] I would like to comment on two aspects of this passage that have developed in the law: the apparent development of a default approach being used by hearing tribunals, and the relevance of the phrase “crushing financial blow”.

A Statutory Framework for Costs

[96] The jurisdiction to award costs derives from s 82(1)(j) of the *HPA*.

[97] Section 82(1) lists a number of remedial *options* that a hearing tribunal may impose after a finding that conduct of a professional constitutes unprofessional conduct. This section is the source of the jurisdiction, for instance, for a hearing tribunal to caution, reprimand, or suspend a professional or cancel their registration; impose conditions on their license; direct counselling or educational requirements; and impose fines. It also includes the requirement that a professional pay “expenses” related to the investigation and/or the hearing.

[98] Specifically, s 82(1)(j) provides a very broad definition of what a hearing tribunal can order be paid by a professional: “all or part of the expenses of, costs of and fees related to the investigation or hearing or both”, and then provides a non-exhaustive list of the types of expenses included:

- witness fees, lay and expert;
- “legal expenses and legal fees” for legal services provided to the college, complaints director and hearing tribunal;
- travel and per diem charges for certain tribunal members, the investigator and complaints director;
- costs of creating a record and costs relating to service of documents; and
- any other expense “directly attributable” to the investigation or hearing or both.

[99] I offer a few observations about this language.

[100] First, like any remedial power under s 82, a hearing tribunal is not required to grant the orders listed. They are neither mandatory nor automatic. This was noted in *KC*. It is not even presumptive that costs should be awarded.

[101] Second, the language used to describe the recoverable expenses is intentionally broad. It does not use the term “costs” which might imply that costs are limited to a civil litigation tariff under the *Alberta Rules of Court*. In British Columbia, the costs of professional discipline decisions are modelled on the costs available in civil litigation: *Roberts v College of Dental Surgeons (British Columbia)*, 1999 BCCA 103; *Shpak v Institute of Chartered Accountants of*

British Columbia, 2003 BCCA 149. The *HPA* uses the broader term of "expenses" and the recoverable costs are not identified by reference to costs recoverable in civil litigation[1].

[102] Third, the expenses can relate to the investigation *or* hearing *or* both.

[103] Fourth, costs can only be awarded one way – against a professional who has been found guilty of unprofessional conduct. There is no jurisdiction for a hearing tribunal to award costs *to* a professional who successfully defends allegations: *Sussman v College of Alberta Psychologists*, 2010 ABCA 356 at para 1.

[104] Fifth, there is no explicit provision for review of the legal costs by a body independent of the regulated profession, save for an appeal of the costs. Whether the legal charges that form part of the expenses ordered are reviewable by a review officer under the Rules of Court has yet to be determined by this Court.

[105] Sixth, a hearing tribunal is part of the College and, when it is awarding costs, it is effectively awarding costs to itself. While this does not create a reasonable apprehension of bias because the members of the hearing tribunal have very remote pecuniary interests in the costs award, *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 891-894, it is an unusual structure.

[106] Seventh, while it is accepted that costs are not to be punitive, the jurisdiction to award them is found in the same section – s 82(1) of the *HPA* – which permits "punishment" after a finding of unprofessional conduct. In addition, if the professional fails to pay "expenses" under s 82(1)(j), the complaints director can suspend the practice permit of the professional: s 82(3)(c). The practice permit can also be cancelled for non-payment: s 43. So even though costs orders are not to be punitive, the legislation has provided a punitive gloss on them.

[107] The power of an appeal council dealing with costs or expenses is similarly worded and raises the same considerations: see s 89(6), *HPA*.

[108] The costs situation under *HPA* is unique. It is not like civil litigation where the successful party is presumptively entitled to costs, whoever that is. It is not like criminal law where, generally speaking, no costs are awarded and the state bears the cost for the investigation and the hearing, even when the state is successful. Rather, the *HPA* creates a scheme where only the professional is liable to pay costs, only the College can recover costs, and the quantum is potentially very high.

B Trends in the Case Law

[109] A review of the cases shows that the approach taken by hearing tribunals is to calculate the total maximum expenses related to a hearing and appeal, and then to order that a percentage of that

[1] However, I use the terms costs and expense interchangeably in these reasons.

amount be paid by the unsuccessful professional. In calculating the total maximum expenses, typically included are the full indemnity legal expenses for two lawyers: the lawyer retained to represent the complaints director in "prosecuting" the allegations and the lawyer retained to advise the hearing tribunal. These legal expenses typically account for the bulk of the total expenses. The percentage of the total amount to be paid will typically be determined by reference to the types of factors set out in *KC*, which include relative success/failure in securing convictions, the conduct of the parties, and the reasonableness of the total expenses incurred.

[110] In this case, the Hearing Tribunal accepted that the costs of this investigation and hearing, which lasted nine days, could reach $240,000 (it was ultimately $237,000) but imposed costs to a maximum of $120,000, which it characterized as less than 60% of the total.

[111] The Panel of Council held that appeal expenses totaled $64,000 (to the point of hearing, not including the expenses related to written submissions or the decision of the Panel), but that it was appropriate to require the appellant to pay only $15,000, just under 25%, as he had not been practicing since 2017 and was the subject of a three-year suspension. As such the reduced amount was appropriate. While the quantum of costs awarded by the Panel of Council in this case was restrained (and not disputed by the appellant), in total the appellant was required to pay $135,000 in costs, which is a significant amount of money.

[112] Other examples of hearing tribunals and appeals panels making a costs award calculated as a percentage of total investigation and hearing expenses include *Zuk v Alberta Dental Association and College,* 2018 ABCA 270 at para 190 (total expenses were $270,000 but reduced to $175,000 by the hearing tribunal which was 64% of the total) and *Al-Ghamdi v College of Physicians and Surgeons of Alberta,* 2020 ABCA 71 at para 46 (total expenses were over $1 million and the professional was ordered to pay 62% of them). Outside the *HPA* context, the same approach has been used in professional regulatory decisions on costs: *Lysons v Alberta Land Surveyors*, 2017 ABCA 7 at para 16 (surveyor ordered to pay 66% of costs of investigation and hearing) and *Erdmann v Complaints Inquiry Committee*, 2016 ABCA 145 at para 15 (chartered accountant ordered to pay 75% of the costs of investigation and hearing). A similar approach has been taken in other jurisdictions such as Ontario, where the default appears to be two-thirds of total costs: Rebecca Durcan & Robin McKechney, *Prosecuting and Defending Professional Regulation Cases,* Criminal Law Series, gen eds Brian H Greenspan & Justice Vincenzo Rondinelli (Toronto, Ont: Emond Montgomery Publications, 2020) at 152-153.

[113] This Court in *KC* stated at para 94 that "costs awarded on a full indemnity basis should not be the default". The approach described above is a kind of 'default approach': calculate the full expenses for the investigation and hearing and then apply a discount warranted in the circumstances. Practically, the end result is not costs on a full indemnity basis, but it is typically a very significant amount.

C Concerns Raised by the Decisions

[114] While the law is clear that costs should not be imposed as a form of punishment, practically speaking the financial hardship arising from the award of costs can be much graver than the punitive aspects of the sanction: James T Casey, *Regulation of Professions in Canada,* Vol 2 (Toronto, Ont: Thomson Reuters, 2019) at, 14-14.1. In professional discipline cases generally, costs awards over $100,000 have become regular: see Casey at 14.14.2.

[115] Further, as noted in *KC* at para 94, "[i]f costs awarded routinely are exorbitant they may deny an investigated person a fair chance to dispute allegations of professional misconduct". This is also reflected by commentary in this area: see Casey at 14-14.1; Bryan Salte, *The Law of Professional Regulation* (LexisNexis Canada Inc, 2015) at s 8.13. A reasonable opportunity to defend oneself can become hollow if the spectre of paying exorbitant costs creates a disincentive to do so. This concern is amplified when the ability to practice one's profession is at stake.

D Justification for Default Approach

[116] The primary argument for requiring a professional to bear all or a significant part of the expenses related to the disciplinary proceedings is that the regulated profession derives its funding from its members, and it is not fair to require the membership to pay for the expenses related to misconduct of one of their own. Rather, the member bearing the burden of the expenses reflects the consequences of being a member of a self-regulating profession and having engaged in unprofessional conduct: Casey at 14-14, 14-14.1

[117] One of the problems with this rationale is that it would lead to every disciplined member having to pay 100% of the costs in every case: *College of Physicians & Surgeons Alberta v Ali*, 2017 ABCA 442, *per* Slatter JA at para 109 (dissenting).

[118] Another problem with this rationale is that it ignores the fact that a regulated profession is funded out of membership dues, and it has to provide *all* of the services required by the legislation out of those dues. The disciplinary process is one of the legislated mandates and the costs related to this are an inevitable consequence of self-regulation: *Ali* at para 110.

[119] More fundamentally, though, this rationale is already embedded in s 82(1)(j) of the *HPA,* which provides that a hearing tribunal *can* order only that a professional pay *all* or part of the costs and expenses of the investigation and hearing. The *HPA* deliberately leaves open the question whether costs should be awarded, and if so, how they should be calculated. As noted in a slightly different context, "the scope of the powers conferred must not be confused with the manner in which they are to be exercised": *HL v Canada*, 2005 SCC 25 at para 88. The rationale for the default approach does not offer any further guidance on *how* a hearing tribunal should exercise its discretion.

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

E Crushing Financial Blow

[121] In *KC*, this Court said at para 94: "[w]hen the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny". This is just one factor to consider in determining whether a hearing tribunal has exercised its discretion reasonably. It is not a standalone test.

[122] In some cases, efforts are made to lessen the financial impact on the professional. For instance, in this case, the Hearing Tribunal directed that the payment of $120,000 could be spread over 10 years. Offering payment plans makes sense for many different reasons. But the existence of a payment plan alone does not avoid review for whether the amount is unreasonably high. It is the total amount that is the issue.

[123] In addition, the fact that a professional may be able to pay the costs award without suffering a "crushing financial blow" does not necessarily mean the amount is reasonable. The ability to pay is a relevant factor, but alone it is not a principled basis on which to award costs. As noted in *KC*, if the magnitude of the award seems unreasonably high, "it deserves careful scrutiny" to ensure that the amount reflects a reasonable exercise of discretion. In other words, if it appears that the amount would result in a crushing financial blow, a hearing tribunal or reviewing body should reflect carefully on whether it is exercising its discretion reasonably.

IV Conclusion

[124] As indicated at the outset of these reasons, I concur with the majority in its reasoning and result on the appeal, subject to my comments on s 79(3).

Appeal heard on June 8, 2021

Memorandum filed at Edmonton, Alberta
this 17th day of September, 2021

Khullar J.A.

Appearances:

S.M. Renouf, Q.C.
for the Appellant

A.N. Chisholm/D.N. Jardine
for the Respondent Alberta College of Pharmacy

J.C. Gagnon (Watching Brief)
for the Respondent Panel of Council of the Alberta College of Pharmacy