

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE HEARING TRIBUNAL
CONCERNING THE CONDUCT OF

HARKAWALJIT SINGH RANDHAWA, a Regulated Member

pursuant to the

HEALTH PROFESSIONS ACT, R.S.A. 2000, c. H-7

**WRITTEN DECISION OF A PANEL OF THE COUNCIL (“COUNCIL”)
OF THE COLLEGE OF PHYSIOTHERAPISTS OF ALBERTA (“COLLEGE”)**

FIELD LLP

Solicitors for the Complaints Director of
the College of Physiotherapists of Alberta

2500, 10175 – 101st Street
Edmonton, AB, T5J 0H3

Attention: Jason Kully / Vita Wensel

GOWLING WLG (CANADA) LLP

Solicitors for Harkawaljit Singh Randhawa

Suite 1600, 421 7th Avenue SW
Calgary, AB, T2P 4K9

Attention: Katie Stys / Anika Winn / Ryan
Holley

DATE OF APPEAL HEARING: November 13, 2024

LOCATION: Virtual appeal hearing

APPEALED DECISIONS: Hearing Tribunal written decision dated May 1, 2024 (the "Decision")

PARTICIPANTS AND ATTENDEES:

Council Members: Melissa Merritt, Regulated Member, Chair
Jon Gabbai, Regulated Member
Lisa Evren, Public Member
Dennis Horrigan, Public Member

NOTE: The Council members hearing the appeal were a panel of the College and are referred to in this decision as the "Council".

Legal Counsel for the Council:

Blair E. Maxston, K.C.

Complaints Director:

Simon Cooke

Legal Counsel for College
Complaints Director:

Jason Kully and Vita Wensel

The Appellant

Harkawaljit Singh Randhawa

Legal Counsel for the Appellant:

Katie Stys, Anika Winn and Ryan Holley

Conduct Coordinator:

Cheryl Blahut

Hearings Director:

Haylee O'Reilly

Court Reporter:

Jessica Young

EXHIBITS:

1. Mr. Randhawa's Notice of Appeal.
2. Notice of Appeal Hearing.
3. Hearing Tribunal's Decision.
4. Record of Hearing.

NOTE: When the Appeal commenced, an updated version of the Record was entered as Exhibit 4 with the consent of both parties.

The Council also received written submissions from Mr. Randhawa and from the Complaints Director.

I. INTRODUCTION

1. Pursuant to section 87(1) of the Health Professions Act, R.S.A. 2000, c. H-7 (the “HPA”) the Appellant, Harkawaljit Singh Randhawa, (“**Mr. Randhawa**”) appealed the November 13, 2024 written findings decision (the “**Decision**”) issued by a hearing tribunal (the “**Hearing Tribunal**”) of the College arising from in person hearings on September 12, 13 and 14, 2023 before the Hearing Tribunal (collectively the “**Hearing**”).
2. The Hearing Tribunal has not issued a penalty decision. Accordingly, Mr. Randhawa’s appeal relates only to the Decision.
3. The College has delegated its duties and powers under section 89 of the HPA to a panel of its council (referred to in this decision simply as the “Council”).

II. BACKGROUND MATTERS: THE STATUTORY FRAMEWORK AND THE FACTS

A. The Statutory Framework

4. The College is the regulatory body for the profession of physiotherapy in Alberta. Pursuant to section 3(1) of the HPA, the overarching mandate of the College is to carry out its regulatory functions in a manner that protects the public. Section 3(1) states:

3(1) A college

- (a) must carry out its activities and govern its regulated members in a manner that protects and serves the public interest,
- (b) must provide direction to and regulate the practice of the regulated profession by its regulated members,
- (c) must establish, maintain and enforce standards for registration and of continuing competence and standards of practice of the regulated profession,
- (d) must establish, maintain and enforce a code of ethics,
- (e) must carry on the activities of the college and perform other duties and functions by the exercise of the powers conferred by this Act, and
- (f) may approve programs of study and education courses for the purposes of registration requirements.

B. Facts: The Hearing Tribunal Decision and Related Matters

5. At the Hearing, the Hearing Tribunal considered the following allegation of unprofessional conduct in relation to events that occurred on April 2, 2022 at Silverberry Physiotherapy Clinic (“Silverberry”) in Edmonton, Alberta, that involved Mr. Randhawa and his patient AK:

1. On or about April 2, 2022, while providing physiotherapy treatment to AK, you did one or more of the following to patient AK:

- (a) Touched her left breast without her consent or a therapeutic purpose;
- (b) Massaged around and on her right breast without her consent or a therapeutic purpose;
- (c) Told her she was beautiful, or words to that effect; and
- (d) Attempted to kiss her.

IT IS FURTHER ALLEGED THAT your conduct constitutes “unprofessional conduct” as defined in s. 1(1)(pp)(i), (ii), and (xii) of the *Health Professions Act*, R.S.A. 2000, c. H-7 (the “HPA”), in particular:

1. Your conduct constitutes “sexual abuse” as defined in s. 1(1)(nn.1) of the HPA and contravenes the College’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct.
2. Further or in the alternative, your conduct constitutes “sexual misconduct” as defined in s. 1(1)(nn.2) of the HPA and contravenes the College’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct.
3. Further or in the alternative, your conduct breaches one or more of the following:
 - (a) Code of Ethical Conduct for Alberta Physiotherapists: Responsibilities to the Client (A1, A4, A5, A12, and A18); Responsibilities to the Public (B1); and Responsibilities to Self and the Profession (C1); and
 - (b) Standards of Practice for Physiotherapists in Alberta: Client-Centered Care; Consent; and Professional Boundaries.

6. The Record of the Hearing indicates that 12 exhibits were entered and that there was an Agreed Statement of Facts and an Agreed Book of Exhibits. The Complaints Director called two witnesses (AK and AK’s sister-in-law, KM). Mr. Randhawa testified and called Mr. Jeffrey Begg (“Mr. Begg”) as an expert witness.

7. After the evidence phase of the Hearing, the Hearing Tribunal requested written submissions about their ability to utilize section 79(2) of the *HPA* to request an expert report. An interim decision dated October 24, 2023 was ultimately issued by the Hearing Tribunal.

8. The Hearing Tribunal issued its decision on May 1, 2024 indicating that allegation 1 was proven and constitutes sexual abuse and sexual misconduct as defined in the HPA and unprofessional conduct pursuant to sections 1 (1)(pp), (ii) and (xii) of the HPA.

C. Mr. Randhawa’s Appeal

9. In letter from his legal counsel dated June 7, 2024, Mr. Randhawa appealed the Decision. Mr. Randhawa’s specific grounds of appeal are described at paragraph 26 of his written submissions.

10. As set out in paragraph 113 of his written submissions, Mr. Randhawa is seeking the following remedies:

- (1) Reversal of the findings of unprofessional conduct, sexual abuse and sexual misconduct; and
- (2) Costs.

III. THE HEALTH PROFESSIONS ACT AND THIS APPEAL

- 11. Pursuant to section 87(1) of the HPA, Mr. Randhawa may appeal the Decision.
- 12. Pursuant to section 89(2) of the HPA and unless leave to introduce new evidence is granted, an appeal to the Council must be based on the record of the Hearing and the decisions of the Hearing Tribunal.
- 13. The Council's powers on an appeal are set out in section 89(4) of the HPA and state:
 - 89(4) The council on an appeal may
 - (a) grant adjournments of the proceedings or reserve the determination of the matters before it for a future meeting of the council but no adjournment may be granted without the consent of the investigated person if that person's practice permit is suspended or cancelled,
 - (b) on hearing an application for leave to introduce new evidence, direct the hearing tribunal that held the hearing to hear that evidence and to reconsider its decision and quash, confirm or vary the decision, and
 - (c) draw inferences of fact and make a determination or finding that, in its opinion, should have been made by the hearing tribunal.
- 14. Section 89(5) also addresses the Council's obligations in terms of issuing its written decision and the orders it can make. Section 89(5) states:

89(5) The council must, within 90 days from the date of the conclusion of the appeal hearing before it, make a decision and, by order, do one or more of the following:

- (a) make any finding that, in its opinion, should have been made by the hearing tribunal,
- (b) quash, confirm or vary any finding or order of the hearing tribunal or substitute or make a finding or order of its own,
- (c) refer the matter back to the hearing tribunal to receive additional evidence for further consideration in accordance with any direction that the council may make, or
- (d) refer the matter to the hearings director to schedule it for rehearing before another hearing tribunal composed of persons who were not members of the hearing tribunal that heard the matter, to rehear the matter.

IV. THE APPEAL HEARING: BACKGROUND MATTERS

- 15. The members of the Council at the November 13, 2024 virtual appeal were Melissa Merritt (Regulated Member and Chair), Jon Gabbai (Regulated Member), Lisa Evren (Public Member)

and Dennis Horrigan (Public Member). The Council was represented by independent legal counsel, Mr. Blair Maxston, K.C.

16. Mr. Randhawa was present at the appeal and was represented by Katie Stys and Anika Winn. Ryan Holley of Ms. Stys and Ms. Winn's firm also attended the Hearing as an observer.

17. Also present were Jason Kully and Vita Wensel (legal counsel for the Complaints Director), Simon Cooke (College Complaints Director), Cheryl Blahut (Conduct Coordinator), Haylee O'Reilly (Hearings Director) and Jessica Young (Court Reporter).

18. With one possible exception, all Council members were unaware of any facts which could constitute a reasonable apprehension of bias or a conflict of interest with respect to the outcome of the appeal or any of the involved individuals.

19. Ms. Merritt disclosed a possible conflict of interest relating to her employer and Mr. Kully representing the employer on an unrelated matter. Mr. Randhawa's lawyers indicated that they had no concerns with respect to Ms. Merritt continuing to participate in this appeal.

20. In summary, there were no objections from either party regarding the composition of the Council hearing the appeal or the Council's jurisdiction to proceed with the appeal.

21. Neither party raised any procedural matters nor made any preliminary applications.

22. All Exhibits were entered with the consent of both parties.

V. THE APPEAL HEARING: ISSUES

23. Bearing in mind Mr. Randhawa's grounds of appeal, the following issue was before the Council at the November 13, 2024 appeal:

- What is the applicable standard of review concerning the grounds of appeal relating to the decision?

Mr. Randhawa also raised the following specific issues on appeal:

- The Hearing Tribunal erred in terms of how they considered evidence.
- The Hearing Tribunal erred in assessment of credibility and reliability relating to AK and Mr. Randhawa.
- The Hearing Tribunal did not afford Mr. Randhawa procedural fairness.

VI. SUBMISSIONS OF THE PARTIES

A. Mr. Randhawa (Ms. Stys and Ms. Winn)

24. Ms. Stys and Ms. Winn's verbal submissions were lengthy but can be summarized as

follows¹:

- Ms. Stys reviewed the principles of natural justice and procedural fairness and submitted that it was an overarching concept that covered all procedures by the Hearing Tribunal. The Council can find that Mr. Randhawa was denied procedural fairness.
- Ms. Stys reviewed section 89 of the HPA and the Council's role and powers. Mr. Randhawa is not attempting to re-argue the Hearing.
- According to the *Yee* decision, the Council must review the Hearing Tribunal decision holistically. Mr. Randhawa's position is that errors were made by the Hearing Tribunal and that there were procedural fairness issues.
- The Council must conduct a robust review of the record and the rationale and outcome of the Decision. Pursuant to *Yee*, the Council is entitled to apply its own expertise and findings about what constitutes unprofessional conduct. A robust review of the record indicates that the allegations were not proven on the balance of probabilities.
- Ms. Stys reviewed the difference between the standard of review for internal appeals and external appeals.
- It is an error of law to make a finding by failing to consider or ignoring material evidence, by mischaracterizing or misapprehending evidence or by making findings of fact based on an unfounded or irrational inference. These errors are reviewed on the standard of correctness.
- Procedural fairness issues are reviewed on the standard of correctness.
- The Hearing Tribunal erred by failing to consider relevant evidence and there was a misapprehension or mischaracterization of evidence. That principally related to two categories: the gown worn during the appointment and the apparent improbabilities of AK's evidence.
- Ms. Stys reviewed the use of the gown at the Hearing and stated that a finding regarding the type of gown AK was wearing must be made. The Hearing Tribunal cannot fill in evidentiary gaps.
- AK's evidence was that she wasn't sure if it was the same gown but the Hearing Tribunal needed an evidentiary foundation.
- The improbabilities of AK's evidence flow from determining what kind of gown she was wearing and relates to the Hearing Tribunal ignoring material evidence regarding who was present in the treatment area and clinic during AK's

¹ Ms. Stys and Ms. Winn made separate submissions to the Council but they are summarized jointly in this part of the Council's appeal decision

appointment and her physical description of those events.

- Ms. Stys reviewed evidence given by AK and Mr. Randhawa in that regard. The Hearing Tribunal can make findings of fact and inferences but cannot ignore relevant evidence especially if the evidence makes a witness's story implausible.
- The Council should find that the Hearing Tribunal should have determined that Mr. Randhawa did not touch AK's left or right breasts as she described.
- Ms. Stys reviewed the principles for credibility and reliability assessment in terms of AK and the Hearing Tribunal ignoring AK's recall difficulties. The Decision does not consider any inconsistencies between AK and Mr. Randhawa's evidence regarding the time spent in Silverberry. The Hearing Tribunal ignored pertinent inconsistencies in the evidence.
- The Hearing Tribunal ignored and misapprehended Mr. Randhawa's evidence to find that he lacked credibility and was unreliable.
- The Hearing Tribunal's assessment of Mr. Randhawa's chart note for April 2 was not correct and the only evidence about reliability of the chart was from Mr. Begg.
- The Hearing Tribunal erred by unfairly characterizing and scrutinizing Mr. Randhawa's evidence in making its credibility and reliability assessment of his testimony.
- The Hearing Tribunal made numerous errors with its findings of fact and inferences made resulting in flawed and incomplete credibility assessments.
- Ms. Winn reviewed procedural fairness and submitted that it involves whether an administrative proceeding is fair. It is not concerned with the outcome.
- Ms. Winn reviewed some of the principles of the procedural fairness and stated that cumulative actions could rise to be a breach of procedural fairness if considered together.
- Contrary to the Complaints Director's submissions at paragraph 39 of their Written Submissions, adequacy of reasons is an issue of procedural fairness.
- Ms. Winn reviewed the purpose of reasons and that a decision is not sustainable if the chain of analysis used by the Hearing Tribunal to reach its outcome was unreasonable. A decision must be justified in relation to the relevant facts and law.
- Mr. Randhawa submitted that the Decision is not transparent, intelligible or justified even though a decision-maker is not required to respond to a line-by-line analysis of every argument.
- Ms. Winn reviewed the Hearing Tribunal's alleged errors in terms of Mr. Randhawa touching AK's breast and the definition of sexual abuse. Ms. Winn also made

submissions about the Hearing Tribunal's findings in relation to the gown and the how Mr. Randhawa put his hand inside AK's gown.

- The Hearing Tribunal failed to properly assess whether the conduct constituted sexual abuse.
- Ms. Winn reviewed the *Oladipo* decision and the Hearing Tribunal's failure to identify *R v. Chase* or other tests relating to how they assessed whether conduct was of a sexual nature.
- In terms of procedural fairness, the Hearing Tribunal reversed the burden of proof on Mr. Randhawa requiring him to disprove the allegations against him. This is an error of law reviewed on the correctness standard; however, it is an error of law that amounts to a breach of procedural fairness.
- Ms. Winn made submissions regarding the Hearing Tribunal's findings about AK's credibility and accepting her evidence as part of reversing the burden of proof.
- The Hearing Tribunal did not independently and objectively consider and assess Mr. Randhawa's evidence and failed to consider it as a whole.
- The Hearing Tribunal reversed the burden of proof, which is an error of law and amounts to a breach of procedural fairness.
- Ms. Winn submitted that the Hearing Tribunal during the proceedings and in their decision demonstrated a reasonable apprehension of bias. Ms. Winn reviewed the accepted test for what constitutes a reasonable apprehension of bias in terms of an informed person.
- The Hearing Tribunal, in considering calling their own expert under section 79(2) of the HPA, was effectively looking to lead evidence that the Complaints Director failed to call.
- The Hearing Tribunal's findings about Mr. Randhawa's chart were not grounded in the evidence. There was no evidence to conclude that treatment must be charted in order and, if it is not, that the chart note is unreliable.
- The Hearing Tribunal only accepted or considered evidence that supported AK's version of events and ignored or excluded evidence that challenged it.
- Each individual issue chips away at the shield of impartiality and objectivity of the Hearing Tribunal and paints a picture that they may have prejudged certain issues and did not assess evidence impartially. This is a breach of procedural fairness that cannot be cured.

B. Complaints Director (Ms. Wensel)

24. Ms. Wensel's verbal submissions were lengthy but can be summarized as follows:

- This appeal relates to a very serious finding of unprofessional conduct after three days of hearing, four witnesses and extensive written submissions. There is one allegation with four sub-parts.
- The only appeal before the Council is the merits decision meaning whether the conduct was factually proven and whether it was found to be unprofessional conduct.
- Ms. Wensel stated she would be making comments about the standard of review and would then address each of the three grounds that had been raised in the appeal.
- There is disagreement about the standard of review but the parties agree about the applicability of Yee.
- This is an appeal on the record and is not an opportunity for a do-over. The Council is not starting again or putting itself in the place of the Hearing Tribunal. You are not listening to what the witnesses had to say and are not seeing the evidence.
- Section 89(5) gives broad powers to the Council.
- This is an internal appeal and Yee is a strong and binding decision in that regard. This appeal is based on the Hearing Tribunal Decision and the record and is fundamentally deferential.
- The Council can't take away the role of the Hearing Tribunal and make it ineffective or obsolete.
- Yee says that the Council should remain focused on the Decision and whether it is based on errors of law, errors of principle or is not reasonably sustainable. The Council should look at the Decision holistically and flexibly without any rigid focus on an abstract standard of review.
- Yee has five guidelines. The first relates to findings of fact and that they should be afforded significant deference. The Hearing Tribunal heard witnesses and significant deference should be given.
- It is almost entirely factual findings and assessment of credibility that is before the Council. The Council will have to grapple with both factual findings and assessment of credibility but this is not a re-examination or a reweighing. Its not a re-do on credibility assessment.

- For Yee's second ground, the Court said that inferences drawn from fact should be respected unless there is an articulable reason for disagreeing and not just a minor reason for disagreeing.
- In the Decision, the Hearing Tribunal makes findings of facts and connects those facts to their inferences.
- There is no articulable reason to disagree with the inferences made by the Hearing Tribunal. Just disagreeing with an inference is not enough.
- In terms of Yee's next ground, the Complaints Director completely agrees that an error of law should be assessed on correctness. The Complaints Director disagrees that there have been errors of law or that what is being described as an error of law is an actual error of law.
- Council must review the decision as a whole, mindful of a flexible holistic analysis and reviewing the decision for reasonableness. The decision must protect the public and the reputation of the profession.
- For the next ground in Yee, you can intervene if you decide that something is procedurally fair or if there was a reasonable apprehension of bias. There is not a deferential exercise in that case but you assess whether there was fairness and whether the test for reasonable apprehension of bias is met.
- There is no sliding scale of standard of review. That is fixed.
- Procedural fairness and the standard of review should not be conflated. The standard of review does not get different or change just because you are looking at sexual abuse.
- Ms. Wensel reviewed the *Vavilov* decision.
- There are three grounds of appeal: the consideration of evidence, reliability and credibility and procedural fairness.
- In terms of evidence, the two main issues are the consideration of AK's treatment gown and a commonsense analysis of evidence. The Hearing Tribunal can make findings of fact and inferences.
- A demonstrative aide (a manikin) was used during the hearing but AK's testimony is on the record. There is a reasonable thread between what Ms. AK testified about and the findings of fact that were made including that she was found credible by the Hearing Tribunal. AK was questioned about the size of the gown extensively and there was no error of law.
- The Hearing Tribunal's findings about AK's gown should not be interfered with.

- Inferences made by the Hearing Tribunal should be respected per *Yee*. Pursuant to the *Vuradin* decision, there is no mandatory obligation to consider implausibilities or improbabilities. It is an option for a decision-maker.
- In terms of the people in the treatment area, the Hearing Tribunal ultimately placed little weight on the fact that there were other individuals in the clinic at the time and this finding of fact is entitled to significant deference.
- The Hearing Tribunal references numerous times throughout their decision that there are only two people in the treatment area.
- Turning to the physical implausibility argument, AK consistently testified that Mr. Randhawa's fingers lifted and then touched her breast and nipple and this was significantly assessed and scrutinized by the Hearing Tribunal. This is not an opportunity to rehash facts since the Hearing Tribunal's inferences were reasonable.
- Mr. Randhawa's assertion about some things being physically implausible does not mean the Hearing Tribunal made an error.
- The Hearing Tribunal received a full demonstration, with clarity, during AK's testimony of what she had experienced and the Hearing Tribunal scrutinized and weighed it and ultimately made findings on what they had seen. They found AK was credible and reliable. There are no gaps in their analysis.
- In terms of the next ground of appeal, credibility, the Hearing Tribunal grappled with credibility and reliability in depth. Disagreeing with credibility assessments is not enough as there needs to be, per *Yee*, errors.
- The Hearing Tribunal is uniquely positioned to assess credibility which is not an easy task. The Hearing Tribunal cannot be just a stepping stone to what the Council is doing today.
- In terms of AK's reliability, the Hearing Tribunal acknowledged her lapses in memory and said that did not undermine her credibility. She acknowledged things that she did not remember and this is set out in the decision.
- There are expected dramatic differences between AK's and Mr. Randhawa's versions of events.
- The Hearing Tribunal assessed both witnesses and found AK to be clear, consistent and credible and that led to their factual findings.
- The Hearing Tribunal assessed Mr. Randhawa's credibility, based in part on gaps in his memory and his charting.

- The Hearing Tribunal's findings about credibility are afforded significant deference. It is not enough to say that they could have assessed something differently. It is not a failure to mention some aspects of the evidence for either witness.
- The Supreme Court has set out that the order of witness evidence provided in a decision is not an error of law. The Tribunal reviewed all the evidence they had heard, made a conclusion statement that findings had been factually proven and that they were sexual abuse and sexual misconduct and they then continued to review every witness and piece of evidence they considered methodically and logically.
- The order of witnesses is not important.
- As stated in *Vavilov*, this is not a line-by-line hunt for error. Disagreement on credibility and reliability is not enough. There was no uneven scrutiny offered in this case.
- The issue of reversing the burden of proof and the issue of reasonable apprehension of bias are not issues of procedural fairness in thinking about the standard of review.
- There is no double analysis to say after applying a standard of review then we are going to conduct a second assessment to determine the overarching issue of procedural fairness.
- The Decision is appropriate, reasonable and fair and upholds the protection of the public. There are not insufficient reasons or untransparent reasons that would cause grounds for interference.
- The Hearing Tribunal's analysis of the *R. v. Chase* case regarding sexual abuse was sufficient.
- There was no error of law regarding the reversal of the burden of proof. The Hearing Tribunal looked at facts and different testimony independently. A bare assertion of a reversal of the burden of proof is not supported at law.
- In terms of bias, the Complaints Director submits there is no repeated pattern or overarching errors that impacted procedural fairness and bias. This is very different from *Yee* where there were comments challenging Mr. Yee directly. Bias cannot be a bare assertion.
- The mere fact that a question was asked but never answered and was then reconciled through agreeing to Mr. Randhawa's counsel's suggestion to reword does not give rise to the threshold for reasonable bias.
- In terms of the expert report, the mere fact that the report was considered with submissions does not give rise to a reasonable apprehension of bias.

- Yee is clear on how to assess findings of fact and inferences of fact. Although there may be disagreement with the decision that is not a reason for interference.

C. Mr. Randhawa’s Reply Submissions (Ms. Stys)

25. Mr. Randhawa’s reply submissions can be summarized as follows:

- The Council must determine which standard of review applies for errors of law. The standard isn’t reasonableness. Ignoring evidence is an error of law and the test isn’t was it reasonable to ignore relevant evidence.
- You may have a sliding scale regarding procedural fairness because of the serious consequences for Mr. Randhawa.
- This is kind of a do-over when you look at the powers that the Council has. Section 89(5) allows the Council to make a decision that the Hearing Tribunal should have if there is an articulable disagreement or errors of law.
- Mr. Randhawa is not seeking a double analysis. Pursuant to Yee, the sixth factor for the Council to consider is procedural unfairness. This overlaps with other areas where errors were made.
- The test of the reasonable person for bias is a holistic test where a reasonable person looks at the totality of the matter realistically and practically.

VII. STANDARD OF REVIEW

A. General Comments

26. The Council recognized that this is an “internal appeal” pursuant to the council appeal provisions of the HPA.

27. Despite the broad powers which are granted to the Council under section 89(5) of the HPA, the Council must consider the Decision and exercise the powers in section 89(5) after first applying the applicable standard of review for internal appeals. This includes determining the amount of deference, if any, the Council must give to the Decision. The Council also concluded that the burden is on the party challenging the Decision, Mr. Randhawa, to establish **that** the applicable standard of review was not met or that any other grounds of appeal are sustainable.

28. The Council determined that the Alberta Court of Appeal decision *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 (“Yee”) applies to this internal appeal and, where applicable, deference must be given to the Decision. Yee establishes the following guidelines that apply to an internal appeal such as this one:

- Findings of fact, particularly those based on the credibility of witnesses, should be afforded significant deference.

- Inferences drawn from the facts should also be respected, unless the appeal tribunal is satisfied there is an articulable reason for disagreeing.
- For decisions on questions of law arising from the discipline tribunal's home statute, the appeal tribunal is equally well-positioned to make the necessary findings. The appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation and to ensure that proper professional standards are maintained.
- For matters engaging the expertise of the profession, such as setting standards of conduct, the appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct. It should not disregard the views of the discipline tribunal or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so.
- Appeal tribunals are also well-positioned to review the entire decision of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession.
- The appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

29. The Council agrees with the Complaints Director that, with the exception of procedural fairness and bias issues raised by him, Mr. Randhawa's appeal primarily relates to issues of fact, credibility or mixed fact and law. Consistent with *Yee*, the Hearing Tribunal's findings in that regard must be given significant deference. The Council rejects Mr. Randhawa's position that Council can intervene and almost carry out a "do-over" and substitute its own findings.

30. The Council applied the principles in *Yee* that when a hearing tribunal makes findings of fact (particularly ones based on an assessment of the credibility of witnesses) those findings should be given significant deference. Findings of fact, inferences made based on those facts and assessment of witness credibility are not areas where an appeal body such as the Council is equally well positioned to review those matters.

31. As *Yee* is the lens through which to consider this appeal, where the Council perceives unreasonableness, error of principle, potential injustice or another sound basis for intervening, it is entitled to do so (see *Yee* at paragraph 35).

32. The Council also adopted the following principles from *Yee*:

- The Council is well positioned to review the entire Decision and conclusions of the Hearing Tribunal for reasonableness to ensure that, considered overall, those decisions properly protect the public and the reputation of the profession.
- The Council must focus on whether the contents of the Decision are based on errors of law or principle or cannot be reasonably sustained but should also "remain flexible and review the decision under appeal holistically, without a rigid focus on

any abstract standard of review”.

33. The Council accepted the Complaints Director’s position that it should review the Hearing Tribunal decisions for errors of law, errors of principle or for decisions that are not reasonably sustainable. The Council should also assess the Decision for reasonableness and to ensure that the decisions properly protect the public and the reputation of the profession (paragraph 24 of the Complaints Director’s Written Submissions).

B. What is Reasonableness?

34. Based on caselaw provided to it in applying the reasonableness standard of review, the Council must consider whether the Decision is reasonable, justifiable, transparent and intelligible and falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law. If the Decision falls within those criteria, then the Council should be reluctant to interfere with it.

35. Consistent with *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 the Decision will be unreasonable if (i) the Hearing Tribunal fundamentally misapprehended or failed to account for evidence before it, (ii) where reasons contain a fundamental gap or reveal an unreasonable chain of analysis, (iii) where reasons do not “add up”, (iv) where there is no line of analysis that could reasonably lead from the evidence to the conclusion reached and (v) where the Decision does not respect the statutory scheme.

C. The First Ground of Appeal: The Applicable Standard of Review Regarding the Hearing Tribunal’s Consideration of Evidence

36. The Council concluded that, as per *Yee*, the Hearing Tribunal’s review of the evidence and the findings of fact should be given significant deference. This involves considering whether the Decision is reasonably sustainable and assessing it for reasonableness.

37. Those same principles apply to inferences made by the Hearing Tribunal based on their findings of fact. As well, the Council can only interfere in findings of fact and inferences made from them if there is an articulable reason supporting that.

38. The Hearing Tribunal was in the best position to assess evidence and make findings of fact and inferences arising from the facts.

39. The Council agreed with the Complaints Director that the errors of law alleged by Mr. Randhawa in terms of the first ground of appeal are improperly characterized by Mr. Randhawa as errors in law. More specifically, the Council agreed that any alleged misapprehensions of the evidence are not errors of law and instead relate to assessing the Hearing Tribunal’s findings of fact and inferences based on those findings.

D. The Second Ground of Appeal: Assessment of Credibility and Reliability of Witnesses

40. The Council agreed with paragraph 23 of the Complaints Director's submissions regarding Yee "that findings of fact, particularly those based on the credibility of witnesses, should be afforded significant deference". The Council concluded that any inferences drawn from findings of fact made by the Hearing Tribunal should also be shown significant deference unless there is an articulable reason for disagreeing.

E. The Third Ground of Appeal: Procedural Fairness

41. The Council disagreed with Mr. Randhawa's submission that procedural fairness is reviewed on the correctness standard of review. The Council found that when considering whether Mr. Randhawa was afforded procedural fairness the Council is engaged in a review of the factual circumstances and must make a determination about whether the required procedural fairness was or was not provided to Mr. Randhawa. The Council agreed with Mr. Randhawa's submissions that procedural fairness is concerned with process and not outcomes. This analysis involves the Council considering whether the principles of natural justice and procedural fairness were met in terms of Mr. Randhawa's involvement in the Hearing.

42. The Council agreed with the Complaints Director that procedural fairness would not trigger the application of either the reasonableness or the correctness standard of review. Consistent with Yee, the Council has no obligation to defer to the Hearing Tribunal. Allegations regarding procedural unfairness should be assessed based on whether the appropriate level of fairness required by the statute or the common law has been met. In brief, the Council must determine whether the procedural fairness requirements of the HPA and the common law have been satisfied having regard to the facts of this case.

43. In terms of the reasonable apprehension of bias appeal ground, this also involves consideration of whether procedural fairness requirements have been met.

44. The Council agreed with Mr. Randhawa at paragraph 109 of his written submissions that the test for reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." This is reflected at paragraph 8 in the Yee decision.

VIII. ANALYSIS AND REASONS: GENERALLY

45. For the reasons that follow, the Council concluded that, where applicable, the Decision met the standard of reasonableness and met the criteria in Yee and should be upheld in its entirety.

46. After reviewing the Decision holistically and in its totality, the Council found that any inconsistencies did not affect the overall validity of the Hearing Tribunal's analysis and conclusions. Any alleged inconsistencies or flaws were not, in the opinion of the Council, sufficiently central or significant to render the decision unreasonable. The Council's review of the Decision is not a treasure hunt. The Hearing Tribunal is not held to a standard of perfection in terms of their Decision.

47. The Council concluded that the Decision from an overall perspective was detailed, understandable and sustainable.

48. The Council concluded that many aspects of Mr. Randhawa's appeal essentially ask the Council to reweigh and reassess evidence, the Hearing Tribunal's findings of fact and inferences and the Hearing Tribunal's determinations regarding witness credibility.

49. Consistent with caselaw, the Council concluded that this appeal was not an opportunity to re-argue the findings of fact, inferences based on those facts and findings of witness credibility and reliability made by the Hearing Tribunal. The Council did not accept many of Mr. Randhawa's grounds of appeal as they would have involved conducting the Hearing again and rendering the Hearing Tribunal's adjudication and findings obsolete. That is not appropriate and is not the statutory or common-law role given to the Council in this appeal. The Council cannot ignore the role of the Hearing Tribunal or render its actions meaningless.

50. The Council concluded that it is not permitted to conduct an assessment of an alleged error using a standard of review analysis and then conduct a second "reassessment" under the guise of procedural fairness. That would distort the process.

51. The Council was unanimous in concluding that the Decision was reasonably sustainable and properly protects the public and preserves the integrity of the physiotherapy profession in the eyes of the public.

52. After carefully reviewing the Record, the Council concluded that the level of due process and fairness required by the *HPA* and caselaw was given to Mr. Randhawa. There was no procedural unfairness.

IX. APPEAL GROUND 1: THE HEARING TRIBUNAL FAILED TO CONSIDER RELEVANT EVIDENCE AND MISAPPREHENDED RELEVANT EVIDENCE

53. Before commenting on the specific grounds of appeal advanced by Mr. Randhawa, based on an overall review of the Decision, the Council found that it was detailed, intelligible and understandable. The Decision is 34 pages long and contains a coherent and rational chain of analysis and contains findings of fact and inferences that were justified in terms of the facts and the law.

54. For the reasons that follow, the Council concluded that the Hearing Tribunal did not misapprehend evidence or fail to take into account relevant evidence.

55. The Decision is also consistent with the College's statutorily prescribed public protection duty and maintains the integrity of the profession in the eyes of the public by expressly and impliedly conveying that Mr. Randhawa's unprofessional conduct is a marked departure from the professional and ethical obligations of physiotherapists.

56. Based on its careful review of the Decision and the Record, the Council was satisfied that the Hearing Tribunal did not misapprehend evidence and did not fail to account for and address

the evidence before it. There were no “fundamental gaps” in the Decision and it contained a more than reasonable chain of analysis. In short, the reasons given by the Hearing Tribunal do “add up”. There is a clear line of analysis that leads from the Hearing Tribunal’s assessment of the evidence (including the testimony of AK and Mr. Randhawa and the Hearing Tribunal’s credibility and reliability assessments) that lead to the conclusions reached by the Hearing Tribunal.

57. The Council was satisfied that the Hearing Tribunal properly and thoroughly considered the evidence before it and also concluded that their findings of fact, inferences from those findings and assessments of credibility of witnesses should be given significant deference and should not be interfered with unless there is a clearly articulable reason for doing so. The Council concluded that there is no articulable reason that would support disturbing the Decision and substituting different findings, inferences or conclusions.

58. Mr. Randhawa’s disagreement with findings of fact and inferences made by the Hearing Tribunal do not constitute errors of law.

A. The Hearing Tribunal Reasonably Considered and Assessed the Evidence Before it Concerning the Gown and Related Matters

59. The Council is satisfied that the Hearing Tribunal’s factual findings about the size of gown worn by AK (including its analysis of the “sample” gown from Silverberry) were fair and reasonable. The Hearing Tribunal was able to assess AK’s description of how Mr. Randhawa went inside the gown, her testimony regarding how the gown was opened and her testimony about how it was fastened. The Hearing Tribunal was entitled to rely on AK’s testimony and had a reasonable basis to make a finding of fact that the gown she wore at Silverberry was loose-fitting. Their finding should be shown significant deference.

60. The Council agrees with the Complaints Director that the Hearing Tribunal did not need to find that the “sample” gown was exactly the same as the one worn by AK. As reflected in the submissions made to the Council, a review of the Decision is not a treasure hunt. The Decision does not have to meet a standard of perfection and it does not have to respond to every issue or every piece of evidence.

61. Contrary to Mr. Randhawa’s submissions, the Decision indicates that the Tribunal did consider the relevant evidence in terms of the “sample” gown and the model wearing the gown.

62. Importantly, the Hearing Tribunal had the benefit of watching AK demonstrate what she experienced and that cannot be characterized as improper speculation. The Hearing Tribunal found AK’s testimony to be credible and believable and it was open for them to place significant weight on it, which they did. The Council affords deference to the Hearing Tribunal on the matters of how the gown fit, the size of the gown, how it was tied and the inferences that were drawn from testimony. There is no articulable reason for disagreeing with their analysis.

63. The Council concluded that generally and with respect to the evidence regarding the gown in particular, the Decision discloses a proper analysis and that the Hearing Tribunal appropriately “grappled” with the evidence and reached conclusions that were supportable based on the information before them.

B. The Hearing Tribunal’s Findings Regarding the Treatment Area and Other Matters

64. After a careful review of the Decision and the Record, the Council concluded that there was a reasonable analysis and evidentiary foundation for the Hearing Tribunal’s conclusions and findings of fact regarding the treatment area. The Hearing Tribunal was entitled to make findings of fact and draw inferences based on the evidence before it and was not required to consider inherent probabilities or improbabilities.

65. The Decision reflects that the Hearing Tribunal was aware that other individuals were at Silverberry on April 2, 2022 and that their crucial findings of fact were confined to the treatment area at Silverberry where Mr. Randhawa and AK were present during the time that treatment was provided. The Hearing Tribunal found that the evidence of other people being in the clinic at the time of AK’s treatment should be given less weight as both parties indicate that they were not visible to other people.

66. The Council agreed with the Complaints Director that the Hearing Tribunal made findings of fact regarding the size of AK’s gown and how Mr. Randhawa placed his hands, including touching AK’s breast and nipple. It was open to the Tribunal to accept AK’s testimony and prefer it to that of Mr. Randhawa’s in terms of the gown, the opening on the gown, how Mr. Randhawa put his hands inside the gown and the nature of the touching that did occur.

67. The Council found that the Hearing Tribunal did consider and analyze the evidence before it about how Mr. Randhawa touched AK’s ribs and breasts. There were factual findings by the Hearing Tribunal that Mr. Randhawa’s fingers made contact with her left breast including her nipple and over her gown. Significantly, the Hearing Tribunal made a determination that AK’s evidence relating to Mr. Randhawa touching her breasts was “consistent on the main points” (Decision at paragraph 138). The Hearing Tribunal considered the question of the physical implausibility of AK’s testimony and, as it had the discretion to do, ultimately made findings which were adverse to Mr. Randhawa.

68. The Hearing Tribunal did consider AK’s testimony in terms of consistency and reliability and the factual findings they made regarding the inappropriate touching should be given significant deference. Again, it was open for the Hearing Tribunal to prefer AK’s evidence over Mr. Randhawa’s evidence.

69. There was no inherent implausibility in the Decision, and the Hearing Tribunal’s findings about the treatment area, the gown worn by AK (including how it fit on AK) and how Mr. Randhawa could have touched AK’s breasts were supported by the evidence before the Hearing Tribunal.

70. The Council agreed with the Complaints Director at paragraph 50 of her written submissions that the plausibility of AK's testimony was addressed by the Hearing Tribunal including scrutinizing the evidence, assessing that English was not AK's first language, determining the size of the gown being loose fitting and concluding that AK was generally consistent on the main points of how she was touched.

71. Consistent with *Yee*, there is no articulable reason for the Council to overturn or vary the Hearing Tribunal's findings of fact and inferences in relation to the critical overall evidence that was before it.

X. APPEAL GROUND 2: THE HEARING TRIBUNAL DID NOT ERR IN TERMS OF ITS CREDIBILITY AND RELIABILITY ASSESSMENT OF AK AND MR. RANDHAWA

A. Generally

72. The Council agrees with Mr. Randhawa that credibility is a question of fact that fundamentally involves assessing honesty and reliability. The Decision indicates that the Hearing Tribunal found AK's evidence to be both honest and reliable.

73. Bearing in mind *Yee*, credibility assessments should be given significant deference by the Council. This appeal is not a forum to re-argue credibility. The Council found that its role does not include reassessing the Hearing Tribunal's analysis of credibility and reliability. That is inconsistent with the principles of deference set out in *Yee* in this context and to do otherwise would undermine the Hearing Tribunal's role and function.

74. Over the course of the three-day hearing, the Hearing Tribunal had the best vantage point to hear witness testimony and to make determinations regarding credibility and reliability. In a hearing such as this one, there were necessarily going to be minor and significant inconsistencies between the evidence of AK and Mr. Randhawa. The Hearing Tribunal was in the best position to hear and see the testimony of all witnesses and to make findings.

75. Accepting AK's overall version of events over the version put forward by Mr. Randhawa in his testimony is not in and of itself a valid appeal ground. Mr. Randhawa argues that "AK struggled to recall many details of the April 2 appointment", however, the Hearing Tribunal was alert to that issue and acknowledged that AK was not able to remember the entirety of her appointment or certain details of that appointment. That was reasonable for a number of reasons including the fact that AK had over 50 treatment sessions which would affect her ability to recall the details of the April 2, 2022 appointment. For those same reasons, it was reasonable for the Hearing Tribunal to still accept the overall content of AK's testimony as reasonable and reliable. Again, the Hearing Tribunal provided an analysis (including support for their inferences) concerning AK's recollection.

76. The Hearing Tribunal's assessment of the timeline during the April 2, 2022 appointment is generally tenable and it was not necessary for the Hearing Tribunal to explain every inconsistency in that regard.

77. Similarly, based on its credibility assessments, it was open for the Hearing Tribunal to make the findings that it did in terms of how Mr. Randhawa touched AK's left breast and nipple, how he circled her right breast and what her position was when Mr. Randhawa removed his mask. Based on the analysis in the Decision, the Hearing Tribunal made a reasonable and defensible overall assessment of AK's evidence.

78. The Council agreed with the Complaints Director that the Hearing Tribunal had evidence before it to determine that AK's version of events was plausible which supported the findings of fact made by the Hearing Tribunal including the manner in which Mr. Randhawa circled AK's breast and findings of fact and inferences. In this appeal, Mr. Randhawa incorrectly (in the opinion of the Council) invited the Council to improperly reweigh and reassess the Hearing Tribunal's analysis and findings concerning credibility, reliability and plausibility. The Council concluded that there was no factual basis or articulable reason which would constitute reviewable error in terms of the Hearing Tribunal's assessment of AK's and Mr. Randhawa's credibility and reliability. As stated at paragraph 77 of the Complaints Director's written submissions, the Hearing Tribunal was not required to deal with every frailty in AK's evidence so long as they grappled with the substance of the issues.

79. Contrary to Mr. Randhawa's submissions, the Decision discloses that the Hearing Tribunal did consider inconsistencies in AK's evidence but ultimately found that her evidence on significant and key points was compelling and credible.

80. The Decision reflects that the Hearing Tribunal weighed and assessed AK's acknowledgement that she did not remember certain events. Nonetheless, the Hearing Tribunal concluded that her evidence was credible. There was clearly an assessment of AK's evidence in relation to Mr. Randhawa's evidence and the analysis in the Decision indicates that Mr. Randhawa's evidence was not believed in many critical areas.

81. Also, it was reasonable and sustainable for the Hearing Tribunal to find that the videos which form the start and end of the timeline could not establish what actually occurred in the treatment area. Their decision to place little weight on the videos was reasonable.

82. Although AK's evidence does not account for the entire 49 minutes she was at Silverberry, the Council sees no justification for overturning the Hearing Tribunal's assessment of AK's version of events as plausible having regard to their overall findings about her credibility and reliability.

83. AK did not speculate in her testimony concerning the details of the appointment and it was open for the Hearing Tribunal to conclude that she provided clear evidence that was generally consistent in terms of the alleged unprofessional conduct.

84. The Hearing Tribunal's assessment and conclusions regarding AK's evidence about being touched on her nipple, that she did not openly discuss the events at Silverberry and about her culture and community were founded in the testimony before the Hearing Tribunal. It was open for the Hearing Tribunal to make the findings of fact that they did in terms of her testimony, not telling her brother about what occurred and her general avoidance about discussing difficult events.

85. AK's evidence regarding her cultural community and the effect it had on her regarding the events at Silverberry was echoed by Mr. Randhawa's evidence about that particular culture. The Council sees no articulable reason which justifies intervening in terms of the Hearing Tribunal's conclusions and assessments in that regard.

86. It was not an error for the Hearing Tribunal to find that the inconsistencies between AK's testimony at the Hearing, her interviews and her written complaint were problematic. Again, deference is owed to the Hearing Tribunal in terms of their overall assessment and acceptance of AK's testimony about the major and significant elements of the unprofessional conduct. There was no error of law or error by the Hearing Tribunal. They did consider inconsistencies in AK's evidence internally and in terms of Mr. Randhawa's evidence and their conclusions were sustainable.

87. The Council accepts the Complaints Director's position that the Hearing Tribunal properly weighed the consistency and inconsistency between AK's complaint and her testimony and that it was open to them to find that her evidence was "as a whole...generally consistent...on the main points..." particularly given that English was not AK's first language.

B. The Hearing Tribunal's Findings Regarding Mr. Randhawa's Credibility and Their Scrutiny of His Evidence

88. Mr. Randhawa submitted that the Hearing Tribunal erred in its assessment of his credibility and other aspects of his testimony, including their findings with respect to the April 2, 2022 chart note. Mr. Randhawa states in his written submissions that the Hearing Tribunal found that the chart note was unreliable because Mr. Randhawa did not chart his treatment in order and sometimes did not document treatment or assessments that were provided. The Council disagrees with Mr. Randhawa that the Tribunal erred on these findings and misapprehended Mr. Randhawa's evidence.

89. The Council agreed with the Complaints Director that these are not errors based on an absence of evidence and are instead inferences drawn from the totality of the evidence. The Decision reflects the Hearing Tribunal's concerns about the reliability of the chart note and their reasonably articulated concerns regarding the order of his charting and the failure to sometimes chart treatment. It was fair and reasonable for the Hearing Tribunal to draw an inference that the reliability of the chart note also affected the reliability of Mr. Randhawa's evidence. There was no misapprehension of evidence and no error of law in that regard.

90. The *HPA* establishes that members of a profession are part of hearing tribunals. Accordingly, it was fair and reasonable for the regulated members of the Hearing Tribunal to rely on their professional knowledge and experience in terms of the practice of physiotherapy and charting requirements for that profession. Similarly, it was open to the Hearing Tribunal to find that Mr. Randhawa's testimony about his charting adversely affected the reliability of the note and adversely affected his reliability.

91. Additionally, the Hearing Tribunal identified internal inconsistencies in Mr. Randhawa's evidence particularly, as the Complaints Director argued him having no recollections of the appointment while simultaneously testifying about specific recollections in terms of the appointment. It was also reasonable for the Hearing Tribunal to make adverse findings regarding

Mr. Randhawa's evidence due to his partial recollections.

92. That is also supported by the Hearing Tribunal's findings that Mr. Randhawa's testimony during cross-examination was flawed for lack of clarity and due to his ability to only recall some but not all of the appointment.

93. The Hearing Tribunal was in the best position to analyze and assess Mr. Randhawa's testimony. The Council afforded the Hearing Tribunal's findings regarding Mr. Randhawa's credibility significant deference and it saw no basis for intervention in that regard.

C. Mr. Begg's Evidence

94. Mr. Begg provided expert testimony about Mr. Randhawa's charting and the April 2, 2022 note. However, Mr. Begg did not have independent direct evidence of the events of April 2, 2022. The Hearing Tribunal (and in particular the regulated members hearing Mr. Begg's evidence) could use their knowledge and experience in the practice of physiotherapy to assess and even discount Mr. Begg's evidence. The overall conclusions made by the Hearing Tribunal regarding Mr. Randhawa's testimony --- which again should be given significant deference --- supported the Hearing Tribunal's assessment of Mr. Begg's evidence. It was open for the Hearing Tribunal to assess Mr. Begg's evidence and give it limited weight based on its assessment of its evidence and surrounding facts such as the contents of Mr. Randhawa's chart.

95. In summary, the Hearing Tribunal's concerns respecting Mr. Randhawa's charting could be relied on by it to adversely affect the credibility and reliability of Mr. Randhawa's testimony. It was open to the Hearing Tribunal who heard and saw Mr. Randhawa's and Mr. Begg's testimony to draw the reasonable inferences of fact that they did and those should not be disturbed by the Council.

D. The Hearing Tribunal Did Not Err by Unfairly Characterizing and Scrutinizing Mr. Randhawa's Evidence

96. Mr. Randhawa argued that the Hearing Tribunal unfairly characterized and scrutinized aspects of Mr. Randhawa's testimony to ultimately determine that he lacked credibility and was unreliable.

97. As per the principles in *Yee*, the assessment by the Hearing Tribunal of Mr. Randhawa's and AK's credibility and reliability must be shown significant deference by the Council. In the absence of clear or compelling arguments to support the position that there was an unfair characterization or over-scrutiny of Mr. Randhawa's testimony, Mr. Randhawa must provide compelling evidence to support that position. The Council found that Mr. Randhawa did not do that. The Hearing Tribunal clearly "grappled" with the issues before it (including those relating to contradictory testimony) and a failure to refer to some aspects of Mr. Randhawa's testimony or that of AK's testimony is not in error.

98. Among other things, the Hearing Tribunal was free to place as much or as little weight as they determined appropriate regarding Mr. Randhawa's telephone call with AK on April 2, 2022. Their assessment that it was unusual should be given deference as they considered all of the evidence and information before them. The Council agrees with the Complaints Director that there is no articulable reason to interfere with the Hearing Tribunal's factual findings in terms of the telephone call and the limited weight they attached to it.

99. As well, the acceptance of AK's testimony generally and reconciling the inconsistencies in her testimony while making adverse findings in terms of Mr. Randhawa's testimony is simply an exercise of the Hearing Tribunal's weighing and assessing the overall testimony of Mr. Randhawa and AK. That Council agreed with the Complaints Director that that in and of itself does not mean that the Hearing Tribunal subjected Mr. Randhawa to an unfair level of scrutiny or amounted to over-scrutiny. Rather, the Hearing Tribunal made assessments of credibility based in part on its analysis of inconsistencies in testimony and the Council sees no compelling error to support reassessing evidence and preferring the evidence of Mr. Randhawa to AK's evidence. Again, this appeal is not intended to allow Mr. Randhawa to re-argue findings of fact and credibility assessment.

XI. APPEAL GROUND 3: PROCEDURAL FAIRNESS

100. Mr. Randhawa submits that the Hearing Tribunal erred in failing to afford him procedural fairness as follows:

- The Hearing Tribunal failed to provide transparent, intelligible and justified reasons.
- The Hearing Tribunal reversed the onus of proof from the Complaints Director to Mr. Randhawa.
- The Hearing Tribunal's conduct gives rise to a reasonable apprehension of bias.

For the reasons that follow, the Council rejects Mr. Randhawa's procedural fairness arguments.

A. The Reasons in the Hearing Tribunal's Decision

101. The Council concluded that Mr. Randhawa's assertion about the insufficiency of reasons in the Decision does not constitute an allegation of procedural unfairness. Whether a decision provides transparent, intelligible and justified reasons is reviewed according to the standard of reasonableness and is not a question of procedural fairness.

102. Consistent with previous comments in this decision, the Council concluded that the Decision was thorough, detailed and understandable and that it contained intelligible analysis and conclusions that fall within a range of possible outcomes. There is a reasonable chain of analysis in the Decision and it should not be set aside.

103. The Council agreed with Mr. Randhawa that the Decision must be based on reasoning that is both rational and logical, including a line of analysis that could reasonably lead the Hearing Tribunal from the evidence before it to the findings and conclusions that it reached. The Council concluded that there is a rational and logical line of analysis in the Decision.

104. In its Decision, the Hearing Tribunal also assessed KM's evidence, Mr. Randhawa's charting, the expert testimony of Mr. Begg, the phone call that occurred on April 2, 2022 and related matters. The Decision clearly indicates that the Hearing Tribunal grappled with the evidence and adequately disclosed analysis of the evidence and provided a rationale for their findings.

105. The summaries provided and conclusions made by the Hearing Tribunal in the Decision are supported by fulsome and intelligible reasons and analysis. The findings of fact, inferences based on those findings and the credibility analysis carried out by the Council are clearly and expressly stated in the Decision.

106. As well, the actions of the Hearing Tribunal during the Hearing regarding possibly obtaining additional expert evidence and their comments in the Decision in that regard, are explained and are part of a reasonable chain of analysis. The Hearing Tribunal was allowed under section 79(2) of the *HPA* to obtain additional evidence. Their ultimate decision not to obtain further expert evidence occurred after hearing submissions from the parties and a fulsome review of that issue, all as reflected in the Record.

107. The Council is satisfied that the Decision contains properly articulable reasons and analysis about whether Mr. Randhawa's conduct was of a sexual nature. The Council agreed with the Complaints Director at paragraph 105 of his submissions that the Hearing Tribunal relied on the applicable sections of the *HPA* and described that the touching by Mr. Randhawa was not inadvertent, therapeutic nor appropriate for the services being provided to AK. The Hearing Tribunal also reviewed the context of Mr. Randhawa telling AK that she was beautiful and attempting to kiss her, all of which justified a finding that the touching of AK's breast was of a sexual nature.

108. The Hearing Tribunal's analysis of the evidence, the context of the events and the issue of sexual misconduct was supported by their finding that Mr. Randhawa called AK beautiful and attempted to kiss her.

109. As the Complaints Director correctly submitted at paragraph 106 of his written submissions, the Hearing Tribunal expressly cited the test from *R. v. Chase* and described the factors that could be considered.

110. Contrary to Mr. Randhawa's submissions, the Hearing Tribunal also did not rely exclusively on AK's subjective perception in terms of what constitutes sexual abuse or sexual misconduct. Although significant weight was given to AK's testimony and perception, the Hearing Tribunal also drew reasonable conclusions about the lack of a therapeutic purpose and that what occurred was not consistent with the treatment being provided to AK.

111. The Decision contains appropriate summaries of the testimony of AK and Mr. Randhawa including comments relating to issues that arose during testimony. The Decision also contains a detailed analysis of the Hearing Tribunal's conclusions concerning the credibility and reliability of AK and Mr. Randhawa as witnesses.

112. Based on a holistic review of the Decision and without a rigid focus on any abstract standard of review, the Council concluded that the wording and content of the Decision meets the reasonableness standard of review and does not disclose errors of law or errors of principal and is reasonably sustainable. Consistent with *Yee*, the Council will not reweigh or reassess the evidence before the Hearing Tribunal or their conclusions in that regard and will not engage in a line-by-line treasure hunt for error.

B. The Hearing Tribunal Did Not Reverse the Burden of Proof

113. The Council agreed with Mr. Randhawa that the Complaints Director had the onus of proving the facts which give rise to the charge on the balance of probabilities and proving that those facts constituted unprofessional conduct under the *HPA*. The Hearing Tribunal expressly stated that the standard of proof was the balance of probabilities and that the burden of proof was on the Complaints Director.

114. The Council concluded that the Hearing Tribunal did not reverse the onus of proof from the Complaints Director to Mr. Randhawa.

115. The mere fact that the Hearing Tribunal's analysis regarding AK's motivations and related matters was completed before considering the remainder of the evidence in the Decision does not in any way mean that the Hearing Tribunal ignored other relevant evidence or required Mr. Randhawa to prove why AK made the allegations. As the Complaints Director stated at paragraph 113 of his written submissions, the order of how evidence is assessed in a written decision is not an error of law.

116. Simply referring to AK's evidence first in the Decision cannot in and of itself be an indicator of any shifting of the burden of proof. That is particularly the case when the balance of the Decision contains a fulsome and understandable assessment of Mr. Randhawa's evidence, including in terms of his credibility and reliability. It was open to the Hearing Tribunal to accept AK's evidence on balance and to prefer it to that of Mr. Randhawa's evidence.

117. The Council concluded that there is no compelling or cogent evidence that during the Hearing or in their Decision the Hearing Tribunal reversed the burden of proof.

C. The Hearing Tribunal's Actions and the Contents of the Decision Do Not Give Rise to a Reasonable Apprehension of Bias

118. Mr. Randhawa's allegation of a reasonable apprehension of bias on the part of the Hearing Tribunal is a component of whether or not Mr. Randhawa was afforded procedural fairness. The Council reviewed this issue consistent with the principles in *Yee* about bias and allegations that the duty of fairness has been breached. Specifically, the Council reviewed the context of the allegation and whether the required content of the duty of fairness was provided to Mr. Randhawa.

119. For the reasons that follow, the Council concluded that the Hearing Tribunal's actions and its written decision do not give rise to a reasonable apprehension of bias.

120. As a preliminary comment, there is agreement between the parties that the test for reasonable apprehension of bias is what would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. The Council agreed with Mr. Randhawa that there does not have to be actual factual bias. Instead, a reasonable apprehension of bias will give rise to breach of procedural fairness.

121. The Council noted the caselaw provided by the Complaints Director that the grounds for a bias allegation must be serious, substantial and based on a real likelihood or probability and not mere suspicion.

122. Mr. Randhawa alleged that the Hearing Tribunal made numerous errors in its analysis which give rise to a reasonable apprehension of bias. Those alleged errors are set out at paragraph 110 of Mr. Randhawa's written submissions and are as follows:

- The Tribunal found Mr. Randhawa to lack credibility and be an unreliable witness for the same reasons AK was found to be credible and reliable;
- The Tribunal repeatedly ignored or misapprehended relevant evidence to accept AK's version of events;
- The Tribunal unfairly characterized and scrutinized Mr. Randhawa's evidence;
- The Tribunal attempted to introduce its own evidence to question the reliability of Mr. Randhawa's chart, which resulted in significant debate;
- The Tribunal attempted to seek an independent expert to opine on an issue that would have challenged Mr. Begg's evidence [and would] have been in the sole benefit of the Complaints Director to fill gaps in the evidentiary record;
- The Tribunal reversed the evidentiary burden by making Mr. Randhawa prove why AK made the allegations, instead of whether the evidentiary record proved the allegations on a balance of probabilities.

123. After carefully considering each aspect of the alleged errors and alleged apprehension of bias, the Council concluded that there was no actual or apprehended bias.

124. Bearing in mind the "he said/she said" nature of the allegation, one of the central tasks of the Hearing Tribunal was to assess witness credibility and reliability and to make findings of fact and inferences on the basis of those assessments.

125. The fact that the Hearing Tribunal preferred AK's evidence to that of Mr. Randhawa's and found that she was credible and reliable (and that he was not) is not in and of itself an indicator of actual or apprehended bias. The Hearing Tribunal was in the best position to assess the testimony of AK and Mr. Randhawa and, as part of determining whether unprofessional conduct did or did not occur, was obligated to make assessments of witness credibility and reliability. Adverse findings in that regard concerning Mr. Randhawa do not in and of themselves mean that the Hearing Tribunal was biased. The assessments made by the Hearing Tribunal in that regard must be given significant deference.

126. As mentioned previously in this decision, the Council determined that the Hearing Tribunal did not repeatedly ignore or misapprehend relevant evidence in accepting AK's version of events. There was a careful and thorough analysis of AK's evidence and Mr. Randhawa's evidence which was robust and fulsome as reflected in the Decision. Also, the Council previously concluded that the Hearing Tribunal did not unfairly characterize or over-scrutinize Mr. Randhawa's evidence.

127. The Hearing Tribunal's attempt to introduce its own evidence in terms of assessing the reliability of Mr. Randhawa's chart is not evidence of actual or apprehended bias. Asking questions to the parties in that regard is entirely appropriate and does not indicate prejudgment.

128. The interactions that occurred regarding the Hearing Tribunal potentially seeking an independent expert is also not evidence of bias. Independent expert testimony or a report could potentially have been provided. Contrary to the assertions at paragraph 110(e) of Mr. Randhawa's written submissions however, that testimony or report would not necessarily have "challenged Mr. Begg's evidence" and would not necessarily "have been in the sole benefit of the Complaints Director to fill gaps in the evidentiary record". An independent expert report could have supported Mr. Begg's testimony (and Mr. Randhawa's position) in whole or in part or it could have favored the Complaints Director's position in whole or in part.

129. Significantly, after hearing submissions from both parties, the Hearing Tribunal ultimately decided not to seek an expert. There is nothing on the Record that demonstrates that the process the Hearing Tribunal engaged in when considering a possible expert report was inappropriate, impartial or involved prejudgment of the issues.

130. Further support for the position that the Hearing Tribunal acted impartially and without any prejudgment is reflected by what occurred after the Hearing Tribunal asked Mr. Begg a question about charting. Specifically, Mr. Randhawa's counsel objected to the question, the Hearing Tribunal then described their rationale for the question and received submissions from both parties. Mr. Randhawa's legal counsel then suggested that the question be re-worded and it was, including approval by Mr. Randhawa's legal counsel concerning the re-worded question.

131. For the reasons mentioned earlier in this decision, the Council found that the Hearing Tribunal did not reverse the evidentiary burden on Mr. Randhawa. There is no reasonable apprehension of bias and therefore no procedural unfairness in that regard.

132. The Hearing Tribunal took steps to ensure fairness and impartiality by explaining the advice they received, clarifying both parties' positions and offering their reasoning on the Record.

There is no evidence of repeated comments, questions, or alleged errors that support a reasonable apprehension of bias.

133. Unlike the factual circumstances in *Yee*, there is no pattern of errors, lack of impartiality or evidence of prejudgment of the issues and the test for reasonable apprehension of bias is not met.

XII. CONCLUSION

134. For all the reasons set out above, the Council dismisses Mr. Randhawa's appeal and confirms the Decision.

135. The Council noted that part of the relief Mr. Randhawa is requesting is an award of costs in his favor. However, section 89 of the *HPA* does not authorize the Council to make a costs award against the Complaints Director.

136. The Council will leave it to the parties to determine the manner in which any submissions are made to the Council regarding any order requiring Mr. Randhawa to pay all or a portion of the costs of the appeal.

Dated this 31st day of January, 2025.

Melissa Merritt

Melissa Merritt, Chair
On behalf of the Council