In the Court of Appeal of Alberta

Citation: Sahi v Alberta Veterinary Medical Association, 2023 ABCA 368

Date: 20231219
Docket: 2201-0049AC
Registry: Calgary

Between:

Dr. Bikramjit Sahi

Appellant

- and -

Alberta Veterinary Medical Association

Respondent

The Court:

The Honourable Justice Patricia Rowbotham
The Honourable Justice Anne Kirker
The Honourable Justice William de Wit

Memorandum of Judgment

Appeal from the Decisions of
The Committee of Council of the Alberta Veterinary Medical Association
Dated the 25th day of January 2022 and the 21st day of June 2022

Memorandum of Judgment

The Court:

Introduction

[1] Following a hearing before a Tribunal of the Alberta Veterinary Medical Association the appellant was found guilty of eight counts of serious unprofessional conduct. The Tribunal issued two written reprimands and ordered the appellant's registration cancelled with a prohibition against re-application for registration for five years. It also ordered the appellant to pay fines totalling $35,500, and 75% of the actual cost of the investigation and hearing up to a maximum of $105,000 within two years or such other time as agreed to by the Complaints Director.

[2] The appellant appealed the Tribunal's findings as well as its sanction and costs order to the Council of the Association. The Council confirmed the Tribunal's decisions and ordered the appellant to pay costs of the appeal, all pursuant to its powers under s. 45 of the *Veterinary Profession Act*, RSA 2000, c V-2.

[3] The appellant now appeals to this Court under s. 45.1 of that *Act*. He asks that we quash three of the misconduct findings and that we set aside or reduce some of the sanctions and costs imposed upon him. It is the appellant's position that the impugned findings of unprofessional conduct are not supported by the evidence, and that two of them differ from the substance of the allegations made against him. He also argues the sanctions and costs imposed upon him are unreasonable, and that the Council erred in failing to intervene.

Background

Findings Related to the Appellant's Misuse of Hydromorphone

[4] The two findings of unprofessional conduct at the center of this appeal stem from the appellant's admission that he personally used large amounts of hydromorphone purchased in his capacity as a registered veterinarian. Hydromorphone is a Schedule 1 controlled narcotic under the *Controlled Drugs and Substances Act*, SC 1996, c 19. Registered veterinarians have professional and statutory obligations related to its handling.

[5] A problem with the appellant's acquisition and use of hydromorphone was brought to the attention of the respondent in 2019 by the client service director of the Western Drug Distribution Centre, a drug and supply distribution centre for veterinarians. The appellant had ordered more hydromorphone for his veterinary practice at the Fauna Animal Hospital in Chestermere, Alberta, than the largest emergency practice in the province would ordinarily order in the same period. The respondent's investigation revealed that the appellant had purchased 79,050 mg of hydromorphone

from 2014 to 2019, of which only 1,336.3 mg was accounted for in the appellant's records. It is helpful in putting these amounts in perspective to note the evidence of the respondent's Deputy Registrar and Complaints Director who testified to his understanding that a two-person veterinary practice in the greater Edmonton area would utilize approximately 60 to 80 mg of hydromorphone annually. The appellant does not dispute that he purchased amounts of hydromorphone that were completely disproportionate to the use in his veterinary practice for the years in question. This was the first of three hydromorphone related allegations of unprofessional conduct directed to a hearing.

[6] The respondent's efforts to determine what happened to the unaccounted-for hydromorphone went unanswered by the appellant. He did write to the investigator to say he was sorry for the discrepancy, but he offered no further explanation. The investigator reported that when he initially sought the appellant's permission to obtain the Western Drug Distribution Centre records, the appellant said:

> ... he would do "anything" to cooperate if [the investigator] "would save his family" and he would be able to "keep his license". He said he was "ashamed" of what he has done – that this matter is very "complicated". He said that he had sold some of the hydromorphone but he would not do so in the future if [the investigator] would "save his family".

However, the appellant failed to respond to all other emails and telephone calls during the investigation.

[7] Based on the information available to it, the respondent included the following additional allegations in its notice of hearing:

> That [the appellant] inappropriately prescribed and/or dispensed Hydromorphone during the period of 2014 through to 2019, specifically in a manner that is not compliant with the [Alberta Veterinary Medical Association] Council Guidelines regarding Prescribing, Dispensing, Compounding and Selling Pharmaceuticals.
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> That [the appellant] distributed and/or sold controlled drugs, namely Hydromorphone in amounts and/or in a manner that was not in accordance with the provisions of the *Controlled Drugs and Substances Act*, SC 1996, c 19, as amended and/or the provisions of the Narcotic Control Regulations.

[8] At the hearing, the appellant said he used all the unaccounted-for hydromorphone. He refused to answer many of the questions that followed about how and when he used it, although he said he took the narcotic at night for sleep and that he weaned himself from it after the allegations of professional misconduct were made. The transcript is replete with uncooperative, and sometimes threatening, responses to the questions asked by the respondent's counsel to test the appellant's revelation.

[9] After the appellant testified, the respondent sought leave to re-open its case and call expert evidence regarding the appellant's evidence on the use of hydromorphone, the quantities used and the likelihood of his explanation. The Tribunal granted the respondent's request and gave the appellant a right of reply. The respondent subsequently tendered expert evidence from Dr. Omar Rahaman, a physician with expertise in addiction medicine. He answered several questions, including in relation to the nature of hydromorphone and what signs and symptoms one could expect from an individual using it. Dr. Rahaman was also asked to provide his opinion about whether the explanation given by the appellant that he used the unaccounted-for hydromorphone was reasonable given the quantities purchased and the record of use in the clinical setting. He found the appellant's claim of personal use unlikely.

[10] The appellant presented expert evidence from Dr. Ronald Lim, another physician with expertise in the field of addictions, who countered some of Dr. Rahaman's assumptions.

[11] The Tribunal found the appellant guilty of unprofessional conduct for dispensing hydromorphone in a manner that was not compliant with the Alberta Veterinary Medical Association Council Guidelines Regarding Prescribing, Dispensing, Compounding and Selling Pharmaceuticals (the Guidelines). The Tribunal took note of the purpose of the Guidelines and held:

> [l]egal counsel for the Complaints Director presented evidence … that showed [the appellant's] control drug logs accounted for only approximately 2 percent of the total amount of Hydromorphone purchased by him in the relevant timeframe. The remaining 98 percent of the hydromorphone purchased between 2014 and 2019 was not accounted for in any way by [the appellant]. Keeping accurate records of the purchase and distribution of controlled narcotics is essential to protect the public from the harm that this medication can cause. The [Association] Bylaws and Council Guidelines are in place to guide members in their professional obligations and compliance with [the] Act and Regulations. [The appellant's] testimony was that he was aware of the Guidelines, that he tried to follow them, but he admitted that he consumed the missing hydromorphone. This was very clearly not in accordance with the Guidelines in place at the time, and this conduct is a clear "dispensation" of the drug other than in accordance with the Guidelines.
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> …

[12] With respect to the allegation the appellant "distributed and/or sold" hydromorphone in "amounts and/or in a manner that was not in accordance with the provisions of the *Controlled Drugs and Substances Act*... and... the Narcotic Control Regulations", the Tribunal observed that:

> ... it is beyond dispute that [the appellant's] behavior with respect to the hydromorphone is not compliant with provisions of the *Controlled Drugs and Substances Act* or the *Narcotics Control Regulation*. Those pieces of legislation create tight controls on the use of controlled substances such as hydromorphone, and [the appellant's] behaviour in obtaining the substance, using it for himself and not keeping accurate records and logs of the use and disposition of hydromorphone is contrary to the law. It is clear that [the appellant] obtained the vast majority of the hydromorphone for the purpose of his personal use, even based on his own evidence; that is, the purpose for which [the appellant] obtained the hydromorphone was not for the legitimate use of it in his clinic; over the course of several years he placed multiple orders which he says were for his own use ...

[13] The Tribunal went on to identify the central issue as "whether [the appellant's] conduct constitutes 'distribution' or 'selling' of the hydromorphone as alleged." The Tribunal was not satisfied on a balance of probabilities that the appellant was selling the narcotic or giving it to someone else. However, the Tribunal found the appellant's use of the hydromorphone was a "distribution" of the drug in a manner not contemplated by the legislation. It reasoned:

> ... that "distribution" is not limited to the provision of a controlled substance to a third party; rather, the hydromorphone was obtained under false pretenses that it would, in fact, be used in accordance with the law for the purpose of administering the drug to animal patients. The use of the drug otherwise than in accordance with that purpose is a "distribution", even where the veterinarian is administering it to him or herself.

[14] The appellant admitted to using two other drugs he acquired in his capacity as a veterinarian which did not form part of the allegations before the Tribunal. The Tribunal referred the issue of the appellant's use of those drugs to the Complainants Director for consideration pursuant to s. 40(4)(a) of the *Veterinary Profession Act*.

Finding Related to the Appellant's Inappropriate Interaction with a Practice Inspector

[15] The additional misconduct finding under appeal stems from an allegation that during a practice inspection in February 2018, before any concerns about hydromorphone arose, the appellant was "inappropriate in [his] interactions with the inspector and misleading with respect to the information [he] provided to the inspector." The only two witnesses to the behaviour in issue were the inspector and the appellant. They described different versions of events. Cognizant of the "difficulties inherent in making assessments of credibility", the Tribunal cautioned itself to look "to each witnesses' power of observation, memory, the plausibility of each version of events, the ability to clearly recall the relevant issues, and the extent to which the version of events corresponds with the preponderance of the other evidence [led] in the hearing." The Tribunal ultimately preferred the evidence of the inspector and explained why. It found the appellant guilty

of this unprofessional conduct, and related failures to satisfy practice inspection and continuing education standards.

The Tribunal's Sanction and Costs Decision

[16] Upon deciding that the conduct of an investigated person constitutes unprofessional conduct the Tribunal has broad remedial authority: *Veterinary Profession Act*, s. 41.1. The respondent asked the Tribunal to impose a fine for each finding of unprofessional conduct and to cancel the appellant's registration for 10 years, emphasizing the serious nature of the appellant's misconduct and expressing concerns about his governability. The appellant did not object to being fined, but he tried to avoid, or at least minimize, any disruption to his practice. The appellant's counsel asked the Tribunal to consider "suspending [the appellant] until he was able to demonstrate his suitability for continued practice." This, counsel argued, "could include a restriction on access to narcotics for an initial period of time, and a requirement for professional counselling of some kind" which would be a "simple fix" for the appellant's personal drug use problem. Counsel argued that when the appellant received notice of the initial complaint, "he faced a new reality and ... unfortunately sought the assistance of legal counsel who was at the time suspended from practice." Counsel explained that the lawyer "alleged conspiracies of many kinds" and therefore the appellant "was not set up for success" in relation to the proceedings. He submitted that "[w]hen orders were made, [the appellant] was not in a state of mind that would [have] been conducive to compliance and that he was suffering at the time and trying to deal with a difficult situation." In short - and in some respects straying from the evidence - counsel said all that could be said to try to characterize the appellant's non-cooperative, and at times antagonistic, attitude toward the respondent as a function of easily rectified poor mental health.

[17] The Tribunal did not accept the appellant's perspective. It addressed the factors set out in *Jaswal v Medical Board (Nfld)* (1996), 138 Nfld & PEIR 181 (SC), 1996 CanLII 11630 (NL SC), and decided to impose fines totalling $35,500 (a lower sum than was requested by the respondent) and to cancel the appellant's registration for five years. The Tribunal explained that it had carefully considered the role that rehabilitation should have in the circumstances. However, given the appellant's "egregious" conduct and failure to take responsibility by maintaining he did what he did because he was unfairly targeted by the respondent, the Tribunal determined rehabilitation could not be a primary consideration. It said the sanctions proposed by the appellant would not accomplish the sanctioning objectives of protecting the public, maintaining the integrity of the profession, or deterring the membership generally or the appellant specifically.

[18] As to the issue of costs, the appellant's counsel argued they should be reasonable so as not to deter other members of the profession from defending themselves. He submitted that "any award beyond 70 percent [of the respondent's costs] would be highly exceptional" and that the appellant should not be required to pay more than 50 percent of the hearing costs, excluding the costs of the Tribunal's legal counsel and the respondent's expert. The respondent sought 100 percent of its investigation and hearing costs, estimated to be approximately $138,000, inclusive of GST. The

Tribunal ordered that the appellant "pay 75 percent of the actual cost of the investigation and hearing up to a maximum of $105,000.00, within two years of the date of this Order, or such other time as agreed to by the Complaint[s] Director."

The Appeal to Council

[19] Before the Council, the appellant argued, among other things, that the Tribunal i) adopted a "more expansive and incorrect definition or interpretation of 'distributed' and 'dispensing' which in turn deprived [the appellant] of the opportunity to properly respond to the relevant allegations", and ii) made inferences of fact that were inconsistent with and unsupported by the evidence. He also asserted that the Tribunal erred in applying the *Jaswal* factors and by imposing penalties "which were impossible for [the appellant] to comply with."

[20] The Council disagreed. Finding that the Tribunal made no legal error and that its decisions were reasonable, it confirmed them and ordered the appellant to pay further costs of the appeal.

Grounds of Appeal

[21] The appellant argues that the Council failed to provide adequate reasons or correctly review the following errors he says were made by the Tribunal:

(a) The Tribunal incorrectly interpreted the terms "dispensed" and "distributed" in the allegations made against him, which deprived the appellant of knowing the case he had to meet and led to findings of guilt that were not supported by the evidence or the Tribunal's findings of fact.
(b) The Tribunal erred in accepting the evidence of the inspector over that of the appellant in relation to the February 2018 interaction between them.
(c) The Tribunal failed to weigh relevant factors in determining sanctions and costs and imposed sanctions and costs that are unreasonable.

Standard of Review

[22] Section 45.1(1) of the *Veterinary Profession Act* provides that "[a]n investigated person may appeal to the Court of Appeal any finding, order or direction of the Council under section 45." Ordinary appellate standards of review apply: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 37 and 49. This means:

> (a) conclusions on issues of law are reviewed for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. That includes questions of statutory interpretation, including interpretation of the tribunal's "home statute".

> (b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: *Housen* at paras. 10, 23; *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 SCR 401.
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> (c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": *Housen* at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* at paras. 33, 36.
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> (d) issues of fairness and natural justice are reviewed, having regard to the context, to see whether the appropriate level of "due process" or "fairness" required by the statute or the common law has been granted: *Vavilov* at para. 77.
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> ...

Al-Ghamdi v College of Physicians and Surgeons of Alberta, 2020 ABCA 71 at para 9, leave to appeal to SCC dismissed, 39308 (23 December 2020); *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at paras 29-30; and *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313 at para 15.

[23] Sanctions in professional disciplinary matters involve questions of mixed fact and law that engage the professional judgment of the governing body and are therefore reviewed for reasonableness: *Alsaadi* at para 16; *Zuk v Alberta Dental Association and College*, 2020 ABCA 162 at para 15, leave to appeal to SCC dismissed, 39237 (26 November 2020). They should not be disturbed on appeal unless they are demonstrably unfit or based on an error in principle: *Alsaadi* at para 16, citing *Jaswal* at paras 33-34; *Byun v Alberta Dental Association and College*, 2021 ABCA 272 at para 36, citing *Groia v Law Society of Upper Canada,* 2018 SCC 27 at para 43. Costs decisions are also reviewed for reasonableness: *Zuk* at para 16.

[24] The standard of review to be applied by the Council in its internal review of a hearing tribunal decision is also relevant in this appeal. As clarified in *Yee* at para 32:

> Different, although overlapping considerations apply to review at various internal levels within the administrative structure: *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paras. 42-3, 57, 493 AR 89, 38 Alta LR (5th) 63. For example, on external review deference is extended by superior courts because the professional disciplinary tribunal is presumed to have heightened expertise and insight. There is no reason to presume that a professional internal appeal tribunal has less expertise than a discipline tribunal. [emphasis in original]

See also, *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at para 53.

[25] Of central importance in assessing the internal standard of review is the role assigned to the Council under the *Veterinary Profession Act*: see, *Moffat* at para 54 citing, among other cases, *Yee* at para 34. The Council's mandate and powers are set out in s. 45:

> 45(1) The Complaints Director and the investigated person may appear and be represented by counsel at an appeal before the Council.
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> (2) An appeal to the Council must be based on the record of the hearing and the decision of the Hearing Tribunal.
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> ...
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> (4) The Council on an appeal may
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> > (a) 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,
> >
> > (b) 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 annual permit is suspended or cancelled, and
> >
> > (c) draw inferences of fact and make a determination or finding that, in its opinion, should have been made by the Hearing Tribunal.
>
> (5) The Council must, within 90 days from the date of the conclusion of the appeal hearing before it, make a decision and may, by order, do any or all of the following:
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> > (a) make any finding that in its opinion should have been made by the Hearing Tribunal,
> >
> > (b) quash, vary or confirm 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.

> (6) Subject to the regulations, the Council may direct the investigated person to pay, within the time set by the Council, all or part of the costs of the appeal in addition to costs referred to in section 41.1(1)(j).

[26] The system of internal review set up under the *Veterinary Profession Act* is similar to the tiered system under the *Regulated Accounting Profession Act*, RSA 2000, c R-12 (since replaced by the *Chartered Professional Accountants Act*, SA 2014, c C-10.2) examined in *Yee*. Consequently, the following observations made by this Court in *Yee* are also instructive here.

[27] The wording of the *Veterinary Profession Act* makes it clear that the Council is to conduct "appeals". Its decision is to be "based on the record of the hearing and the decision of the Hearing Tribunal": *Veterinary Profession Act*, s. 45(2). This requirement signals that the primary role of the Council is to review the Tribunal's decision; it is not Council's role to re-conduct the hearing *de novo*: *Yee* at para 34, citing *Newton v Criminal Trial Lawyer's Association,* 2010 ABCA 399 at para 64. This legislative intention is underscored by the provision allowing the Council, on hearing an application for leave to introduce new evidence, to direct the Tribunal to hear that evidence and reconsider its decision rather than conduct a re-hearing itself.

[28] When reviewing a decision of the Tribunal, the Council should remain focused on whether the decision is based on errors of law or principle or is not reasonably sustainable. The Council should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: *Yee* at para 35, citing *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at para 23. The guidelines set out at paragraph 35 of *Yee* assist in the analysis. There is no need to repeat those guidelines here, but we would add that where an issue is raised in relation to the scope or substance of an allegation, the Council may intervene if the investigated person is tried on a charge that is different from what was specifically alleged.

Decision

The Council's Review of the Tribunal's "Dispensed" and "Distributed" Findings

[29] There was no basis upon which the Council could interfere with the Tribunal's finding of unprofessional conduct arising from the allegation the appellant "prescribed and/or dispensed" hydromorphone in a manner that was not compliant with the Guidelines. The Tribunal's reasons in relation to this allegation provided a transparent and intelligible justification for its decision. It was reasonable, sound in principle, and resulted in no unfairness to the appellant because he knew the case he had to meet.

[30] The Guidelines define dispensing as "the act of supplying" in the following terms:

> Dispensing is the act of supplying prescription medication(s) on the specific direction (prescription) of a registered veterinarian, for a specific animal or group of animals.
>
> ...
>
> Dispensing is the act of supplying prescription medication(s) on the specific order of a practitioner, who has determined the need or anticipated need of a patient (either individual animal or group of animals with a similar need) and who is responsible to treat or address this specific need.

[31] They go on to say that:

> A registered veterinarian may dispense drugs only through an [Association] certified veterinary practice entity, and only for animals located within Alberta.
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> ...
>
> All veterinary practice entities (VPEs) must create and maintain medical records of dispensing undertake[n] by veterinarians working in that VPE.
>
> The [Association] will undertake practice inspections and may audit pharmaceutical sales from veterinary practice entities.
>
> All pharmaceuticals that are sold from an [Association] certified and inspected veterinary practice entity must have a recorded audit trail.

[32] With respect to "narcotic, controlled and targeted substances" specifically, the Guidelines explain how:

> [v]eterinarians are unique in that they are defined in Federal legislation as a practitioner who has the authority to prescribe and are entitled through Alberta legislation (the Veterinary Profession Act) to dispense. With this privilege comes significant risks with regards to the accessibility of narcotic controlled and targeted substances. The nature of these pharmaceuticals in these categories carry a risk of diversion and addiction. This risk extends well beyond the patient being treated and can impact the patient's owner and general public as well as veterinary practitioner, allied professionals and staff.
>
> Incidents of addiction, self-medication, drug diversion, theft, fraud and other illegal activities are all too common. It is the veterinary profession's responsibility to ensure that continued access to these necessary products is maintained through processes that guarantee their safe use in all situations.

> The [Association] is committed to protection of public and member wellness. Accordingly, the Council directive for prescribing narcotic, controlled and other targeted substances is that the [Association] participates fully in the College of Physicians and Surgeons of Alberta Triplicate Prescription Program (TPP).
>
> ...

[33] The Triplicate Prescription Program incorporates the obligations imposed upon practitioners, including veterinarians, with respect to administering, prescribing, and selling narcotics under the *Narcotic Control Regulations*, CRC, c 1041. The Guidelines make it "mandatory for veterinary practitioners to record all prescribing and dispensing of narcotic, controlled and other targeted medications through the use of a triplicate prescription form."

[34] The appellant now suggests that his "personal consumption of hydromorphone [was] irrelevant to" the charge that he "dispensed" hydromorphone, and that although his consumption of hydromorphone "was certainly in contravention of many laws, professional standards, and guidelines, ... [that charge was] never put to him". This argument ignores: what the Guidelines plainly say and seek to achieve; how the hydromorphone related allegations against him were framed; and what was argued at the Tribunal hearing.

[35] One of the important objectives of the Guidelines in relation to controlled substances, including hydromorphone, is to limit the risk of diversion and addiction for veterinarians themselves. The Tribunal interpreted the word "dispensed" in the second allegation made against the appellant with this and the other objectives of the Guidelines in mind. In the context of the Guidelines and having regard to the way in which the allegation was framed, it was reasonable for the Tribunal to conclude that the term "dispensed" included the act of supplying a controlled substance to oneself.

[36] The appellant did not argue otherwise during the hearing. On the contrary, in response to a question by a Tribunal member about how to interpret the word "distributed" in the third hydromorphone related allegation made against the appellant, the appellant's counsel argued there were distinctions between the "various levels" of obligation reflected in the allegations. He submitted:

> If you look at how these allegations are broken down, … that also … can shed light on the meaning of distributed. … the first allegation … indicates concerns relating to the purchase. The second allegation relates to prescribing and/or dispensing … Then I would suggest to you if you take this in a stronger context, the word distributed in the third allegation with respect to the Hydromorphone … relates to giving or making available to a third party.

[37] The appellant did not ask the Tribunal to dismiss the "dispensed" allegation based on his evidence of personal use. Rather, his counsel invited the Tribunal to "conclude that [the appellant]

never sold or distributed Hydromorphone or any other controlled substances illegally." Counsel argued the evidence the Tribunal heard was sufficient to clear the appellant of this *third* allegation. With respect to the first and second hydromorphone related allegations, counsel asked only that the Tribunal "consider the evidence [and] apply their own good judgment" to arrive at a conclusion favourable to the appellant. It is evident from the record that by this he meant the appellant had used hydromorphone:

> … as a result of severe mental health issues and that this is why he ordered the amounts that he ordered in the time frame he did. This is also why [the appellant] stopped using Hydromorphone, not only because it was unavailable but the deep, deep shock, fear and guilt that came from trying to [respond] to this investigation led him to take whatever measures he could to attempt to stop taking Hydromorphone, and it was his evidence that he succeeded in doing so.

[38] In contrast, it was not clear that the allegation the appellant "distributed and/or sold" hydromorphone was intended to capture personal use. This lack of clarity was reflected in the question asked of counsel by one of the Tribunal members during the closing submissions.

[39] "It is a fundamental principle of professional disciplinary proceedings that the tribunal cannot find the member guilty based on matters not in the formal charges": *Nowoselsky v Alberta College of Social Workers (Appeal Panel)*, 2011 ABCA 58 at para 19; see also, *MacLeod v Alberta College of Social Workers,* 2018 ABCA 13 at para 24; *Visconti v College of Physicians and Surgeons of Alberta,* 2010 ABCA 250 at paras 11-12; *Yee* at para 76; *Alsaadi* at para 25. The "allegations of professional misconduct must be specific enough that the professional can know the case that he or she must meet. When the allegations are taken to a hearing, the tribunal's mandate is to decide if those specific allegations have been proven" [emphasis added]: *MacLeod* at para 24. Here, the question put to the Tribunal was not whether the appellant breached his obligations under the *Controlled Drugs and Substances Act* and *Narcotic Control Regulations* – clearly, he did – but more specifically whether he "distributed and/or sold" hydromorphone in a manner contrary to the legislation. This issue required the Tribunal to consider whether the act of "distribution" under the *Controlled Drugs and Substances Act* and *Narcotic Control Regulations* – the legislation the appellant was alleged to have breached by "distributing and/or selling" hydromorphone – could be interpreted to include personal use.

[40] Although the Tribunal identified the issue, it overlooked what the allegation in the notice of hearing said and failed to engage in any way with the language used in the statute and regulations in reaching its conclusion. Instead, the Tribunal found the appellant guilty of breaching his obligations under the *Controlled Drugs and Substances Act* and *Narcotic Control Regulations* and then labelled it a "distribution". This was an error in principle. The Council erred in its application of the internal standard of review by failing to consider whether the Tribunal answered the specific question put to it. The issue raised by the appellant in relation to the scope of the third allegation made against him should have engaged a more intensive review: see *Yee* at para 35.

[41] The terms "distribute" and "distribution" fall within the meaning of the word "sell" under the *Controlled Drugs and Substances Act* and are not otherwise used in the *Narcotic Control Regulations*. In a criminal law context, there is authority for the proposition that there is no distribution where a narcotic is given to one person only for their personal use. "Distribution means the allocation to a number of persons": David Watt, KC & Michelle Fuerst, *Tremeear's Criminal Code* (Toronto: Thomson Reuters Canada Limited, 2023) at 2043, citing *R v Christiansen* (1973), 6 NBR (2d) 810 (CA), 13 CCC (2d) 504. Given this, and the context surrounding the question here where a breach of the Guidelines effectively incorporates a breach of practitioner obligations under the *Narcotic Control Regulations*, it was not reasonable to conclude that the "distributed and/or sold" allegation in this case was intended to extend to, or could be proved by, the appellant's personal use. The allegation as framed was limited to a question about whether the appellant was giving hydromorphone to third parties, with or without financial gain. This is reinforced by the fact that the respondent thought it necessary to re-open its case and call expert evidence to establish that the appellant could not have personally used all the hydromorphone as he claimed. Leaving aside whether this specific aspect of the respondent's case against the appellant involved statutorily defined professional misconduct that was properly the subject of a professional disciplinary proceeding (which was never raised), the third hydromorphone related allegation was not established on the facts found by the Tribunal.

[42] The Tribunal was unable to "conclude on a balance of probabilities that [the appellant] was 'selling' the hydromorphone or giving it to someone else". Therefore, the finding that the appellant was guilty of unprofessional conduct on the basis that he "distributed and/or sold" hydromorphone "in amounts and/or in a manner that was not in accordance with the provisions of" the *Controlled Drugs and Substances Act* and/or *Narcotic Control Regulations* is quashed.

The Council's Review of the Tribunal's Credibility Assessment

[43] The Council made no error in confirming the Tribunal's conclusion the appellant "was inappropriate in his interactions with the inspector and misleading with respect to the information he provided to the inspector." This finding of unprofessional conduct turned on the Tribunal's assessment of the witnesses' credibility and that assessment was entitled to the deference the Council afforded it: *Yee* at para 35. It is not this Court's role to re-weigh the evidence which is what the appellant is asking us to do.

The Reasonableness of the Sanctions and Costs Imposed

[44] In view of our decision to quash the finding of guilt based on the alleged "distribution" of hydromorphone, the $10,000 fine imposed for this finding of unprofessional conduct must be set aside. Apart from this fine, however, there is no basis to interfere with the sanctions imposed. The appellant did not take issue with a fine being imposed for each finding of guilt. Before the Tribunal, the Council, and again here, his primary concern is with the Tribunal's decision to cancel his registration for a period of five years. This part of the Tribunal's sanction decision was based on the gravity of the factual findings it made; namely that the appellant purchased "astonishing"

quantities of a dangerous narcotic and professionally accounted for only two percent of what was dispensed. Adding to the gravity of this misconduct was the fact that the appellant failed to provide details or answer questions about when he started to use the narcotic, the frequency of use, and when he ceased to use it. The Tribunal also considered that "the trust placed by governments in veterinarians with respect to the obtaining, use and disposition of controlled substances was violated by [the appellant] over a significant period of time." The Tribunal additionally weighed the "very serious" nature of the "proven allegations of failing to maintain minimum practice standards, failure to cooperate with the [practice] inspector, and failing to respond to the investigator." In other words, the gravity of the appellant's unprofessional conduct as assessed by the Tribunal is not materially diminished by the removal of one of two overlapping misconduct findings. The detailed assessment of the remaining factors weighed by the Tribunal is similarly unaffected.

[45] While the appellant disagrees with the Tribunal's assessment of some of the *Jaswal* factors, arguing that the "findings of the Hearing Tribunal do not suggest [the appellant] is ungovernable, at best they find that he was a drug abuser which can be remedied with treatment and support", this is not a basis upon which this Court can interfere with the sanctions imposed: *Byun* at para 36; *Virk v Law Society of Alberta*, 2022 ABCA 2 at para 32. The decision to cancel the appellant's registration was and remains a reasonable one in the circumstances.

[46] We are not persuaded that the 75% share of costs the appellant was ordered to pay by the Tribunal is unreasonable either. The appellant engaged in serious unprofessional conduct. Had he cooperated during the respondent's investigation, some or all of the hearing costs he now complains about could have been avoided. The Tribunal limited the amount the appellant must pay in recognition that one allegation of unprofessional conduct was not proved and because it accepted that it was not reasonable to require him to bear the full cost of the investigation and hearing. It also provided the appellant with extended time to pay. That said, having quashed the finding of guilt on the third hydromorphone related allegation, it is reasonable to remove from the amount the appellant was ordered to pay the costs for the respondent's expert and for the day of the hearing when the experts testified (October 14, 2020). These costs were incurred by the respondent solely for the purpose of proving that the appellant was giving hydromorphone to third parties, a finding the Tribunal did not make.

[47] The Council ordered the appellant to pay $35,000 in costs for that appeal. This amount was similarly based, in part, on the Council's determination that "the Complaints Director was completely successful in [the] appeal." Because we have found that the Council's decision in relation to one ground of appeal was in error, we consider it appropriate to reduce the costs payable by the appellant for the appeal to the Council to $25,000.

Disposition

[48] The finding of unprofessional conduct based on the allegation the appellant "distributed and/or sold controlled drugs, namely Hydromorphone in amounts and/or in a manner that was not

in accordance with the provisions of the *Controlled Drugs and Substances Act*...and/or the provisions of the Narcotic Control Regulations" is quashed and the associated fine of $10,000 is set aside. The costs the appellant was ordered by the Tribunal to pay are reduced by the amount of the respondent's expert costs and its costs incurred for the October 14, 2020, hearing date.

[49] The costs ordered payable by the appellant for his appeal to the Council are also reduced to $25,000.

[50] All remaining grounds of appeal are dismissed. As success is divided, each party shall bear their own costs for this appeal.

Appeal heard on November 7, 2023

Memorandum filed at Calgary, Alberta
this 19th day of December, 2023

Rowbotham J.A.

Kirker J.A.

de Wit J.A.

Appearances:

D.J. Girard
D. Glossop
for the Appellant

K.A. Smith, KC
for the Respondent