In the Court of Appeal of Alberta

Citation: Dr Ignacio Tan III v Alberta Veterinary Medical Association, 2025 ABCA 119

Date: 20250408
Docket: 2403-0036AC
Registry: Edmonton

Between:

Dr. Ignacio Tan III

Appellant

- and -

Alberta Veterinary Medical Association and Committee of Council of The Alberta Veterinary Medical Association

Respondents

The Court:

The Honourable Justice Jack Watson
The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker

Memorandum of Judgment of the Honourable Justice Watson

Memorandum of Judgment of the Honourable Justice Ho and Justice Kirker Concurring in the Result

Appeal from the Decision by
The Committee of Council of the Alberta Veterinary Medical Association
Dated the 29th day of January, 2024

Memorandum of Judgment

Watson J.A.:

I. Introduction

[1] The appellant challenges the decision of a Committee of the Council of the Alberta Veterinary Medical Association (the Council) issued January 29, 2024, in accordance with section 45.1 of the *Veterinary Profession Act*, RSA 2000, c V-2 (*VPA*) dealing with the appellant's appeal from decisions of a Hearing Tribunal dated February 2, 2023, (findings of professional misconduct) and August 2, 2023, (sanction) respectively.

[2] The appeal to this Court arises under Part 5, Division 5 of the *VPA* and is an appeal as of right based on the record below. As discussed below, this Court has a broad jurisdiction to deal with the merits, the sanction and costs.

II. Decision of the Hearing Tribunal

[3] The facts underlying the appeal to this Court date back to events between July and November 2016, relating to treatment of three different dogs, namely an Italian Greyhound (Duke), a Doberman (Diesel), and a Mastiff (Isabella). There was also evidence related to a kitten. All of the animals were companion animals and were young. There were 39 counts initially brought against the appellant essentially related to allegations of medical and surgical mismanagement of the cases, lack of professionalism in his relationship with clients, lack of professionalism in dealings with staff, and record keeping. The appellant had a clear history of practice prior to these events, having been enrolled in 2009. After being charged, the appellant did undertake to refrain from involving in orthopedic surgery of companion animals while the professional proceedings were pending, which process ran a period of years.

[4] The decisions refer to "allegations" rather than "counts", but I found it more grammatically appropriate in these reasons to refer to the specified allegations as "counts". There were originally 16 counts as to alleged improper handling of Duke's treatment. The appellant was found guilty of 9 counts (counts 1-6, 8, 9 and 12) and acquitted of 7 counts (counts 7, 10-11, 13-16). There were 7 counts as to alleged improper and unduly delayed handling of Diesel's treatment of which the appellant was found guilty of 3 counts (counts 20, 21, 23) and acquitted of 4 counts (count 17-19, 22). One of these acquittals (count 22) was made on the basis the count was redundant to another count (count 21). There were 2 counts as to Isabella; 1 count to do with treatment (count 24) and the other to do alleged failure to respect the appellant's staff concerns about her treatment (count 25). The appellant was acquitted of the treatment count but found guilty of the count as to his behavior relating to staff (count 25).

[5] As to professionalism more generally, 2 counts alleged that the appellant failed to take responsibility for his practices and blamed others. He was acquitted of 1 such count (count 26) as to failing to take responsibility on the basis it was "too broad", the count being worded in such a way as to not permit a proper decision by the Tribunal. He was found guilty of the count of blaming, to a client, an 'RVT' for his error in relation his dealing with a kitten (count 27).

[6] A further count alleged that he improperly dispensed drugs outside of a Veterinary Client-Patient Relationship and he was found guilty of that count (count 28). There were 4 further counts globally impugning his work and his competence having regard to outcomes (counts 29-32). He was found guilty of the latter 2 counts (counts 31-32) related to Duke and Diesel. There were 5 counts about improper record keeping (counts 33-37) and he was found guilty of 2 of those (counts 33, 37). There were 2 counts alleging breach of his undertaking made to the Association and the appellant was acquitted of those (counts 38-39). In total, the appellant was found guilty of 19 counts and acquitted of 20 counts.

[7] As to sanction, the Hearing Tribunal imposed a reprimand and imposed fines of $1,000 per count for all but 2 counts for which guilty findings were made. Those 2 counts with higher fines were the count of failing to respect staff concerns as to Isabella (count 25), resulting in a fine of $6,000, and the count as to blaming another person for the death of the kitten (count 27), resulting in a fine of $6,000. The total of fines, accordingly, was $29,000.

[8] The Hearing Tribunal rejected the Director's submission for a suspension of 12 months, imposing instead a suspension of 30 days. The Hearing Tribunal distinguished, for sanction purposes, cases of cruelty or dishonesty cited by the Director as precedents. The Hearing Tribunal imposed a requirement to participate in 100 hours of continuing education and to complete a professional (international) examination. Relatedly, the Hearing Tribunal subjected the appellant's license to a restriction to refrain from "any aspect of orthopedic surgery" until he completed the education and training conditions and satisfied the Director of his competence to do such work.

III. Decision of the Council

[9] The Council applied the standard of reasonableness to the factual findings of the Hearing Tribunal but opined that it should have regard to, but need not, defer to the Hearing Tribunal as to "questions of law, the expertise of the profession, and the setting of standards of conduct". It said it would intervene if it found that there was "unreasonableness, error of principle, potential injustice or another sound basis for intervening", either on the merits or as to sanctions.

[10] One point in the Council reasons concerned whether the absence of written standards of practice made it impossible to assess "whether Dr. Tan's actions fell below the requirements for a veterinarian or, as a result, that a decision maker such as the Hearing Tribunal could not make findings of unprofessional conduct". The Council did not accept that position, stating:

> 52. As the Complaints Director argued, there is no requirement that every standard for a profession must be codified in writing. Written standards of practice adopted through the VPA are undoubtedly an important part of setting expectations and, where appropriate, requirements for safe, competent and qualified practice by veterinarians.
>
> 53. However, written standards of practice do not --- and for practical purposes cannot --- operate as the only means for governing and measuring the practice of veterinarians (or any other profession for that matter). As is the case with every profession, many standards for the veterinary profession are unwritten. They are based on core and fundamental principles of veterinary medicine which are taught at accredited veterinary educational institutions, that are consistently practiced by veterinarians throughout the profession and that form a foundational aspect of the expected standard of practice for veterinary medicine.
>
> 54. In brief, the fundamental knowledge, skill and judgment base for veterinary medicine can be both written and unwritten and must be applied by all members of this profession.
>
> 55. It was reasonable for the Hearing Tribunal to conclude that there were recognized, accepted and clinically justified unwritten standards of practice which all veterinarians were required to comply with in terms of Dr. Tan's actions.

[11] The Council felt that absurd results would follow from a requirement that "every aspect of acceptable veterinary medicine would have to be set out in writing in order to be enforceable." As such, the Council concluded the professional body was entitled to apply its own expertise, adding:

> 57. There is no suggestion in the caselaw that standards of practice must be in writing before a professional can be found to have committed unprofessional conduct. It would be impossible and untenable to place a burden on the ABVMA and similar professional regulatory organizations to reduce all requirements for practice in writing. Instead, written standards of practice act in concert with unwritten standards reflecting fundamental and generally accepted requirements for safe and effective practice that are taught to and applied by veterinarians throughout every aspect of their practice.

[12] The Council also rejected the appellant's argument that the existence of a "reasonable and competent body of professional opinion that supports the member's conduct or judgment" would obviate the ability of the profession to convict the accused member of the profession of professional misconduct. Since the appellant did not call evidence of the existence of such a body of opinion, the Council concluded that this argument devolved to "assertions".

[13] In its reasons, the Council assessed the findings of the Hearing Tribunal as to each conclusion of guilt. In doing so, the Council proceeded on the analytical process urged by counsel for the appellant, namely to "remain focused on whether the decision of the Tribunal is based on errors of

law, errors of principle or is not reasonably sustainable": at para 34. Also, the Council agreed with counsel for the appellant that it was equally positioned to make findings of law and that it "should have regard for the view of the Hearing Tribunal but the COC is entitled to independently examine issues, promote uniformity in interpretation and, very importantly, to ensure that proper professional standards are maintained": at para 35.

[14] Prior to ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65, [2019] 4 SCR 653, in ***Stewart v Elk Valley Coal Corporation***, 2017 SCC 30 at paras 19-20, [2017] 1 SCR 591, McLachlin CJC helpfully commented that "[b]eneath the rhetoric that surrounds standard of review lies the question of deference: Should the reviewing court approach the decision below with deference?". Although dealing with the Human Rights Tribunal, McLachlin CJC said it was "the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts. And it is the tribunal's task to interpret the statute in ways that make practical and legal sense in the case before it, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas."

[15] Consistent with what the Supreme Court has, since ***Vavilov***, described as the "legal constraints" binding upon deciders, the Council dutifully drew legal guidance particularly from ***Yee v Chartered Professional Accountants of Alberta***, 2020 ABCA 98, 9 Alta LR (7th) 10, which covered, *inter alia*, the subject of 'internal' standards of review within regulators, which is to say it covered the role of itself, the Council, in its assessment of the decision of the Hearing Tribunal. On this point, the 'legal constraints' on deciders included established case law, if directly applicable and of binding effect: compare ***Mason v Canada***, 2023 SCC 21 at paras 64-77, 485 DLR (4th) 583; ***Ontario v Restoule***, 2024 SCC 27 at paras 153-154, 494 DLR (4th) 383; ***Auer v Auer***, 2024 SCC 36 at paras 50-51, 497 DLR (4th) 381.

[16] Returning to its analysis of the findings, notably of facts, by the Hearing Tribunal, the Council found the extensive reasons of the Hearing Tribunal were "comprehensive and intelligible document (including a thorough analysis of witness testimony)": at para 46. In this respect, the Council said that the "Merits Decision and the Record disclose clear, extensive and consistent testimony and evidence on which the Hearing Tribunal could reasonably make the findings of unprofessional conduct that it did": para 48. The Council also said it conducted a "fulsome and independent assessment" as to whether there was duplication in the counts or other unfairness: at para 50. This Court should take the Council at its word that it performed the close examination of the record that it said it did: compare ***R v O'Brien***, 2011 SCC 29 at para 18, [2011] 2 SCR 485.

[17] Further, the Council's review of the evidence suggests that the Council also may have brought to bear its own subject matter expertise in evaluating the reasonableness of the Hearing Tribunal's conclusions as to the expert and other evidence called by the Complaints Director regarding the treatment of Duke (paras 63-123, 152-58, 159-165), Diesel (paras 124-137, 152-158, 159-165), and Isabella (paras 138-143). The Council also addressed in detail the counts as to improper drug dispensation (paras 148-151) and inadequate reasons (paras 166-174).

[18] A similar care is apparent in the approach taken by the Council as to findings relating to sanction, and its discussion of the relevance of delay in the process for sanction purposes, or in finding the appellant's complaints about the involvement of the Complaints Director to be without merit. ***Yee*** did not suggest the internal review decider was disentitled to weigh the evidence carefully. The concern in ***Yee*** was that the internal review decider was not to simply *substitute* its own opinion of the evidence for that of the initial decider. No such concern arises here.

[19] That said, at the hearing of the appeal, counsel for the appellant argued, referring to ***Yee***, that it was open to the Council under the broad terms of s 45(4) of the *VPA* to reconsider the conclusions of the Hearing Tribunal if satisfied that the Hearing Tribunal made a mistake.

[20] As noted below, some of the particulars of argument under Ground of Appeal C regarding the Merits appeal by the appellant, criticize the Council for failure to correct alleged errors of the Hearing Tribunal. Section 45(4) of the *VPA* provides as follows:

> (4) The Council on an appeal may
>
> (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. [Emphasis added]

[21] Counsel for the appellant also assailed the adequacy of the reasons provided by both the Hearing Tribunal and the Council. Counsel was asked if his argument included that it would be proper or improper if any conclusions of the Council may have been assisted by the professional experience and expertise that Council members may *themselves* have had in relation to any of the subject matters. Counsel for the appellant did not put forward that specific argument in this case although he contended, rightly enough, that whether any Council members brought personal knowledge into the assessment did not necessarily contradict any of his specific grounds of appeal. Nonetheless, he also raised the possibility of unfairness of 'internalized expertise' by the decider in some cases, although not here.

[22] Counsel's position as to not pressing this point as a specific argument is appropriate. If a regulated member should object to a member of a regulator decider, such objection should be made at the earliest time: compare ***R v Curragh Inc***, [1997] 1 SCR 537 at para 11. Failure to object in a timely way can defeat the objection: ***Ghirardosi v British Columbia (Minister of Highways),*** [1966] SCR 367; ***N(L) v M(S)***, 2007 ABCA 258 at paras 25-33 per majority, at paras 56-67 per McFadyen JA

dissenting, 284 DLR (4th) 1. Apprehension of bias cases differ from this case. *A fortiori*, as to an objection to a tribunal member for being too *knowledgeable*, even assuming (without deciding) that such an argument could provide a rational basis for an objection, it would be hard to avoid finding waiver of such an objection if not made at the outset.

[23] The expertise of the Council is not immaterial here because counsel for the Association took the position that both the Hearing Tribunal and Council deserved deference on issues of policy, both of professional and legal dimensions, particularly as to sanction but also as to veterinary practice. Likewise, the Council itself said that it could review issues of practice standards. For his part, the appellant effectively challenges the ability of the two deciders to assess the limits of professional misconduct without pre-existing written guidance.

[24] Since ***Vavilov***, the existence of expertise on the part of the regulator decider under review is no longer a required factor to define the standard of review: ***Vavilov*** at paras 27-31, 46, 58-61. But ***Vavilov*** also said, at para 31, "we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review." The existence of apparent qualifications of expertise by members of a Council may "reveal to a reviewing court that an outcome ... accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision": ***Vavilov*** at para 93.

[25] Moreover, ***Vavilov*** reminded review courts that expertise of the decider has other effects:

> 91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: Newfoundland Nurses, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
>
> 92 *Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge -- nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision -- indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.*

> 93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. *Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.*
>
> 94 The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or *may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency*. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member. [Emphasis added]

[26] In the end, this Court is empowered by the *VPA* to decide if a decision of the Council is reasonable when considered in its context. This Court is not empowered to re-try the facts nor to re-determine matters of special knowledge without reference to expert opinion evidence.

IV. Grounds of Appeal and Standard of Review

[27] The Grounds of Appeal as to merits are as follows:

> It is respectfully submitted that the COC erred in:
>
> (a) upholding the Decision of the Hearing Tribunal attributing unprofessional conduct to what was, in essence, a divergence of opinions about surgical techniques;
> (b) the COC failed to identify or articulate the standards of practice in veterinary orthopedic surgery which allegedly had not been met by Dr Tan (as had the Hearing Tribunal); and,

(c) the COC failed to properly assess the evidence or otherwise erred in making credibility findings and simply adopted without serious analysis the Decision of the Hearing Tribunal.

[28] The Grounds of Appeal as to sanction are as follows:

> With respect to the Sanction Decision, the COC erred in upholding an unfit sanction ordered by the Hearing Tribunal by:
>
> (a) failing to give weight to the absence of published standards of practice as a mitigating factor;
> (b) failing to consider the passage of time to be a mitigating factor;
> (c) imposing sanctions disproportionate to the factually proven unprofessional conduct;
> (d) imposing sanctions including suspension, fines and costs that are inconsistent with precedent, and which were unreasonable; and,
> (e) improperly delegating enforcement powers to the Complaints Director

[29] ***Vavilov*** made clear that a judicial review by this Court that is by way of statutory appeal from a decider which is part of a professional regulator system, such as the Council here, involves appellate standards of review: ***Vavilov*** at paras 39, 47; ***Law Society of Saskatchewan v Abrametz***, 2022 SCC 29 at paras 26-28, 470 DLR (4th) 328; ***Yee*** at paras 29-30; ***Alsaadi v Alberta College of Pharmacy***, 2021 ABCA 313 at paras 15-17, 463 DLR (4th) 335; ***Chartered Professional Accountants (Complaints Inquiry Committee) v Mathison***, 2024 ABCA 33 at paras 17-22, leave denied [2024] SCCA No 110 (QL) (SCC No 41199).

[30] As summarized by the Supreme Court of Canada in ***Abrametz*** at para 29,

> "... the standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at paras. 24-25."

[31] Under the overall appellate review architecture in Canada, exercises of discretion "may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence), or a failure to exercise discretion judicially (which includes acting arbitrarily or being 'so clearly wrong as to amount to an injustice'): (*Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48 at para. 41, quoting *P. (W.) v. Alberta*, 2014 ABCA 404, 378 DLR (4th) 629, at para. 15)": ***Saskatchewan (Environment) v Métis Nation – Saskatchewan***, 2025 SCC 4 at para 32, [2025] SCJ No 4 (QL); see also ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71 at para 43, [2003] 3 SCR 371; ***Penner v Niagara (Regional Police Services Board)***, 2013 SCC 19 at para 27, [2013] 2 SCR 125; ***Fontaine v Canada***, 2017 SCC 47 at para 36, [2017] 2 SCR 205; ***Yatar v TD Insurance Meloche Monnex***, 2024 SCC 8 at para 41, 489 DLR (4th) 191.

[32] The line of inquiry on appeal or review as to procedural fairness by the Council as an administrative decider does not involve deference by this Court towards the Council or, for that matter, towards the Hearing Tribunal. However, arguably, proper curative steps by the Council intended to overcome the unfairness might, under the terms of the *VPA*, cure fairness problems at the Hearing Tribunal, if any were found: compare ***Stewart v Lac Ste. Anne (County) SDAB***, 2006 ABCA 264 at paras 24-16, 274 DLR (4th) 291; ***Allsop v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2011 ABCA 323 at para 39, 29 Admin LR (5th) 321; ***McBride v Canada (Minister of National Defence)***, 2012 FCA 181 at paras 41-45, 431 NR 383; ***Hnatiuk v Society of Management Accountants of Manitoba***, 2013 MBCA 31 at para 92, 291 Man R (2d) 203; ***G, R (on the application of) v X School***, [2011] UKSC 30 at paras 84-85 (Lord Dyson), 94 (Lord Hope), 119 (Lord Brown), [2011] All ER 625; ***Laing v The Queen (Bermuda),*** [2013] UKPC 14 at para 12, [2013] 1 WLR 2670.

[33] The ability to repair unfairness at a higher administrative level decision maker is one of the rationales for the exhaustion principle: compare ***MK Engineering Inc v Assn of Professional Engineers and Geoscientists of Alberta***, 2014 ABCA 58 at para 19, 68 Admin LR (5th) 135; ***Budlakoti v Canada***, 2015 FCA 139 at paras 56-61, 35 Imm LR (4th) 1, leave denied [2015] SCCA 334 (QL) (SCC No 36591).

[34] Assessment of procedural fairness by this Court involves independent evaluation of whether the process was substantively and objectively fair consistent with principles of natural justice and any reasonable expectations of the affected party. Factors in delineation of what is natural justice and fair process include the legislative system creating the decider and setting out its procedures, the nature of the decider, the processes it has adopted to perform its function, the significance of the decision, the legitimate expectations of the party affected, and the history and circumstances of the matter: ***Baker v Canada***, [1999] 2 SCR 817 at paras 21-48; ***Abrametz*** at paras 26-40; ***AltaLink Management Ltd v Alberta Utilities Commission***, 2023 ABCA 325 at para 35, 66 Alta LR (7th) 212; ***Sandhu v College of Physicians and Surgeons of Alberta***, 2023 ABCA 61 at para 36, [2023] AJ No 176 (QL); ***Magneson v Alberta Securities Commission***, 2023 ABCA 348 at para 4, [2023] AJ No 1272 (QL); ***Muradov v College of Naturopathic Doctors of Alberta***, 2024 ABCA 224 at paras 14-27, [2024] AJ No 725 (QL); ***Métis Nation of Alberta Association v Alberta (Indigenous Relations)***, 2024 ABCA 40 at para 35, 492 DLR (4th) 509. I bear these factors in mind.

[35] Some further elaboration of the concept of palpable and overriding error seems useful here.

a) Palpable and Overriding Error

[36] The concept of palpable and overriding error looms large in this appeal. That is because many of the challenges to the decisions of the Council and the Hearing Tribunal come down to disagreements as to fact finding or of application of legal discretions to the facts by both deciders.

[37] The palpable and overriding standard reminds appeal and review Courts that even if they were to detect errors of fact by the decider under review, those errors of fact, howsoever numerous, would

not destroy the decision made if they do not remove its foundations or scramble its analysis. Recently in ***R v Kruk***, 2024 SCC 7 at para 90, 489 DLR (4th) 385 the Supreme Court of Canada said:

> 90 In general, the introduction of new errors of law has the potential to upset the established balance in relation to credibility and reliability findings. Review based on an error of law may invite a "yes-no" answer measured on a standard of correctness, which opens the door to undue scrutiny of matters properly before the trial judge. To some extent, the materiality inquiry associated with the rule against ungrounded common-sense assumptions -- under which the appellant must show that such reasoning "mattered in arriving at the impugned factual finding" (J.C., at para. 100) -- mitigates the categorical nature of an error of law. However, in my view, it remains preferable to assess whether an error has been made in the first place based on the palpable and overriding standard. An overriding error is necessarily material because it must be shown to have affected the trial judge's decision -- but it is important to emphasize that an overriding error affects not just an isolated finding of fact, which may or may not have played a role in reaching the outcome, but the trial judge's decision as a whole. *It is not enough for an appellant asserting palpable and overriding error to pull at leaves and branches and leave the tree standing; the entire tree must fall (South Yukon Forest Corp. v. Canada, 2012 FCA 165, 431 N.R. 286, at para. 46, cited in Benhaim v. St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, and Salomon v. Matte-Thompson, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 116*). [Emphasis added]

[38] The Supreme Court of Canada has maintained this posture of deference many times recently beyond the cases noted in ***Kruk***: see ***Benhaim v St-Germain***, 2016 SCC 48, [2016] 2 SCR 352; ***Salomon v Matte-Thompson***, 2019 SCC 14, [2019] 1 SCR 729; ***Modern Cleaning Concept Inc v Comité paritaire de l'entretien d'édifices publics de la région de Québec***, 2019 SCC 28, [2019] 2 SCR 406; ***Southwind v Canada***, 2021 SCC 28, [2021] 2 SCR 450; ***3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada***, 2018 SCC 43, [2018] 3 SCR 8. In ***Uniprix inc. v Gestion Gosselin et Bérubé inc***, 2017 SCC 43 at para 130, [2017] 2 SCR 59, the Court also mentioned the metaphor used by Morrisette JA in ***G(J) v Nadeau***, 2016 QCCA 167 at para 77, where he said a palpable and overriding error is [translation] "in the nature not of a needle in a haystack, but of a beam in the eye".

[39] The application of the essentials of the appellate review standard of palpable and overriding error is not a novelty in the common law. In ***R v Clark***, 2005 SCC 2 at para 9, [2005] 1 SCR 6, Fish J for the Supreme Court of Canada put the standard this way:

> 9. The appellant submits that the Court of Appeal, in this regard and in other respects as well, departed impermissibly from the trial judge's appreciation of the evidence. With respect, I agree. But since I would in any event allow the appeal on other grounds, I find it sufficient for present purposes simply to reaffirm the governing principles. Appellate courts may not interfere with the findings of fact made and the factual

> inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. *The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm*: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; Schwartz v. Canada, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. [Emphasis added]

[40] The phrase "palpable and overriding error" was expressed by Ritchie J in ***Stein v Kathy K (The),*** [1976] 2 SCR 802 as an encapsulation of the guidance offered to appeal courts from as far back as ***The Sir Robert Peel*** (1880), 4 Asp. MLC 321.3, at p. 322, where James LJ said "[t]he Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, *unless they find some governing fact which in relation to others has created a wrong impression*" [Emphasis added]. This passage was adopted by Lord Sumner in ***S S Honestroom (Owners) v S S Sagaporack (Owners)***, [[1927] AC 37 at pp 47-48. Indeed, the perspective is even older going back to Lord Kingsdown in ***The Julia***, (1860) 14 Moo. P.C. 210, 235

[41] The line of authority moved through from ***The Sir Robert Peel*** through to Lord Shaw in ***Clarke v Edinburgh Tramways Co***, [1919] SC (HL) 35 at p 36, which was adopted in Canada in ***Prudential Trust Co Ltd v Forseth***, [1960] SCR 210 at pp 216-7. Meanwhile English cases continued referring to "plainly wrong" in ***Powell v Streatham Manor Nursing Home***, [1935] AC 243 at p. 250, and more recently in ***Perry v Raleys***, [2019] UKSC 5 at para 49, where the United Kingdom Supreme Court observed that the Court of Appeal had reminded themselves of "the very real constraints facing an appellate court when invited to overturn a judge's findings of fact at trial. For that purpose, they referred to *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. ..."

[42] ***McGraddie v McGraddie*** [2013] UKSC 58 at paras 3-4, [2013] 1 WLR 2477, had reached across the ocean to the United States Supreme Court in ***Anderson v City of Bessemer*** (1985), 470 US 564 (1985), 574-575, where the Court said:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. *Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources*. In addition, *the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one*: requiring them to persuade three more

> judges at the appellate level is requiring too much. As the court has stated in a different context*, the trial on the merits should be 'the 'main event' ... rather than a 'try out on the road'.'* … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception. [Emphasis added]

[43] Another way of putting the distinction between an appeal or review court on the one hand and the fact decider (here there are, in effect, two fact assessors) on the other, is that the fact decider "will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping": ***Fage UK Ltd v Chobani UK Ltd***, [2014] EWCA Civ 5.

[44] At the end of all this, it may perhaps be said that appellate decision making embodies a form of judicial self-discipline, perhaps even judicial humility for both judges and quasi-judicial regulator deciders, when reviewing decisions of first instance expert tribunals, even if the expertise is not itself the sole rationale for doing so.

[45] An error that is discerned in the decision must, to be overriding, go to the core of the decision, not to details: see ***R v Lohrer***, 2004 SCC 80 at para 2, [2004] 3 SCR 732; ***Van de Perre v Edwards***, 2001 SCC 60 at para 15, [2001] 2 SCR 1014; ***Benhaim*** at para 38; ***Salomon v Matte-Thompson***, 2019 SCC 14 at para 116, [2019] 1 SCR 729; ***British Columbia (Attorney General) v Council of Canadians with Disabilitie***s, 2022 SCC 27 at para 96, 470 DLR (4th) 289; ***Nelson (City) v Mowatt***, 2017 SCC 8 at para 38, [2017] 1 SCR 138; ***Yunusova v Naimi***, 2023 BCCA 124 at para 30, [2023] BCJ No 465 (QL). In ***Mahjoub v Canada***, 2017 FCA 157 at paras 56-75, 387 CRR (2d) 1, Stratas JA discussed the meaning of both "palpable" and "overriding" in some detail, including the comment that: "even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding."

b) Statutory Terms

[46] At hearing of the appeal here, the appellant's counsel contended that the language of the section 45(4) of the *VPA* -- notably as to the Council being empowered to make the "determination or finding that, in its opinion, should have been made" -- invited the inference that the Legislature intended to grant the Council a broader authority to review the Hearing Tribunal than the level of review contemplated in ***Yee***. While there may be a semantical possibility in the *VPA* here, I subscribe to the view expressed in ***Yee***, and I do not read the statute as intending a more intrusive role for the Council, the existence of which would make the Hearing Tribunal's function more like a "try out on the road".

[47] While the Legislature would be entitled to re-write the review standard, it would take clearer language to rescind almost two centuries of legal tradition about appellate review. The Legislature is taken to understand its 'book of common law' when it enacts: see Ruth Sullivan, *Construction of Statutes*, 7th Edition, [Lexis/Nexis 2022] at p 205, Ch. 8, Part 1, §8.02, referring to the presumption of legislative knowledge as "very far-reaching", citing many cases.

[48] Indeed, two examples of related judicial recognition can be furnished. One is ***L(H) v Canada***, 2005 SCC 25 at paras 4-5, [2005] 1 SCR 401, where the Supreme Court of Canada was invited to compare Saskatchewan legislation with ***Housen v Nikolaisen***, 2002 SCC 33, at paras 4-5, [2002] 2 SCR 235. The Court, in ***L(H),*** said:

> 4 More particularly, the *2000 Act* did not change the standard of review applicable in Saskatchewan to appellate intervention with respect to findings of fact. The criteria that govern *the exercise* by the Court of Appeal of its statutory powers in this regard remain unchanged. Like other appellate courts across the country, it may substitute its own view of the evidence and draw its own inferences of fact *where the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence.*
>
> 5 This standard of appellate review is subject, of course, to statutory exceptions. It does not apply where the legislature has expressly provided otherwise. Nothing in the *2000 Act* reflects any such intention or has any such effect. It sets out the powers of the Court of Appeal in considerable detail; in other Canadian jurisdictions, equivalent powers are conferred in more general terms. As we shall see, however, the *2000 Act* neither bestows on the Court of Appeal for Saskatchewan unique powers of appellate intervention on questions of fact nor ordains their exercise in a manner that, within Canada, is exclusive to Saskatchewan. [Emphasis added]

[49] The second case is ***Canada v Khosa***, 2009 SCC 12, [2009] 1 SCR 339 where Binnie J, in talking about ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190 and his debate with Rothstein J on points later settled in ***Vavilov***, noted at para 16 that s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, had extensively addressed grounds of appeal and, seemingly, standard of review related thereto. Binnie J said at para 19:

> 19 Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the *British Columbia Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58(2)(a) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of indicia of patent unreasonableness are given in s. 58(3). Despite Dunsmuir, "patent unreasonableness" will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to

> afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

He later added at para 28:

> 28 In my view, the interpretation of s. 18.1 of the Federal Courts Act must be sufficiently elastic to apply to the decisions of hundreds of different "types" of administrators, from Cabinet members to entry-level fonctionnaires, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not. It cannot have been Parliament's intent to create by s. 18.1 of the Federal Courts Act a single, rigid Procrustean standard of decontextualized review for all "federal board[s], commission[s] or other tribunal[s]", an expression which is defined (in s. 2) to include generally all federal administrative decision-makers. A flexible and contextual approach to s. 18.1 obviates the need for Parliament to set customized standards of review for each and every federal decision-maker.

[50] In other words, if Parliament or a Legislature wanted to change the standard of review, they would be entitled to do so, within Constitutional limitations. But I do not detect such intention in this language of the *VPA*, broad as it is. ***Vavilov*** is, arguably, more precise than ***Dunsmuir*** and ***Khosa*** about how statute fits into the generations of common law dealing with appellate review of whether fact-tinged findings by first instance deciders are reasonable. But ultimately the result is the same for statutory appeals. Fact findings at first instance and made by an internal appeal decider, on review in this Court, are reviewed on the standard of palpable and overriding error. Questions of law are reviewed for correctness. Despite the broad language of section 46.1 of the *VPA* as to the powers of this Court “on hearing an appeal”, that language does not suggest a departure from traditional appellate standards of review.

[51] I turn now to the specific grounds of appeal. The subtitles used below are merely simplifications of the grounds intended for brevity.

V. Discussion

a) Ground 1: Divergence of Professional Opinions

[52] As noted above, the first ground contends that the Council erred in upholding the Decision of the Hearing Tribunal attributing unprofessional conduct to what was, in essence, a divergence of opinions about surgical techniques. This ground somewhat overlaps with the second ground of appeal conceptually, but the core of this ground concerns, in our view, the weighing of expert evidence by a qualified deciders in both the Hearing Tribunal and then the Council. Moreover, as counsel for the appellant properly accepted during the appeal hearing, this argument does not apply to all the counts for which guilty findings were made.

[53] Under this first ground, counsel for the appellant advances the contention that to amount to conduct deserving of sanction, the Hearing Tribunal and Council both were *required* to find, in effect, "that no adherent to standards accepted by any recognized medical institution, acting conscientiously, would have considered the [conduct] in question to be reasonable in the circumstances."

[54] For this, counsel cites ***Stephen v College of Physicians and Surgeons***, [1991] SJ No 436 (QL), which was a first level review decision dealing with a medical procedure of complexity and on scene judgment. There was said to be "some variation of opinion within the medical profession" about the matter. The count in ***Stephen*** flatly alleged that the medical intervention was not *warranted* but the evidence concerned the *timing* of the method chosen; that is, how close the intervention was to an earlier health episode. The strenuous "no adherent" language was indirect in ***Stephen*** as it was within a quote from an earlier Ontario case called ***Re Casullo and College of Physicians and Surgeons of Ontario*** (1973), 2 OR (2d) 61. For itself, the Saskatchewan court in ***Stephen*** expressed a standard that "the proof of the misconduct [must be] clear and convincing". That level of proof is not a valid fetter on the ability of an expert decider to reach a conclusion under civil or administrative law "where criminal or morally blameworthy conduct is alleged": compare ***H (F) v McDougall***, 2008 SCC 53 at paras 39-40, [2008] 3 SCR 41, which addressed that very point.

[55] Even setting aside ***McDougall***, ***Stephen*** does not justify such an absolute test as "no adherent ...". Such a test resembles the rule about circumstantial evidence in criminal cases: compare ***R v Villaroman***, 2016 SCC 33, [2016] 1 SCR 1000. Indeed, the Saskatchewan court in ***Stephen*** ended up with "a sense of unease and disquiet that I have concluded that it would be unsafe to sustain the conviction thereon". With respect, such an approach is not only not reconcilable with ***McDougall*** but with the standard of review under ***Vavilov***. In any event, the point at hand in ***Stephen*** turned very much on the factual context of that case and I need not consider it influential here.

[56] The appellant's counsel also cites these cases: ***Sussman v College of Alberta Psychologists***, 2010 ABCA 300 at para 54, 37 Alta LR (5th) 177; ***Creager v Provincial Dental Board of Nova Scotia***, 2005 NSCA 9 at para 36, 230 NSR (2d) 48; ***Walsh v Council for Licensed Practical Nurses***, 2010 NLCA 11 at para 46, 317 DLR (4th) 152; ***Reddoch v Yukon Medical Council***, 2001 YKCA 13 at para 60, 39 Admin LR (3d) 138. These cases have their own characteristics and do not articulate a "no adherent ..." test. Indeed, they largely coincide on the position that each decision is decided on its merits except perhaps for *obiter* in ***Reddoch***.

[57] What remains in this case is the test that the Hearing Tribunal and Council applied, which was drawn from ***Yee.*** That test was that each was required to be satisfied on a balance of probabilities that the conduct of the appellant was faulty enough to "engage the broader public interest or reputation of the profession": ***Yee*** at para 39. As noted above, many paras in ***Vavilov*** support the ability of the Hearing Tribunal and Council to make such a decision.

[58] Speaking more generally, the appellant's argument that there was a 'divergence' of opinion between the position taken by the expert witnesses called for the regulator and the position, without specification or specific support, offered by the appellant, was resolved in part by the Council saying

there was no divergence, as such, since there was substantive evidence on one side and mere ‘assertions’ on the other. The Court sees no error in that conclusion, so by review for reasonableness, that conclusion collapses this ground of appeal.

[59] Even passing that by, the Court sees the ground of appeal as posited by the appellant as attempting to draw an artificial distinction between the role of the Hearing Tribunal as the first instance decider, and the role of the Council as an appellate decider, as to weighing expert opinion evidence, on the one hand, and the appellant’s contention that the specific opinions of the experts were debatable on the other. There is still only one thing occurring – the weighing of expert opinion evidence. The alleged existence of other possible theories or arguments in the sphere of special knowledge is not unique to the sciences under consideration here. Such alleged existence of an opposing viewpoint does not automatically forestall the ability of the decider to accept and rule on the viewpoint that the decider does have based on the expert opinion evidence before it.

[60] That ability to choose includes situations where the decider itself lacks the specialized knowledge being proposed and theoretically answered. Indeed, most of the time, *lack* of specialized knowledge is the case for deciders.

[61] In general, the *admissibility* of evidence of a properly qualified expert requires that the expert has special skill or knowledge acquired through study or experience, or both, in the subject matter of the opinion that *is beyond that* of decider and is assessed on necessity and reliability criteria: ***White Burgess Langille Inman v Abbott and Haliburton Co***., 2015 SCC 23, [2015] 2 SCR 182; ***R v Mohan***, [1994] 2 SCR 9; ***R v Marquard***, [1993] 4 SCR 223; ***R v Bingley***, 2017 SCC 12 at paras 13-17, [2017] 1 SCR 170. It has also been suggested that a proposed expert should not be qualified as an expert if that expert's knowledge of the subject matter is ‘minimal’ or of low probative value as against its potential prejudicial effect on the proceedings: ***R v J-LJ***, 2000 SCC 51 at para 28, [2000] 2 SCR 600, cited in ***White Burgess***.

[62] But an expert’s opinion is not of “minimal” value, let alone obliterated, merely because it might not be *a lot more* than *already* possessed by the decider to begin with. Part of the value of expert opinion in the administrative law / expert decider context may be clarification or reinforcement of how the (perhaps somewhat shared) expert opinion can be seen to apply to the facts of the case. The advantages of having frailties or limitations of expert opinion evidence being better appreciated, or that any concerns about partiality of the common literature or of having the surreptitious advocacy of partisan views exposed and ventilated should not be underestimated.

[63] Deciders with their own expertise in the administrative law context might be better equipped than a lay decider to restrain an unnecessary flood of expert opinion evidence that is or would be of no real advantage to the case. That said, it would be of assistance to the administrative decider, and would provide a roadmap for later appellate review, if properly admissible expert opinion evidence is put into the record when helpful. That happened here.

[64] Deference is given to a competent decider's evaluation of expert opinion evidence and to the decider's giving of weight to such evidence, whether or not the decider *also* has qualifications in that same field: ***Mouvement laique québécois v Saguenay (City)***, 2015 SCC 16, [2015] 2 SCR 3; ***White Burgess*** at para 20; ***T(BJ) v D(J),*** 2022 SCC 24 at para 84, 469 DLR (4th) 183; ***Thomas v Rio Tinto Alcan Inc***., 2024 BCCA 62 at para 113, 493 DLR (4th) 385; ***Kon Construction Ltd v Terranova Developments Ltd***, 2015 ABCA 249 at paras 18, 26, 50-52, 387 DLR (4th) 623. Furthermore, the deciders were not required to adopt an "all-or-nothing' approach to the evidence: ***R v Le***, 2019 SCC 34 at para 266, [2019] 2 SCR 692.

[65] In ***Isbister v Delong***, 2017 BCCA 340 at para 19, [2018] 2 WWR 572, leave denied [2017] SCCA No 473 (QL) (SCC No 37866), after citing ***Benhaim*** and ***Nelson (City) v Mowatt***, 2017 SCC 8 at para 38, 406 DLR (4th) 1, the Court said:

> 19 Such deference is owed not only to findings based on the *viva voce* testimony of ordinary witnesses, but also to findings based on the *viva voce* testimony or written reports of expert witnesses: *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247 at 1249-1250; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 at 358-359; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby General Hospital*, [1994] 1 S.C.R. 114 at 121-122. *Further, an appellate court will generally not interfere with the weight given to an expert's opinion even when the expert's evidence contains inconsistencies and incorrect assumptions: Holsten v. Card*, 2002 BCCA 44 at para. 27, 97 B.C.L.R. (3d) 323; *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 at para. 75, 308 B.C.A.C. 122, leave to appeal ref'd [2011] S.C.C.A. No. 442, [2012] 1 S.C.R. v. [Emphasis added]

See also ***Alberta v Enmax Energy Corporation***, 2018 ABCA 147 at para 67, 68 Alta LR (6th) 217, leave denied [2018] SCCA No 256 (QL) (SCC No. 38181).

[66] Exercises of evidence weighing and of discretion operate within the limits of relevance and fairness. The mere existence of a choice as to decision making does not make decision making impossible. Rather, it is *the point* of decision making. Palpable and overriding error is the standard of review. The appellant's submission that professional misconduct findings cannot be concluded where there is a decision to be made about the facts, the circumstances, or the standards of relevance cannot succeed.

[67] In the end, I discern no impropriety or palpable and overriding error in the decisions of the Hearing Tribunal or the Council as to receipt or weighing of the expert opinion evidence. Ground of Appeal 1 fails.

b) Ground 2: Necessity of Specific Performance Duties

[68] Relatedly to the first ground of appeal, the second ground of appeal proposes that a regulator cannot prosecute a member of the regulated profession for discreditable performance of the duties of

that profession in the absence of a clear set of guidelines as to what are the rules and boundaries of such duties and consequently such performance. During argument of the appeal, it was noted that, by comparison, members of the Alberta legal profession are provided with an elaborate structure of guidance with associated commentary.

[69] That comparison is unavailing to the appellant, however. As nuanced as the legal profession rules and commentaries may be, many of them are essentially decantations of common sense, of forthrightness, of plainly necessary skills or attitude for any professional or of statements of the obvious, while others provide for a range or spectrum of conduct (within statutory boundaries) which members would be expected not to sidestep or ignore. The commentaries are generally an exegesis about practicalities of performance of legal duties and comment on why the guidelines exist. No complete and precise description of the rules of law is intended and arguably it is doubtful any such guidance could be achieved to Cartesian detail and certainty. As Oliver Wendell Holmes observed in his book, *Common Law*, at page 1, [London: Macmillan], the law is a development "through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

[70] Researchers located online suggest that animal husbandry and related animal health care date back at least ten thousand years -- which places that form of practical science in an extended timeline like the law although not to the start of paleolithic times. As with the law, the skills and proprieties of veterinary medicine are evolving sciences. It stands to reason that the regulator of that profession, like that of the law, could write down a lot of guidance. Perhaps, it should. But presumably most of such guidance would be to the objectives and to the effects as for the law described in the immediately preceding paragraphs.

[71] Such guidance presumably would leave space for judgment and for the influence of such things as increased human understanding of the sentience of animals: compare ***R v Chen***, 2021 ABCA 382 at paras 21-22, 39-40, 407 CCC (3rd) 215. Jeremy Bentham asked whether the day may come when humans say about our animal companions that "[t]he question is not, Can they reason? nor, Can they talk? but Can they suffer?" (Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation 311* n1 [Oxford, Clarendon Press 1781]. Although finding that Happy, the last of seven elephants named after the eponymous dwarves of *Snow White*, was not eligible for the remedy of *habeas corpus*, the New York Court of Appeals in ***Matter of Nonhuman Rights Project, Inc. v Breheny*** (2022), 38 NY 3d 555 at pp 618-619, noted that "Happy and elephants like her "possess complex cognitive abilities" of a great number. Among those myriad qualities and abilities include "autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have Elepminds); insight; working memory; [and] an extensive long-term memory that allows them to accumulate social knowledge." Elephants may have a significant sentience advantage over smaller companion animals like the dogs in this case, but one does not need to be a veterinarian to recognize, as did Bentham, that they can suffer.

[72] This Court is far from being able to instruct the veterinary profession what its rules and guidance should look like as to professional responsibility and performance. This Court cannot take

judicial notice of such a topic. On the other hand, some of the appellant's conduct for which guilty findings were made, such as blaming or belittling staff, would not require expert guidance to know its limits. And as noted respecting Ground 1, the two qualified tribunals below exhibited no difficulty in finding misconduct in some matters, and not in others.

[73] The reasons provided are clear and it is hard to see why a professional veterinarian would be in doubt or confusion about them. In sum, the scientific and philosophical dimensions of professional misconduct rested on experience, knowledge and common sense and could be the subject of general professional understanding. There is no requirement in law for precise rules about every professional default of the appellant before a charge could be founded on such a deficit. The Council noticed that one Count was so general as to be meaningless. In that, the Council revealed that it was not oblivious to the need for clarity. Ground of Appeal 2 fails.

c) Ground 3: Specific Counts

[74] The appellant's counsel's factum contends, as to Count 1, that the Hearing Tribunal and Council were "distracted by the expert witnesses" and misconceived the evidence. There is no palpable and overriding error in the conclusions as to count 1. The appellant argues that Count 2 is 'particularization' of Count 1. He calls this "unsuccessful surgery". That is not how the two deciders saw the situation and, again, their assessments are entitled to deference.

[75] The appellant disputes the inference that Duke was still intubated when the appellant left the practice location and that, absent published standards, Count 3 was no offence. Deference again applies. As to Count 4, the appellant argues that the timing of the radiograph was "irrelevant". That is the appellant's opinion -- perhaps. The deciders found otherwise.

[76] As to Count 5, it is now said by the appellant that the "decision to ignore his judgment is unreasonable". There is no error here. As to Count 6, the appellant objects to the amendment of the Count to coincide with the evidence. I discern no unfairness to the appellant in this procedural step or its effects. As to Count 8, the appellant argues that the Count is duplicative of Count 6 and both should fall. The Hearing Tribunal and Council could have been more detailed in their explanation as to the differences between those Counts, but once again I am not persuaded that either decider dealt with this unfairly. The reasons of both the Hearing Tribunal and the Council recognized various objections as to duplication by the appellant and agreed with him about one such situation (Count 35 being a particular of Count 33).

[77] Furthermore, the Council agreed that "questions of duplicative allegations raise issues of professional fairness which must be considered pursuant to the correctness standard of review and, more specifically, whether Dr. Tan was or was not actually afforded procedural fairness: at para 28 of Council reasons. As noted earlier in these reasons, this Court should take the Council at its word that it made a "fulsome and independent assessment" about duplications: at para 50 of Council reasons. As to Counts 6 and 8, the Council said Count 6 "relates to improper intubation of Duke", whereas

Count 8 “refers to anesthetic protocol” and deficiencies there. I see no problem with the distinction drawn and could not re-try the point even if it were obscure.

[78] The appellant likewise argues that Count 9 is duplicative of Counts 1 and 3. In essence, the appellant argues his explanation of this Count should have been accepted. The record discloses an arguable reason to consider the counts distinctly particularly as explained by the Hearing Tribunal.

[79] The appellant effectively argues ‘inconsistent verdict’ as between Count 12, where professional misconduct was found proven based upon failure to proceed in a properly sterile manner, and Counts 12 to 16, where professional misconduct was not found. He also says that he offered a “reasonable clinical decision” or, if not, that his conduct did not rise to the level of professional misconduct. The respondent argues that, absent a body of expert evidence showing that how he proceeded was within the margin of appreciation of a qualified veterinarian, the deciders below could find professional misconduct. I agree.

[80] The appellant again argues that Counts 20 and 21 are duplicative and that he offered a credible explanation for why he left the surgery and the patient in the care of a first-year student. He also said that the patient did recover, which is, with respect, irrelevant to the Counts. Overall, the appellant’s arguments are grounded on his subjective characterizations of what happened. Other evidence, such as what the student says the appellant told him when he left, and how he answered questions at the hearing, supports the reasonableness of how the deciders saw the matter. The appellant also says Count 23, which addressed the issue of “proper anesthetic protocol”, while Counts 20 and 21 relating to his leaving the surgery, are duplicative. The differences are clear in our opinion.

[81] The appellant suggests that it was inconsistent to find guilt of professional misconduct for how he dealt with staff as to treatment of Isabella under Count 25 and to find guilt was not proven as to the actual treatment of Isabella. The deciders below made fact findings, notably on reliability of evidence. There is no palpable and overriding error, nor error of principle as to Count 25. Similarly, the findings that the appellant blamed others as set out in Count 27 was a fact finding to which deference applies. Count 28 as to improper dispensing is likewise not a plainly invalid decision.

[82] The appellant’s complaints about Count 31 amount to arguments that his conduct was error and not misconduct. The deciders below did not agree. Their conclusions are not unreasonable. His submissions about Count 32 dealing with the appellant’s ‘complication rate’ are his assessment of the case against him, not a defence to what the deciders considered sufficient evidence. Deference applies here also. His complaint about his record keeping in Count 33 and 37 suffers a similar fate. There was evidence in support.

[83] I have not rehearsed every single item of argument of the appellant as to his guilty findings. That is not our role. I am not persuaded there was palpable and overriding error, or unfairness, in the guilty findings. Ground of Appeal 3 fails.

d) Ground 4: Are the Sanctions Excessive?

[84] It is convenient to organize the various sentencing grounds and the topic of costs under this single heading.

[85] Overall, the appellant returns to his position that the deciders below made professional misconduct findings based upon mere errors at worst. The deciders below did not accept the appellant's position on his various defaults under appeal, but did give him the benefit of the doubt on many counts. The standard of review as to sanctions is deferential: ***Alsaadi*** at para 16; ***Law Society of New Brunswick v Ryan***, 2003 SCC 20 at paras 41-42, [2003] 1 SCR 247; ***Byun v Alberta Dental Association and College***, 2021 ABCA 272 at para 36, [2021] AJ No 1019 (QL); ***Zuk v Alberta Dental Association and College***, 2020 ABCA 162 at paras 15, 43-44, 72 Admin LR (6th) 130, leave denied [2020] SCCA No 208 (QL) (SCC No 39237); ***Khan v General Pharmaceutical Council (Scotland)***, [2016] UKSC 64 at para 36, [2017] 3 All ER 87.

[86] Interestingly, a decision called ***Jaswal v Medical Board (Newfoundland)*** (1996), 42 Admin LR (2d) 233, [1996] NJ No 50 (QL) was given pride of place in the discussion of sanctions below. That was also an appeal and not a judicial review as such, like the case here. The decision in ***Jaswal***, at para 36, summarized decisions as to sanction in a list of factors:

1. the nature and gravity of the proven allegations;
2. the age and experience of the offending physician;
3. the previous character of the physician and in particular the presence or absence of any prior complaints or convictions;
4. the age and mental condition of the offended patient;
5. the number of times the offence was proven to have occurred;
6. the role of the physician in acknowledging what had occurred;
7. whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made;
8. the impact of the incident on the offended patient;
9. the presence or absence of any mitigating circumstances;
10. the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of medicine;
11. the need to maintain the public's confidence in the integrity of the medical profession;
12. the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct;
13. the range of sentence in other similar cases.

[87] It has been said that decisional law should not be approached in the same as legislation and not treated as holy writ either. The Council suggested that the decision in ***Jaswal*** seems to have been considered very persuasive for this professional body. The Council felt the case was helpful to focus its mind on sanctions in an orderly manner (see para 182), albeit that some of the factors mentioned

could not apply. Without intending to be parochial, I would suggest that this professional regulator might develop sentencing jurisprudence of its own to help explain, as raised here by the appellant, why most counts got the same fine and two others got much higher fines.

[88] At any rate, the appellant has a series of complaints initially on the theme of unduly harsh punishment when considered in the whole context.

[89] One complaint by the appellant concerns the passage of time before the imposition of the sanctions: compare ***Abrametz*** at paras 107-116. The appellant cites ***Kherani v Alberta Dental Association***, 2025 ABCA 2, [2025] AJ No 2 (QL), which involved *an exceptionally long* delay. Delay is not generally a factor in assessing the gravity of the guilty findings nor of the degree of responsibility of the member. But it can be a factor in assessing the impact of the adverse findings and the sanctions when seen in context.

[90] Delay may also be mitigating if it involves collateral or ancillary negative consequences for the member which aggravate the impact on him beyond what would be a predictable result of the misconduct. Delay might also be relevant if the member put the delay to beneficial use to upgrade his professional capacities and improve his insights and perspectives.

[91] The Council said that the delay was a mitigating factor. In that period the appellant had voluntarily withdrew from orthopedic surgery. The Council concluded that the fact the Hearing Tribunal imposed "a significantly shorter suspension than the Complaints Director was requesting and much reduced costs compared to the Complaints Director's request" was a sufficient accounting for delay, particularly because "the glaring and serious departures from expected standard of practice are vivid". I agree with the appellant that these reasons are lacking information. If it were possible to compare the dispositions for similar violations in similar cases it would be easier for this Court to ascertain what the mitigating effect of the delay was. The Council essentially distinguished all the precedents offered: at para 812.

[92] Relatedly, the appellant argues that this Court has pointed out that intentional misconduct can be expected to receive greater severity than misconduct lacking such intention, citing ***Jinnah v Alberta Dental Association and College***, 2022 ABCA 336 at paras 120-121, 474 DLR (4th) 571, leave denied to the College [2022] SCCA No 459 (QL) (SCC No. 40497). A five-member panel of this Court recently sat to review the aspects of ***Jinnah*** dealing with costs: see ***Charkhandeh v College of Dental Surgeons of Alberta***, 2024 ABCA 239, [2024] AJ No 810 (QL).

[93] It seems that the Council considered the disposition as to the sanctions overall here was lenient. As noted earlier in these reasons I should defer to the Council on assessments of matters of policy and professional needs as to sanctions for misconduct. But I find the reasons do not explain the effect in mitigation of several factors: the delay; the voluntary step-back from surgical work; and his lack (then) of prior misconduct findings. Nor is it clear how the gravity of the offences and his degree of responsibility in them affected the sentence. I deal with the effect of this shortcoming of the reasons below.

[94] The second complaint of the appellant concerns the decision of the Hearing Tribunal, affirmed by the Council, of equal fines of $1000 for Counts of varying degrees of seriousness, and fines of $6,000 for each of two of them. Once again, the appellant argues that the reasons given for this are "unacceptably general" and conclusory. The appellant repeats his position that he did not wilfully flout the standards of his profession. As to the fines, this Court can understand that on the number of findings of misconduct, which in our view were reasonably made, the total amount of the fines, howsoever allocated, were reasonably found by the Council to not be unduly harsh. The misconduct findings cover a spectrum of professional deficiencies, and the Council was entitled to conclude that the message to send to the membership should be unambiguous.

[95] The totality of the fines was not extraordinary. The concept of totality is relevant to fines: compare ***R v Great White Holdings Ltd***, 2005 ABCA 188 at paras 27-34, 47 Alta LR (4th) 233; ***R v 507357 Alberta Ltd. and Suetter***, 2009 ABCA 398 at para 10, 469 AR 241; ***Alberta (Health Services) v Bhanji,*** 2017 ABCA 126, 51 Alta LR (6th) 215. The dimensions of the fines are not so consequential as to veer into *Charter* breaches or into the realm of *Magna Carta* as reinvigorated by *the Bill of Rights of 1689*, 1 Wm. & Mary, ch. 2, §10, in 3 Eng. Stat. at Large 441 (1689): compare ***R v Boudreault***, 2018 SCC 58, [2018] 3 SCR 599; ***Bedard v DPCP***, 2021 QCCA 377, [2021] JQ no 1833 (QL).

[96] Nor did the quantum of the fines lose sight of the objective of encouraging compliance as opposed to punishment per se: compare ***R v Goebel***, 2003 ABQB 422 at para 13, 17 Alta LR (4th) 153***. Goebel*** does criticize the approach of imposing equal fines for different counts, but that is not exactly what happened here. And even if the reasoning trajectory is not entirely clear, I am satisfied that such an error, if error it be, was not material in the outcome: compare ***R v Lacasse***, 2015 SCC 64 at paras 11, 16, [2015] 3 SCR 1089. I reject this element of the appellant's argument.

[97] The appellant argues that the education and surveillance elements of his disposition are unfair because they place him under the authority of the Complaints Director rather than a practice review committee. The Law Society, for example, has a well-established practice review system which is distinct from the discipline side, recognizing that some forms of error are best treated curatively rather than punitively. It was explained to us that the capacities of the Association were not such as to make that option realistically available.

[98] The essence of the appellant's complaint on this point is that in cases of ongoing rehabilitative efforts, the executive of the regulator charged with prosecutions might not be the best official to engage with such process, particularly after a lengthy prosecution where the Director considered the misconduct with a gimlet eye. That said, I am not persuaded that the involvement of the Director from this point in time would be, in effect, exposing the appellant to institutional bias.

[99] Absent evidence capable of dislodging an assumption of professionalism on the part of the Director, I am prepared to assume that the Director would not further the Council's decision in a manner which converts the Council's rehabilitative intentions into a form of embargo from practice. The Director must take the Council's decision as made and recognize that his mandate from this point is not to treat the outcome as a barrier to return.

[100] Finally, as to costs, the Council chose to impose a costs award against the appellant. He takes issue with the award on grounds it is contrary to ***Jinnah***. I am not persuaded that I should interfere as to costs as I do not see any reviewable error.

[101] Returning to the question of the insufficiency of reasons, I conclude that since the fines, the educational and surveillance components, and the costs are not clearly unreasonable or harsh for the misconduct findings, and the two expert deciders agreed on them in that way, the failure to provide adequate reasons is not, in this case, a sufficient basis to set aside the sanctions to any degree. While regulators are not expected to write like legal scholars on sanctions, the reasons here are sufficient to reach the conclusion that the sanctions should remain as they stand.

VI. Conclusion

[102] The appeal is dismissed.

Appeal heard on March 4, 2025

Memorandum filed at Edmonton, Alberta
this 8th day of April, 2025

Watson J.A.

Ho J.A. and Kirker J.A. (concurring in the result):

[103] For the following reasons, we agree this appeal must be dismissed.

[104] The standards of review applicable to the various proceedings contemplated by the *Veterinary Profession Act*, RSA 2000 c V-2, were recently addressed by this Court in a similar appeal involving the appellant: see ***Dr Ignacio Tan III v Alberta Veterinary Medical Association***, 2024 ABCA 94 at para 2, citing ***Sahi v Alberta Veterinary Medical Association***, 2023 ABCA 368 at paras 22-28. As was the case in the appellant's previous appeal:

(a) The Committee of Council relied on this Court's guidance respecting the internal standard of review in reviewing the Hearing Tribunal's decision. That guidance is set out at paragraph 35 of *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98, and need not be repeated here.
(b) The standards of review set out in *Housen v Nikolaisen*, 2002 SCC 33, apply to this Court's review of the Committee of Council's decision. Conclusions on questions of law are reviewed for correctness; findings of fact and findings on questions of mixed fact and law are reviewed for palpable and overriding error unless there is an extricable error of law.
(c) Sanctions and costs in professional disciplinary matters are reviewed for reasonableness.

[105] The grounds of appeal raised by the appellant in relation to the merits decision all challenge the factual foundation upon which the Committee of Council's confirmation of the Hearing Tribunal's findings of unprofessional conduct rests. However, the appellant has failed to establish any reviewable error that would justify interference with the facts as found. The findings of the Hearing Tribunal are supported by the evidence. There was no basis for the Committee of Council to interfere with the Hearing Tribunal's findings and there is no basis for this Court to interfere with the decision of the Committee of Council.

[106] Some aspects of the appellant's professional misconduct reflected a marked departure from the expected standard of care and resulted in harm to patients. In these circumstances, we are not persuaded the sanctions imposed are unreasonable or that the Committee of Council erred in upholding the Hearing Tribunal's assessment that the appellant should pay part of the costs of the investigation and hearing.

Appeal heard on March 4, 2025

Memorandum filed at Edmonton, Alberta
this 8th day of April, 2025

Ho J.A.

Kirker J.A.

Appearances:

S.M. Renouf, KC
for the Appellant

K.A. Smith, KC (No appearance)
N. Tran
for the Respondent, Alberta Veterinary Medical Association

B.E. Maxston, KC
for the Respondent, Committee of Council of The Alberta Veterinary Medical Association