

**IN THE MATTER OF A HEARING OF THE HEARING TRIBUNAL OF THE  
COLLEGE OF PHYSIOTHERAPISTS OF ALBERTA**

**INTO THE CONDUCT OF PRANJALI KHAIRMODE, A REGULATED MEMBER**

**PURSUANT TO THE**

**HEALTH PROFESSIONS ACT, RSA 2000, c. H-7**

**DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF  
PHYSIOTHERAPISTS OF ALBERTA**

The hearing of the Hearing Tribunal was held on April 30, and May 24, 2024, via videoconference.

Present were:

The members of the Hearing Tribunal of the College of Physiotherapists of Alberta (“the Hearing Tribunal”)

Ms. Simone Hunter, Chair  
Mr. Joey Mo, Member  
Ms. Patricia Hull, Public Member  
Mr. Andrew Otway, Public Member

Ms. J. Vogelgesang, Complaints Director, College of Physiotherapists of Alberta  
Ms. V. Wensel, Legal Counsel for the Complaints Director

Ms. Pranjali Khairmode, Member  
Mr. D. McGarvey, KC, Legal Counsel for Ms. Khairmode  
Ms. W. Teed, Articling Student

Mr. D. Jardine, Independent Legal Counsel for the Hearing Tribunal

Ms. Haylee O’Reilly, Hearing Coordinator  
Ms. Cheryl Blahut, Conduct Coordinator

**The Hearing on April 30, 2024**

**Opening of the Hearing**

1. The hearing opened on April 30, 2024, and all persons present introduced themselves for the record. The hearing was recorded by a Court Reporter who was

also present online. It was noted that there were members of the public who had preregistered to attend the hearing and who were online observing the hearing.

2. The Hearing Tribunal was advised that there were no objections to the members of the Hearing Tribunal or the jurisdiction of the Hearing Tribunal to proceed with the hearing.
3. Ms. Wensel advised the Hearing Tribunal that all materials being tendered in the hearing redacted the patient's name and referred to her as Ms. P.B. and the Chair confirmed that the patient would be referred to throughout the hearing as Ms. P.B.

### **Exhibits Entered by Consent**

4. With the joint consent of the Parties, the following Exhibits were entered by consent:

Exhibit 1 – Agreed Statement of Facts and Acknowledgment of Unprofessional Conduct (12 pages)

Exhibit 2 – Attachments to the Agreed Statement of facts and Acknowledgment of Unprofessional Conduct Tabs 1 through 16 (94 pages)

Exhibit 3 – Updated Resume relating to Pranjali Khairmode

At this point, Ms. Wensel, with the consent of Mr. McGarvey, applied to withdraw Allegation 5(c) from the Notice of Hearing.

### **Admissions by Ms. Khairmode**

5. Mr. McGarvey confirmed on behalf of Ms. Khairmode that he waived the reading of the Notice of Hearing and Notice to Attend as Witness into the Record.
6. Ms. Khairmode advised the Hearing Tribunal that she admitted the allegations set out in the Notice of Hearing.

### **The Agreed Statement of Facts and Acknowledgment of Unprofessional Conduct (Exhibit 1)**

7. This hearing arose out of a complaint by Ms. P.B. relating to an appointment with Ms. Khairmode on February 11, 2023, when Ms. P.B. attended for assistance with bladder control and pelvic floor rehabilitation. Prior to attending her appointment, Ms. P.B. completed a patient information form in which she disclosed that she was diagnosed with relapsing remitting multiple sclerosis ("MS"). Ms. P.B.'s condition of

MS caused her to have reduced sensation, reduced muscle strength and reduced muscle coordination.

8. During the appointment, Ms. Khairmode treated Ms. P.B. with a hot pack underneath her buttocks in the supine position on the treatment table with her knees over a bolster (the modified crook lying position). This caused a majority of Ms. P.B.'s body weight to be resting on the hot pack for the entirety of the ("MHP treatment").
9. As a result of the treatment, Ms. P.B. suffered serious burns on her buttocks that required regular homecare treatment for three months and experienced pain and irritation, difficulty sitting and laying down; impacts on her ability to attend events/places due to the burns and a delay in a scheduled surgery due to the inability to lay on her back.
10. The Agreed Statement of Facts described the use of hot packs in physiotherapy practice to provide a form of moist heat treatment ("MHP treatment") performed to relax a muscle, provide relief of localized pain, extend the connective tissue, reduce muscle spasms or accelerate healing. It noted that hot packs are stored in hydrocollators where they absorb heat from temperature controlled hot water. It also noted that hot packs are generally wrapped in cloth bags, towels, or other fabric insulation prior to being applied to a patient. (Exhibit 1, paragraph 9)
11. The Agreed Statement of Facts also noted that the Complaints Director obtained an expert report from Mr. Iain Muir, a regulated member of the College and an associate professor at the University of Alberta and that a copy of the expert report was attached as Tab 8 to Exhibit 1 and could be summarized as follows:
  - a. The level of assessment was insufficient, especially in light of Ms. P.B.'s pre-existing condition of MS. Additionally, assessment or testing should have been completed in the location where a hot pack is to be applied.
  - b. The use of a hot pack was not clinically indicated, considering the purpose of Ms. P.B.'s visit, an absence of pain in the sacral and gluteal area and the absence of injury. Additionally, the use of a hot pack was contraindicated while using electrical stimulation to stimulate the muscles at the same time.
  - c. The use of a hot pack, considering the lack of assessment and Ms. P.B.'s medical condition created an "unacceptable risk".
  - d. The position of Ms. P.B. and the hot pack increased the risk of thermal skin damage.
  - e. Frequent monitoring should occur when a patient is receiving a hot pack, including a visual check of the skin colour and verbal check of the temperature intensity, as well as leaving a call bell. However, Mr. Muir noted

that where a patient's sensation is reduced, a call bell is not an effective safety method.

- f. Ms. P.B. suffered at least deep-partial to full thickness burns.

## **The Allegations Set Out in the Notice of Hearing and the Admissions of Ms. Khairmode**

### **Allegation 1**

12. On or about February 11, 2023, you failed to perform appropriate assessments in relation to client P.B. prior to initiating moist heat treatment with a hot pack ("MHP treatment"), including one or more of the following:
  - a. failed to conduct a pain sensitivity assessment;
  - b. failed to conduct a thermal sensitivity assessment.
13. Ms. Khairmode admitted that she did not conduct any thermal or pain sensitivity assessments on Ms. P.B. Instead, Ms. Khairmode conducted a light touch sensation assessment by touching various parts of Ms. P.B.'s body and asking if she had normal sensation in the area. Ms. Khairmode acknowledged that the assessment she conducted was inappropriate and inadequate.

### **Allegation 2**

14. On or about February 11, 2023, you failed to have and/or document a therapeutic justification for applying MHP treatment to client P.B.'s buttocks.
15. Ms. Khairmode acknowledged that she failed to document any specific therapeutic justification for the use of a hot pack. Ms. Khairmode also acknowledged that based on Ms. P.B.'s purpose of treatment, her therapeutic needs, the nature of the concerns noted and her existing medical conditions, the hot pack treatment was not therapeutically justified and was contraindicated by Ms. Khairmode's use of electro stimulation (NMES) which was intended to stimulate Ms. P.B.'s muscles.

### **Allegation 3**

16. On or about February 11, 2023, you failed to implement patient P.B.'s MHP treatment in a safe and/or competent manner, including one or more of the following:
  - a. failed to consider information about client P.B.'s health, including that they had sensory loss in the gluteal and sacral regions;

- b. failed to determine potential risks to client P.B.;
  - c. placed the hot pack underneath client P.B.'s buttocks while they were laying in the modified crook lying position;
  - d. failed to wrap the heat pad with sufficient towels and/or covers, considering the placement of the hot pack underneath client P.B.'s buttocks.
17. Ms. Khairmode acknowledged that she implemented Ms. P.B.'s MHP treatment in an unsafe and incompetent manner and that she failed to consider Ms. P.B.'s sensory loss and diagnosis of MS prior to administering the hot pack, including the risk of thermal damage to Ms. P.B.
18. Ms. Khairmode also acknowledged that she did not canvass, discuss, or determine the potential risks to Ms. P.B. prior to implementing the MHP treatment.
19. Ms. Khairmode admitted that by positioning Ms. P.B. with a hot pack underneath her buttocks in the supine position in the modified crook lying position, she caused the majority of Ms. P.B.'s body weight to be resting on the hot pack for the entirety of the MHP treatment.
20. Ms. Khairmode agreed that she had failed to wrap the heat pad with sufficient towels or covers considering the unique and high-risk position of the hot pack under Ms. P.B.'s buttocks with her body weight resting on it. Ms. Khairmode acknowledged that as described by Mr. Muir, she should have wrapped the heat pack with six to eight layers of towels, but she did not do so.

#### **Allegation 4**

21. On or about February 11, 2023, you failed to adequately monitor client P.B. during the MHP treatment, including one or more of the following:
- a. inappropriately relied on P.B.'s verbal response instead of conducting a visual assessment of client P.B.'s gluteal region;
  - b. failed to conduct assessments of client P.B. with sufficient frequency.
22. Ms. Khairmode agreed that the timer was set for approximately 20 minutes after the hot pack was applied and that she then left the room. She further acknowledged that despite being aware of Ms. P.B.'s sensory loss and pre-existing medical condition, she did not re-enter the room to conduct a physical assessment of Ms. P.B.'s body, specifically where the hot pack was placed, at any time when the hot pack treatment was being administered. Ms. Khairmode acknowledged that the only check made during this 20-minute treatment, was a single verbal

check of Ms. P.B. from the hallway by either Ms. Khairmode or her physiotherapist assistant.

23. Ms. Khairmode admitted that after the 20-minute timer went off, she re-entered the room and re-set the NMES for approximately 10 minutes and provided Ms. P.B. with a call bell. Ms. Khairmode then left the room again, leaving the hot pack in the same position.
24. Ms. Khairmode acknowledged that when she returned and removed the hot pack and NMES, based on the hot pack placement and Ms. P.B.'s sensory loss, she did not adequately assess Ms. P.B. during the treatment.

### **Allegation 5**

25. Between February 12, 2023, and March 2, 2023, you failed to respond to client P.B.'s concerns in an appropriate and/or professional manner, including one or more of the following:
  - a. failed to demonstrate sensitivity and/or accountability to client P.B. when you were notified about client P.B.'s burns over the phone;
  - b. failed to document an incident report in a timely manner after being notified about client P.B.'s burns on February 13, 2023; and
  - c. [withdrawn]
26. Ms. P.B. contacted the clinic and left a voicemail on February 12, 2023, describing her concerns and the blisters she was experiencing. Ms. Khairmode returned the call on February 13, 2023. Her response caused Ms. P.B. to feel that Ms. Khairmode took no responsibility for the burns Ms. P.B. had suffered. Ms. Khairmode acknowledged that her response demonstrated a lack of accountability and sensitivity to her patient who has suffered significant burns.
27. Ms. Khairmode also acknowledged that despite being notified of Ms. P.B.'s burns on February 12, 2023, she did not complete an incident report until March 1, 2023.

### **Ms. Khairmode's Acknowledgment of Unprofessional Conduct**

28. Ms. Khairmode acknowledged that her admitted conduct amounted to unprofessional conduct within the meaning of section 1(1)(pp) of the Health Professions Act and that her conduct:
  - a. Constitutes a lack of knowledge, skill or judgment in the provision of professional services (s. 1(1)(pp)(i);

b. Contravenes the College's Code of Ethical Conduct and Standards of Practice (s.1(1)(pp)(ii):

**Conduct of Ethical Conduct for Alberta Physical Therapists,  
Responsibilities to the Client**

Sections A1, A12, A13, A18, B1 and C1

**Standards of Practices for Physiotherapists in Alberta**

Client Assessment, Diagnosis, Interventions:

The physiotherapist demonstrates proficiency in client assessment, diagnosis, and intervention to deliver quality client-centered services.

Client-Centered Care:

The physiotherapist integrates a client-centered approach in all aspects of physiotherapy service delivery.

Documentation and Record Keeping:

The physiotherapist maintains documents/records that are accurate, legible and complete, written in a timely manner, and in compliance with applicable legislation and regulatory requirements.

Evidence-Informed Practice:

The physiotherapist incorporates evidence-informed practice in all aspects of physiotherapy service delivery.

Risk-Management:

The physiotherapist participates in risk-management activities to promote quality physiotherapy services.

Safety:

The physiotherapist promotes and maintains a safe environment for clients, health-care providers, her/himself, and others to support quality services.

- c. Is conduct that harms the integrity of the regulated profession (s. 1(1)(pp)(xii).

### **Submissions by Ms. Wensel**

29. Ms. Wensel suggested that the admissions made by Ms. Khairmode simplified the task of the Hearing Tribunal because Ms. Khairmode had admitted the alleged facts and had acknowledged that the admitted facts constituted unprofessional conduct. She advised that as a result, neither party would be calling witnesses at this stage, and they would be relying on the Agreed Statement of Facts and Admissions of Unprofessional conduct.
30. Ms. Wensel reviewed the Agreed Statement of Facts and noted Ms. Khairmode had joined the provisional register in 2016 and had become a fully registered physiotherapist in 2018.
31. She advised that the complaint received on February 28, 2023, arose from treatment provided to Ms. P.B. by Ms. Khairmode on a first appointment on February 11, 2023. She noted that the complaint alleged that serious burns on Ms. P.B.'s buttocks occurred from the use of hot packs by Ms. Khairmode and referred the Hearing Tribunal to photos of the burns which were part of the Agreed Statement of Facts.
32. Ms. Wensel referred to the Agreed Statement of Facts and advised that Ms. P.B. had attended a first appointment on February 11, 2023, seeking treatment for bladder control and pelvic floor rehabilitation in preparation for an upcoming hysterectomy. Ms. P.B. disclosed multiple medical conditions including a diagnosis of multiple sclerosis (MS) from 2008. Ms. Wensel pointed out that the Agreed Statement of Facts described that Ms. P.B.'s condition of MS caused her to have reduced sensation, reduced muscle strength and reduced muscle coordination.
33. Ms. Wensel referred the Hearing Tribunal to the treatment records found at Tab 11 of Exhibit 2. She then reviewed the five allegations and noted as follows:

Allegation 1 – Ms. Khairmode admits that she failed to perform appropriate assessments in relation to Ms. P.B. prior to initiating the hot pack treatment and failed to do a pain sensitivity assessment and a thermal sensitivity assessment. Ms. Wensel placed particular emphasis on the failure to conduct a thermal assessment and noted that Ms. Khairmode did only a light touch assessment.

Allegation 2 – Ms. Khairmode agreed that there was no specific therapeutic justification documented for the use of a hot pack and agreed that



considering Ms. P.B.'s purpose of treatment, her needs, her condition, and the nature of the concerns noted, the use of a hot pack was not therapeutically justified.

Allegation 3 – Ms. Khairmode acknowledged that she failed to implement the hot pack in a competent and safe manner. She acknowledged failing to determine potential risks as well as placing the heat pack underneath Ms. P.B.'s buttocks without sufficient towels or covers considering the placement of the heat pack. This resulted in the majority of Ms. P.B.'s body weight resting on the heat pack for the entire treatment.

Allegation 4 – Ms. Khairmode acknowledged that despite being aware of Ms. P.B.'s sensory loss and condition, she did not reenter the room to conduct a physical assessment of the area that was touching the hot pack or check where the hot pack was placed while it was being administered.

Allegation 5 – Ms. Khairmode also acknowledged that her response to Ms. P.B. when Ms. P.B. called concerning the burns and blisters she was experiencing was not appropriate and caused Ms. P.B. to believe that Ms. Khairmode was taking no responsibility for the burns that occurred.

34. Ms. Wensel noted that Ms. P.B. sought medical assistance which was documented in Tab 2 of Exhibit 2 and noted that the injuries included two lesions on Ms. P.B.'s buttocks described in size as 4 by 6 centimeters and 6 by 8 centimeters. She also pointed out that it was agreed that Ms. P.B.'s burns required home care treatment for three months and the impact on her life and well-being was significant, including pain, irritation, difficulty sitting or lying down, inability to attend events and places and delay of scheduled surgery.
35. Ms. Wensel submitted that the facts admitted by Ms. P.B. as well as the Expert Report of Mr. Ian Muir (Tab 8 of Exhibit 2) proved the factual allegations set out in Allegations 1 to 5 and established that the proven allegations constitute unprofessional conduct.

### **Submissions of Mr. McGarvey**

36. Mr. McGarvey advised that Ms. Wensel had fairly and adequately gone through the Agreed Statement of Facts with the Hearing Tribunal, and that he had no objection to any of her submissions. He acknowledged that Ms. Wensel had fairly laid out the allegations and the reasons for the allegations.

37. Mr. McGarvey noted that Ms. Khairmode had signed an acknowledgment of unprofessional conduct, and that she had made multiple reviews of Mr. Muir's report and had learned from these reviews.
38. Mr. McGarvey submitted that the matters before the Hearing Tribunal related to a series of errors in relation to the use of the hot pack. He noted that while there were 5 allegations, they all arose from the same set of facts and one incident with the patient, as unfortunate as that was.
39. Mr. McGarvey referred to the photographs in Tab 3 of Exhibit 2 and acknowledged that the burns that occurred were significant. He pointed out that the temperature of the hot packs was not the issue and that they were actually below the recommended temperature. He submitted that it was the other issues, including Ms. P.B.'s decreased sensitivity, which was not properly assessed, the length of time of treatment, and the fact that Ms. P.B. did not feel pain that caused the injuries.
40. Mr. McGarvey noted that Ms. Khairmode had considered this matter at great length and has acknowledged her unprofessional conduct and worked hard through his office to achieve the agreed statement of facts and admission of unprofessional conduct. He noted that this had saved time and expense and saved Ms. P.B. from having to testify.

### **Decision of the Hearing Tribunal Regarding the Acknowledgment of Unprofessional Conduct**

41. The Hearing Panel then adjourned to consider the Exhibits and the submissions of the parties.
42. When it returned, the Hearing Tribunal advised that it had accepted the admissions of unprofessional conduct and determined that all the allegations set out in the Notice of Hearing were proven and constituted unprofessional conduct. The Hearing Tribunal advised that it would provide its detailed reasons for accepting the Acknowledgment of Unprofessional Conduct in its written decision.
43. The parties then proceeded to make submissions on sanctions.

### **Submissions on Sanctions**

44. Ms. Wensel advised the Hearing Tribunal that the parties had come to agreement on a Partial Joint Submissions on Penalty which included a number of exhibits and the partial agreement on sanctions. The Partial Joint Submission on Penalty was produced and entered as Exhibit 4.

45. The parties then provided a document containing a series of Appendices to the Written Submissions on Sanctions which was marked as Exhibit 5.
46. Mr. McGarvey then produced a series of exhibits that were entered by consent:
  - Exhibit 6 – Certificate from American College of Lifestyle Medicine
  - Exhibit 7- Documents from Haven Clinical Counselling and Consulting Services Inc. relating to Pranjali Khairmode
  - Exhibit 8 – Letter from Autism Today Foundation Canada dated April 22, 2024
  - Exhibit 9 – Letter of recommendation from [...] dated April 21, 2024
  - Exhibit 10 – Letter of recommendation from Giri Srinivasan dated April 24, 2024
  - Exhibit 11 – Letter from Dawn Payne dated April 21, 2024
  - Exhibit 12 – Letter from [...] dated April 26, 2024
47. Mr. McGarvey then provided two further exhibits regarding financial and tax information relating to Ms. Khairmode and Vector Physiotherapy Inc. He requested that this sensitive and confidential financial and tax information be received as Exhibits by the Hearing Tribunal but that restrictions be placed on access by the public to this information after the Hearing. In response, Ms. Wensel suggested that the concerns might be dealt with by redacting certain information from the documents so that they never became part of the record.
48. After some further discussions, the Hearing Tribunal adjourned so that Mr. McGarvey and Ms. Wensel could discuss the issue of redactions of the documents. When the hearing resumed the parties advised that it had been agreed that with respect to the T2 corporate tax returns of Ms. Khairmode's corporation for 2022 and 2023, the documents would be entered in full at the hearing and then at the end of the hearing Mr. McGarvey and Ms. Wensel would attempt to agree on redactions to the documents before they were placed on the hearing file.
49. The Hearing Tribunal agreed to this procedure and the following Exhibits were entered:
  - Exhibit 13- 2022 T2 Corporate Tax Return relating to Vector Physiotherapy Inc.

Exhibit 14 – 2023 T2 Corporate Tax Return relating to Vector Physiotherapy Inc.

50. At this point by agreement between Ms. Wensel and Mr. McGarvey, Ms. Khairmode was called as a witness.

**Ms. Khairmode's Evidence**

51. Ms. Khairmode advised that she had obtained her Bachelor of Physiotherapy in 2005 and her Master's in Neurosciences in Physiotherapy in 2009. She had practiced in India for five years in a hospital setting and multidisciplinary clinics in private practice for five years before coming to Canada in September 2014.
52. Ms. Khairmode stated that she worked as a physiotherapy assistant for approximately one and a half years and completed the PC written examination in 2016 at which time she was placed on the Provisional Register and worked as a Physiotherapy Intern for approximately two years until she completed the Practical Examination in 2018 and was admitted to the general register. Ms. Khairmode advised that she has continued to work as a physiotherapist since 2018.
53. Ms. Khairmode confirmed that she had treated Ms. P.B. on February 11, 2023, and that as a result of that treatment, Ms. P.B. had suffered a heat pack burn on the sacral and buttock area.
54. Ms. Khairmode then described for the Hearing Tribunal how this incident had changed her practice of physiotherapy including the following steps:
- a. Reducing her amount of work including seeing fewer patients;
  - b. Increasing her documentation of assessments and treatment protocol discussions with patients including discussions of benefits and potential harms of the treatment;
  - c. Reviewing information regarding safety and risk management from the College of Physiotherapists of Alberta;
  - d. Spending more time with patients and placing less reliance on physiotherapy assistants; and
  - e. Reducing the time spent on managerial duties at the various clinics she owned or practiced at.
55. Mr. McGarvey then asked Ms. Khairmode to review the two Corporate Tax Returns entered as Exhibits 13 and 14. She confirmed that these Corporate Tax Returns

had been prepared by her accountant and reviewed various aspects of the Corporate Tax Returns in response to questions from Mr. McGarvey.

56. Mr. McGarvey asked Ms. Khairmode to confirm that her income shown in Exhibit 14 for 2023 was significantly lower than the income shown in Exhibit 13 for 2022 and asked her to explain the reason for the decline in income.
57. Ms. Khairmode stated that this decline occurred for several reasons. The first was a reduction in workload which involved seeing fewer patients and attempting to have more one-on-one patient care. The second was dealing with this ongoing procedure and obtaining some counselling for symptoms that included head and body aches, lack of appetite, anxiety and sleep issues which increased as the hearing date approached.
58. Ms. Khairmode also described opening a lifestyle medicine practice in January 2024 which reduced her physiotherapy practice. She also noted her ongoing stress leading up to the hearing which was reflected in the clinical notes from her counseling sessions which she reviewed with Mr. McGarvey. Ms. Khairmode concluded by expressing her regret and remorse for the treatment she provided, and harm suffered by Ms. P.B.

### **Cross-examination by Ms. Wensel**

59. Ms. Wensel reviewed with Ms. Khairmode her education and professional experience in India and in Alberta.
60. Ms. Wensel then asked Ms. Khairmode a series of questions regarding her treatment of Ms. P.B. and her knowledge of the injuries suffered by Ms. P.B.
61. Ms. Wensel asked Ms. Khairmode how this experience had changed her practice. Ms. Khairmode suggested that she had reduced the amount of work she does and had reviewed how to improve her communication with her patients. She emphasized that a major change was in seeing fewer patients and spending more time with her patients.
62. Ms. Wensel reviewed with Ms. Khairmode the clinics that she co-owned and her duties and roles with each clinic. These questions included questions concerning other physiotherapists co-owned and practiced at these various clinics.
63. Ms. Wensel then reviewed with Ms. Khairmode the Tax Returns entered as Exhibits 12 and 14 and the five-year tax summaries contained in the exhibits. Ms. Khairmode confirmed that these returns were prepared by her accountant. Ms. Wensel then reviewed these tax returns with Ms. Khairmode with an emphasis on

the fact that the total assets shown had grown based on the records for 2022 and 2023.

64. Ms. Wensel also questioned Ms. Khairmode regarding her LinkedIn Profile document which was entered as Exhibit 15 and her relationship with the individuals and organizations that had sent letters of reference which were entered as Exhibits 8, 9, 10, 11, and 12.
65. Ms. Khairmode acknowledged that she had been working five or six days per week at the various clinics she was associated with but indicated that she had reduced her practice as a physiotherapist at these clinics while she maintained management roles at the clinics.
66. Mr. McGarvey conducted a brief re-examination of Ms. Khairmode clarifying some of the changes in the balance sheets between 2022 and 2023 and a reduction of dividends in 2023.

### **Questions from the Hearing Tribunal**

67. The Hearing Tribunal asked Ms. Khairmode questions regarding educational courses she had taken and whether any related to heat pack treatments. She also answered questions about her practice and whether there had been any changes in her clinical and managerial practices since the incident with Ms. P.B.
68. Ms. Khairmode described changes to her written consent document and extra time being taken for an initial assessment and additional documentation before beginning a treatment. She also advised that she now spends additional time explaining the treatment and limitations to patients and that she is more cautious when she applies heat treatments. Ms. Khairmode also advised that she now conducts additional visual checks on patients.
69. In response to a question from the Chair, Ms. Khairmode described changes to her approach to heat pack therapy and additional testing and discussion with patients that may have sensory issues before applying heat packs.

### **Submissions on Sanctions from Ms. Wensel**

70. Ms. Wensel suggested that having heard the evidence of the parties, and having determined that the allegations of unprofessional conduct in the Notice of Hearing were proven (except for Allegation 5c which was withdrawn), the Hearing Tribunal was now in a position to receive submissions on sanctions from the Parties.

71. Ms. Wensel noted that the parties had come to a Partial Joint Submission on Penalty and this document was presented to the Hearing Tribunal and reviewed by Ms. Wensel.
72. The Partial Joint Submission on Penalty is attached as an Appendix to this decision as it sets out a detailed joint recommendation requiring Ms. Khairmode to:
  1. Review the College's Patient Safety and Risk Management Guide ("the Guide") and prepare a self-directed reflection on the Guide including at least 5 goals of self-improvement relating to the issues identified in the Notice of Hearing and cite at least 5 secondary resources reviewed by Ms. Khairmode, including the Guide and the College's applicable standards and responsibilities.
  2. Undergo a practice review by a practice reviewer who is approved by the Complaints Director or their delegate subject to a series of terms and conditions (2a to 2j) which are set out in detail in the Partial Joint Submission on Penalty attached as an Appendix to this decision.
73. The Partial Joint Submission on Penalty also contained a series of conditions regarding the operation of the requirements of the Self-Reflection and Practice Review that provided that:
  1. Should Ms. Khairmode be unable to comply with any of the timelines referred to in paragraphs 1 or 2, the Complaints Director, may, in their sole discretion, grant an exemption.
  2. The parties shall make submissions with respect to appropriate costs of the investigation and hearing of this matter and further appropriate penalty orders before the Hearing Tribunal.
  3. Should Ms. Khairmode fail to comply with any of the orders above, or orders granted by the Hearing Tribunal, within the deadline specified or within the period of the extended deadline granted by the Complaints Director, the Complaints Director (or her delegate) may do any or all of the following;
  4. Treat Ms. Khairmode's non-compliance as information for a complaint under s. 56 of the Act;
  5. In the case of failure to complete the Practice Review, or pay costs within the timelines referred to above, or within the amended deadline agreed to by the Complaints Director, Ms. Khairmode's practice permit shall be suspended until she has complied with the outstanding order(s); or refer the matter back to a hearing tribunal for further direction.

6. Where mutual agreement is required between Ms. Khairmode and the Complaints Director relating to an outstanding requirement, and an agreement cannot be reached by Ms. Khairmode and the Complaints Director on the implementation of the outstanding requirement, the Complaints Director (or her delegate) may refer the matter back to a hearing tribunal for further direction.
74. Ms. Wensel noted that where parties have arrived at a joint submission on sanction, there is a very high threshold set by the Supreme Court of Canada in the case of *R. v Anthony-Cook* that requires that a joint submission on sanction should not be rejected unless it would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.
75. Ms. Wensel advised that in addition to the sanctions set out in the joint submission on sanction, the Complaints Director was seeking an order for a 30-day suspension and seeking an order directing payment of 50 percent of the costs in this matter due within 24 months. Ms. Wensel referred the Hearing Tribunal to the Written Submissions of the Complaints Director for the specific terms and conditions regarding the proposed suspension and payment of costs.
76. In respect to the overall costs, Ms. Wensel referred the Hearing Tribunal to a breakdown of estimated costs which was contained as an Appendix to Exhibit 5 and estimated costs of approximately \$40,000.00.
77. In respect to the issue of whether a suspension was justified, Ms. Wensel submitted that a 30-day suspension was appropriate considering the severity of the conduct, the marked departure from the expected standard of care of a physiotherapist and the harm caused to the patient. She noted that the primary purpose of sanctions against a regulated member is the protection of the public, ensuring that the public has confidence in the profession and sending an appropriate message to other members of the profession that the conduct in question was unacceptable.
78. Ms. Wensel referred to the factors set out in *Jaswal v Medical Board (Nfld)* and submitted that the following factors were relevant:
- a. The nature and gravity of the allegations – while this was one patient and one treatment, there was serious harm to the patient in form of second degree burns that required ongoing medical care and the injuries arose from a series of failures by Ms. Khairmode both during the treatment and in her response when she was contacted by Ms. P.B. including her delay in creating an incident report.



- b. Ms. Khairmode was an experienced physiotherapist with a busy physiotherapist practice;
  - c. Ms. P.B. was a patient with serious medical conditions and her MS created reduced sensations which created a vulnerability that was not taken into account;
  - d. Ms. Khairmode did not provide sufficient accountability to Ms. P.B. when she was contacted by Ms. P.B. about Ms. P.B.'s injuries;
  - e. Ms. Khairmode did not suffer a loss of employment or of her businesses and any loss of income shown was limited;
  - f. General deterrence is an important point, and it must be clearly demonstrated to the profession that this unprofessional conduct is not acceptable and will have significant consequences for any physiotherapist who engages in similar conduct.
79. Ms. Wensel then referred to the case of College of Nurses of Ontario v Myrtil in which a registered psychiatric nurse improperly administered a hot pack, and the patient suffered a serious burn on her arm that ultimately led to an amputation. In that case the Discipline Committee ordered a 30-day suspension finding that the proposed sanction was a deterrent and made clear that this behaviour could not be tolerated.
80. Ms. Wensel submitted that without a suspension, the proposed orders would not "inspire confidence" in the profession of physiotherapy or the disciplinary process and would not create sufficient deterrence to ensure public safety.
81. On the issue of costs, Ms. Wensel referred to section 82(1)(j) of the Health Professions Act ("the HPA") for the authority of the Hearing Tribunal to order the investigated person to pay all or part of the expenses, costs and fees related to the investigation and hearing. She suggested that the Complaints Director was seeking an order that Ms. Khairmode pay 50% of the costs of the hearing which were estimated to be approximately \$40,000.00.
82. Ms. Wensel then referred to the case of Jinnah v Alberta Dental Association and College which had set a new framework for approaching an order in respect to the costs of a hearing. She noted that in the Jinnah decision the Court of Appeal suggested that substantial costs orders should not be ordered automatically without compelling reasons to do so which might include:
- a. The regulated member engaged in serious unprofessional conduct;

- b. The regulated member is a serial offender;
  - c. The regulated member failed to cooperate with the investigation; or
  - d. The regulated member engaged in hearing misconduct, or behaviour that prolongs the hearing or otherwise increases the cost of the hearing.
83. Ms. Wensel submitted that Ms. Khairmode's conduct falls within the category of serious unprofessional conduct, and she referred the Hearing Tribunal to a series of cases since the Jinnah decision where regulatory bodies governed by the HPA had issued orders of costs against regulated members which were set out at paragraph 23 of her Written Submissions on Sanctions.
84. Ms. Wensel also noted the direction of the Alberta Court of Appeal in *KC v College of Physical Therapists of Alberta* in which the Court of Appeal noted that an order for costs should not be a "crushing financial blow". She submitted that an order for 50% of the costs would not create a crushing financial blow to Ms. Khairmode particularly given the suggestion that the costs be paid over a two-year period.

### **Submissions from Mr. McGarvey**

85. Mr. McGarvey referred to his Written Submissions but advised he would not be going through them in detail as he assumed the Hearing Tribunal had reviewed them.
86. In respect to the Partial Joint Submission on Penalty, Mr. McGarvey noted that Ms. Wensel had taken the Hearing Tribunal through the Partial Joint Submission in detail, and he confirmed that he agreed with her comments regarding *R. v. Anthony-Cook* regarding those partial joint submissions. He added that in respect to the practice review portion of the Partial Joint Submission the cost of that practice review was being paid by Ms. Khairmode and that she had already started on the first portion of her self-reflection.
87. Mr. McGarvey referred to Ms. Khairmode's evidence that this incident had a profound effect on her emotionally and in her practice. However, he emphasized that the burns suffered by Ms. P.B. were significant and the photos of her burns made clear that this had been a horrific experience for Ms. P.B.
88. Mr. McGarvey acknowledged that there were a series of mistakes made by Ms. Khairmode in the administration of the assessment and treatment of Ms. P.B. and he submitted if a proper pain and temperature or thermal assessment was done on Ms. P.B. at the outset, the injuries would not have occurred. Mr. McGarvey

indicated that there were a series of cascading errors that led to these serious injuries.

89. Mr. McGarvey emphasized that Ms. Khairmode had expressed her genuine remorse at what had occurred and that it was never intention to harm Ms. P.B. He submitted that Ms. Khairmode had learned significantly from this event and will continue to learn as she continues her profession.
90. Mr. McGarvey agreed with Ms. Wensel that protection of the public and the maintenance of the integrity of the profession were major factors for the Hearing Tribunal to consider. However, he submitted that a suspension would not serve any necessary purpose and would not go so far as to prevent another physiotherapist from failing to do the necessary thermal or pain assessment.
91. Mr. McGarvey suggested that in his experience with professional disciplinary complaints, the most significant sanction that any professional can receive is not suspension, but publication and he noted that publication would occur in this case.
92. Mr. McGarvey submitted that a suspension was not necessary to uphold the integrity of the profession or protect the public in this case. He suggested that what was needed was education, understanding, training and communication and that all of these things are dealt with in the Partial Joint Submission on Penalty which will give the kind of education, training and reflection necessary to ensure that a similar event would never happen again. He also noted the expert report of Mr. Muir which Ms. Khairmode had reviewed on many occasions and took no issue with was an important part of the education process.
93. Mr. McGarvey submitted that the Corporate Tax Returns provided had showed that there had been a reduction in net income (partially due to an increase in expenses for travel to conferences for more training) and that it was this additional education and training that would maintain the integrity of the profession and protect the public. Mr. McGarvey also highlighted Ms. Khairmode's evidence that she is seeing fewer patients and spending more time with the patients that she does see.
94. Mr. McGarvey noted the five letters of reference provided by Ms. Khairmode. He suggested that these testimonials were helpful to tell the Hearing Tribunal the type of practitioner that Ms. Khairmode is. He also submitted that everyone would lose from having her not provide physiotherapy services especially to the complex neuro physiotherapy patient that she sees.
95. Mr. McGarvey submitted that Ms. Khairmode had practiced for 16 years with a spotless record until this one incident with one patient.

96. Mr. McGarvey then reviewed the Jinnah decision of the Court of Appeal and he stated that there is a fundamental disagreement between the parties regarding the impact of that decision. Mr. McGarvey submitted that a number of principles were established by the Court of Appeal in Jinnah:
- a. The starting point is that the professions should bear the cost of self-governance including the regulation and supervision of its members;
  - b. There must be a compelling reason to depart from this general principle and the Court of Appeal has identified four exceptions to the general principle:
    - i. The professional engages in serious unprofessional conduct such as sexual assault on a patient or fraud perpetrated on an insurer;
    - ii. The professional is a serial offender or engages in unprofessional conduct on two or more occasions;
    - iii. The professional fails to cooperate with the College and forces the College to expend more resources than is necessary to ascertain the facts relating to the complaint;
    - iv. Where a professional engages in hearing misconduct that unnecessarily prolongs the Hearing.
97. Mr. McGarvey also noted the comment of the Court of Appeal in paragraph 145 that "It follows that the profession as a whole should bear the costs in most cases of unprofessional conduct."
98. Mr. McGarvey also submitted that the Court of Appeal in the Jinnah case stated that serious unprofessional conduct involving a marked departure from the ordinary standard of care that must be so marked that the professional must have known that such behavior was unprofessional conduct. He suggested that this denotes an element of intention in the unprofessional conduct and that there was no evidence of that in this case.
99. Mr. McGarvey submitted that in this case, there was no intentional act but only a series of mistakes that led to serious consequences. He also submitted that this case did not tend to the furthest end of the range and that costs in this case should not be a departure from the general rule that they are borne by the College.
100. Mr. McGarvey then reviewed the Moiz and Sherman cases from previous Hearing Tribunals of the College of Physiotherapists of Alberta. He suggested that the Moiz case was distinguishable but that the Sherman case was not. He noted that Mr.

Sherman's case was one in which sexual assault of a patient was found and Mr. Sherman's practice permit was cancelled as required under the Health Professions Act. He noted that in this very serious case, the Hearing Tribunal only assessed 10 percent of the costs against Mr. Sherman.

101. Mr. McGarvey encouraged the Hearing Tribunal to follow the principles set by the Court of Appeal in Jinnah and suggested it was the leading case on the law of costs before professional tribunals in Alberta.
102. At this point, it became apparent that there would not be sufficient time to complete the submissions on sanctions. After discussion between the parties and the Hearing Tribunal, the hearing was adjourned, and the Panel requested the Hearing Administrator to arrange a further date for a further half-day hearing to complete the hearing.

### **The Hearing on May 24**

103. The Hearing began with Mr. McGarvey advising the Hearing Tribunal that he wished to deal with some housekeeping matters, then have Ms. Khairmode address the Hearing Tribunal, and then conclude by making some further submissions. In terms of housekeeping matters, Mr. McGarvey advised the Hearing Tribunal that Ms. Khairmode had updated her LinkedIn profile and made it current. He advised that she had also taken certain courses on patient safety and patient care since the last hearing. Mr. McGarvey clarified that some concerns he had expressed at the prior hearing should not have referred to Ms. Wensel and he stated that Ms. Wensel had been thoroughly professional throughout their dealings.
104. Ms. Khairmode then spoke to the Hearing Tribunal. Ms. Khairmode described her experience in neuro physiotherapy for the last 16 years and her attempt to always uphold the highest standards of professionalism in her practice and her operation of her clinics. She described several volunteer activities she was involved with and her passion for promoting health and wellness through her services.
105. Ms. Khairmode stated that the incident that had impacted Ms. P.B. had shaken her and she acknowledged that she had reviewed the interaction with Ms. P.B. and realized that she could have minimized the error professionally by being physically present and then by observing and checking on Ms. P.B. personally during the entire session rather than relying on verbal confirmation from her assistant. She advised that she was deeply sorry for what had occurred to Ms. P.B. and that she wished to again sincerely apologize to Ms. P.B. for what had happened.

106. Ms. Khairmode advised that she had already started her practice review, further education and detailed assessment strategies. She stated that she was focusing on keeping herself exclusively available for patients with complicated or multisystem issues, emphasizing full discussion of benefits and potential harms, the importance of ongoing visual and verbal checkups during treatment sessions, and checking and communicating well with patients about their treatment.
107. Ms. Khairmode stated that she had struggled with the fact that she had hurt a patient and advised that she had reduced her work to pay greater attention and time to each of her patients. She indicated that this experience had been extremely humbling and that she was striving hard to be a better physiotherapist and to ensure that no such incident ever happened again.
108. Ms. Khairmode concluded by once again apologizing to Ms. P.B.
109. Mr. McGarvey then made some additional submissions. He submitted that there were four issues that the Hearing Tribunal ought to consider when dealing with sanctions in this case:
  - a. Do the terms of the Partial Joint Submission on Penalty constitute a sufficient and reasonable sanction considering the facts of this case.
  - b. Is it appropriate or even necessary to consider or impose a suspension on Ms. Khairmode's practice permit.
  - c. Having regard to the facts of the case and the current case law, should Ms. Khairmode be ordered to pay costs of this discipline process and, if so, in what amount.
  - d. Is there any other sanction that the Hearing Tribunal believes may be appropriate having regard to the facts of the case.
110. Mr. McGarvey then reviewed the terms of the Partial Joint Submission on Sanctions for the Hearing Tribunal. He emphasized the order to review the College's Patient Safety and Risk Management Guide, the conduct self-reflection and five goals for self-improvement. He noted the very specific and comprehensive terms and conditions of the practice review to which Ms. Khairmode had agreed. He pointed out that the costs of this review would be borne by Ms. Khairmode. He also noted her statements apologizing to Ms. P.B. and advising that she had reduced her patient load and income along with an increase in her expenses for travel to attend conferences to upgrade her education.
111. Mr. Garvey submitted that the request by the Complaints Director for a costs sanction of 50% of the costs of the discipline process (approximately \$20,000.00)

when taken with the requested suspension and other sanctions would tend to create the “crushing financial blow” referred to by the Court of Appeal in the K.C. v. College of Physiotherapists case.

112. Mr. McGarvey suggested to the Hearing Tribunal that a suspension was unnecessary and when combined with the costs that were requested would have far-reaching financial impacts not only on Ms. Khairmode but on the employees, the physiotherapists, and the patients at the clinics she co-owns.
113. Mr. McGarvey also commented on the Myrtil and Moiz cases referred to by the Complaints Director and noted that in those cases the suspensions had been agreed to as part of a consent hearing which made them of limited assistance in this case. He also submitted that caution was required in accepting as precedents cases where there had been a joint submission on penalty as the Hearing Tribunal would not know what the reasoning was for the joint submission.
114. Mr. McGarvey concluded by submitting that nothing would be served by a suspension in this case and that a suspension and costs would be disproportionate in this case. He urged the Hearing Tribunal to accept the Partial Joint Submission on Sanctions as sufficient to discipline Ms. Khairmode in this case.

#### **Reply by Ms. Wensel**

115. Ms. Wensel submitted that Mr. McGarvey’s submission that the nature of the conduct was a series of cascading errors was inaccurate. She submitted that the conduct was not cascading errors but “numerous mistakes” and a “bulk of errors”. She also submitted that the Hearing Tribunal should be cautious in accepting the submission that Ms. Khairmode had scaled back her practice. Ms. Wensel also disagreed with what she saw as a suggestion by Mr. McGarvey that the Jinnah case required that there be an element of intent in a case of marked departure from ordinary care. She then reviewed aspects of the Jinnah and Moiz cases and noted that the Hearing Tribunal in Moiz found that it was a case where a significant order of costs could be made.

#### **Further Reply by Mr. McGarvey**

116. Mr. McGarvey advised that he held to his description of what occurred as a series of cascading errors and he suggested that if any of the series of errors that occurred had been caught, the burns might have been prevented or been less severe. He also emphasized that the evidence of income supported Ms. Khairmode’s evidence that she was seeing fewer patients. He also re-emphasized his interpretation of Jinnah that there must be knowledge and intent before the exceptions in Jinnah would apply. He also stood by his submission that it was

dangerous to rely upon cases in which sanctions were determined by joint submissions.

117. At this point, the hearing was recessed for the Hearing Tribunal to determine whether it could reach a verbal decision at this time. When the Hearing Tribunal returned, it advised that it had no further questions for the parties and that it would not be making a decision at this time and would provide its written decision and reasons once it had concluded its deliberations.

### **Reasons of the Hearing Tribunal Concerning the Finding of Unprofessional Conduct**

118. In accepting the acknowledgment of unprofessional conduct made by Ms. Khairmode, the Hearing Tribunal finds that there were a series of serious errors made by Ms. Khairmode which resulted in Ms. P.B. experiencing deep-partial and full thickness burns to her sacral and gluteal area requiring several months of care and delaying her planned hysterectomy surgery. These injuries resulted in permanent consequences including scarring, decreased skin integrity, sensation, chronic itch, and increased vulnerability to future injury (including pressure and shear injuries) to this area.
119. The errors made by Ms. Khairmode included:
- a. It was not appropriate to institute a hot pack treatment without first conducting an appropriate and thorough assessment of the patient;
  - b. There was no clinical indication or justification for providing either thermotherapy or electrotherapy during this first initial assessment given that the patient was coming for a pre-operative pelvic floor rehabilitation;
  - c. There was poor clinical judgment in applying a hot pack treatment and electrotherapy to a patient with multiple sclerosis (MS) due to known sensory loss and heat intolerance with this condition;
  - d. There was no sensation testing performed to identify if pain or thermal sensitivity were present and whether a heat pack could be applied safely;
  - e. The heat pack was placed in a position that was dangerous due to increased pressure placed on sensitive tissues;
  - f. The heat pack was not properly prepared with sufficient towels or covers;
  - g. The heat pack was applied for an excessive amount of time (30 minutes);
  - h. There was insufficient monitoring of the patient relying on verbal check-ins through a therapy assistant rather than physical monitoring;



- i. As a registered physiotherapist, especially one with a self-expressed practice interest in neurological conditions (such as MS), Ms. Khairmode should have known that this was an inappropriate and unsafe treatment for P.B.
  - j. There was an improper response to the patient to acknowledge their injury as indicated in both the Expert Report of Mr. Muir and the patient's account of the incident in her complaint.
120. These proven errors were serious departures from the required standard of care as outlined in the Standards of Practice for Physiotherapists in Alberta document and in total they establish serious unprofessional conduct on the part of Ms. Khairmode which fully justified her admission of unprofessional conduct. This was not a single error or mistake. It was a series of errors that created a dangerous situation that seriously injured Ms. P.B.
121. The Hearing Tribunal notes Ms. Khairmode's description of her efforts to restrict her hours of practice and to see fewer patients to provide appropriate care. However, the efforts she has described should have been part of the minimum standard of care provided at all times and should not now be considered a voluntary restriction on her practice.

### **Reasons of the Hearing Tribunal Regarding the Appropriate Orders in this Matter**

122. In considering the appropriate orders for the serious unprofessional conduct that was proven in this case, the Hearing Tribunal agrees that Self-Reflection ordered in the Partial Joint Submission on Penalty is an appropriate and positive step to improve Ms. Khairmode's practice and to reduce the risk of any future injuries to patients.
123. The Practice Review Orders set out in the Partial Joint Submission on Penalty are also appropriate and in the public interest. This detailed Practice Review process will assist Ms. Khairmode in improving her practice and avoiding the issues that led to the injuries suffered by Ms. P.B. and the findings of unprofessional conduct in this hearing.
124. The detailed Practice Review and monitoring will also provide assurance to the College and the public that the issues which led to this hearing and the injuries to Ms. P.B. have been thoroughly reviewed and that Ms. Khairmode has improved her practice to avoid the errors and practice failures that resulted in the injuries to Ms. P.B.

125. The public is protected by the Practice Review process and the monitoring of Ms. Khairmode, and Ms. Khairmode is provided with feedback and assistance to improve her practice and to avoid any similar errors in the future.

### **The Issue of the Requested 30-Day Suspension**

126. In the opinion of the Hearing Tribunal the 30-Day suspension of Ms. Khairmode's practice permit requested by the Complaints Director is appropriate in the circumstances of this matter.

127. While the complaint related to single treatment for a patient, there were a series of significant errors made by Ms. Khairmode during that treatment which resulted in a serious burn injury to Ms. P.B. In the opinion of the Hearing Tribunal these significant errors constituted serious unprofessional conduct that had a very negative impact for the patient.

128. This was not a single error or mistake. The errors described above at paragraph 120 were numerous, serious, and clearly unacceptable practice. As a result, there was a need for an order for a substantial and extensive Practice Review as provided in the Partial Joint Submission on Sanctions. This was necessary to ensure that Ms. Khairmode can practice safely and that the public is protected.

129. However, in the opinion of the Hearing Tribunal, the number of errors made by Ms. Khairmode, the proven serious unprofessional conduct, and the significant impact of those errors on the patient require more than remedial orders.

130. The Hearing Tribunal believes that a 30-Day suspension will make clear to Ms. Khairmode, the profession, and the public that this was serious unprofessional conduct and that such conduct must not occur. It will also make clear that if this type of serious unprofessional conduct occurs there will be significant consequences for Ms. Khairmode or for any other physiotherapist who engages in similar unprofessional conduct.

131. A suspension, which will appear on Ms. Khairmode's practice record, is critical to maintaining public confidence in the integrity and quality of the physiotherapy profession. The suspension will protect the public by helping to deter any similar conduct in the future by Ms. Khairmode or any other physiotherapist. It will also protect the reputation of the profession by making clear to the public that the conduct that occurred in this case is unacceptable, cannot be accepted by the profession, and will result in serious sanctions for any member who engages in similar conduct.

## **The Request for an Order that Ms. Khairmode Pay 50% of the Costs of the Investigation and Hearing**

### **Submissions by Ms. Wensel**

132. Ms. Wensel has requested that the Hearing Tribunal make an order under section 82(1)(j) of the HPA directing pay 50% of the total costs of the investigation and hearing on the following terms:
- a. the costs are due 24 months after the date that Ms. Khairmode receives both a copy of the Hearing Tribunal's written decision and a statement of final costs;
  - b. the costs must be paid to the College, whether or not Ms. Khairmode holds an active practice permit with the College; and
  - c. the costs are a debt owed to the College and if not paid by the deadline indicated, may be recovered by the College as an action of debt.
133. The Complaints Director provided a Statement of Anticipated Costs (Estimate Only) that showed Total Anticipated Costs for the hearing as \$40,282.41. The Hearing Tribunal recognizes that the total costs incurred may have increased as a result of the need for a further half-day hearing on May 24, 2024.
134. Ms. Wensel referred to the decision of the Court of Appeal in *KC v College of Physical Therapists of Alberta* as authority for the principle that costs are discretionary and that costs on a full indemnity basis should not be the default. This suggested that factors to be considered such include: the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts. This case also directed that costs should not be so great as to be a "crushing financial blow".
135. She also referred to other Court of Appeal cases which had confirmed this discretionary approach to costs including *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, *Zuk v Alberta Dental Association and College*, *Al-Ghamdi v College of Physicians and Surgeons of Alberta*, *Alsaadi v Alberta College of Pharmacy* and *Dr. Ignacio Tran III v Alberta Veterinary Medical Association*.
136. Ms. Wensel also made submissions on the principles set out by the Court of Appeal in its decision in *Jinnah v Alberta Dental Association and College*. She noted that in this case, the Court of Appeal created a presumption against substantial costs being automatically awarded without a "compelling reason" to do

so. She reviewed the four categories suggested in Jinnah as justifications to order a “substantial” or significant portion of the costs and suggested that the category that applied in this case was that “the regulated member engaged in serious unprofessional conduct”.

137. Ms. Wensel also referred at paragraph 23 of her written submissions to a series of costs orders made by regulatory bodies since the Jinnah decision including the Moiz decision made by a Panel of this College. She submitted that these cases showed that a range of costs, generally between 25% and 50%, have been ordered where the compelling reason of serious unprofessional conduct is found by a Hearing Tribunal. She submitted that these cases reflected the discretionary approach to costs set out in the Jinnah decision.
138. Ms. Wensel submitted that in this case an order of 50% of the costs would be appropriate on the basis that Ms. Khairmode’s conduct was serious unprofessional conduct because a patient was severely injured by improper assessments, treatment and monitoring that reflected “a marked departure from the ordinary standard of care”, and “breached numerous ethical responsibilities arising from the Code of Ethical Conduct and the Standards of Practice”.
139. She submitted that the costs incurred by the College in this case were a result of Ms. Khairmode’s conduct and reflected the necessary steps taken in the investigation and hearing and the seriousness of the charge admitted by Ms. Khairmode. She noted that these costs included:
  - a. the investigation which was concluded internally;
  - b. an expert opinion, which was cited and referred to at the hearing;
  - c. legal fees, including lengthy negotiations with opposing counsel;
  - d. transcripts relating to the investigation; and
  - e. anticipated fees for independent legal counsel for the Hearing Tribunal.
140. Ms. Wensel submitted that the proposed order of costs was not a crushing financial blow. She noted that Ms. Khairmode had been practicing as a physiotherapist with no imposed impediment to earning income since the complaint was made.

### **Submissions of Mr. McGarvey**

141. Mr. McGarvey submitted that the law with respect to costs in professional disciplinary matters had evolved over the years and submitted the trend has been

away from making an Investigated Member pay costs of the hearing, except in the most egregious cases.

142. He reviewed the *KC v College of Physical Therapists of Alberta* case emphasized two points made in paragraph 94 of the decision:

The fact that the Act and Regulation permit recovery of all hearing and appeal costs does not mean that they must be ordered in every case. Costs are discretionary, with the discretion to be exercised judicially. ...

Costs are not a penalty and should not be awarded on that basis. When the magnitude of the costs delivers a crushing financial blow, it deserves careful scrutiny.

143. He also referred to comments made by Justice Khullar in a concurring decision in *Alsaadi v Alberta College of Pharmacists and the Appeal Panel of Council of the College of Pharmacy* where she made the following points:

As noted in *K.C.*, if the magnitude of the award seems unreasonably high, "it deserves careful scrutiny" to ensure that the amount reflects a reasonable exercise of discretion. In other words, if it appears that the amount would result in a crushing financial blow, a hearing tribunal or reviewing body should reflect carefully on whether it is exercising its discretion reasonably. ...

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

144. Mr. McGarvey then reviewed the *Jinnah* case and noted that there was a fundamental disagreement between the parties in terms of this case. Mr. McGarvey stated that the starting point in *Jinnah* is that professions should bear the costs of self-governance. He stated that the Court of Appeal has stated that there must be a compelling reason to depart from that general principle.

145. He submitted that the relevant issue in Jinnah relates to the issue of serious unprofessional conduct which may warrant some form of costs order and raised as an example sexual assault. He suggested that in this case, what occurred was not an intentional act but a series of mistakes. While the mistakes led to serious consequences, Mr. McGarvey submitted that they did not tend to the furthest end of the range and did not give a reason to depart from the general rule that costs should be borne by the College.
146. Mr. McGarvey submitted that the most relevant case was the Sherman case. He noted that although sexual assault against a patient was found and Mr. Sherman had his practice permit cancelled, the Hearing Tribunal imposed only 10% of the costs on the hearing on Mr. Sherman.

### **Decision of the Hearing Tribunal on Costs**

147. The Hearing Tribunal has considered whether this is a case in which it is appropriate to order that Ms. Khairmode pay a portion of the costs of this investigation and hearing.
148. The first issue to be determined is whether the unprofessional conduct found in this case is serious unprofessional conduct that may justify an order to pay costs. The Hearing Tribunal has provided its reasons for finding that the unprofessional conduct in this case was serious unprofessional conduct at paragraphs 119 to 121 of this decision.
149. In the opinion of the Hearing Tribunal, the serious unprofessional conduct that has been found in this case does justify an order that Ms. Khairmode pay a portion of the costs of the investigation and hearing. The Complaints Director has requested payment of 50% of the costs of the investigation and hearing. Mr. McGarvey has suggested that no costs should be ordered and has suggested that payment of 50% of the costs of the investigation and hearing (which the Complaints Director had estimated at \$20,000.00) may constitute a crushing financial blow.
150. The Hearing Tribunal does not agree that payment of 50% of the costs of the investigation and hearing would constitute a crushing financial blow for Ms. Khairmode. However, the Hearing Tribunal recognizes that its order of a 30-Day suspension will have a significant impact on Ms. Khairmode and her practice.
151. The Hearing Tribunal has therefore determined that the appropriate order is that Ms. Khairmode pay 25% of the costs of the investigation and hearing on the following terms:

- a. the Costs are to be paid within 24 months after the date that Ms. Khairmode receives the Hearing Tribunal's Written Decision on Sanction and the statement of final costs from the Complaints Director;
- b. the Costs must be paid to the College, whether or not Ms. Khairmode holds an active permit with the College; and
- c. the Costs are a debt owed to the College and if not paid by the deadline indicated, may be recovered by the College in an action in debt.

### **The Orders Made by the Hearing Tribunal**

152. As set out in these Written Reasons, the Hearing Tribunal makes the following orders:

1. Ms. Khairmode's Practice Permit will be suspended for a period of thirty (30) days with the period of suspension to commence within fifteen (15) days of receipt of the Hearing Tribunal's decision or within such other time as agreed to by the Complaints Director.
2. Ms. Khairmode shall pay 25% of the costs of the investigation and hearing on the following terms:
  - a. the Costs are to be paid within 24 months after the date that Ms. Khairmode receives the Hearing Tribunal's Written Decision on Sanction and the statement of final costs from the Complaints Director;
  - b. the Costs must be paid to the College, whether or not Ms. Khairmode holds an active permit with the College; and
  - c. the Costs are a debt owed to the College and if not paid by the deadline indicated, may be recovered.
3. Within thirty (30) days of receiving the Decision, Ms. Khairmode shall:
  - a. Review the College's Patient Safety and Risk Management Guide (the "**Guide**"); and
  - b. Prepare a self-directed reflection on the Guide and considering the Hearing Tribunal's decision (the "**Self-Reflection**"), that must:
    - i. Include at least five (5) goals of self-improvement relating to the issues identified in the Notice of Hearing (the "**Reviewable Concerns**") in Ms. Khairmode's practice as a physiotherapist;

- ii. Cite at least five (5) secondary resources reviewed by Ms. Khairmode, including the Guide, the College's applicable standards and responsibilities.
- 4. Ms. Khairmode shall undergo a practice review ("**Practice Review**") by a practice reviewer (the "**Reviewer**") who is approved by the Complaints Director, or their delegate, and Ms. Khairmode, subject to the following terms and conditions:
  - a. Ms. Khairmode is responsible for finding a Reviewer and must submit the name, and other information about the proposed reviewer requested by the Complaints Director to determine their suitability to engage in the Review. This information must be submitted to the Complaints Director within thirty (30) days of receiving the Decision.
  - b. If Ms. Khairmode is unable to find a Reviewer, she may seek assistance from the Complaints Director in finding a Reviewer, demonstrating all reasonable efforts taken by her and the reasons for not finding a Reviewer to date.
  - c. Upon confirmation that the proposed Reviewer has been approved by the Complaints Director:
    - i. The Complaints Director will provide the Reviewer with copies of the Notice of Hearing, the Agreed Statement of Facts (including attachments), and the decision of the Hearing Tribunal.
    - ii. Ms. Khairmode must provide a copy of her Self-Reflection to the Reviewer.
  - d. Within fifteen (15) days from the date the Complaints Director provides the Reviewer with the information referred to in Order 4 (c), the Reviewer will have an initial meeting with Ms. Khairmode to discuss and review:
    - i. the Reviewable Concerns;
    - ii. the Self-Reflection completed by Ms. Khairmode;
    - iii. the Guide, all applicable standards and responsibilities of the College and any other secondary resources that the Reviewer believes are relevant to the Reviewable Concerns.



- e. During the initial meeting, or if the Reviewer requires additional time, within seven (7) days following the initial meeting, the Reviewer will provide Ms. Khairmode with recommendations regarding their practice and the Reviewable Concerns, including recommending the completion of any remedial or educational activities related to the Reviewable Concerns and changes to Ms. Khairmode's practice.
- f. After the initial meeting and Ms. Khairmode receiving the Reviewer's recommendations, the Reviewer shall observe Ms. Khairmode's practice as a physiotherapist (the "**Sessions**"), subject to the following terms and conditions:
  - i. The Reviewer must observe Ms. Khairmode complete the following:
    - a. At least five (5) physiotherapy assessments of new patients, including observations of:
      - (1) Assessments of proprioception, pain, light touch, and temperature perception;
      - (2) Formation of a plan of care, including selecting and documenting interventions to address abnormalities of body structure, function, activities, and participation limitations; and
      - (3) Justifying selected interventions and providing evidence-based rationale for selections examination techniques and treatment interventions.
    - b. At least fourteen (14) treatment sessions with patients where the application of electrophysical agents (heat, cold and/ or ultrasound) is required and including observations of:
      - (1) Formation of a plan of care, including selecting and documenting interventions to address abnormalities of body structure, function, activities, and participation limitations; and
      - (2) Justifying selected interventions and providing evidence-based rationale for the application of electrophysical agents including:
        - (a) documentation of rationale,

- (b) describing rationale for the selected modality,
  - (c) description and attention to indications, contraindications, and precautions,
  - (d) physical safety in the application of electrophysical agents,
  - (e) Monitoring the patient's response to the application of electrophysical agents, and
  - (f) modification of application to patients based on their response.
- ii. The Sessions shall occur at Ms. Khairmode's place of business and shall be held on one or more dates, as needed in order to complete the observations referred to above.
- iii. The Sessions shall be completed within a period of forty-five (45) days after the initial meeting;
- iv. The Reviewer will complete a log of the patient assessments and treatment observed during the Sessions that shall be provided to the Complaints Director with the Reviewer's written report;
- v. Each Session shall include a discussion and feedback based on the Reviewer's observations with Ms. Khairmode, with specific reference on any areas of improvement identified for Ms. Khairmode to improve and the Reviewable Concerns.
- g. Following the initial meeting with the Reviewer, Ms. Khairmode shall implement all recommended activities and any practice changes proposed by the Reviewer throughout their Practice Review and in their practice, including:
  - i. During the Sessions while with the Reviewer; and
  - ii. While Ms. Khairmode is practicing independently.
- h. Following completion of the Sessions, the Reviewer will provide a written report, including the log of patient assessments and treatment from the Sessions, to the Complaints Director and Ms. Khairmode confirming:

- i. the results of the Practice Review;
  - ii. whether there are any continued Concerns; and
  - iii. whether Ms. Khairmode is practicing to the standard expected by the College in relation to the Reviewable Concerns.
- i. If there are any additional concerns identified in Ms. Khairmode's practice by the Reviewer in their written report regarding the Reviewable Concerns or if the Reviewer is unable to confirm that Ms. Khairmode is practicing to the standard expected of the College, the Complaints Director may take further steps as appropriate, including remitting the matter back to a hearing tribunal of the College for further consideration regarding whether additional orders are appropriate.
  - j. Ms. Khairmode shall be responsible for any costs related to the Practice Review, including any remedial or educational activities or practice changes deemed necessary by the Reviewer, as these costs become due.
5. Should Ms. Khairmode be unable to comply with any of the timelines referred to in paragraphs 1 or 2, the Complaints Director may, in their sole discretion, grant an extension.
6. Should Ms. Khairmode fail to comply with any of the orders above, or orders granted by the Hearing Tribunal, within the deadline specified or within the period of the extended deadline granted by the Complaints Director, the Complaints Director (or her delegate) may do any or all of the following:
- a. Treat Ms. Khairmode's non-compliance as information for a complaint under s. 56 of the Act;
  - b. In the case of failure to complete the Practice Review, or pay costs within the timelines referred to above, or within the amended deadline agreed to by the Complaints Director, Ms. Khairmode's practice permit will be suspended until she has complied with the outstanding order(s); or
  - c. Refer the matter back to a hearing tribunal for further direction.

7. Where mutual agreement is required between Ms. Khairmode and the Complaints Director relating to an outstanding requirement, and an agreement cannot be reached by Ms. Khairmode and the Complaints Director on the implementation of the outstanding requirement, the Complaints Director (or her delegate) may refer the matter back to a hearing tribunal for further direction.

Dated this 20th day of August 2024

Signed on Behalf of the Hearing Tribunal



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Simone Hunter, Chair