IN THE MATTER OF
THE *MEDICAL PROFESSION ACT*,
SNWT 2010, c 6

and

IN THE MATTER OF an Investigation regarding
Dr. ANDREW KOTASKA, a Medical Practitioner

DECISION OF THE BOARD OF INQUIRY UNDER THE MEDICAL PROFESSION ACT

I. INTRODUCTION

A panel of the Board of Inquiry (the "Panel") held a virtual hearing into the conduct of Dr. Andrew Kotaska on February 9 and 10, 2023. The members of the Panel were:

Dr. Ian MacNiven of Yellowknife as Chair;
Dr. Don Yee of Edmonton; and
Ms. Gillian Burles of Yellowknife (public representative).

Mr. Matthew Woodley acted as independent legal counsel for the Panel.

In attendance at the hearing was Mr. Craig Boyer, legal counsel for the Complaints Officer and Ms. Dawn Hartfield, the Complaints Officer. Mr. Jon Rossall KC and Maxine Fine, legal counsel for Dr. Kotaska, along with Dr. Kotaska, attended the hearing. Mr. Ronald Halabi, legal counsel for AB, the patient (the "Patient"), attended as her advisor pursuant to section 69(4) of the *Medical Profession Act* (the "Act").

II. PRELIMINARY MATTERS

Neither party objected to the composition of the Panel or its jurisdiction to proceed with the hearing. The Chair stated that pursuant to section 68 of the Act, the hearing was open to the public, unless the Panel ordered all or some portion of the hearing closed to the public. Mr. Boyer made an application to hold the hearing in private given concerns raised by the Patient with respect to the private and sensitive nature of the medical evidence that was expected to be heard. In support of that application, Mr. Boyer referred the Panel to *Hirt v College of Physicians and Surgeons of British Columbia* (1985), 17 DLR (4th) 472 (BCCA) and *Ip v Wilson*, 2019 BCSC 2519, in support of the application to hold the hearing in private. Counsel for Dr. Kotaska took no position on the application.

The Panel determined that the very sensitive nature of the medical issues to be addressed in the hearing, including details regarding the Patient's medical history, surgical intervention, and the resulting circumstances giving rise to the allegation of unprofessional conduct, warranted an exception to the presumption of openness. The Panel found that there was a real and substantial risk of personal and confidential medical information being disclosed to the public if the hearing were held in public, and that there was no way to address that risk without limiting public access to the hearing, the transcripts and the exhibits. Noting that the Panel's written decision will be available for public review (with identifying information of the Patient removed) to ensure an appropriate degree of public scrutiny regarding the decision made by the Panel, including its rationale, the Panel concluded that such transparency is sufficient to ensure the protection of the public and to reassure the public that the medical profession is capable of effective self-government. The information ultimately unavailable to the public will be the narrow sliver of information relating to the identity of the Patient; the material aspects of the evidence upon which the decision below was made will be summarized and will be available for scrutiny by the public. For those reasons, the Panel determined that there was sufficient reason to hold the hearing in private.

III. CHARGE

The Notice to Practitioner listed the following allegation:

1. On or about November 22, 2019, you did demonstrate unprofessional conduct, particulars of which include one or more of the following;
    a. Making the comment intra-operatively to the surgical team "let's see if I can find a reason to remove the left tube as well";
    b. Removing the left fallopian tube of your patient, [AB], without her consent;
    c. Removing the left fallopian tube of your patient, [AB], when there was no medical reason to remove the tube without prior consent and doing so would render the patient sterile;
    d. Failure to respect the opinions of the circulating nurse and anesthesiologist in the operating room when they raised concerns to your intended removal of the patient's left fallopian tube given the lack of patient consent for that procedure; and
    e. Failure to consult intra-operatively with another surgeon about whether there was a sufficiently urgent medical reason to remove the patient's left fallopian tube without prior consent and doing so would render the patient sterile.

IV. EVIDENCE

The following Exhibits were entered into evidence during the hearing by agreement:

1. Agreed Exhibit Book, comprised of the following documents:
    a. Notice to Practitioner dated January 24, 2023
    b. Complaint Form from Dr. John Sauvé dated July 24, 2020
    c. Letter of response from Dr. Kotaska dated October 16, 2020
    d. Stanton Hospital records for [AB]
    e. Dr. Wiwchar email to the College of Physicians and Surgeons of Alberta dated March 29, 2021
    f. Letter of response from Dr. Kotaska dated June 6, 2021
    g. Statement from Nurse Ronald Flannigan undated
    h. Office records of Dr. Kotaska for [AB]
    i. Memorandum of Understanding between Dr. Kotaska and Northwest Territories Health and Social Services Authority dated January 28, 2020
    j. Report from Dr. Brassard dated January 1, 2021
    k. Letter of response from Dr. Kotaska dated June 22, 2022
    l. Report from Dr. Brassard dated July 4, 2022
    m. Canadian Medical Association *Code of Ethics and Professionalism*
    n. Curriculum Vitae for Dr. A. Kotaska
2. Kotaska A. Informed consent and refusal in obstetrics: A practical ethical guide. *Birth*. 2017;00:1-5.
3. Letter of Support dated December 4, 2022.

The Panel heard oral evidence from the following witnesses during the hearing:

1. Dr. John Sauvé
2. The Patient
3. The Patient's spouse
4. Dr. Andrew Kotaska
5. Dr. Shireen Mansouri
6. Lesley Paulette

V. ANALYSIS AND FINDINGS

Following the conclusion of the hearing, the Panel met to analyse the particulars of the allegation, to make necessary findings of fact, and ultimately determined that the proven facts amount to unprofessional conduct under the following aspects of the definition of "unprofessional conduct" in section 43 of the Act:

(a) engaged in conduct that displays a significant lack of knowledge, skill or judgment in the practice of medicine;
(b) engaged in conduct that does not comply with accepted standards for the practice of medicine;
(c) engaged in conduct that brings or tends to bring the standing of the medical profession into disrepute;

The reasons for the Panel's conclusions are set out below, and are based on the Panel's analysis of the particulars set out in allegation 1. While the Panel has analysed the allegation based on the specific particulars, it has considered whether the proven conduct amounts to unprofessional conduct on a holistic basis.

In order to provide its decision in a timely manner, the Panel has not included a detailed review of all of the evidence heard from each of the witnesses. However, it has referred to the relevant evidence that it considered in deliberating and making findings on each aspect of the allegation before it.

Particular (a), Making the comment intra-operatively to the surgical team "let's see if I can find a reason to remove the left tube as well"

This Particular arises from the intraoperative anaesthesia record written by Dr. John Sauvé, the anesthesiologist participating in the surgery on November 21, 2019. Further testimony was heard from Dr. Sauvé that this comment was spoken during the operation, prompting him to join Nurse Flannigan in questioning Dr. Kotaska intra-operatively, specifically regarding the existence of a need to exceed the written consent by removing the left fallopian tube. The Panel notes that this comment is not written in any other documents provided by Dr. Sauvé in the days following the surgery. Furthermore, this comment is not referenced in the documentation provided by Nurse Flannigan or medical student Wiwchar.

Dr. Kotaska addressed this issue in his evidence. His explanation was that he was voicing his thought process out loud. He testified that he was analysing the information he had at his disposal during the operation in addition to what he had gleaned in his initial and pre-operative consultations. He then used this information and his clinical experience to determine whether it was in the Patient's best interests to

remove the left fallopian tube. He proceeded in what he described as good faith to do so and the evidence suggests that his reasoning is threefold.

First, he believed that the Patient was not planning to have further children based on his opinions gleaned from the pre-operative consultations. Second, he was of the opinion of the clinical benefit that the removal of the contralateral tube would reduce the Patient's lifetime risk of gynaecological cancer. Finally, according to his subspecialty surgical training and experience as a consult Obstetrician and Gynecologist, he felt this would improve the Patient's chances of reducing her presenting complaint of pelvic pain due to pelvic congestion syndrome. Although Dr. Kotaska's motivations will be more specifically relevant to the Panel's analysis below, the Panel notes that Dr. Kotaska did acknowledge in his oral testimony that he made a statement following the removal of the right fallopian tube to the effect of, "whether we had enough reason to take out the other tube".

Although the Panel is able to conclude that some statement similar to the one set out in Particular (a) was made by Dr. Kotaska, it is not able to conclude that the making of the statement, standing alone, rises to the level of unprofessional conduct as set out above. The making of the statement does not reflect a significant lack of judgment, nor does it represent a violation of an accepted standards for the practice of medicine, nor is it conduct that (again, standing alone) would bring the medical profession into disrepute.

The Panel accepts that Dr. Kotaska believed in good faith that the Patient and her spouse had indicated that they did not intend to have more children. Based on that acceptance, the Panel finds that the intra-operative comment was not made maliciously but was made as a comment to himself, and Dr. Kotaska was under the impression he was acting in the best interest of the Patient. It is accepted as medical fact that high-quality literature has been published that demonstrates a reduction in lifetime risk of gynaecological cancer in patients who have had bilateral salpingectomies.

The Panel concludes that on the balance of probabilities, Particular (a) standing alone does not represent unprofessional conduct.

Particular (b), Removing the left fallopian tube of your patient, [AB], without her consent

Regarding Particular (b), the Panel finds that the left fallopian tube was removed by Dr. Kotaska without the Patient's written consent; this is clear based on the contents of Exhibit 1 and the testimony of the parties. The Patient and Dr. Kotaska signed a valid, standard Stanton Territorial Hospital operative consent form on November 21, 2019. This listed the surgical procedure as:

1. Hysteroscopy and removal of endometrial polyp D + C and
2. Diagnostic laparoscopy possible right salpingo-oopherectomy.

In order for the Panel to determine why Dr. Kotaska performed the left salpingectomy, the evidence provided on whether the Patient and her spouse intended to have more children was assessed. The Panel accepts from a detailed analysis of the written and oral evidence, that it is likely that the Patient and her spouse communicated to Dr. Kotaska in some manner that they did not in fact intend to have more children. There is evidence that multiple discussions between the Patient and Dr. Kotaska, as well as among the Patient, her spouse, Dr. Kotaska and medical student Wiwchar did in fact occur. From Dr. Kotaska's clinical record and medical student Wiwchar's email, there is documentation that suggests the Patient and her spouse did not think they would have more children. At the very least, the evidence suggests that there was some basis for Dr. Kotaska to have understood, broadly speaking, that there was

no intention of having additional children. The Panel acknowledges that this finding is not consistent with the testimony provided by the Patient or her spouse, and to the extent that the evidence differs on this point, the Panel prefers the evidence of Dr. Kotaska because it was consistent with his subsequent actions. Further, the statement from medical student Wiwchar indicates that although the Patient and her husband had stated that they did not think they would have more children, later in the consult the Patient affirmed that she wanted only the right tube and ovary removed. Although the Panel finds that Dr. Kotaska therefore subjectively understood that to be the intention, the Panel notes that the comment was not from the Patient herself and was not definitive.

However, there is no written documentation of left salpingectomy, or even the possibility thereof, documented on the written consent. The evidence from Dr. Kotaska's clinical notes demonstrates a discussion of potential left salpingectomy (in addition to the right) as a safe and effective option for irreversible family planning. The consultation notes provided by Dr. Kotaska indicate that the Patient was aware that there was an additional benefit of potentially reducing the presenting symptoms of pelvic pain and decreased lifetime cancer risk, if she consented to bilateral salpingectomies. This is further corroborated in the statement provided by medical student Wiwchar set out in Exhibit 1.

However, there is no written evidence that the Patient consented to a left salpingectomy either in writing or verbally. On a balance of probabilities, the Panel concludes that the Patient did not consent to a left salpingectomy either in writing (which was essentially admitted) or verbally prior to the surgical procedure. On the evidence heard by the Panel, it was in fact clear that the Patient was advised about the possibility and potential benefits of a left salpingectomy, but specifically stated that she did not wish for that procedure to be performed and that only the right tube and ovary were to be removed. This point is a crucial one in relation to the allegation and in relation to Dr. Kotaska's evidence about why he proceeded in the absence of written consent.

The Panel also concludes that the left salpingectomy without the consent of the Patient, in circumstances where the possibility was raised and rejected by the Patient, and without any intra-operative event which posed a risk to the Patient, is a clear instance of unprofessional conduct. Dr. Kotaska's view that a left salpingectomy might assist with pre-operative symptoms is simply not a basis to proceed with the procedure in the absence of consent (see also the expert opinion of Dr. Brassard on this point). Consent is a cornerstone of medical interventions, and proceeding with a surgical removal of a part of a patient's body without their consent reflects a significant lack of judgment in the practice of medicine, is conduct that brings the standing of the medical profession into disrepute, and violates both paragraphs 11 and 12 of the "Professional Responsibilities" of physicians set out in the *Canadian Medical Association Code of Ethics and Professionalism*, which states:

> 11. *Empower the patient to make informed decisions regarding their health by communicating with and helping the patient (or, where appropriate, their substitute decision-maker) navigate reasonable therapeutic options to determine the best course of action consistent with their goals of care; communicate with and help the patient assess material risks and benefits before consenting to any treatment or intervention.*
>
> 12. *Respect the decisions of the competent patient to accept or reject any recommended assessment, treatment, or plan of care.*

The Panel also notes the expert evidence provided by Dr. Graeme Brassard (Exhibit 1, tabs 10 and 12) reinforces the Panel's determination that Dr. Kotaska's actions represent non-compliance with accepted standards for the practice of medicine.

The Panel concludes that Dr. Kotaska's actions in particular (b) represent unprofessional conduct.

Particular (c), Removing the left fallopian tube of your patient, [AB], when there was no medical reason to remove the tube without prior consent and doing so would render the patient sterile

Dr. Kotaska did perform a left salpingectomy on the Patient on November 21, 2019. The pathology analysis, the dictated Operative Note, and the medical record confirm that a left salpingectomy was performed, and the parties agree on this fact. In relation to whether or not there was a medical reason to remove the left fallopian tube, the Panel notes that Dr. Kotaska did provide evidence to justify his medical decision to perform the left salpingectomy. According to Dr. Kotaska's testimony, he felt it would reduce the Patient's pelvic pain, treat her pelvic congestion pathology, provide a long-term family planning solution, and reduce her lifetime risk of gynaecological malignancy. The Panel agrees with the general medical basis for Dr. Kotaska's conclusions on this issue. However, proceeding with the surgical procedure without the Patient's consent was inappropriate for the reasons set out above. Dr. Kotaska's role was to provide the Patient with information on risks and benefits of the potential options of surgical interventions, but ultimately to let the Patient decide what she was willing to have done based on her values and priorities.

The Panel also relies upon and accepts the expert opinion provided by Dr. Brassard (Exhibit 1, tabs 10 and 12) with respect to the specific nuances relating to the Patient's gynecological issues and the surgical decision-making surrounding them. The opinion of Dr. Brassard was clear that there was no justifiable basis for Dr. Kotaska to proceed with the left salpingectomy in the absence of the Patient's specific consent.

As noted, there was no emergent issue arising during the procedure to justify a departure from the written consent provided. Lastly, upon analysis of the ramifications of this decision to perform a left salpingectomy, the Panel finds that this left the Patient sterile. The fact that both fallopian tubes were removed would essentially eliminate the Patient's chance at a spontaneous, natural pregnancy. It was noted that *in vitro* fertilization remains an option, but for the reasons articulated by legal counsel for the Complaints Officer, it is not a realistic option for the Patient and her spouse given the cost and availability of such procedures in the north.

For these reasons, the Panel concludes that the conduct in this Particular has been proven, and that it amounts to unprofessional conduct pursuant to all of sub-sections 41(1)(a), (b) and (c) of the Act for the reasons set out above.

Particular (d), Failure to respect the opinions of the circulating nurse and anesthesiologist in the operating room when they raised concerns to your intended removal of the patient's left fallopian tube given the lack of patient consent for that procedure

The Panel finds that this Particular is not supported by the evidence. From testimony provided by Dr. Sauvé, Dr. Kotaska, medical student Wiwchar and Nurse Flannigan, there is no consistency with respect to whether Dr. Kotaska listened and respected the feedback of these health professionals. As Dr. Kotaska was acting on his extensive surgical experience and using his clinical judgement at the time

(although flawed for the reasons set out above), coupled with his knowledge of the Patient and his subjective understanding of her wishes, the Panel is not able to conclude that he failed to respect the opinions of these individuals. Dr. Kotaska's evidence was that the comments from Dr. Sauvé and Nurse Flannigan caused him to stop and look again before proceeding with the left salpingectomy. The Panel finds that Dr. Kotaska did indeed pause, reflect, and consider the opinions before continuing the operation in a manner based on his experience and expertise. Not agreeing or refusal to comply with the opinions of others is not evidence that Dr. Kotaska does not "respect" their views.

For the reasons set out above, his decision to reject the comments made by Dr. Sauvé and Nurse Flannigan represented a significant lack of judgment and represented a violation of his ethical obligations, but the Panel concludes that the evidence does not indicate that he failed to respect those other views and does not represent unprofessional conduct.

Particular 1(e), Failure to consult intra-operatively with another surgeon about whether there was a sufficiently urgent medical reason to remove the patient's left fallopian tube without prior consent and doing so would render the patient sterile.

The Panel finds that the factual basis for this Particular has been proven. Dr. Kotaska admitted that he did not consult with another surgeon intra-operatively, and testified that he "wished he had" in hindsight.

However, the Panel is not able to conclude that this Particular is sufficient, standing alone, to amount to unprofessional conduct as defined in the Act. Testimony provided by Dr. Kotaska, Dr. Mansouri, Lesley Paulette, his attached *curriculum vitae*, the letter of support from colleagues, all indicate that Dr. Kotaska is an accomplished, thoughtful surgeon who is capable of excellent clinical decision-making. It is not possible to conclude that his failure to seek a second opinion in these circumstances rose to the level of unprofessional conduct set out in the Act. The Panel finds this is an isolated, but significant, failure of judgment. The evidence does not indicate that a second opinion was <u>required</u> in order to meet the standard of care. There is evidence that Dr. Kotaska diagnosed and treated the Patient at the standard of care within his subspecialty, with the failure being the need to respect and limit the operative procedure to the written and signed consent as set out in more detail above.

The Panel therefore concludes that this Particular, standing alone, does not represent unprofessional conduct as defined in the Act.

Summary

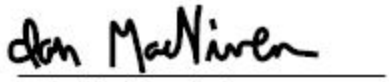
For all of those reasons, the Panel finds that Dr. Kotaska's actions relating to the surgery on November 21, 2019 reflect a significant lack of judgment relating to the removal of the left fallopian tube without the consent of the Patient, and without any intra-operative emergent need to do so. This represents a significant departure from expected standards of professionalism, is conduct that brings the profession into disrepute, and is conduct that violates the *Code of Ethics and Professionalism*.

The Panel therefore makes one finding of unprofessional conduct against Dr. Kotaska in relation to allegation 1.

VI. SUBMISSIONS ON SANCTION

The Panel directs the parties to consult with each other in relation to submissions on an appropriate sanction. The Panel will accept submissions orally or in writing, or both, based on agreement between the parties. In the absence of agreement, the Panel directs the parties to provide oral submissions on sanction with relevant case law provided not less than 14 days in advance. The parties may coordinate scheduling and any written materials through the Panel's independent legal counsel.

Signed on behalf of the Panel by the Chair on 7 March 2023:



Dr. Ian MacNiven, Chair

IN THE MATTER OF
THE *MEDICAL PROFESSION ACT*,
SNWT 2010, c 6

and

IN THE MATTER OF an Investigation regarding
Dr. ANDREW KOTASKA, a Medical Practitioner

DECISION OF THE BOARD OF INQUIRY UNDER THE MEDICAL PROFESSION ACT

I. INTRODUCTION

A panel of the Board of Inquiry (the "Panel") held a virtual hearing into the conduct of Dr. Andrew Kotaska (the "Member") on February 9 and 10, 2023. The members of the Panel were:

Dr. Ian MacNiven of Yellowknife as Chair;
Dr. Don Yee of Edmonton; and
Ms. Gillian Burles of Yellowknife (public representative).

Mr. Matthew Woodley acted as independent legal counsel for the Panel.

On March 7, 2023, the Panel issued its decision (the "Merits Decision") which found that the Member engaged in unprofessional conduct as defined under the *Medical Profession Act* (the "Act"). The Panel incorporates the Merits Decision by reference. The Panel then received written submissions from the parties relating to sanction.

II. SUBMISSIONS ON SANCTION

The parties presented the following joint submission on sanction:

1. A suspension of Dr. Kotaska's medical license under the *Medical Profession Act* of the Northwest Territories for a period of three months to six months in length, as determined by the Inquiry Panel, which should be considered as having been served in full given the time that Dr. Kotaska has been out of practice since April 2022;
2. By August 31, 2023, Dr. Kotaska shall, at his own expense, have completed and unconditionally passed the PBI Medical Ethics and Professionalism course, as described in the attached Schedule A to this joint submission, or alternatively the Center for Personalized Education for Professional's PROBE: Ethics and Boundaries Program - Canada as described in the attached Schedule B to this joint submission (each being the "Program");
3. That prior to applying for registration in the Program, Dr. Kotaska shall provide to the Complaints Officer for her approval the application letter proposed to be sent to ensure that the Program understands the reason for Dr. Kotaska undertaking the Program and that the Program will include the requirement that Dr. Kotaska undertake a graded, written final examination;
4. In the event that Dr. Kotaska fails to unconditionally pass the graded, written final examination, that he shall be required to undertake, at his own expense, a one-on-one ethics remediation program with Dr. Brendan Leier, Medical Ethicist, at the University of Alberta (the "Ethics Remediation");
5. Before starting the Ethics Remediation, the nature and scope of the Ethics Remediation shall be approved in writing by the Complaints Director, including confirmation that Dr. Leier is aware of the Inquiry Panel's findings issued on March 7, 2023, the Inquiry Panel's decision on sanction, and the results of the graded, written final examination at the conclusion of the Program.
6. That the Ethics Remediation shall be deemed completed when the Complaints Officer receives written confirmation from Dr. Leier that Dr. Kotaska has undertaken and completed the Ethics Remediation.
7. That Dr. Kotaska be responsible for the costs of the investigation and hearing before the Inquiry Panel, or a portion of those costs to be determined by the Panel, subject to the limit set by section 73(3)(a) of the *Medical Profession Act*.

The parties provided brief written submissions in support of the proposed joint sanction. The Complaints Officer recommended that the Panel impose a six-month suspension and costs in the amount of $20,000. The Complaints Officer noted the gravity of the proven misconduct along with other factors set out in the Panel's reasons, below. The Member disagreed that a suspension of six months was required in the circumstances, and encouraged the Panel to consider a costs award in the range of $4,000.00.

The Panel is aware that while the parties have agreed on a joint submission on sanction, the Panel is not bound by that submission. Nonetheless, the Panel defers to a joint submission unless the proposed sanction is unfit, unreasonable or contrary to public interest. The Panel acknowledges that joint submissions make for a better process and engage the member in considering the outcome. A rejection of a proposed agreement would undermine the goal of fostering cooperation through joint submissions. The Panel therefore carefully considered the joint submission on sanction proposed by the parties.

III. DECISION ON SANCTION

The Panel determined that the proposed sanction order was appropriate and consistent with the factors referred to by the parties in their submissions which guide tribunals on the issue of sanctions, including the factors set out in *Jaswal v Newfoundland Medical Board*. The Panel considered the following factors, and noted the following with respect to them:

1. The nature and gravity of the proven allegation:

   As set out in the Merits Decision, the Panel determined that the Member engaged in unprofessional conduct as set out in the Act. The central nature of the allegation was the removal of the left fallopian tube of the Patient without her consent. The Panel considers this conduct by the Member to be a serious violation of the doctor–patient relationship. Considering that this surgical decision was made during the course of an uneventful operation, whilst the Patient was anesthetized, adds to the severity of this unprofessional conduct. The Member was aware that the Patient had not signed informed consent for a bilateral salpingectomy and despite having a subjective belief that he was acting in good faith with respect to the removal of the left fallopian tube, this represents a significant lapse in judgment. The gravity of this misconduct was further emphasized by the opinion of the medical expert submitted on behalf of the Complaints Officer. Physicians have a duty to care for patients. This care was compromised when the Member performed an additional surgical procedure on an anesthetized patient without consent, and without an emergent reason to do so. This factor tends towards a more serious sanction.

2. The age and experience of the offending physician:

   The evidence indicates that the Member is an experienced, thoughtful, caring surgeon who has contributed a significant amount to Obstetric and Gynecological care in the territory. He is highly respected by peers and colleagues, exemplified by the supporting letter submitted for review by the Panel, by testimony supplied by witnesses, by his *curriculum vitae*, and by his personal statements. He has published multiple articles, and has received considerable accolades within his subspecialty of Obstetrics and Gynecology and prior to this in his role as a General Practitioner. The Panel is not dealing with an inexperienced or unsophisticated

member, and the Member clearly ought to have known better than to proceed in the circumstances noted above. This factor suggests a more serious sanction.

3. The previous character of the physician and the presence or absence of any prior findings of unprofessional conduct:

   For the same reasons set out above in consideration 2, the Panel notes that the Member provided significant supporting evidence demonstrating his contributions to Obstetric and Gynecological care in the territory. It is clear to the Panel that this circumstance represents a lapse in judgment, and is not symptomatic of an underlying problem or a general failure to know and follow ethical rules that apply to the profession. Further, there is no evidence of any previous findings of unprofessional conduct under the Act. This factor suggests a less serious sanction.

4. The age and mental condition of the patient:

   The Patient was 37 at the time of the surgical procedure. The Patient is of sound mind. There is no indication that she had any issues with her ability to proceed with the standard informed consent discussion which is the protocol at Stanton Regional Hospital within the Department of Surgery. The consent she signed was valid, dated, and there is evidence that she had ample time to discuss the procedure with the Member. There was no particular issue of vulnerability aside from the fact that the Patient was anesthetized at the time of the surgical procedure. This is a neutral factor in relation to sanction.

5. The number of times the unprofessional conduct was proven to have occurred:

   The Panel considered in its decision on sanctions during the joint submission process that this was an isolated incident. There are no other concerns of unprofessional conduct with respect to the Member. This is a slightly mitigating factor in relation to sanction.

6. The role of the physician in acknowledging what had occurred:

   The Panel recognizes that the Member took responsibility for his decision to proceed with the left salpingectomy, although he did not admit that such conduct was unprofessional. The Panel also recognizes that the Member has demonstrated significant remorse. He remains profoundly troubled and has acknowledged his failure of judgment. This is a somewhat mitigating factor.

7. Whether the physician had already suffered other serious financial or other penalties as a result of the underlying conduct:

   The parties agree that the Member has subjectively and objectively suffered significantly as a result of this event. The Member has not been able to find meaningful employment since the end of his contract with the Government of the Northwest Territories in April of 2022. This has not only resulted in significant financial implications but also has had negative effects on his health, well being and quality of life. This was evident upon his testimony to the Panel, and is an important factor in the Panel determining that the proposed joint submission is appropriate and

in particular the fact that the period of suspension will be imposed on the basis that it has been served.

8. The impact of the incident on the Patient:

   The Patient has suffered considerably due to the events that took place intra-operatively on November 19, 2022. From her testimony and evidence provided, she has had considerable negative effects on her well being, quality of life, her ability to choose to reproduce without medical assistance, and lack of trust in the medical system. From the time of her perioperative experience where she was informed that both fallopian tubes had been removed, up to and including the date of the hearing, the Patient continues to be emotionally affected by this occurrence. Patients should have full autonomy over their medical decisions and this must be respected by treating physicians. Although there are rare indications for exceeding surgical consent, it is clear to the Panel that in this case, by exceeding the surgical consent and rendering the Patient sterile, this has had a severe, permanent, and irreversible negative consequences for the Patient.

9. Other mitigating or aggravating circumstances:

   No other mitigating or aggravating circumstances were identified.

10. The need to promote specific and general deterrence and to protect the public and ensure the safe and ethical practice of medicine:

    Confidence and trust are paramount to the physician–patient relationship. Autonomy of the patient to make decisions that they feel are in their best interest is critical. Physicians provide an important role in providing information, helping patients understand risks and benefits, and ultimately allowing them to make informed decisions within their own framework. The medical community does not find it acceptable to exceed surgical consent unless very specific conditions are met, including an emergent complication, or a very severe intraoperative finding that necessitates immediate care. In this case, the Panel found that the Member failed in providing safe and ethical care due to his error in judgment intraoperatively. The Panel agrees with the Complaints Officer that this case requires that the Panel communicate a strong message to the profession and the public that such conduct will result in significant sanctions. This factor indicates strongly that general deterrence is a key component of the Panel's sanction, including with respect to the length of the suspension.

11. The need to maintain the public's confidence in the integrity of the medical profession:

    The Panel accepts the joint submissions that have been provided. The public's confidence in the integrity of the medical profession can be reassured through these proceedings and eventual sanctions. The proposed sanction is appropriate and aids in maintaining public confidence in the ability of the profession to regulate itself.

12. The degree to which the conduct was found to be outside of the range of permitted conduct:

    The conduct by the Member was found to be outside the range of permitted conduct. The Panel determined that the Member exceeded the range of permitted conduct and thus agrees

with the joint submission on sanctions. This factor suggests that a mores serious sanction is required.

13. The range of sanctions in similar cases:

    The Panel has considered the cases jointly provided by the parties (attachment 5 to the Complaint Officer's submission). Although the range of sanctions varied significantly depending on the particular facts, the Panel is satisfied that this case falls within the general framework of cases provided by the parties. Both of *Ontario (College of Physicians and Surgeons of Ontario) v Frank*, 2018 ONCPSD 20 and *Ontario (College of Physicians and Surgeons of Ontario) v Irwin*, 2018 ONCPSD 36 involve conduct which (taken together) is arguably more serious than the facts here, they support the imposition of a period of suspension. The balance of the cases provided were less relevant, but they provided important context in relation to the imposition of a requirement for course work and costs.

As noted above, the Panel was invited to determine the appropriate period of suspension within the range of three to six months provided by the parties, and to determine an appropriate costs award (essentially between $4,000 and $20,000). In relation to the period of suspension, the Panel has determined that a suspension of five months is required based on the factors noted above. It was necessary for the Panel to recognize the severe error in surgical judgment, and the significant harm to the Patient, her family, her autonomy, and that the unprofessional conduct at issue has ultimately removed her ability to have children in the future. On the other hand, the maximum period was not appropriate given that this was an isolated event, that the Member largely accepted responsibility, the error was disclosed to the Patient, the character of the Member as testified to by his peers, his lengthy and successful career as a family physician and specialist, and the significant stress and negative health effects the Member has suffered. The Panel determined that there is an exceptionally low chance of another consent-related violation by the Member. It is for these reasons that a suspension of five months is appropriate.

In relation to costs, the Panel finds that the Member should be responsible for the costs of the investigation and hearing to the maximum amount of $20,000.00. The Panel finds that although the one allegation had a number of particulars, not all of which were proven, there was in fact only one allegation against the Member and only one potential finding of unprofessional conduct. The Panel therefore disagrees that costs should be based on the number of particulars proven. It is not disputed that the actual costs of the investigation and hearing will exceed $20,000.00, and the Panel finds that the very serious nature of the proven misconduct compels an order requiring the member to bear a significant portion of those costs. In making such an order, the Panel is cognizant that costs are not to be imposed as a penalty, but rather as a result of a determination that members of the profession who engage in serious misconduct should expect to shoulder some of the burden placed on the profession for the resulting investigation and hearing.

Finally, the Panel determined that the Member must complete and unconditionally pass the Center for Personalized Education for Professional's PROBE: Ethics and Boundaries Program – Canada. This is a comprehensive course and Panel finds that it will beneficial for the Member, and continue to support the public's confidence in the principles of self-governance within the medical profession.

For all of those reasons, the Panel imposes the following sanction on the Member:

1. Dr. Kotaska's medical license under the *Medical Profession Act* of the Northwest Territories shall be suspended for a period of five months in length, which is considered to have been served in full given the time that Dr. Kotaska has been out of practice since April 2022;

2. By August 31, 2023, Dr. Kotaska shall, at his own expense, complete and unconditionally pass the Center for Personalized Education for Professional's PROBE: Ethics and Boundaries Program - Canada (the "Program");

3. Prior to applying for registration in the Program, Dr. Kotaska shall provide to the Complaints Officer for her approval the draft application letter to ensure that the Program understands the reason for Dr. Kotaska undertaking the Program and that the Program will include the requirement that Dr. Kotaska undertake a graded, written final examination;

4. In the event that Dr. Kotaska fails to unconditionally pass the graded, written final examination, he shall be required to undertake, at his own expense, a one-on-one ethics remediation program with Dr. Brendan Leier, Medical Ethicist, at the University of Alberta (the "Ethics Remediation");

5. Before starting the Ethics Remediation, the nature and scope of the Ethics Remediation shall be approved in writing by the Complaints Officer, including confirmation that Dr. Leier is aware of the Panel's findings dated March 7, 2023, the Panel's decision on sanction, and the results of the graded, written final examination at the conclusion of the Program.

6. That the Ethics Remediation shall be deemed completed when the Complaints Officer receives written confirmation from Dr. Leier that Dr. Kotaska has undertaken and completed the Ethics Remediation.

7. That Dr. Kotaska be responsible for the costs of the investigation and hearing before the Panel, in the amount of $20,000.00.

The Panel reserves the right to provide clarification to the parties with respect to this sanction as required.

Signed on behalf of the Panel by the Chair

Dated: May 9, 2023

Ian MacNiven

Dr. Ian MacNiven