

ALBERTA COLLEGE OF PHARMACISTS

IN THE MATTER OF
THE HEALTH PROFESSIONS ACT

AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
MOUSTAFA ALREFAEY

DECISION OF THE HEARING TRIBUNAL

January 24, 2018

I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Moustafa Alrefaey. In attendance on behalf of the Hearing Tribunal were: Kevin Kowalchuk, Pharmacist (Chair), Gillian Hansen, Pharmacist, Tanner Bengry, Pharmacist and Nancy Brook, public member. Katrina Haymond acted as independent legal counsel to the Hearing Tribunal.

In attendance at the hearing were James Krempien, Complaints Director for the Alberta College of Pharmacists (“ACP”) and Craig Boyer and Annabritt Chisholm (student-at-law), legal counsel for the Complaints Director. The member, Mr. Moustafa Alrefaey, attended along with his legal counsel Ken Fitz and Jessica Kruhlak.

The hearing was originally scheduled to proceed on August 23, 2016. However, the hearing was adjourned at Mr. Alrefaey’s request until April 13, 2017. Mr. Alrefaey requested and was granted a further adjournment. The hearing was re-scheduled and took place on September 13 and September 18, 2017 at the second floor conference center, 8215-112 Street NW, Edmonton, Alberta. The hearing was held under the terms of Part 4 of the *Health Professions Act* (the “HPA”).

II. PRELIMINARY AND JURISDICTIONAL ISSUES

There were no objections to the composition of the Hearing Tribunal.

At the outset of the hearing, Mr. Boyer indicated that he was aware that Mr. Alrefaey was making an application to close the hearing, and that the Complaints Director did not object given that the personal health information of patient [the complainant] would be discussed during the hearing.

Mr. Fitz then indicated that he was making an application on behalf of Mr. Alrefaey to close the hearing pursuant to s. 78(1) of the HPA. Mr. Fitz indicated that Mr. Alrefaey has been charged criminally, and that the criminal trial is scheduled to proceed in April of 2018. He requested that the hearing be closed pursuant to s. 78(1)(a)(i) of the HPA, because of probable prejudice to the prosecution of an offence.

The Hearing Tribunal adjourned to deliberate and then advised the parties that the application to close the hearing was granted. Although there is a presumption that hearings held under Part 4 of the HPA will be held in public, there are circumstances where the presumption is outweighed by other factors. The Hearing Tribunal agreed with the submission by the parties that the hearing should be closed to the public, given that the evidence will include a consideration of [the complainant]’s personal health information. In addition, the Hearing Tribunal agreed that the hearing should be closed, so as not to prejudice Mr. Alrefaey’s rights in the criminal trial that is scheduled to proceed in 2018.

The Hearing Tribunal notes that although the application to close the hearing is granted, members of the public will be nevertheless be able to obtain a copy of the Hearing Tribunal’s written decision in accordance with s. 85 of the HPA. However, members of the public will not

be able to access the transcripts of the hearing. This strikes the appropriate balance between concern for patient privacy, the potential prejudice to Mr. Alrefaey's rights in the criminal proceedings, and the public's interest in transparency of discipline proceedings conducted pursuant to Part 4 of the HPA.

III. ALLEGATIONS

The allegations against Mr. Alrefaey were set out in the Notice of Hearing dated April 3, 2017, and were as follows:

IT IS ALLEGED THAT:

1. On February 2, 2016, [the complainant] attended Mell Pharmacy (License #2917) in Calgary, Alberta with a new prescription for Cipralex and melatonin. You are the owner and licensee of Mell Pharmacy and were the pharmacist on duty when [the complainant] attended at the pharmacy.
2. At your suggestion, [the complainant] entered the pharmacy's private counseling room with you and the door was closed.
3. In response to questioning by you, [the complainant] indicated that she had a history of back pain and you suggested a medicated cream with 10% diclofenac, 2% cyclobenzaprine, and 2% lidocaine cream to be applied topically to treat the back pain.
4. You left the counseling room and returned with a small amount of the diclofenac medicated cream. After further discussion, you offered to show [the complainant] how to apply the medicated cream and asked her to lie down on the examination table with the door closed.
5. After [the complainant] laid down on the examination table, you pulled up [the complainant]'s shirt and applied the medicated cream to her mid to lower back.
6. You then lowered [the complainant]'s leggings and underwear below her buttocks and touched her hips and buttocks without proper notice to [the complainant] and without obtaining consent from [the complainant]
7. You then provided the remaining diclofenac cream and bottle of melatonin pills to [the complainant] free of any charge to her.
8. You did not properly "prescribe" or "dispense" the diclofenac cream on February 2, 2016 and there was no prescription received or written by you for this Schedule 1 medication and no proper documentation of the prescribing and dispensing activities were made in a timely and appropriate manner.
9. These actions by you constituted a serious boundary violation in placing [the complainant] in a closed counseling room and then partially disrobing her and placing your hands on her, followed by inappropriate touching and clothing removal without the informed and express consent of [the complainant]

IT IS ALLEGED THAT your conduct in these matters:

- a. Undermined the integrity of the profession'
- b. Was contrary to accepted pharmacist practice and ethical standards;

- c. Was a serious personal boundary violation of your patient;
- d. Did not take sufficient and reasonably expected precautions to care for your patient;
- e. Showed a serious disregard of your duties as a pharmacist to your patient, the Alberta College of Pharmacists and to the public which relies upon the integrity and competence of pharmacists as members of a self-regulating profession.

IV. OPENING STATEMENTS

Mr. Boyer made a brief opening statement on behalf of the Complaints Director. Mr. Boyer indicated that this matter arises out of events that occurred on February 2, 2016, at Mr. Alrefaey's pharmacy in Calgary. He indicated that he intended to call Mr. Krempien who would explain how the complaint came to the attention of the ACP, how the investigation was undertaken, and his determination that the matter should be referred to a hearing. He also intended to call [the complainant], who was the patient involved in the incident. Finally, he intended to call Dale Cooney, Deputy Registrar, who provided some information to the Calgary Police Service ("CPS") in response to an inquiry about the Standards of Practice in response to a complaint [the complainant] made to the CPS.

Mr. Fitz also provided a brief opening statement on behalf of Mr. Alrefaey. Mr. Fitz indicated that the matter concerns the attendance of a young female patient on Mr. Alrefaey in February of 2016. She will testify that she has never filed a complaint with the ACP regarding the allegations that she makes. She did call the CPS shortly thereafter and alleged that there was an inappropriate touching of her which led the CPS to charge Mr. Alrefaey criminally. The CPS contacted the ACP during its investigation, which led the ACP to initiate and conduct an investigation. Mr. Fitz explained that Mr. Alrefaey is originally from Egypt where he practiced as a pharmacist before coming to Canada in around 2010 or 2011 time period. He owns his own pharmacy and is married with children.

Mr. Fitz indicated that the patient was 19 at the time of the incident, was on social services, and had a young family. On the occasion in question, she attended on the pharmacy for a prescription for an anti-depressant, anti-anxiety medication, and a recommendation for Melatonin. Mr. Fitz indicated that the evidence will establish that the pharmacy is very small, and that [the complainant] and Mr. Alrefaey went to the consulting room to discuss the medication and her anxiety and sleep issues, which gave rise to the application of the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream.

Mr. Fitz stated that a number of issues were not in dispute: the patient consented to go into the counseling room, was counseled with respect to the Ciprallex medication, advised Mr. Alrefaey that she experienced back pain, and that Mr. Alrefaey suggested the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream might assist.

The issues in dispute revolve around whether Mr. Alrefaey lowered [the complainant]'s pants and applied cream to her butt and hips, which Mr. Alrefaey categorically denies.

Mr. Alrefaey's position is that the ACP's investigation was flawed, and that the errors that were made led to the matter being referred to a hearing.

Mr. Fitz submitted that after hearing the evidence, the Hearing Tribunal would have to consider three issues: (1) whether a pharmacist can apply a Schedule 1 medicated cream to the back of a patient who consents to the application (2) whether a prescribing pharmacist can give a sample to a patient without writing a prescription and (3) whether the labeling and charting were adequate in the circumstances of this matter.

V. EVIDENCE

Exhibits

The following Exhibits were entered at the hearing:

- Exhibit #1 First Notice of Hearing, dated May 12, 2016
- Exhibit #2 Letter from s. 65 Committee to M. Alrefaey and J. Krempien, dated March 30, 2016
- Exhibit #3 Section 65 Committee Decision, dated April 7, 2016
- Exhibit #4 Standstill Agreement, dated May 31, 2016
- Exhibit #5 Hearing Tribunal letter to K. Fitz and D. Jardine, dated March 27, 2017
- Exhibit #6 Second Notice of Hearing, dated April 3, 2017
- Exhibit #7 Complaint Admittances, dated March 17 and 14, 2016
- Exhibit #8 Complaint Referral Form, dated March 17, 2016
- Exhibit #9 Memo from J. Krempien, dated March 17, 2016
- Exhibit #10 Email exchange between K. Kalyta and M. Alrefaey, dated March 17, 2016
- Exhibit #11 Email from M. Ruark to D. Cooney, dated March 17, 2016
- Exhibit #12 Memo from J. Krempien, dated March 21, 2016 re: meeting with M. Alrefaey, Written Statement from M. Alrefaey, Patient Records, Photographs taken by J. Krempien during site visit
- Exhibit #13 Memo from J. Krempien, dated March 21, 2016 re: meeting with [the complainant]
- Exhibit #14 Memo from J. Krempien, dated March 21, 2016 re: meeting with M. Alrefaey
- Exhibit #15 Memo from J. Krempien, dated April 11, 2016
- Exhibit #16 D. Cooney letter to Det. Ruark, dated March 31, 2016
- Exhibit #17 Alberta College of Pharmacists, Code of Ethics
- Exhibit #18 Alberta College of Pharmacists, Standards of Practice for Pharmacists
- Exhibit #19 Pharmacy Diagram
- Exhibit #20 Investigation Report, April 18, 2016
- Exhibit #21 Memo, April 14, 2016
- Exhibit #22 Witness Statement
- Exhibit #23 Four photographs
- Exhibit #24 Letter, dated November 3, 2014
- Exhibit #25 Prescription transactions

Witnesses

The following witnesses were called to testify: James Krempien, Complaints Director for the ACP, [the complainant], and Moustafa Alrefaey.

James Krempien, Complaints Director

Mr. Krempien has been the Complaints Director at the College for nine years. He was licensed with the Alberta Pharmaceutical Association in 1991, then worked as a pharmacist with the Canadian Armed Forces until 1999. He worked at Coop and Canada Safeway, before taking the position as Complaints Director with the College in 2008.

Mr. Krempien provided background information with respect to the events leading up to the Notice of Hearing being issued. He also summarized the contents of Exhibits 1-18.

- Exhibit 1
 - Identification of the original Notice of Hearing in the matter.
- Exhibit 2 & 3
 - A letter and decision submitted by the committee appointed under Section 65 of the Health Professions Act to apply conditions onto the practice of Mr. Alrefaey pending the outcome of the hearing due to the seriousness of the allegations.
- Exhibit 4
 - The details of the Stand-Still Agreement between Mr. Alrefaey and the Alberta College of Pharmacists. A joint agreement, whereby a request for an adjournment to a later date of the Hearing, Mr. Alrefaey would agree to certain terms of the condition of that delay.
- Exhibit 5
 - A letter written on behalf of the Hearing Tribunal panel granting an adjournment of this hearing.
- Exhibit 6
 - A revised Notice of Hearing, rescheduling the matter from August the 23, 2016 to April 13, 2017.
- Exhibit 7
 - Completed Complaint Admittance Forms by Jim Krempien. Mr. Krempien recounted a summary of conversations held between himself and the CPS.
- Exhibit 8
 - Completed Complaint Referral Form. Documentation of information received of the particulars in the matter and used as the basis of the complaint. Mr. Krempien confirmed that his name is on the Complaint Referral Form since he initiated the complaint.
- Exhibit 9
 - Internal memo outlining that an investigation will be conducted under Section 56 of the Health Professions Act and that Jim Krempien self-assigned himself as the investigator.
- Exhibit 10
 - Email exchange between the Alberta College of Pharmacists and Jim Krempien notifying Mr. Alrefaey of the information received from the CPS that he had been charged with sexual assault under the Criminal Code for actions that occurred within his pharmacy. As a consequence of the information received from the CPS an investigation by the college would occur, with a request for a written response

to the allegations by Mr. Alrefaey and that a scheduled visit to the pharmacy as part of the investigation would take place.

- Exhibit 11 & 16
 - Email exchange between Mr. Cooney, Deputy Registrar of the Alberta College of Pharmacists and Det. Ruark of the CPS, outlining the details of the sexual assault complaint received by the CPS. Within the communication a request by the CPS was made inquiring whether the actions of Mr. Alrefaey were within the scope of his duties as a pharmacist and whether his actions breach the Code of Ethics, Standards of Practice of the Alberta College of Pharmacists and any Alberta legislation governing the Alberta College of Pharmacists?
- Exhibit 12
 - Included the written summary, by Jim Krempien, of the meeting held with Mr. Alrefaey at his pharmacy, a written statement provided by Mr. Alrefaey during the same interview, copies of the patient record of [the complainant] and a series of photographs of the pharmacy and medical clinic, specifically depicting the pharmacy dispensary location within the medical clinic and pictures of the consultation room within which the allegation occurred.
- Exhibit 13
 - Typed transcript of the audio recording of the phone interview conducted with [the complainant] by Jim Krempien.
- Exhibit 14
 - Summary of the phone conversation with [REDACTED], pharmacy intern at Mell Pharmacy, respective the events that allegedly took place on February 2, 2016 and the potential role of a chaperone she would undertake as per the conditions set out of the Section 65 Committee.
- Exhibit 15
 - Summary of the phone conversation between Jim Krempien and Mr. Alrefaey in follow up to an e-mail Mr. Alrefaey received from the Alberta College of Pharmacists registration manager.
- Exhibits 17 & 18
 - Are excerpts from Code of Ethics and the Standards of Practice relating to the provisions identified in the Notice of Hearing.

Further to the testimony respective Exhibits 1 to 18, Mr. Boyer asked Mr. Krempien to comment to the Schedule 1 cream, 10% Diclofenac, 2% Cyclobenzaprine, 2% Lidocaine, involved in the allegation. Mr. Krempien referenced Standards 14 & 18 and confirmed the absence of any documentation respective the application of the cream to [the complainant] and consent being provided by [the complainant] in the patient record, despite verbal confirmation of the application of the cream offered to Mr. Krempien during the interview by Mr. Alrefaey.

On cross-examination Mr. Krempien was asked questions respective the contents of Exhibits 19 – 22.

- Exhibit 19
 - Detailed pharmacy diagram depicting the pharmacy layout and the consultation room location within the medical clinic as related to the location of the allegations

of the Notice of Hearing. With the exception of Mr. Alrefaey, [REDACTED] and the medical clinic receptionist, Mr. Krempien was unable to confirm if there were other individual within the pharmacy and medical clinic at the time of the allegations.

- Exhibit 20
 - Mr. Krempien was asked how he was able to come to the conclusion within his investigation report that Mr. Alrefaey committed a serious boundary violation based on the report received from the CPS, when in actuality they simply charged Mr. Alrefaey and at this point have not reached any conclusion whether or not a sexual assault had occurred. Mr. Krempien responded that he was not aware of the criminal relevance, but rather that the CPS had detained Mr. Alrefaey and charged him with sexual assault. Questions were also presented to Mr. Krempien as to how he established in his report that the crown concluded that a sexual assault had occurred, when in fact no conclusions have been reach yet but rather there is sufficient evidence to warrant it being referred to a trial. Mr. Krempien responded that the court may not have yet come to a decision but with the referral to a trial, the Crown had. Mr. Krempien was questioned whether he interviewed the medical clinic receptionist or the physician that were working the evening of the alleged incident. Mr. Krempien responded no to both.
- Exhibit 21
 - Mr. Krempien was asked what were his specific concerns that any misconduct occurred, when [the complainant] did consent to go into the consultation room and have Mr. Alrefaey obtain the medicated cream, while lying face down on the medical examination table, consented to having her shirt lifted to expose her middle and lower back for the purpose of having Mr. Alrefaey apply the medicated cream to her central, middle and central lower back. Mr. Krempien indicated that [the complainant] reported that she was nervous about her situation, and even though she consented to events described above, [the complainant] said she did not provide consent or was given the opportunity to provide consent to Mr. Alrefaey lowering her leggings or underwear or to permit the touching of her hips and butt by him.
 - Further questions where presented to Mr. Krempien's investigation as to whether Mr. Alrefaey did in fact contravened the Standards of Practice or other legislation by providing a sample of a Schedule 1 medication, where there is no legislation that prohibits this activity. Mr. Krempien replied that while there is nothing specific in the legislation framework that prevents providing something for free or a sample, there are requirements that an authorized person in providing and administering a schedule 1 product must adhere to such as a formal prescription that must be prepared and documented first.
- Exhibit 22
 - Mr. Krempien was questioned as to the reasons for the absence of the second page of the written police statement that [the complainant] provided the CPS. Mr. Krempien's response was that he was provided two carbon copies of the same statement.

Mr. Krempien was questioned as to why [the complainant] was not the original complainant but rather why Mr. Krempien took it upon himself to initiate the complaint on behalf of the College on March 17, 2016 and why the usual formal process of a complaint by the public was not followed, specifically the completion of a formal complaint form with the college by [the complainant] Mr. Krempien responded that he was not even aware of the identity of [the complainant] for the initial several days of the investigation since the matter was first presented to the College through contact initiated by CPS and not until March 21, 2016 that [the complainant] via a phone call with Mr. Krempien that [the complainant] expressed concerns and wanted to file a complaint. Mr. Krempien indicated that he was subsequently provided a copy of the written statement she provided to CPS from February 3, 2016. Furthermore, Mr. Krempien indicated that there is no requirement in the HPA where the complainant is mandated to complete a formal complaint form.

[The complainant]

[The complainant] testified that she was born in 1996. She has a high school diploma and is currently a waitress and a medical responder. She attended Mell Pharmacy (Remedy Rx) on February 2, 2016 and attended with a physician at Northmount Medical Center, within which Mell Pharmacy (Remedy Rx) is located.

She went to the pharmacist desk to get her prescriptions filled. Mr. Alrefaey told her that he would like to talk to her about the side effects of the medication. Mr. Alrefaey suggested that they move to a private consultation room that was located beside the dispensary. During the consultation, Mr. Alrefaey asked [the complainant] if she experienced any body pain, and she responded yes that she had back pain, since as a child in the area of her mid-back. Mr. Alrefaey indicated that there is a cream that could be used to treat this. Mr. Alrefaey asked if [the complainant] had anybody at home to apply the cream. [The complainant] responded, no, that it was just her and her two-year-old daughter. Mr. Alrefaey asked if he could show [the complainant] where and how to apply the cream on her back. [The complainant] indicated that she didn't feel the need to question since a pharmacist probably was allowed to do that, so [the complainant] agreed. Mr. Alrefaey told [the complainant] to lie down on her stomach on the room's bed. Mr. Alrefaey raised her shirt just below the shoulder blades. Mr. Alrefaey took the cream and while wearing gloves, put the cream on his glove, and then applied it on [the complainant]'s back. Mr. Alrefaey massaged the cream in circular motions on her mid-back. Mr. Alrefaey told [the complainant] that he has a certificate for massage therapy. [The complainant] did not reply to this statement made by Mr. Alrefaey, because she was starting to be uncomfortable with the situation. Mr. Alrefaey proceeded massaging lower than where [the complainant] told him the pain originated from, including touching her hip. [The complainant] testified that Mr. Alrefaey proceeded, after touching her hip, to pull down her yoga pants, followed by pulling down her underwear. Mr. Alrefaey continued to massage the top of [the complainant]'s buttocks and told [the complainant] that this would be the source of the pain. At that point [the complainant] reported to being in complete shock. She had no idea what a pharmacist could or could not do. [The complainant] indicated that she was completely uncomfortable. She felt what was happening was wrong, but she was still unsure if a pharmacist was allowed to do this, like a doctor. [The complainant] described that at this point she "froze". Mr. Alrefaey got a phone call, and left the room. [The complainant] testified that she told herself,

that she “needs to do something”. [The complainant] decided to leave the consultation room and was just about to get up, when Mr. Alrefaey walked back in the room. He asked [the complainant] if he could finish applying the cream, and [the complainant] immediately said, “No, the pain is gone” and repeated that statement two to three times. [The complainant] attempted to pull her pants up while on the bed. Mr. Alrefaey put his hand on her back and he said, “no, there is ointment on your back, let me do it”. Mr. Alrefaey pulled up [the complainant]’s pants for her without allowing [the complainant] to do it herself. [The complainant] felt that this was completely inappropriate and had the feeling of being very helpless.

[The complainant] indicated that she does not have any injury or disability that would affect her from being able to apply cream to her body or use soap in the shower or a bath. Furthermore, she testified that Mr. Alrefaey did not question her whether she was physically able to apply cream to her own back or hips.

After [the complainant] left the pharmacy, but before going to her scheduled dentist appointment, she called her mother and told her what happened. After [the complainant]’s dentist appointment was finished, she contacted CPS and reported the events that took place at the pharmacy via a written two-page statement.

[The complainant] was questioned by Mr. Boyer with respect to Exhibit 22.

- Exhibit 22
 - [The complainant] was questioned to the details noted on the second page of the written statement regarding the private call received. [The complainant] indicated that she did not answer the call because she suspected that it may be from Mr. Alrefaey since he would have her contact information. However, [the complainant] confirmed that since she did not answer the call she cannot say if it was from him or not. Further questions involved references in her written statement respective to the time lines referred to in Exhibit 22, and how she came to those conclusions. [The complainant] responded that the entire event felt very long to her and she could not describe exactly the amount of time but only that it felt “extremely long and terrifying”.

On cross-examination, [the complainant] testified that the reason for the appointment with Dr. [REDACTED] was for a continuation of a prescription for antidepressant medication and treatment for difficulty sleeping that she was experiencing. [The complainant] was also asked to verify the details of Exhibit 23, 21 and 12.

- Exhibit 23
 - Four photographs detailing the proximity of the consultation room to the pharmacy dispensary and the reception desk of the medical clinic and if the photographs depicted were accurate to her recollection. [The complainant] responded “yes”.
- Exhibit 12

- [The complainant] was questioned whether the times noted on the prescription files were accurate and to provide additional details of the events that took place in the consultation room. She confirmed that the recorded times were accurate. [The complainant] also acknowledged that she went into the private counseling room where Mr. Alrefaey provided counseling services in terms of the prescription medication and also asked her questions about any other problems that she may have. [The complainant] reported to Mr. Alrefaey that she had back pain and that led to a discussion about the medicated cream. [The complainant] confirmed that Mr. Alrefaey had to leave the room to go get the medicated cream as he didn't have it in the room with him prior to the start the conversation. [The complainant] further confirmed that she agreed to try the medicated cream that he was recommending, but that Mr. Alrefaey did not give [the complainant] a prescription for it. [The complainant] was questioned whether Mr. Alrefaey indicated to her that he didn't have enough of the medicated cream to fill a prescription. [The complainant] did not recall him saying that, but that Mr. Alrefaey did provide a small container of the medicated cream as well as Melatonin, both at no charge.
- Exhibit 21
 - [The complainant] was questioned whether her recollection that Mr. Alrefaey lifted up her shirt was accurate. Mr. Fitz, suggested that it was in fact [the complainant] that lifted up her own shirt and showed Mr. Alrefaey the area where she was experiencing the back pain. [The complainant] replied that suggestion was not accurate. The same question was presented again to [the complainant] with the same response from [the complainant] that it was Mr. Alrefaey who lifted her shirt, with the additional comment that Mr. Alrefaey not only lifted her shirt but also pulled down her pants.
 - [the complainant] was questioned whether Mr. Alrefaey told her to call the next day, after she tried the medicated cream, and he could write a prescription or she could get a prescription from her physician. [The complainant] responded that Mr. Alrefaey did not tell her that she could get a prescription from him or her doctor. She was told to call him to let him know the results of the cream.
 - [The complainant] was asked why she exaggerated to her mother what Mr. Alrefaey had done and whether it was this exaggeration which caused her mother to suggest that [the complainant] call the police. [the complainant] replied with a “No, that this is not what happened and what brings us here today is that he crossed boundaries that he should not have” [the complainant] added that her mother felt that the events that she described to her were highly inappropriate and so [the complainant] decided to call the police.
 - [The complainant] was questioned if she filed a formal complaint with the College of Pharmacists. [The complainant] confirmed that she did not, but provided Mr. Krempien when she met with him on April 14, 2016 a copy of the written statement that she gave the CPS. [The complainant] confirmed that her written statement to the police was given five to six hours after the incident. [The complainant] confirmed that she called the police immediately after her dentist appointment and it took the police that long to come to her home. [the

complainant] was asked to confirm the time lines provided in the written statement, specifically around [the complainant]’s report that Mr. Alrefaey had massaged her for two to three minutes and then he had rubbed her for a further 10 to 15 minutes. [The complainant] responded that this is how long it felt to her. [The complainant] was asked if at any point when she was in the counseling room with Mr. Alrefaey she ever called out to the receptionist or anyone else that she needed assistance. [The complainant] replied that she felt like she was in shock and the reason she did not call out for help.

The Hearing Tribunal also asked [the complainant] several questions of clarification. Specifically, what exactly did she tell her mother about what had happened, what was her mother’s response and when did she exactly speak to her mother.

[The complainant] responded that she told her mother that she went to the pharmacy for her regular medication and the pharmacist took her to the back. [the complainant] confirmed that she skipped all of the details of the event when recounting to her mother, except for the fact that the pharmacist, after she got on the bed, put the cream on her back and then he pulled her pants off. [The complainant] recounted the statement her mother made to her “you know, it was incredibly inappropriate for him... you should talk to someone, to the police about it.” [The complainant] confirmed that her mother did not tell her she had to contact the police, only that she should. [The complainant] confirmed that she called her mother right after she got out of the pharmacy, while waiting for the bus to go to her scheduled dentist appointment.

[the complainant] was also asked to provide additional detail of her experience in the private counseling area and what were her thoughts, at that time, as to what she believed pharmacists could or could not do and whether the pharmacist at any point explained his rationale. [The complainant] indicated that the pharmacist only made comment what the cream was for and what she could expect when it was applied. Mr. Alrefaey did not explain to [the complainant] why it needed to be massaged in the way that he did. Mr. Alrefaey did not go into details. He asked if he could apply it, and [the complainant] said “okay”. Mr. Alrefaey put the cream on [the complainant]’s back and told her he had a certificate. Mr. Alrefaey moved lower and told her, this is the source of the pain. [The complainant] indicated that she did not get an explanation from Mr. Alrefaey similar to what her doctor would provide during the incident.

[Pharmacy Intern]

Mr. Boyer entered into evidence a Memo of a phone conversation between Mr. Krempien and [REDACTED], dated April 11, 2016. During the course of the hearing, Mr. Boyer indicated that he and Mr. Fitz agreed not to call [REDACTED], given that she is late in her pregnancy, and resides on the Sunshine Coast. Both parties agreed that [REDACTED]’s evidence is summarized in the memo that Mr. Krempien prepared (Exhibit 14). The Memorandum indicated that [REDACTED] was in the pharmacy on the date in question, and that she observed Mr. Alrefaey and [the complainant] enter the patient counseling room, and that they remained there with the door closed for approximately 5 minutes. Mr. Alrefaey left the counseling room and obtained what appeared to be a container of 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream and returned to the counseling room. Approximately 1-2 minutes later, [the complainant] left the

patient counseling area and went outside. [The complainant] was not shouting or crying as she left.

Dale Cooney

In addition, Mr. Boyer entered a letter from Dale Cooney to Det. Ruark (Exhibit 16) through Jim Krempien. Mr. Boyer indicated that he was prepared to call Mr. Cooney to speak to the contents of the letter. However, Mr. Fitz indicated that he had very few questions for Mr. Cooney and did not need to cross-examine him.

The letter from Mr. Cooney to Det. Ruark provides an overview of the statutory framework that applies to pharmacists in the province of Alberta. In his letter, Mr. Cooney confirmed that:

- It is not unusual for a pharmacist to invite a patient into a private room for discussion regarding their condition;
- Pharmacists who have “Additional Prescribing Authorization” may prescribe drugs. Prior to prescribing, the pharmacist is expected to conduct an assessment, which includes gathering and considering specific patient information.
- Some pharmacists may conduct a physical assessment. The pharmacist would be expected to explain what he was doing in order to obtain informed consent, particularly if it involved removal of an article of clothing.
- Pharmacists are allowed to administer medications to patients. This is most commonly administration of injections.
- The administration of a medicated cream is not specifically prohibited, but is very unusual. Such actions would require fully informed consent.
- The authorization for a pharmacist to prescribe a drug does not authorize provision of prescription drugs to patients without either receiving or writing a prescription.

Moustafa Alrefaey

Mr. Alrefaey testified that he is 36 years old. He is married and has three children. He was born in Egypt, and became a Canadian citizen in 2015. He obtained his Bachelor of Pharmaceutical Sciences in 2004 in Egypt. Mr. Alrefaey described his education and work history prior to immigrating to Canada. He commenced an internship in Alberta in September of 2012, and got his license from the ACP in 2013. He has practiced as a pharmacist in Alberta since 2013.

Mr. Alrefaey confirmed that he received additional prescribing authorization from the ACP to prescribe medication on November 3, 2014.

Mr. Alrefaey indicated that he and his wife are shareholders of the corporation that owns the Mell Pharmacy (Remedy Rx) that [the complainant] attended on February 2, 2016. He has been operating the pharmacy since it opened in July of 2015.

Mr. Alrefaey described the pharmacy, utilizing photographs that he had taken. The pharmacy is a sublease of 320 square feet located within the doctor’s clinic. The dispensary follows the same open hours as the medical clinic. The reception area of the medical clinic is not shared between the pharmacy and the clinic. The proximity of the reception area to the dispensary is

approximately one meter. The dispensary does have a gate that allows it to be locked off a night from the clinic, maintaining security. To the right of the dispensary is the counseling room which can also be used as an examination room by the physicians. There are three video cameras in the main areas of the clinic. They only serve the purpose of monitoring and do not record. There are no cameras located in the pharmacy counseling room.

Mr. Alrefaey indicated that on the evening in question [REDACTED], Mr. Alrefaey's pharmacy intern and himself were working in the pharmacy. In the medical clinic was Dr. [REDACTED], owner and the doctor in the clinic and [REDACTED], the clinic's receptionist. There were approximately five patients in the medical clinic including [the complainant] Four of the patients were served by the pharmacy as reflected in the pharmacy computer dispensing transactions. Mr. Alrefaey indicated that he never dealt with [the complainant] or recalls meeting her in person in any way prior February 2nd, 2016. However, Mr. Alrefaey indicated that [the complainant] has a daughter which he has served on two previous occasions, but unaware if [the complainant] came with the daughter or someone else on behalf of her those times.

[The complainant] presented a prescription at the pharmacy at approximately 6:41 PM for CipraleX and melatonin that she received from Dr. [REDACTED]. Mr. Alrefaey proceeded to create a new patient profile. He asked [the complainant] to have a seat while he and his intern prepared the prescription. Mr. Alrefaey reported observing [the complainant] while she dropped off the prescription, to be agitated, angry, and on the verge of crying. Mr. Alrefaey did not address [the complainant] as to reasons of his observation of her, but decided rather to ask her when he would counsel her on the prescription pick up. The prescriptions were completed in approximately 10 minutes. Mr. Alrefaey suggested to [the complainant] that she join him in the private consultation room as he wished to review her medication with her. Mr. Alrefaey indicated that he always invites patients with mental health related conditions into a private area, appreciating that this group of patients tend to be uncomfortable to discuss their condition in front of other people. [the complainant] agreed to go into the consultation room. Mr. Alrefaey commenced to counsel [the complainant] about the side effects that she can expect to have from taking the medications CipraleX and Melatonin. Mr. Alrefaey proceeded to ask her if she has any other medical conditions. [the complainant] replied that she has back pain. Mr. Alrefaey told [the complainant] that the back pain could be contributing to her depression and insomnia. Mr. Alrefaey asked how many days did [the complainant] have trouble sleeping. [the complainant] replied approximately three days. Mr. Alrefaey indicated that nonsteroidal anti-inflammatory medications are the best for back pain, but his preference would to give her something topical, instead of an oral one. Mr. Alrefaey offered to prescribe the topical cream. [the complainant] replied yes. At that point Mr. Alrefaey asked [the complainant] to allow him a moment to get the cream which was located back in the dispensary. As he went to retrieve the cream, he discovered that he only had a very small quantity left. Mr. Alrefaey upon his return to the consultation room indicated to [the complainant] that he did not have too much of the cream left. Mr. Alrefaey suggested to [the complainant] that he provide this small amount now to her, because of the trouble sleeping she was experiencing. [the complainant] replied that she would take this amount and he could make more for her at a later time. Mr. Alrefaey reaffirmed to [the complainant] to phone him tomorrow and let him know if she wanted more or not. Mr. Alrefaey then proceeded to counsel [the complainant] on the cream. He showed her what the active ingredients in it were. Mr. Alrefaey asked [the complainant] if she had anybody at home to apply this cream for her.

[The complainant] said no. He asked her if she applied this cream before, [the complainant] replied no. Mr. Alrefaey told [the complainant] if she did not have anybody to apply this cream, that he could show her how to apply it. [The complainant] agreed. Mr. Alrefaey told her to show him the exact area where to apply the cream. [The complainant] referred to her back. Mr. Alrefaey suggested to [the complainant] to sit on the bed and he would apply the cream. [The complainant] then lifted her shirt and indicated the area of her back that was experiencing pain. Mr. Alrefaey reported to applying the cream for approximately 30 seconds. Mr. Alrefaey indicated that he stressed to [the complainant] that she was lucky that there were a couple of grams remaining, but he could not prepare the full prescription now, because it would be unfair to do a prescription for just a couple of grams and bill Social Services for a couple grams, but would prepare 100 grams tomorrow, if she would like, or she could ask Dr. [REDACTED] to prescribe 100 grams more for her. After that [the complainant] thanked him and she left.

Mr. Fitz asked Mr. Alrefaey for additional clarity around the events that occurred in the consultation room specifically whether Mr. Alrefaey adjusted her clothing at all. Mr. Alrefaey responded that he did not touch her clothes at any point of time and added that he told her this is “greasy material, like ointment”, so it might stain her clothes, so when she returned home she might need to change her clothes. Mr. Alrefaey was asked if he completed any paperwork. Mr. Alrefaey disclosed that the only documentation done was on February 2, 2016 noted in Exhibit 12 and that he did not record this prescription inside the Kroll system until February 10, 2016. Mr. Alrefaey was asked to provide additional details around the time lines of the events on Feb 2, 2016 with [the complainant] Mr. Alrefaey indicated that he was with [the complainant] in the consultation room for approximately five minutes before he left the consultation room to retrieve the cream from the dispensary and that [the complainant] left the pharmacy at around 7:05 PM. Mr. Alrefaey was asked to confirm what [the complainant] said to him and if she raised any concerns when she left. Mr. Alrefaey replied that [the complainant] said “thank you” with no issues or concerns expressed.

Mr. Alrefaey provided testimony with respect to Exhibits 12 & 6.

- Exhibit 12
 - Confirmation that the pictures accurately reflect his pharmacy and the consultation room as they would have been on Feb 2, 2016.
- Exhibit 6
 - The accuracy of each allegation was asked of Mr. Alrefaey.

Allegation 1, it is alleged that [the complainant] attended at Mell Pharmacy in Calgary on February 2nd, 2016, with a new prescription for Cipralex and Melatonin. Mr. Alrefaey confirmed that happened.

Allegation 2, at Mr. Alrefaey’s suggestion [the complainant] entered the pharmacy's private counseling room with you and the door was closed. Mr. Alrefaey confirmed that happened.

Allegation 3, in response to questioning initiating by you, [the complainant] indicated that she had a history of back pain and you suggested a medicated cream

with 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream to be applied topically to treat the back pain. Mr. Alrefaey confirmed that happened.

Allegation 4, you left the counseling room and returned with a small amount of the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream. After further discussion you offered to show [the complainant] how to apply the medicated cream and asked her to lie down on the examination table with the door closed. Mr. Alrefaey confirmed that happened, but qualified only after he asked her whether somebody was available to help her and if she can do it by herself, and she did not answer him if she could do it by herself or not.

Allegation 5, after [the complainant] laid down on the examination table, you pulled up [the complainant] shirt and applied the medicated cream to her mid to lower back. Mr. Alrefaey replied that [the complainant] did lie down on the examination table and he did apply the cream to her mid to lower back, but he did not pull up [the complainant]'s clothes but rather she did that herself.

Allegation 6, you then lowered [the complainant]'s leggings and underwear below her buttocks and touched her hips and buttocks without prior notice to [the complainant] and without obtaining consent from [the complainant] Mr. Alrefaey replied that this never happened.

Allegation 7, you then provided the remaining 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream and a bottle of Melatonin pills to [the complainant] free of any charge to her. Mr. Alrefaey indicated that is accurate and that he not only has done this for [the complainant] but for all over-the-counter medications for free for three groups of patients. Social Services, Refugees and First Nations.

Allegation 8, you did not properly prescribe or dispense the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream on February 2, 2016 and there was no prescription received or written by you for this Schedule 1 medication and no proper documentation of the prescribing and dispensing activities were made in a timely and appropriate manner. Mr. Alrefaey responded that the allegation was not 100% accurate. He did make an assessment for [the complainant] and noted that she will use 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream and noted it in the patient's chart records noted in Exhibit 12. Mr. Alrefaey also added that he advanced her a couple of the grams with the expectation that she would come back the next day and would do the full amount. Mr. Alrefaey did acknowledge that the only mistake that he made was that the sample he provided did not have a medication label on it, but that he told her exactly what was in the cream. The reason he did not label it because he did not create a prescription at that time.

Allegation 9, these actions by you constituted a serious boundary violation in placing [the complainant] in a closed counseling room and then partially

disrobing her and placing your hands on her, followed by inappropriate touching and clothing removal without the informed and expressed consent of [the complainant] Mr. Alrefaey confirmed that he put her in a closed counseling room, but the other components of the allegation are untrue. Mr. Alrefaey also stated that he just wanted to help [the complainant] as she was in a difficult situation that evening. [The complainant] presented very angry and agitated and Mr. Alrefaey felt that if allowed [the complainant] to leave the pharmacy, [the complainant] might get suicidal and take the whole Cipralext prescription. Mr. Alrefaey felt that he had to provide the best service possible.

On cross-examination, Mr. Alrefaey was asked to provide additional detail around courses that he had taken in mental health. Mr. Alrefaey indicated that had completed online courses focusing on depression, anxiety, psychosis and bipolar disorders. Mr. Alrefaey was asked to elaborate on the observations of irritation and agitation that was displayed by [the complainant] on the evening in question and what specifically was cause for concern for Mr. Alrefaey. Mr. Alrefaey indicated that he did not know what [the complainant]'s past history was and whether she was on antidepressants at the moment. Mr. Alrefaey's concern was that he felt there was a risk of her hurting herself. Mr. Alrefaey felt that there is some link between starting Selective Serotonin Reuptake Inhibitors, especially in this age, and starting this medication has an increase in suicidal ideation. Mr. Alrefaey stated that he did not document in her record any of his concerns described. Mr. Alrefaey did not suggest to [the complainant] based on his observations that she go back to see Dr. [REDACTED] since [the complainant] had just seen him and presented a prescription for an antidepressant. Mr. Alrefaey was asked to provide detail of the extent he was aware of [the complainant] personal circumstances and to what degree he considered the impacts of [the complainant] being a single parent and the financial pressures she was experiencing the necessitated her to be on social services.

Mr. Alrefaey indicated that he was aware that she was 19 years of age on social assistance and that she had a two-year-old child and could identify, as he also is a parent and the fact that she is on social services is why he provided the medication for free. Mr. Alrefaey was questioned why he did not consider having his pharmacy intern in the counseling room while he was with [the complainant] Mr. Alrefaey expressed that there were three other patients waiting for prescriptions to be filled. Also, by not having a staff member present in the pharmacy increased the risk of theft.

Mr. Boyer asked Mr. Alrefaey to comment as to why there was no documentation in the patient record for the application of the cream and the reason for the delay in capturing electronically within his pharmacy dispensing software not until Feb 10, 2016. Mr. Alrefaey responded that there was no medical reason to mention it. With respect to the entry into the pharmacy computer Mr. Alrefaey indicated that he leaves all documentation until the end of the week.

Mr. Boyer asked Mr. Alrefaey about inconsistencies between the testimony provided by Mr. Alrefaey and the summary notes recorded by Mr. Krempien. Mr. Alrefaey indicated that Mr. Krempien's report indicating that he had told him that he had turned down the waistband of the leggings, so the cream would not get on the leggings was not accurate. This was a misunderstanding and what he meant to say was that her clothes could get contaminated from the cream, which is greasy. Mr. Alrefaey emphasized that he didn't touch her clothes. Mr. Alrefaey

was asked whether he found [the complainant] to be a young attractive woman. Mr. Alrefaey responded that it depends. Every man sees a woman as attractive or not. He emphasized that he is a married man and loves his wife.

The Hearing Tribunal also asked Mr. Alrefaey several questions of clarification why Mr. Alrefaey felt it was appropriate and beneficial to the patient that he apply the cream to her back that evening, how he determined that consent was provided and the details of the physical and clinical assessment he made to support his decision. Mr. Alrefaey was unsure if [the complainant] could with her status, apply the cream for herself or not. He did not do any physical assessments or ask [the complainant] if she could reach the area on her own. Mr. Alrefaey only asked [the complainant] if she had anybody at home to assist, she said no. Mr. Alrefaey indicated to [the complainant] that it would only take half a minute to show her how to apply the cream and after that she can apply the cream for herself. [The complainant] was observed to be stressed and agitated so he wanted to try to help her.

Mr. Alrefaey stated that he got primary verbal consent from [the complainant] to enter the room with her. Mr. Alrefaey received a second verbal consent from [the complainant] that she would like for him to get the cream for her. The third verbal consent he received was after Mr. Alrefaey returned back to the counseling room and he asked [the complainant] if she wanted him to show her how to apply the cream on her back, she said yes, please. Mr. Alrefaey asked her to show the exact area that she was having pain and he suggested to her that he could apply the cream for her. She showed the area with her two hands, one up and one down the location of the pain being in between. [The complainant] provided three verbal consents, plus after the three consents provided she physically showed where the pain was located to allow Mr. Alrefaey where to apply the cream. Additional details were described by Mr. Alrefaey respective his recollection of the time lines of the evening. Mr. Alrefaey indicated that it took around five minutes for him to discuss with her the side effects for Cipralext, suicidal ideations, Serotonin Syndrome and how to take the medication.

He left the pharmacy for approximately one or two minutes to retrieve the cream before returning to the consultation room. Mr. Alrefaey denied that he left the consultation room a second time to take a phone call. An additional one or two minute inside the room passed while he applied the cream and completion of the assessment form and collecting information. All information gathered in his hand-written notes took place on Feb 2, 2016 and the electronic entries of his notes took place on Feb 10, 2016. Mr. Alrefaey was questioned whether he told [the complainant] that he had a certificate in massage therapy or any suggestion that he had extra training in this field. Mr. Alrefaey responded that he is not massage therapist.

Mr. Alrefaey was asked to provide additional details as to his process, as an APA pharmacist, how in his documentation he conducts his assessment, determining goals of therapy, determining if there is any drug related problems, identification of other medical conditions that he would need to collaborate with other health care professionals, his follow-up in monitoring and the time frames to complete this documentation relative to [the complainant] Mr. Alrefaey indicated that he first asked about her medical history, which she replied that she has anxiety, depression, insomnia, and back pain. He proceeded to ask her if she currently is on any medications and have used medications in the past for her medical conditions. She said, yes, and it seems it didn't

work. She was asked if she has any allergies, Goal of therapy at this time was to relieve her symptoms, back pain. For monitoring and follow up he instructed [the complainant] to give him a call the next day. After the assessment Mr. Alrefaey went back to the pharmacy to package the cream. Since there was such a small amount of the prescription cream left maybe a total of two applications felt that he would not record it in his pharmacy computer software, till he knew she would be continuing with the cream and would be taking a full prescription would he then fill the prescription. Mr. Alrefaey returned to the consultation room and spoke with her about the cream, side effect of cream, everything she should know about the cream. He indicated to [the complainant] for her to come back to the pharmacy tomorrow or just phone him whether to make up the prescription. He cautioned her that if she had no improvement after a couple of days she might need a referral to her doctor for physiotherapy or to further investigate what exactly is the problem. Mr. Alrefaey confirmed that he did not document everything and some information may be missing because she didn't show up or called him back. If she had showed up next day he would have documented the whole assessment and follow-up if he was required to prescribe and fill the prescription cream. Mr. Alrefaey acknowledged that he failed to complete all the legislated steps required in the prescribing and dispensing of a schedule 1 medication and that it does not matter how small the quantity involved, however there is no legislation that indicates that a sample cannot be provided and why he felt his actions were acceptable.

VI. CLOSING ARGUMENTS

Closing Argument on Behalf of the Complaints Director

Mr. Boyer made closing arguments on behalf of the Complaints Director. He stated that it is the Hearing Tribunal's role to make findings of fact, to determine the standard of conduct that applies, and to apply the facts against the standards.

Mr. Boyer stated that what was in dispute was what occurred in the counseling room on February 2, 2016, and that the Hearing Tribunal would have to make those determinations. In fulfilling that role, the Hearing Tribunal would have to assess credibility. Mr. Boyer referred to the Court's decision in *Faryna v. Chorny* which outlines how credibility ought to be assessed.

Mr. Boyer stated that Mr. Alrefaey's testimony changed over time. What he said when he was interviewed on March 21, 2016 was different than what he described in examination-in-chief. During the hearing, Mr. Alrefaey testified that [the complainant] appeared confused and unable to apply the cream and asked for help. However, that information was not provided to Mr. Krempien. The information originally provided by Mr. Alrefaey was that he asked for consent, the patient consented, and he applied the cream.

According to Mr. Boyer, there was no apparent reason in the clinical record why [the complainant] could not apply the cream herself, and nothing to indicate that she could not understand instructions provided to her. There was no reason given as to why, even if there was confusion, a demonstration could not be provided.

Mr. Boyer stated that [the complainant] had told the police that the incident lasted 10-15 minutes, but she testified during the hearing that it felt like the events took that long. She

testified that when the incident occurred, she was in shock, and that when someone is in shock, it can seem to them like time stands still.

He anticipated that [the complainant]'s credibility might be challenged because she received a prescription for anti-depressants or because she did not call out or makes a fuss when leaving the premises. Mr. Boyer submitted that such an argument is inconsistent with the decision in *R. v. Seaboyer*. Moreover, her behavior was not unexpected given her testimony that she was stunned.

Mr. Boyer suggested that Mr. Alrefaey's description of [the complainant] became more dramatic as the hearing approached, there is a suggestion that she is fantasizing about what occurred, and that she is not a reliable witness. He indicated that what should also be considered is why she would have gone to the police given the difficulty that victims of sexual assault face.

Mr. Boyer also noted that when Mr. Alrefaey was interviewed by Mr. Krempien, Mr. Alrefaey acknowledged that he rolled down the band on [the complainant]'s pants to avoid getting cream on them.

He also suggested that the clinical notes (pages 47-48 of Exhibit Book) were likely made on February 10, 2016, not February 2, 2016. He submitted that the notes were made after the police attended and Mr. Alrefaey knew that he was being investigated. He suggested that they were created to provide the specter that there was a clinical rationale for applying the cream, and that the failure to reference the application of the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream is relevant to Mr. Alrefaey's credibility.

In contrast, [the complainant]'s testimony was consistent and credible in all respects, with the exception of her report to the police that the incident lasted 10-15 minutes.

Mr. Boyer indicated that there was no prescription written for the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream, and suggested that s. 31(2) of the *Pharmacy and Drug Act* indicates that Schedule 1 drugs may be compounded, dispensed or sold only pursuant to a prescription. The fact that only a few milligrams were on hand is a red herring, since a prescription is required for any Schedule 1 drug.

Mr. Boyer submitted that the allegations in the Notice of Hearing were proven, on a balance of probabilities.

Closing Argument on Behalf of Mr. Alrefaey

Mr. Fitz made closing submissions on behalf of Mr. Alrefaey.

Mr. Fitz indicated that when considering the evidence provided by Mr. Alrefaey when he was interviewed by Mr. Krempien, it must be remembered that the notes (pages 35-38) were not made at the same time as the interview, but were dictated after he left the pharmacy. In addition, Mr. Alrefaey's first language is not English, and Mr. Krempien may have had difficulty

understanding Mr. Alrefaey. Accordingly, the more reliable version of Mr. Alrefaey's initial evidence is the written summary provided by Mr. Alrefaey (page 39).

With respect to Mr. Boyer's submission that the notes (pages 47-48) were created after the police attended at the pharmacy so Mr. Alrefaey could cover his tracks, Mr. Fitz stated that there is no evidence as to the date when the police attended at the pharmacy.

Mr. Fitz also submitted that the suggestion that the notes were created on February 10, 2016, rather than February 2, 2016, was not a question that was put to Mr. Alrefaey. Accordingly, Mr. Alrefaey's evidence that the handwritten notes were created on February 2, 2016 is unchallenged.

Mr. Fitz also suggested that [the complainant] attended at the pharmacy in a troubled state, and that Mr. Alrefaey was simply trying to assist her. She never filed a complaint with the College. She did file a complaint with the CPS, but the CPS charged Mr. Alrefaey based solely on [the complainant]'s evidence, and he hasn't had an opportunity to respond to those allegations.

Mr. Fitz submitted that there were a number of mistakes during Mr. Krempien's investigation. He didn't see (or ignored) the second page of the police report which indicated the time that the alleged assault took place. There was a disconnect, with respect to the timing, given the evidence of both [REDACTED] and Mr. Alrefaey. Mr. Krempien erred in failing to consider this evidence, since it undermined [the complainant]'s credibility.

Moreover, Mr. Krempien erred in considering the fact that the police had laid a charge as part of his assessment. The CPS acted on a complaint, but no determination has been made in the criminal context.

Mr. Fitz indicated that [the complainant]'s credibility was an issue for a variety of reasons. Her estimate of the time Mr. Alrefaey spent applying the cream at the hearing was inconsistent with the information provided in the police report. In addition, [the complainant] testified that after Mr. Alrefaey applied the cream, he got a phone call and left the room. Although Mr. Boyer suggested that she was shocked, she testified that she got up.

Also, he submitted that [the complainant]'s testimony was that when Mr. Alrefaey left the room, he left the door ajar, while she was lying there with her pants down. He suggested her evidence was not credible given the layout of the clinic and how close the receptionist was to the patient counseling room.

In regard to the provision of the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream without a prescription, Mr. Fitz submitted that the legislative framework is not clear as to whether a pharmacist can provide a sample without writing a prescription.

Mr. Fitz also suggested that it would be unfair to give [the complainant]'s statement she provided to the police more weight than the statement that Mr. Alrefaey provided to Mr. Krempien, given that Mr. Alrefaey was not even notified of the complaint until March 17, 2016.

Mr. Fitz also summarized what he perceived to be the relevant evidence provided on behalf of each of the witnesses.

Mr. Krempien testimony indicated that [the complainant] confirmed that consent was given to go into the counseling room. She consented to lying on the table. She confirmed that the raising of her shirt was consensual. She consented to the cream being applied to her back. Even though there is disagreement as to who lifted the shirt, there was consent provided by [the complainant]

Mr. Fitz suggested that [the complainant]'s written statement of the incident that she provided to the CPS on February 2, 2016 was prepared when the incident was fresh, compared to subsequent statements provided after this date. Mr. Fitz suggested that there are significant discrepancies in the time evidence provided from this initial statement when compared to subsequent interviews and testimony given at the hearing. [the complainant] acknowledged that she did receive counseling services with respect to her prescription medication, all of which are things that are expected of a pharmacist in the legislative framework and premise as to why she agree to join him in the consultation room. She agrees that she consented to lying down on the table. She acknowledged that she consented to Mr. Alrefaey applying the cream to her mid to lower back.

Mr. Alrefaey's testimony indicated that he was satisfied that he had consent based on the acknowledgments provided by [the complainant] by her own testimony. It is on her own evidence that when she left the pharmacy she did not display being angry or upset, at least not noticeably so. He acknowledged he didn't label the sample of the cream he provided. But in absence of clarity in the legislation whether a sample can be provided or not, he did not believe he contravened any part of the legislation.

VII. FINDINGS

The Hearing Tribunal, after considering the documentary evidence, the witness testimony, and the submissions of the parties, finds that allegation #1, #2, #3, #4, #5, #7, #8 and #9 were factually proven on a balance of probabilities. The Hearing Tribunal finds that allegation #6 is proven, in that Mr. Alrefaey pulled [the complainant]'s leggings and underwear down to expose at least the upper part of her buttocks, and then touched her hips and the upper part of part of her buttocks without obtaining her consent.

Although all of the allegations were factually proven, allegations #1, #2, #3, #4, #5 and #7 are statements of fact that provide some context with respect to the remaining allegations, but do not constitute unprofessional conduct in and of themselves.

The Hearing Tribunal finds that the following allegations are factually proven and also constitute "unprofessional conduct": #6, #8, and #9.

In determining that the allegations are factually proven, the Hearing Tribunal made the following key findings of fact:

- [The complainant] attended with Dr. [REDACTED] at Northmount Medical Center on February 2, 2016 sometime between 6:00 and 6:30 p.m. She attended with Dr. [REDACTED] because she was having trouble sleeping and required anti-depressants, which she had been prescribed before by someone other than Dr. [REDACTED]. Dr. [REDACTED] prescribed her Cipralex and melatonin.
- After [the complainant] attended with Dr. [REDACTED] she dropped off her prescriptions at Mell Pharmacy (Remedy Rx) at approximately 6:41 p.m.
- Mr. Alrefaey asked [the complainant] to follow him to the private counseling room. Mr. Alrefaey informed her of the side effects of the Cipralex. The conversation occurred in the patient counseling room, with the door closed.
- The pharmacy is a small area and the private counseling room is close to the pharmacy counter and the reception area for the adjoining medical clinic.
- Mr. Alrefaey asked [the complainant] whether she had any pain in her body, and she advised him that she had pain in her mid-back since she was a child.
- Mr. Alrefaey advised that he had some cream that could help her and he left the patient counseling room and obtained a small bottle of 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream.
- Mr. Alrefaey asked [the complainant] if there was anyone at home who could apply the cream. She indicated that there was only her young daughter.
- Mr. Alrefaey asked if he could show [the complainant] how to apply the cream.
- During her attendance with Mr. Alrefaey, he did not inquire whether [the complainant] was physically capable of applying the cream to her mid and lower back herself. In fact, [the complainant] was capable of applying the cream to her mid to lower back and did not need assistance to do so.
- Although [the complainant] felt she required anti-depressants and had been having trouble sleeping, when she attended in the patient counseling room, she was capable of understanding instructions regarding how to apply the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream and there was no reason why Mr. Alrefaey needed to apply the cream to [the complainant]'s mid to lower back.
- Mr. Alrefaey told her [the complainant] to lie down on the examining table and he raised her shirt so he could apply the cream.
- He applied the Diclofenac cream to her mid and lower back in a circular motion. [the complainant] consented to the application of the cream to her mid and lower back.
- He then pulled down the pants she was wearing, flipped over the waistband, and then lowered her underwear down so that the upper portion of her buttocks was exposed.
- Mr. Alrefaey proceeded to massage her hips and the top of her buttocks, close to her back, and told her that would be the source of her pain.
- Mr. Alrefaey applied the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream and rubbed [the complainant]'s mid and lower back, and then her hips and buttocks, for a short period of time (approximately 2 minutes).
- Mr. Alrefaey did not ask [the complainant] whether he could pull her pants and underwear down, and did not warn her he was going to do so. [The complainant] did not consent to Mr. Alrefaey pulling her pants or underwear down, and did not consent to the application of the cream to her hips or her buttocks.

- The door to the patient counseling room was closed during the entire period of this encounter.
- Mr. Alrefaey received a phone call and left the patient counseling room for a short time, leaving the door slightly ajar. [The complainant] got up from the table. Mr. Alrefaey returned before she was able to pull her pants up. Mr. Alrefaey pulled her pants and underwear up for her.
- Although [the complainant] did not consent to Mr. Alrefaey pulling down her pants and underwear, or applying the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream to her hips and the top part of her buttocks, [the complainant] did not voice any objection when Mr. Alrefaey pulled her pants and underwear down, and did not voice any objection or cry out in protest when Mr. Alrefaey applied the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream to her hips and the top part of her buttocks.
- Mr. Alrefaey gave [the complainant] a small bottle of the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream without writing her a prescription at no charge. He also provided her with a bottle of melatonin at no charge.
- [The complainant] left the pharmacy immediately thereafter. There were other individuals in the pharmacy and at the clinic when [the complainant] left. [The complainant] did not report what had happened to any of those individuals.
- Immediately after [the complainant] left the pharmacy while she was at the bus stop waiting for the bus [the complainant] phoned her mother and told her mother what happened.
- [The complainant] took the bus to her dentist appointment, and when she got home her mother suggested that she should contact the police.
- [The complainant] made the decision to contact the police. The police attended at her home, and she completed a two-page police report at approximately midnight on February 3, 2016.
- The only documentation created by Mr. Alrefaey with respect to the counseling provided to [the complainant] is the electronic records which were entered on February 10, 2016, and the handwritten notes (pages 47 and 48) that are undated. The Hearing Tribunal finds that the notes were created on February 10, 2016, not February 2, 2016.
- Mr. Alrefaey did not document his application of the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream.

VIII. ANALYSIS OF THE EVIDENCE AND ALLEGATIONS

In determining whether the allegations were proven, the Hearing Tribunal was required to assess the credibility of both [the complainant] and Mr. Alrefaey, who gave conflicting testimony regarding some of the events. The Court in *Faryna v. Chorny* held the following with respect to assessment of credibility:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth the story of a witness in such a case must be its harmony with the preponderance of

the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

The Hearing Tribunal considered a number of factors to assess the credibility of the witnesses, including: appearance and demeanor, whether the witness had a clear recollection of events, whether the evidence was both internally and externally consistent, whether the version of events proposed by the witnesses was probable or plausible, the witness’ ability to perceive, and whether the witness was motivated to recount the events in a certain way.

In general, the Hearing Tribunal found [the complainant] to be a more credible witness than Mr. Alrefaey. Where their evidence conflicted on material points, the Hearing Tribunal generally preferred the testimony of [the complainant]. The reasons for finding [the complainant]’s testimony to be credible are:

1. [The complainant] was somewhat reserved but appeared clear, direct and forthright during the course of her testimony. [The complainant] remained calm on cross-examination, and remained consistent in her responses.
2. Despite the passage of time, [the complainant] had a good recollection of key events on the date in question.
3. [The complainant] called her mother immediately upon leaving the pharmacy to report what had occurred. This is consistent with [the complainant]’s evidence that she felt that something inappropriate had happened during the course of her interactions with Mr. Alrefaey.
4. [The complainant] made the decision to contact the police later that evening. Her reporting of the events to her mother, and that same evening to the police, is consistent with her testimony that Mr. Alrefaey touched her hips and buttocks, without obtaining her consent.
5. [The complainant] candidly acknowledged that she told Mr. Alrefaey about the history of her back pain. She also acknowledged that she consented to entering the patient counseling room with Mr. Alrefaey, and she permitted him to raise her shirt so he could apply cream to her mid-back. However, she did not consent to him lowering her pants and underwear, or to him applying cream to her buttocks or hips. [the complainant]’s testimony on these points suggested that she was clear in her own mind that there was a difference between what she consented to, and what actually occurred.
6. [The complainant]’s evidence was consistent on key, material points. In her report to the police, she stated that she told Mr. Alrefaey she had back pain, and that he told her he had cream and would show her how to apply it. He asked her to lay down, started to touch her upper back then her hips, then pulled her pants down and then her underwear. He then massaged her lower back and butt, before leaving the room for a phone call. He then returned and insisted on helping to pull her underwear and pants up. Although [the complainant] provided additional details to Mr. Krempien when she was interviewed, the information she provided to Mr. Krempien on key, material points was largely consistent with her initial report to the police the same night that the event occurred.
7. [The complainant] had no prior dealings or relationship with Mr. Alrefaey, and had no motivation to fabricate her evidence.

8. The Hearing Tribunal did consider that there were some discrepancies in [the complainant]'s evidence. Most of the discrepancies were minor and did not undermine [the complainant]'s evidence with respect to the key elements of the allegations. However, there was a significant discrepancy regarding her report of the amount of time that Mr. Alrefaey spent when he was applying the cream to her back, hips and buttocks.

In her written police report, submitted on February 3, 2016 at 12:13 a.m., [the complainant] stated that "...at one point he stayed on one spot at the top of my butt and massaged it for about 2-3 min. He rubbed me for 10-15 min." During the course of the hearing, Mr. Alrefaey testified that he rubbed her mid-back for approximately 30 seconds. Moreover, ██████████'s statement indicated that Mr. Alrefaey left the patient counseling room to obtain the cream, and was only in the room for 1-2 minutes after he returned. During the hearing, [the complainant] was asked about the amount of time that it took for Mr. Alrefaey to apply the cream. [the complainant] stated that she couldn't give an exact time, but at the time of the events, it felt extremely long and terrifying.

Although [the complainant] acknowledged during her testimony that she had written her police statement just 5-6 hours after the event occurred, when the events were fresher in her mind, and that her evidence was inconsistent with the information provided by both Mr. Alrefaey and ██████████, this inconsistency did not undermine her evidence on key points. [The complainant] testified that when the incident occurred, she was in shock, and that she "froze." The Hearing Tribunal finds that while her perception of the time (as noted in her police report) was not supported by external evidence, most notably ██████████'s statement, the inconsistency was reasonable given the nature of what was occurring, and her state of mind at the time. Also the accuracy of the stated time estimates by ██████████ was impossible for the Hearing Tribunal to confirm as she was not called as a witness.

There was also no demonstration during the hearing what was defined as the level of the butt crease. This did not undermine the rest of [the complainant] testimony which consistently communicated that of being frozen and feeling exposed.

Accordingly, the inconsistencies with respect to this aspect of [the complainant]'s evidence did not undermine [the complainant]'s credibility.

During the course of the hearing, counsel for Mr. Alrefaey suggested that there were a number of additional factors that the Hearing Tribunal should consider that negatively affected [the complainant]'s credibility. The Hearing Tribunal considered these submissions on behalf of Mr. Alrefaey.

- 1. Whether [the complainant]'s state of mind on the date in question negatively affected her ability to perceive what was happening, her memory of the events, or her ability to recount what occurred.**

During the course of the hearing, Mr. Alrefaey testified that [the complainant] appeared to be "agitated", "nervous", and "angry", and that it seemed like she was going to cry.

In the written statement provided to Mr. Krempien on March 21, 2016, Mr. Alrefaey only stated that she looked “irritable and little nervous.” The Hearing Tribunal accepts that [the complainant] may have been irritated and nervous when she attended with Mr. Alrefaey.

During the course of the hearing, [the complainant] was not specifically asked whether she was “angry” or whether she was about to cry. However, even if the description of [the complainant]’s demeanor as provided by Mr. Alrefaey at the hearing was accurate, it does not follow that she was suffering from a medical or emotional condition that would not allow her to perceive the events accurately, or that caused her to fabricate or fantasize the events that took place.

Moreover, the Hearing Tribunal considered [the complainant]’s personal circumstances at the time of the incident. She demonstrated mental competency, mental ability and maturity. She was a single mother, living on her own, taking care of her daughter, with modest financial resources, while still advancing herself as a student enrolled in an Emergency Medical Responder course. The fact that she suffered from depression, and received treatment for it, did not undermine the credibility or reliability of her evidence.

2. Whether [the complainant]’s failure to call out for help negatively affected her credibility

The Hearing Tribunal also carefully considered whether [the complainant]’s credibility was diminished, since she did not call out for help during the event or make a fuss when leaving the premises. The Hearing Tribunal finds that the fact that [the complainant] did not call out or immediately tell the receptionist what had occurred did not diminish her credibility. Her actions would be quite typical and reasonable responses for a victim dealing with this type of misconduct from a person in a position of authority and in light of the distinct power inequity between [the complainant] and Mr. Alrefaey, who is a healthcare professional. The fact that [the complainant] did not confront Mr. Alrefaey directly did not diminish her credibility. By [the complainant]’s own admission, she was confused what a pharmacist was allowed to do or not do, and was in shock, but felt the actions by Mr. Alrefaey were wrong regardless.

3. Whether [the complainant] exaggerated the incident when she reported it to her mother

It was also suggested that [the complainant] contacted the police after she had exaggerated the events to her mother, and that she did so not on her own accord, but rather at the request of her mother. The Hearing Tribunal rejected the suggestion that [the complainant] had exaggerated the events to her mother. There was no motivation for her to do so, and the Hearing Tribunal believed [the complainant] when she denied the suggestion that she had exaggerated what occurred when she spoke to her mother. [The complainant] consistently stated that while she spoke to her mother about the event, it was her choice to contact the police. Consideration was given by the Hearing Tribunal why [the complainant] would go to the police given the difficulty that victims of sexual assault face and what would [the complainant] gain by launching an inaccurate account of the events to the CPS.

4. Whether the fact that [the complainant] had a prescription filled at the pharmacy on March 9, 2016 negatively impacted her credibility

The Hearing Tribunal also considered the fact that [the complainant] had a prescription for her child filled at the pharmacy on March 9, 2016, approximately five weeks after the incident. Mr. Alrefaey did not know whether [the complainant] actually came to the pharmacy herself. However, [the complainant] testified that on the date in question, someone else picked up the prescription for her, and the Hearing Tribunal accepts her evidence in that regard. Although it would have been surprising for [the complainant] to have returned to the pharmacy herself (thereby risking another encounter with Mr. Alrefaey), the fact that [the complainant] elected to have another prescription filled at the same pharmacy did not diminish her credibility, especially given that [the complainant] did not pick up the prescription herself.

5. Whether [the complainant]’s testimony is plausible given her evidence that Mr. Alrefaey left the door to the consultation room partially ajar

The Hearing Tribunal also considered the plausibility of [the complainant]’s evidence, in light of the evidence that she provided when she met with Jim Krempien on April 14, 2016, that Mr. Alrefaey left the consultation room for a phone call, and that the door was not fully closed and was “a little bit ajar.” The Hearing Tribunal considered whether [the complainant]’s evidence that Mr. Alrefaey had pulled her leggings and underwear down was plausible, given her testimony that he left the door open, while she remained on the table with her pants down. The only evidence on this point is the information provided by [the complainant] to Mr. Krempien, that the door was a “little ajar”. Further, [the complainant]’s testimony at the hearing was consistent with her earlier evidence, when she agreed with Mr. Fitz’ suggestion that the door was “partially open.” The fact that Mr. Alrefaey left the door slightly ajar did not undermine [the complainant]’s testimony, given that Mr. Alrefaey left for a very short period of time and the door was not fully open.

For the reasons set out above, the Hearing Tribunal found that [the complainant] was a credible witness, and accepted her version of events on key material points.

The Hearing Tribunal also carefully considered Mr. Alrefaey’s credibility. The reasons the Hearing Tribunal accepted [the complainant]’s testimony when it conflicted with Mr. Alrefaey’s testimony on key material points is described below.

1. Mr. Alrefaey provided his evidence during the hearing in a definitive manner. He stated with certainty that he specifically recalled a number of aspects of his interactions with [the complainant], including that he did not move her shirt in order to rub the cream on her back, that she moved her shirt herself, and that she appeared “angry.” The definitive manner in which Mr. Alrefaey provided his evidence undermined his credibility. It is unusual that Mr. Alrefaey would recall with certainty every aspect of his interaction with [the complainant], especially given that Mr. Alrefaey had no notes relating to the issue of

informed consent, and no notes indicating that he applied cream to [the complainant]'s back.

2. Mr. Alrefaey's testimony changed with respect to his description of his interactions with [the complainant] In Mr. Krempien's Memo dated March 21, 2016 summarizing his interview with Mr. Alrefaey, Mr. Krempien noted that Mr. Alrefaey told him that he rolled down the band on [the complainant]'s pants to avoid getting cream on them. Although Mr. Krempien's Memo is only a summary of the evidence provided by Mr. Alrefaey, the Hearing Tribunal considered that the Memo was prepared very shortly after the interview with Mr. Alrefaey. The Hearing Tribunal does not believe that Mr. Krempien was mistaken and accepts that it is an accurate summary of the information provided by Mr. Alrefaey.

During examination-in-chief, Mr. Alrefaey stated he did not touch any part of [the complainant]'s clothing. Specifically, he testified that he did not lift her shirt and did not touch any part of her pants or her underwear.

When Mr. Alrefaey was interviewed by Mr. Krempien approximately seven weeks after the incident, he admitted to having touched [the complainant]'s pants, but later denied doing so. The Hearing Tribunal found that this was a significant discrepancy.

3. In addition, there was a dramatic increase in the nature of the details provided with respect to Mr. Alrefaey's description of [the complainant]'s demeanor and presentation. In his written documentation of the encounter with [the complainant], which he stated was recorded on February 2, 2016, he stated that the patient had "back pain and anxiety." In his initial written statement provided to Mr. Krempien, Mr. Alrefaey stated that [the complainant] looked "irritable" and "nervous" When he testified at the hearing, Mr. Alrefaey testified that she presented as "nervous", "agitated", "angry", and on the verge of crying. If Mr. Alrefaey had concerns with respect to [the complainant]'s state of mind at the time he provided counselling to her, the hearing Tribunal would have expected him to note his concerns in the records that he prepared. Yet, the only observation he noted was "anxiety." The Hearing Tribunal found that the additional details were provided to try to undermine [the complainant]'s credibility. However, the evolution of Mr. Alrefaey's description of [the complainant] ultimately diminished his own credibility.
4. Mr. Alrefaey's claim that his first language is not English and the source of the misunderstanding in the statements provided was not accepted as a credible reason for the inconsistency. The changes in his evidence cannot be attributed to a simple lack of understanding of English grammar, especially given that Mr. Alrefaey is a pharmacist who communicates with members of the public in English on a daily basis.
5. There was no apparent clinical reason why Mr. Alrefaey needed to apply cream to [the complainant]'s back. As noted above, [the complainant] was capable of understanding simple instructions, and did not suffer from any physical limitation or condition that would prevent her from reaching behind her to apply the cream. Mr. Alrefaey's explanation that she seemed "confused" is not consistent with [the complainant]'s level of functioning and ability to process information that was observed by the Hearing

Tribunal, and the Hearing Tribunal rejects the assertion that she was confused on the date in question. Although there is nothing that prevents a pharmacist from administering medication to a patient, and administration of medication is within the pharmacy scope of practice, the fact that Mr. Alrefaey chose to do so when it was unnecessary negatively impacted Mr. Alrefaey's credibility.

6. In addition, the Hearing Tribunal considered Mr. Alrefaey's documentation of the encounter with [the complainant]. He testified that he prepared a written record of the treatment he provided to [the complainant] on February 2, 2016, and that he added an electronic note later on February 10th. Although in his closing argument Mr. Fitz suggested that Mr. Alrefaey was never asked whether he had added the handwritten notes after the fact, Mr. Alrefaey was cross-examined with respect to the timing of the creation of the patient records. On cross-examination, Mr. Boyer suggested to Mr. Alrefaey that he created the record on February 10th, after the police had come to the pharmacy to ask him about his encounter with [the complainant]. Accordingly, Mr. Alrefaey was given notice and an opportunity to respond to the suggestion that the note was not created on February 2nd.

Although Mr. Alrefaey maintained that the handwritten portion of his record was created on February 2nd, the same day that he applied the cream to [the complainant], the Hearing Tribunal found that it is more likely than not that the electronic and handwritten portion of the records were both created on February 10th, over a week after the incident. This finding was based on the Hearing Tribunal's review of Exhibit 12 (page 47 and 48), which shows the handwritten portion of the 'care plan' below the electronic record. It does not make sense that Mr. Alrefaey would make a handwritten notation starting halfway down the page, just enough to allow the sticker to be affixed above it and not obscuring any of the handwritten notes. Moreover, the handwritten portion appears to be a continuation of the electronic notes, and does not appear to be a discrete and standalone entry.

There was no specific evidence of the date when the police attended at the pharmacy, and accordingly, the Hearing Tribunal does not find that the record was created in response to the police investigation. Nevertheless, Mr. Alrefaey's testimony that he recorded his handwritten notes on February 2, 2016, and added the electronic record after that was not accepted.

Although the Hearing Tribunal did not conclude that the notes were created in response to the police investigation, as noted above, the Hearing Tribunal questioned why Mr. Alrefaey charted that he gave [the complainant] a sample, and charted his instructions to her regarding how to apply the cream ("round, round and up") but failed to make any entries regarding the treatment he provided. While not prohibited, it is extremely unusual for a pharmacist to apply cream to a patient. The Hearing Tribunal would have expected Mr. Alrefaey to record his actions at the time of the occurrence. On the balance of probabilities considering that he did not chart affects his credibility.

7. Mr. Alrefaey's claim whether there is anything wrong in providing a free sample of schedule 1 medication, without a written prescription as required in the legislation presented concern for the Hearing Tribunal and the credibility of Mr. Alrefaey. This behaviour by Mr. Alrefaey demonstrates his own personal interpretation of the legislation and application suitable to his needs and not the patient or the scope which governs pharmacist practice.

Allegations #1, #2, #3, #4, #7

There was no disagreement amongst the key witnesses with respect to allegations #1, #2, #3, #4 and #7. Mr. Alrefaey confirmed that these allegations were factually true.

Although these allegations are factually proven, they were presented as factual background with respect to the incident in question. None of the allegations constitute "unprofessional conduct" as defined in s. 1(1)(pp) of the HPA.

Allegation #5

[The complainant] testified that Mr. Alrefaey asked her to lie down on the examining table, and that he then pulled up her shirt in order to apply the cream. Mr. Alrefaey agreed that he asked her to lie down on the examining table, but testified that [the complainant] pulled up her own shirt so that he could apply the cream.

As noted above, the Hearing Tribunal preferred the testimony of [the complainant] as compared with Mr. Alrefaey's testimony where it conflicted on material points. The Hearing Tribunal accepts [the complainant]'s testimony that Mr. Alrefaey pulled her shirt up after she lay down on the patient examining table. The Hearing Tribunal finds the allegation is factually proven for the reason that [the complainant] was consistent in her account of the events, whereas Mr. Alrefaey's testimony on certain points was inconsistent, and changed over time in some respects.

Although the Hearing Tribunal finds that Mr. Alrefaey did pull [the complainant]'s shirt up for her, the Hearing Tribunal considered [the complainant]'s evidence with respect to this allegation. [the complainant] testified that she did receive counseling services with respect to her prescription medication, all of which are things that are expected of a pharmacist in the legislative framework and premise as to why she agree to join him in the consultation room. She agrees that she consented to lying down on the table. She acknowledged that she consented to Mr. Alrefaey applying the cream to her mid to lower back.

In the circumstances, the Hearing Tribunal finds that Mr. Alrefaey's actions in asking [the complainant] to lie on the examination table and pulling [the complainant]'s shirt up for her do not constitute unprofessional conduct. The reason for this determination by the Hearing Tribunal, was that clear consent was provided by [the complainant] for the shirt to be lifted to expose her mid to lower back for the purpose to apply the cream by Mr. Alrefaey. [The complainant] acknowledges she understood the intentions of the pharmacist and what was to be achieved by the application of the cream to this specific area of her back.

Allegation #6

With respect to allegation #6, Mr. Alrefaey testified that he did not lower [the complainant]'s leggings or underwear and did not apply cream to her hips or buttocks. [The complainant] testified that Mr. Alrefaey pulled her pants and underwear down to the crease of her bum and then applied cream to her hips and the top of her buttocks. [The complainant] testified that Mr. Alrefaey did not ask her permission to lower her pants or underwear and did not obtain her consent before applying cream to her hips and buttocks.

As noted above, the Hearing Tribunal finds that Mr. Alrefaey did lower [the complainant]'s leggings below the mid-part of her buttocks, and then proceeded to lower her underwear. He then proceeded to apply cream to her hips and the top part of her buttocks without obtaining consent from [the complainant].

The Hearing Tribunal did not accept [the complainant]'s testimony that Mr. Alrefaey lowered her pants and underwear down below the crease of her bum, because the physical ability to perform this action to the degree claimed would not be possible while [the complainant] was laying prone on her stomach on the table as described. To achieve the lowering of her pants and underwear to the degree described, [the complainant] would have had to voluntarily lift her hips to permit the clothing to slide down to below the crease at the bottom of her buttocks. However, the Hearing Tribunal found that Mr. Alrefaey did lower her pants and leggings to the mid part of her buttocks. The Hearing Tribunal made this finding because of his admission of turning down the waist band of her pants on his initial interview by Mr. Krempien and that that pulling down the pants and underwear midway could be achieved with no compliance or assistance from [the complainant]

Allegation #9

With respect to allegation #9, the Hearing Tribunal found that Mr. Alrefaey's actions as outlined in allegation #6 and as described in allegation #9 occurred. These actions constituted a serious boundary violation in placing [the complainant] in a closed counselling room and then partially disrobing her and placing his hands on her, followed by inappropriate touching and clothing removal without the informed and express consent of [the complainant]

As noted above, Mr. Alrefaey lowered [the complainant]'s pants and underwear without obtaining [the complainant]'s consent, and then proceeded to apply the cream to her hips and buttocks without obtaining her consent. In considering whether this was a boundary violation, the Hearing Tribunal noted that there was no legitimate clinical reason for Mr. Alrefaey to physically apply the cream to [the complainant] in the first place. Given that there was no clinical reason for him to do so, it raises concerns with respect to Mr. Alrefaey's motive and reasons for doing so.

The Hearing Tribunal then considered whether the conduct referred to in allegation #6 and #9 constitutes "unprofessional conduct" as defined in s. 1(1)(pp) of the HPA, which defines "unprofessional conduct" to include conduct that contravenes a code of ethics or standards of practice, and conduct that harms the integrity of the profession.

The Hearing Tribunal determined that Mr. Alrefaey's conduct constituted a serious boundary violation that undermined the integrity of the profession. Moreover, Mr. Alrefaey's conduct contravened Standards 1, 2, 7, 11, 14, 17 and 18 of the Standards of Practice, and Principles 1(1, 2, 7), 2 (3,4), 3 (1, 2, 3), 5 (6), 9 (6) and 10 (1, 2) of the ACP Code of Ethics Bylaw.

The ACP's Code of Ethics established a number of key principles that pharmacists must adhere to. Pharmacists must hold the well-being of each patient to be their primary consideration, and safeguard the well-being of each patient. Pharmacists must also respect each patient's autonomy and dignity, and maintain professional relationships with their patients, including maintaining proper professional boundaries. Pharmacists must protect their patient's privacy, and recognize their own limitations.

The Standards of Practice establish that pharmacists must ask professionally, must establish and maintain appropriate relationships with their patients, and must obtain informed consent before administering a drug to a patient.

Pharmacists are expected to treat patients with dignity and respect. Pharmacists have been granted a number of privileges and rights. While they are entitled to administer drugs to patients, they must do so in a manner that is appropriate and respects a patient's boundaries. Mr. Alrefaey administered cream to the patient's hips and buttocks without obtaining informed consent when there was no clinical reason requiring him to do so. His actions in doing so clearly fell below the standard expected of members of the pharmacy profession, and clearly constitute unprofessional conduct.

Allegation #8

With respect to allegation #8, the Hearing Tribunal finds that this allegation is factually proven. There was no evidence that a prescription was reduced to writing for the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream. Section 31(2) of the *Pharmacy and Drug Act* indicates that Schedule 1 drugs may be compounded, dispensed or sold only pursuant to a prescription. The fact that only a few milligrams were on hand is irrelevant, since a prescription is required for any Schedule 1 drug regardless of the quantity involved. There also is no differentiation between Schedule 1 medications, meaning that one schedule medication is safer than another and is exempt from the regulations and control of Schedule 1 medications.

Prior to issuing a prescription, it is the responsibility of the pharmacist with Additional Prescribing Authorization, to ensure when prescribing any Schedule 1 medication that an appropriate assessment is performed and the determination of that assessment is documented in its' entirety is completed. Not only whether the medication is appropriate for the condition identified and the absence of potential drug interactions, but also the ability for the patient to self-administer the medication once dispensed. In the case of [the complainant] many gaps in the assessment documentation were identified. Specifically the appropriateness of an external cream formulation for the [the complainant] versus and internal administered dosage form, and documentation respective the physical assessment whether [the complainant] was capable to self-administering the cream once dispensed.

Mr. Alrefaey acknowledged during his interview with Mr. Krempien and in his testimony at the hearing that he did not follow the prescribing process as per the Regulations required of pharmacists with APA certification. Mr. Alrefaey identified that a complete assessment, while performed in his opinion, was not accurately captured in its' entirety in the patient record, a prescription was not reduced to writing and no labeling of the product was done prior to dispensing to [the complainant]

In finding that this allegation is proven, the Hearing Tribunal specifically considered Mr. Alrefaey's submission that there is nothing that prohibits a pharmacist from providing patients with a free sample. The Hearing Tribunal agrees that there is nothing that precludes a pharmacist from giving a patient a sample or any drug free of charge. However, the allegation does not speak to whether it is appropriate to provide a Schedule 1 medication at no charge to the patient, but rather relates to whether the legislative requirements were followed, enabling the clinical best interests and safety of the patient as required in the legislation to be maintained. Mr. Alrefaey did not prescribe the Schedule 1 drug, submitting that it was unnecessary because it was a sample. However, the *Pharmacy and Drug Act* requires Schedule 1 drugs to be prescribed pursuant to a prescription. The Hearing Tribunal finds that, conversely, Schedule 1 drugs cannot be prescribed (or administered) unless a prescription has been written. Mr. Alrefaey is a prescribing pharmacist, he would be the one who would be responsible for creating that prescription and he failed to do so.

The Hearing Tribunal then considered whether the conduct in issue concerning allegation #8 constitutes "unprofessional conduct" as defined in s. 1(1)(pp) of the HPA. The Hearing Tribunal determined that Mr. Alrefaey's conduct contravened was unprofessional because it undermined the integrity of the profession; was contrary to accepted pharmacist practice and ethical standards; did not take sufficient and reasonably expected precautions to care for his patient; showed a serious disregard of his duties as a pharmacist to his patient, the Alberta College of Pharmacists and to the public which relies upon the integrity and competence of pharmacists as members of a self-regulating profession.

Specifically, the Hearing Tribunal found that Mr. Alrefaey's conduct breached a number of provisions of the ACP's Code of Ethics.

Principle 1 requires the pharmacist to hold the well-being of each patient to be the primary consideration. By not following the legislative requirements in prescribing a Schedule 1 medication, [the complainant] was put at a potential risk for harm.

Principle 10(1) requires pharmacists to act with honesty and integrity, and comply with both the letter and the spirit of the law that governs the practice of pharmacy and the operation of pharmacies.

By Mr. Alrefaey's own admission, he did not follow the legislative requirements of an APA pharmacist in the prescribing and dispensing of a Schedule 1 medication, by not fully documenting the assessment of [the complainant] in the patient record, reduce the prescription to writing and labeling the Schedule 1 medication that he dispensed.

In addition, the Hearing Tribunal found that Mr. Alrefaey's conduct in relation to allegation #8 breached a number of the Standards of Practice.

Standard of Practice 1.1 requires pharmacists to practice in accordance with the law, including the *Pharmacy and Drug Act*. By Mr. Alrefaey's own admission, he did not follow the legislative requirements of an APA pharmacist in the prescribing and dispensing of a Schedule 1 medication, by not reducing the prescription to writing and labeling the Schedule 1 medication that he dispensed.

Standard of Practice 7 provides that each time a pharmacist dispenses a Schedule 1 drug, the pharmacist must ensure that:

- a) the prescription is filled correctly,
- b) appropriate dispensing procedures are used,
- c) the drug or blood product is packaged properly,
- d) the container is labeled properly, and
- e) a final check is performed.

Section 7.5 of Standard of Practice 7 establishes rules with respect to proper labeling. A pharmacist or a pharmacy technician who dispenses a drug or blood product must ensure that the container in which the drug or blood product is dispensed has a label that is clearly legible and includes the following:

- a) the name of the patient for whom the drug or blood product is dispensed;
- b) the name, address and telephone number of the pharmacy;
- c) the name of the prescriber of the drug or blood product;
- d) a description of the drug or blood product in English by:
 - i. generic name, strength and the identity of the manufacturer for single entity drugs;
 - ii. generic name, strength and the identity of the manufacturer for combination drugs, where possible, or the brand name and strength;
 - iii. name of compounded drugs or ingredients and strength; or
 - iv. in the case of a blood product, the name of the blood product;
- e) instructions for the use of the drug or blood product;
- f) a unique prescription number;
- g) the date the drug or blood product was dispensed;
- h) the quantity of the drug or blood product dispensed; and
- i) the number of refills remaining if applicable.

Subsection 7.5 was completely ignored and not performed by Mr. Alrefaey.

Standard of Practice 11 states that a pharmacist who prescribes a Schedule 1 drug or blood product must understand the regulatory framework in relation to pharmacist prescribing and must comply with it.

Section 11.2 of Standard 11 states that a pharmacist who chooses to engage in prescribing must prescribe in accordance with these standards.

Subsection 11.2 was completely ignored by Mr. Alrefaey.

Standard of Practice 11.10 states that a pharmacist who prescribes a drug or blood product must reduce the prescription to writing in a clear, concise and easy-to read format that includes all information required in a complete prescription as outlined in Standard 6.7.

Subsection 11.10 was completely ignored and not performed by Mr. Alrefaey.

In the circumstances, Mr. Alrefaey failed to properly prescribe or dispense the 10% Diclofenac, 2% Cyclobenzaprine, and 2% Lidocaine cream in accordance with the standards that are expected of pharmacists. Although Mr. Alrefaey only provided a small amount of cream to [the complainant], the Hearing Tribunal finds that the amount of cream provided is irrelevant. Pharmacists have been granted prescribing rights, which is a privilege. The privilege has to be exercised in accordance with the governing legislation and standards, which are in place to protect the public. Unlabeled medications should never be dispensed, even if the amount is small, since there is always a chance that a member of the public will use the medication for an unintended purpose.

IX. CONCLUSION

In conclusion the Hearing Tribunal finds that Allegations #6, #8 and #9 were factually proven and also constitute “unprofessional conduct” as defined in the HPA.

The Hearing Tribunal will determine what orders should be issued after hearing submissions on penalty.

Signed on the 24th day of January 2018
on behalf of the Hearing Tribunal by the Chair

[Kevin Kowalchuk]

Per: Kevin Kowalchuk