IN THE MATTER OF A HEARING OF A HEARING TRIBUNAL OF THE COLLEGE OF CHIROPRACTORS OF ALBERTA

pursuant to *THE HEALTH PROFESSIONS ACT*, being Chapter H-7 of the Revised Statutes of Alberta

Regarding the conduct of Dr. Curtis Wall

WRITTEN SUBMISSIONS OF DR. CURTIS WALL REGARDING PENALTY AND COSTS

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I. INTRODUCTION

1. The College of Chiropractors of Alberta Hearing Tribunal hearing allegations brought by the College Complaints Director that Dr. Curtis Wall committed unprofessional conduct issued a 93-page decision on the merits on January 27, 2023 (the "Findings Decision").

2. Unfortunately, the Members of the Tribunal did not seem to heed Dr. Wall's plea they be honest with the evidence and prioritize truth over political convenience. In an egregious manifestation of contempt for its obligations to follow the evidence where it leads instead of blithely agreeing with the Complaints Director at every turn, the Tribunal did not trouble itself to even once cite to the evidentiary record in a decision that was extraordinarily selective regarding the evidence.[1]

3. It is a wonder to Dr. Wall the Tribunal holds itself out as acting to uphold the public interest when it declines to permit public scrutiny by demonstrating to the public the evidence it relied upon in making its Findings Decision. This lack of accountability followed rulings by the Tribunal to make secret the evidence Dr. Wall tendered in his defence and even the identities of his four expert witnesses. It is ironic, given this context, the Tribunal described Dr. Wall's actions in not telling the College he was not wearing a mask as "acting in secrecy".[2]

4. Therefore, Dr. Wall has lost all confidence in this Tribunal's ability to rule fairly and impartially in his case. Although he again implores the Tribunal to objectively engage with the evidence and case law he relies upon, he provides the submissions within primarily for the purposes of putting his position on the record and preparing for the inevitable appeal of the Findings Decision. Dr. Wall is not "ungovernable", but, as demonstrated throughout these proceedings, he is a man of integrity and principle and refuses to pretend he is not dealing with a biased decision maker when he clearly is.

[1] This failure is all the more absurd in light of the fact the lawyer advising the Tribunal spent **157.2 hours** in assisting the Tribunal to craft its decision and that lawyer, judging by the fact (s)he charged **$735/hr** or more, must have been experienced.
[2] Findings Decision at 54.

II. PENALTY

5. This case is unprecedented. Even the Complaints Director acknowledges it is exceptional.[3] This case is not about sexual or relational misconduct, fraudulent conduct, practicing while intoxicated, out-of-scope practice, sub-standard treatment which harmed a patient, negligently failing to recognize a patient's serious health issue, or any other type of unethical or incompetent conduct "serious" enough to justify expending over half a million dollars to prosecute[4] and to penalize with a suspension to practice or hefty fines.

6. This case originated not from a patient complaint, but from the College's former Complaints Director, David Lawrence vindictively and arbitrarily initiating his own complaint in response to Alberta Health Services telling the College it was aware of a chiropractor practicing without wearing a mask.[5] No patient ever complained to the College regarding Dr. Wall's inability to wear a mask. No patient was ever harmed during the over two-year period when it was apparently dangerous to not wear a mask and yet Dr. Wall was nonetheless permitted by the College to practice without wearing a mask.

Factors for Determining a Fit and Just Penalty

7. The Complaints Director relies on the *Jaswal* factors[6] to ground her submissions that Dr. Wall should suffer a three-month suspension of his practice permit and pay $26,000 in fines. Indeed, ***if*** this were a case of unethical or incompetent conduct, such as the sexual misconduct at issue in *Jaswal* itself, the non-exhaustive *Jaswal* factors would provide this Tribunal with useful guidance. However, in the unique circumstances of this case, *Jaswal* is of little utility.

8. Dr. Wall suggests the following factors are the most relevant to this case:

    a. Whether any patients were harmed by or at least complained about the conduct of Dr. Wall;

[3] College's Penalty Submissions at para 48.
[4] Statement of Costs, Appendix A to the Submissions of the Complaints Director ("CDS").
[5] Letter to Dr. Curtis Wall from Complaints Director David Lawrence, dated December 21, 2020.
[6] *Jaswal v Newfoundland (Medical Board)*, [1996] N.J. No. 50, 138 Nfld. & P.E.I.R. 181 [*Jaswal*].

b. Whether the public's confidence in the profession will be improved or harmed by the imposition of a significant penalty;

c. Whether chiropractic patients will, specifically and generally, benefit from or be harmed by a penalty involving a suspension of care;

d. Whether the circumstances giving rise to the case are reasonably likely to occur again such that deterrence is logically relevant;

e. Whether a deterrent effect is reasonably likely to be realized because Dr. Wall or other chiropractors are likely to act differently than Dr. Wall did in similar future circumstances;

f. The degree to which penalty will be the result of vengeance, not merely denunciation; and

g. Dr. Wall's ability to financially and occupationally survive a lengthy suspension, large fines, or a combination of both.

9. Application of these factors indicate the appropriate penalty is a reprimand, publication of the Tribunal's decisions, and a fine of $1,000 for each of the five charges.

10. The Complaints Director has not demonstrated, and, indeed, did not even attempt to demonstrate, that any patient of Dr. Wall's or member of the public was harmed as a result of Dr. Wall or his patients not wearing a mask. Surely, if Dr. Wall's actions threatened the safety of his patients or the public such evidence would exist given the length of time (over two years) that Dr. Wall constantly did the ostensibly dangerous act of practicing without wearing a mask. Surely, if protection of the public was the motivation for prosecuting Dr. Wall, the Complaints Director would have attempted to adduce such evidence. The absence of demonstrated harm to any patient or member of the public should weigh more heavily than any other factor in determining a fit and just penalty.

11. That the Complaints Director elected to bring this matter to a hearing and expend in actual and anticipated costs approximately $525,000 instead of resolving it is a disgrace

to the profession. No evidence has been adduced by the Complaints Director that the general public, chiropractic patients, or the profession would have more confidence in the profession if the Tribunal imposed a harsh penalty on Dr. Wall. In fact, what evidence is before the Tribunal on this issue is that confidence in the profession and in the College's ability to regulate it has been harmed by the prosecution of Dr. Wall, and will be harmed further if the Tribunal orders a suspension of Dr. Wall's ability to provide chiropractic care.[7]

12. Patients of Dr. Wall and chiropractic patients generally will not incur a net benefit from Dr. Wall receiving a suspension of his practice permit. Three patients of Dr. Wall have testified how important it is the Tribunal not take from them the care Dr. Wall provides.[8] Chiropractic patients as a whole can only benefit from a suspension to practice if it is in response to conduct that undermined patient care, such as the aforementioned unethical or incompetent conduct. Since Dr. Wall's conduct was neither of these, nor actually dangerous, suspending Dr. Wall's practice permit results in no benefit to patients of chiropractic and would serve only to punish Dr. Wall for punishment's sake.

13. There is no reason to suppose the circumstances giving rise to this case are likely to repeat themselves. Fortunately, it is exceedingly rare that the College imposes rules upon its members to which there is reasonable opposition on the basis of a lack of scientific support, or because the rules violate human rights and constitutional freedoms. Most rules, even onerous ones, do not engage fundamental rights, are not scientifically controversial, are not politically motivated, and are and will continue to be readily complied with both by Dr. Wall and other chiropractors, even the most independently-minded of them. The College has led no evidence to suggest otherwise and there is no reasoned basis to equate everyday rules with the exceptional rules of mandatory mask wearing such that Dr. Wall not complying with mask-wearing has any bearing on other chiropractors complying with other requirements of the College. General deterrence,

[7] Transcript of testimony: Charles Russel at 756, line 14 to 757, line 23; Dave Hilsebeck at 769, lines 3 to 11 and 772, line 24 to 775, line 1.
[8] Transcript of testimony: Jarvis Kosowan at 740, line 5 to 741, line 11; Charles Russel at 756, lines 4 to 9; Dave Hilsebeck at 767, line 9 to 770, line 6.

then, is not logically relevant as it would be in a more typical case involving unethical or incompetent practice.

14. Further, no deterrent is likely to be realized because Dr. Wall, whether punished lightly or harshly, would not conduct himself otherwise if, in fact, a similar situation arose in the future. Neither is there any reason to suppose members of the profession generally would alter their conduct depending on the sanction imposed on Dr. Wall. In the absence of evidence on this point, it is suggested the few other chiropractors who did not wear a mask did so for similar, principled reasons as Dr. Wall, meaning deterrence would have no impact. Very little, if any, deterrence is needed to "send a message" to the chiropractors who did wear a mask that they had better continue to comply with the College's rules.

15. Compliance with everyday rules and with the rules against fraud and sexual impropriety is susceptible to waning if there is a lack of deterrence, but compliance with rules that engage principles is inelastic. Chiropractors will either comply because the rule, for them, does not engage any principle or they will not comply, regardless of the potential penalties, because the rule engages their principles. Either way, deterrence has no impact.

16. Tempered denunciation may be a legitimate goal of professional sanctions, but vengeance is not. At what point denunciation becomes vengeance is a matter of discretion, but there can be no doubt $26,000 in fines against Dr. Wall is vengeful. Such fine amounts when there was no patient complaint and no patient harm amount to a thinly-veiled retaliation for Dr. Wall having robustly defended himself. If the Tribunal ordered the $26,000 sought by the College, it would be effectively condoning the former Complaints Director's improper attempt to intimidate Dr. Wall into abandoning his defence.[9]

17. Dr. Wall operates a small-volume practice with revenue of less than $10,000/month. Dr. Wall is the sole provider for his wife and eight children, many of whom still live at home and are financially dependent on him. The loss of income for any length of time, and certainly for three months, would put into jeopardy Dr. Wall's ability to keep his practice

[9] See David Lawrence's email of March 28, 2022 and Dr. Wall's March 29, 2022 Application to the Tribunal. Mr. Lawrence "retired" in the face of Dr. Wall's Application to remove him as prosecutor for prosecutorial misconduct.

alive and to pay his mortgage and otherwise provide for his family. A suspension of three months may permanently deprive the community of Dr. Wall's services whilst also imposing severe financial hardship on a family, neither of which are in the public interest. Ability to escape poverty and ability to pay are of little relevance in cases involving sexual misconduct or fraud, but are highly relevant in a case such as this where there was no patient harm.

Comparisons to Other Recent Discipline Cases

18. Even if the Tribunal finds the *Jaswal* factors are relevant, the fines sought by the College are incommensurate with the fines levied against chiropractors who have committed more grievous offences, in some cases over lengthier periods of time, and which, unlike Dr. Wall's conduct, the Court of Appeal in *Jinnah*[10] has defined as **"serious"** unprofessional conduct.

19. Over a span of 10 years, Dr. Corey Graham committed unprofessional conduct by operating unregistered class 3b laser equipment in his clinics and providing inaccurate information to the College concerning the registration of this equipment. Dr. Graham further delegated the provision of clinical services, specifically the use of the class 3b lasers to unregulated health providers, and/or allowed unregulated health providers to use class 3b lasers while he was not present to provide supervision. In October of 2019, the Hearing Tribunal ordered Dr. Graham to pay a fine of $10,000—a mere $1,000 for each ***year*** he committed the unprofessional conduct.

20. Over an unidentified period of time, Dr. Paul McConnell had sex with multiple patients, among other offences, and in 2020, appears to have been fined $0. Likewise, Mr. Ronald Latch appears to have been fined $0 in 2021, after having being convicted on six counts of sexual assault on patients, among other infractions. Dr. Stephen Goodwin had sex with a patient, later marrying her, but the latter fact made no difference to the Hearing Tribunal, which stated, "[T]he Hearing Tribunal wishes to make it clear that the conduct in issue is **extremely** serious. The Hearing Tribunal did not agree with the submissions on

[10] *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 [*Jinnah*].

behalf of Dr. Goodwin that the fact that it was [the patient] who instigated the relationship, or their subsequent marriage, were properly considered to constitute mitigating factors". Nevertheless, Dr. Goodwin was fined just $2,500 in 2022.

21. Dr. Timothy Sharp did not receive patient consent before lowering a patient's pants, lifting her shirt out of the way, and unlatching her bra in the performance of a chiropractic procedure, which caused the patient "longstanding" "distress". In 2022, the Hearing Tribunal accepted that Dr. Sharp's conduct was "serious", and Dr. Sharp was fined $1,000 per infraction and $3,000 total. Likewise, Drs. Robert Kariatsumari, sanctioned in 2021, and Pardip Athwal, sanctioned in 2020, committed unprofessional conduct in the performance of chiropractic, and were fined $0 and $1,000, respectively. Dr. Kariatsumari touched his patient too near her pubic bone without sufficient informed consent and Dr Athwal's patient had to be conveyed from her office to hospital by ambulance. Dr. Athwal had another encounter with discipline in 2021, this time for altering patient records and various other patient record infractions in the years 2014, 2016 and 2017. In 2019, 25 patient files could not be located at the auditor's request. Dr. Athwal was fined $1,000.

22. In 2020, Dr. Christopher Senko was fined $10,000 for submitting insurance claims for services not rendered and other insurance claim anomalies over a period of two years.[11]

23. The Complaints Director's request for fines to be levied against Dr. Wall which are 260% more than those recently assessed for what amounts to habitual insurance fraud or ten years of performing chiropractic procedures below the standard of care is unsupportable, as are fines more than 10 times the amount assessed for the "extremely" serious conduct of engaging in a sexual relationship with a patient; and fines 26 times greater than those assessed for bodily boundary violations in the performance of chiropractic procedures, chiropractic care that sent a patient to hospital, and altered/disappearing patient records.

[11] All of these cases are accessible on the College's website at https://www.theccoa.ca/CCOA/Complaintsdiscipline/Discipline_decisions/CCOA/ComplaintsDiscipline/Discipline_decisions_and_agreements.aspx?hkey=049edbcd-64c5-4ff2-949b-3c127cc334da.

The Real Reason the College Has Sought Such Exorbitant Fines

24. The Complaints Director is likely embarrassed at how much has been spent on prosecuting Dr. Wall—rightly so—and is therefore anxious to recover some of the costs. The only conceivable way the Complaints Director may recover ***any*** of the $525,000 spent is to convince this Tribunal Dr. Wall's conduct was "serious". That difficult job is made slightly easier if the Complaints Director can first convince the Tribunal it should award fines many times higher than other recent cases, even cases involving actual "serious" misconduct such as fraud and sexual impropriety. The Complaints Director asks Dr. Wall be ordered to pay approximately $158,000 in costs (30%), which, at six times $26,000 in fines, is clearly punitive and therefore offside *Jinnah*,[12] but less obviously so than being 32 times a reasonable total fine amount of $5,000.

Conclusion on Penalty

25. Had reason and sobriety prevailed—had the College resisted the intoxicating effect of fear (and the expensive, politically-driven responses to it)—this case would not have been prosecuted.[13] If reason and sobriety were to prevail now among the Tribunal Members, Dr. Wall's practice permit would not be suspended and he would not be burdened with five-digit fines. There is no precedential value in depriving Dr. Wall's patients of his care, nor will any specific or general deterrence be realized. Similarly, any global fine amount exceeding $5,000 ($1,000 for each charge) will constitute vengeance on the part of the College and Tribunal, undermining any legitimate denunciation that may be served by reasonable fine amounts. Dr. Wall should not have his practice permit suspended and should pay fines of no more than $5,000.

[12] *Jinnah* at paras 124, 127, 76. The Complaints Director acknowledges *Jinnah* on this point, yet she seeks costs in the amount of $158,137.13—more than 608% higher than the amount of the fines she seeks, only the latter of which are permitted to be punitive.
[13] See *Jinnah* at para 147.

III. COSTS

Dr. Wall's Conduct Does Not Rise to the Level of "'Serious' Unprofessional Conduct" on the *Jinnah* Standard

26. The Court of Appeal in *Jinnah* enumerates several examples that would constitute "serious" unprofessional conduct: "a sexual assault on a patient, a fraud perpetrated on an insurer, the performance of a [healthcare] procedure while suspended or the performance of a [healthcare] procedure in a manner that is a marked departure from the ordinary standard of care".[14]

27. Dr. Wall was not found to have molested any patients, perpetrated fraud, or performed a chiropractic procedure while suspended. Nor was Dr. Wall found to have performed a chiropractic procedure in a manner that is a marked departure from the ordinary standard of care.

28. In her submissions, the Complaints Director misapprehends the last of the serious unprofessional conduct examples provided by the *Jinnah* court, which leads to a false equivocation, stating: "Serious unprofessional conduct includes…practicing in a manner that constitutes a marked departure from the ordinary standard of care".[15]

29. First, the *Jinnah* court clarifies that the examples it provides are analogous to other health professionals: "While we refer to dentists in this discussion, our observations apply to all professionals regulated by the *Health Professions Act*".[16]

30. Second, the Court circumscribes its standard of care example to the performance of the medical procedure itself, not to some general standard of care or ethical consideration: "the **performance of a dental procedure** in a manner that is a marked departure from the ordinary standard of care".[17]

31. Accordingly, the correct analog is not, as the Complaints Director suggests, "practicing in a manner that constitutes a marked departure from the ordinary standard of care" in some

[14] *Jinnah* at para 141.
[15] CDS at para 55.
[16] *Jinnah* at para 140.
[17] *Jinnah* at para 141.

general way untethered to the procedure being performed. Rather, the correct analog is the **performance of a <u>chiropractic procedure</u>** in a manner that is a marked departure from the ordinary standard of care **in performing chiropractic procedures.**

32. Even had the Court used the word "practicing", as the Complaints Director represents in her submissions, as opposed to the word "performance" which the Court actually used, the meaning would not change, since Schedule 2 of the *Health Professions Act* defines "practice" in the context of chiropractic thus:

> **Practice**
>
> **3** In their practice, chiropractors do one or more of the following:
>
> (a) examine, diagnose and treat, through chiropractic adjustment and other means taught in the core curriculum of accredited chiropractic programs, to maintain and promote health and wellness,
>
> (a.1) teach, manage and conduct research in the science, techniques and practice of chiropractic, and
>
> (b) provide restricted activities authorized by the regulations.

33. The *Jinnah* court further clarifies its narrow meaning when it states, effectively, that a single allegation brought by a single patient "**unrelated to patient care**" is too minimally serious to impose costs:

> 123 Dr. Jinnah argues that the costs the appeal panel imposed…were **excessive** for a hearing involving **one allegation by a single patient unrelated to patient care on the low end of the seriousness scale.**
>
> 124 **We agree. These sums are so large that they, in effect, become the primary sanction. Costs are not supposed to be a sanction.**

34. In context, "patient care" refers to the legislative definition and the Court's definition, which are one and the same: in Dr. Wall's case, caring for patients in the "chiropractic" sense.

35. The Complaints Director's false equivocation of the specific to the general attempts to broaden the Court's definition of the type of conduct it views as "serious", as that is the

only way the College can squeeze conduct entirely unrelated to the way Dr. Wall performs **chiropractic** procedures into the test.

36. As with the *Jinnah* case, the basis of the proceedings against Dr. Wall was one isolated complaint to Alberta Health Services which the Complaints Director of the College treated as a complaint, and which had nothing to do with Dr. Wall's practice of chiropractic as defined in the legislation nor the *Jinnah* court's intended meaning, that is, performing a *chiropractic* procedure.

37. As Dr. Wall has not been found guilty of, for example, performing a chiropractic adjustment outside of the ordinary standard of chiropractic care, he plainly does not fit the seriousness category as contemplated by the Court of Appeal in *Jinnah*.

"Ungovernability" Is Not a *Jinnah* Factor

38. Ungovernability is not among the exceptions enumerated in *Jinnah*, either included in the seriousness factor or as a separate factor. To the extent ungovernability could be read-in to *Jinnah*, it would be covered under the head of "serial offender", since logically, serial offending would be a necessary, if not sufficient, condition to ground a finding of ungovernability. Moreover, ungovernability is almost always accompanied by a failure to cooperate, which the Complaints Director expressly admits Dr. Wall did not fail to do.

Dr. Wall Is Not a Serial Offender on the *Jinnah* Standard

39. Neither a discipline history with the College, nor a series of acts contributing to one disciplinary event, is in and of itself sufficient to ground a finding that a member is a "serial offender" on the *Jinnah* standard.

40. Dr. Jinnah had a discipline history, of which the Court of Appeal was aware at the time it rendered its decision, and which the Court of Appeal references in its decision when stating that she was not a serial offender:

> The College's website lists three decisions involving Dr. Jinnah: the matter before this court…in which the hearing tribunal found unprofessional conduct on November 10, 2020; the decision…in which the hearing tribunal found unprofessional conduct on December 17, 2021…and

> one…for which a decision is pending following an appeal to the council, for which no file is linked or date provided.[18]

41. A recent case that considered *Jinnah*, the case of *Kelley*,[19] disposed of the *Jinnah* factor of "serial offender", finding that even though Ms. Kelley committed multiple serious breaches of the *Real Estate Act* over a period of time, she was not a serial offender: "This Panel can quickly dispense with the factors of a serial offender, failure to cooperate or engaging in hearing misconduct. As can be seen from this decision, the Licensee has not engaged in any of those behaviours".[20]

42. Ms. Kelley's "serious" but not "serial" offences touched sections 41(c), 41(d), 41(g), 42(b), 43(3) and 57(a) of the *Real Estate Act* Rules and included the following activities:

- Knowingly providing an unlicensed third party with a blank listing agreement, Consumer Relationship Guide, and verification of identity forms and allowing the unlicensed person to explain and sign those forms with clients;
- Signing as witness on the listing agreement and filling in details on the blank agreement after receiving partially signed copies of it from the unlicensed party and not having actually witnessed the signatures herself;
- Failing to meet with, verify the identities of, or speak directly to the clients;
- Allowing the unlicensed party to use her to list the property on MLS and listing the property without measuring it nor having direct conversations with the client about the property;
- Allowing for the unlicensed third party to commit fraud by lying to the client and inducing her to believe the house sold for $455,000 when it actually sold for $529,000, the difference of which he stole;
- Failing to directly explain her role and the services she would provide to the clients directly;

[18] *Jinnah* at note 225.
[19] *Kelley (Re)*, 2023 ABRECA 12 (CanLII) [*Kelley*].
[20] *Kelley* at section C.

- Failing to perform the services she agreed to perform on behalf of her brokerage in the listing agreement, by declining to set up viewings because the tenants required one-day notice;

- Allowing the unlicensed third party to do showings;

- Entering old unverified information on the MLS listing on behalf of her clients;

- Allowing her clients to be advised and directed in the sale of their property by an unlicensed third party who was not their agent and did not owe them any fiduciary duties, leaving them vulnerable to fraud and liability;

- Allowing an unlicensed third party to negotiate with her clients without being present or representing them in the negotiation;

- Allowing the unlicensed third party to lie to her clients and induce them to enter into a sale contrary to their best interests;

- Failing to disclose to two clients how she would be paid for her services;

- Filling in the commission portion of the listing agreement after the clients had signed it in blank form;

- Withholding a true copy of the signed listing agreement from one of her clients;

- Failing to use her best efforts to market her client's property and failing to promote the interest of her seller clients;

- Failing to provide a comparative market analysis or comparable listings to her clients to ensure that the listing price was reasonable or in their best interests;

- Using the listing price from the previous MLS listing without taking steps to ensure that the price was reasonable;

- Using information and photos from an old listing for the property without the consent of the previous listing brokerage.[21]

43. Applying *Jinnah*, the tribunal in the *Kelley* matter found that Ms. Kelley's unprofessional conduct was "serious", as she was guilty both of participating in fraud and of executing

[21] *Kelley* at sections C-D, F-H.

actual real estate services in a manner well below the standard of care. The tribunal did not find, however, that her unprofessional conduct was "serial".

44. In other words, neither having a discipline record, as was the case in *Jinnah*, nor performing numerous acts of serious unprofessional conduct over a period of time, as was the case in *Kelley*, were found to constitute "serial offending" within the meaning of the Court of Appeal judgment in *Jinnah*. Accordingly, Dr. Wall is not a "serial offender" as contemplated by the Court of Appeal in *Jinnah*.

45. If a discipline record is not in and of itself sufficient to trigger the serial offender exception, and if repeated conduct arising from the same single instance does not in and of itself qualify an offender as a "serial" offender, what *would* qualify an offender as a serial offender under the third *Jinnah* factor? Perhaps the answer lies in the *type* of unprofessional conduct in the contemporaneous discipline matter—as in the recent case of *Ralh*,[22] or in the type of conduct in the discipline record, or a combination of both—as in *Eraga*,[23] the most recent case applying the *Jinnah* factors.

Law Society of Alberta v Ralh* and *Law Society of Alberta v Ihensekhien-Eraga

46. The *Ralh* tribunal, characterizing the conduct of Mr. Ralh as "extremely serious", describes a series of premeditated and well-orchestrated steps which pushed his fraud over the line of isolated incident to sophisticated machination which struck at "the heart of the solicitor client relationship":

> 46 Mr. Ralh embarked upon an improper course of action to facilitate a forgery to the ultimate detriment of all of his clients. He involved staff members and staged the setting of the forgery to happen in his absence when he knew full well it had occurred. He continued to give effect to the forgery through multiple steps and sworn documents through the rest of the real estate transaction, including misleading his lender client. He continued his misconduct and compounded it by wrongly urging a victim of the fraud, the estranged wife, to reconcile with her fraudulent spouse and, further, he urged her not to report the crime to the police or the LSA in order for Mr. Ralh's misconduct to escape detection. Mr. Ralh eventually reported the matter to his insurer but withheld his misconduct from the LSA until there

[22] *Law Society of Alberta v Ralh*, 2023 ABLS 9 (CanLII) [*Ralh*].
[23] *Law Society of Alberta v Ihensekhien-Eraga*, 2023 ABLS 13 (CanLII) [*Eraga*].

> was no other realistic option but to report the fact of his criminal charges. Mr. Ralh's conduct was not only grossly unethical, it was a crime followed by extensive efforts to cover it up. On the scale of misconduct for lawyers, this conduct was **extremely serious**. While Mr. Ralh was not a "serial offender" prior to these events, in the sense that he had no prior discipline record, his conduct cannot reasonably be construed as an isolated incident. This was a series of acts of misconduct over an extended time. Mr. Ralh engaged in serious misconduct **going to the heart of the solicitor client relationship**; this kind of misconduct seriously undermines public confidence in the profession as a whole. [Emphasis added.]

47. The *Eraga* tribunal easily identified Ms. Eraga as a serial offender who had a pattern of unprofessional conduct, reproduced from the decision as follows:

> 2. On May 10, 2019 Ms. Eraga was found guilty of failing to be candid with the LSA on six occasions between November 16, 2017 and February 2, 2018, regarding a factum submitted in support of her application to abbreviate her articling term. As a result, Ms. Eraga's registration was ordered to be suspended for a period of 12 months, beginning June 25, 2019.
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> 3. On April 17, 2019 police responded to an incident at Ms. Eraga's home. On November 4, 2019 Ms. Eraga was charged with public mischief related to the April 17, 2019 incident.
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> 4. On January 14, 2020 Ms. Eraga submitted an application for reinstatement to the LSA following the suspension (Reinstatement Application). On review of the Reinstatement Application the LSA noted it was incomplete and potentially inaccurate, therefore requested additional information and clarification of Ms. Eraga. This led the LSA to investigate Ms. Eraga's conduct related to the April 17, 2019 incident and the public mischief charge. The investigation continued until October 25, 2021.
>
> 5. On March 25, 2020 criminal proceedings regarding the public mischief charge were stayed (filed in court April 6, 2020). On September 22, 2020 Ms. Eraga reported her criminal charge to the LSA.
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> 6. A hearing into the conduct of Ms. Eraga took place from August 29 to September 2, 2022 (Merits Hearing), and for the reasons set out in its decision dated December 23, 2022 (Merits Decision), this Hearing Committee (Committee) found Ms. Eraga guilty of conduct deserving of sanction in relation to the following five citations:
>
> > 1) It is alleged that Ivie Ihensekhien-Eraga failed to report or disclose to the Law Society her criminal charge and that such conduct is deserving of sanction;

> 2) It is alleged that Ivie Ihensekhien-Eraga created a false eyewitness statement and provided such false statement to the police in the course of a criminal investigation and that such conduct is deserving of sanction;
>
> 3) It is alleged that Ivie Ihensekhien-Eraga provided false photo evidence in response to a Law Society investigation and that such conduct is deserving of sanction;
>
> 4) It is alleged that Ivie Ihensekhien-Eraga failed to be candid with the Law Society and that such conduct is deserving of sanction; and
>
> 5) It is alleged that Ivie Ihensekhien-Eraga breached an undertaking to the Law Society to preserve electronic data on her cell phone and that such conduct is deserving of sanction.

48. Ms. Eraga had been "previously disciplined, for similar misconduct": "Ms. Eraga's disciplinary record displays a pattern of misconduct…**repetitive instances**".[24]

49. The decision makers in both *Ralh* and *Eraga* further factored in what the public and the profession would reasonably expect in terms of where the costs burden should lie: "We find that both the public and the profession would and should reasonably expect that Mr. Ralh, and not the profession as a whole, bear the burden of the costs of these proceedings for this very serious misconduct";[25] and "The public and the profession would reasonably expect that Ms. Eraga bear the burden of the costs of these proceedings for this very serious misconduct".[26]

50. Indeed, it would be difficult to find a member of the public or the profession who would disagree the offending members in the preceding cases should bear the burden of the costs of the proceedings against them. Similarly, members of the public and the profession would be few and far between who would opine that molesting patients, defrauding real estate clients, defrauding insurers, performing professional activities while suspended or committing malpractice in the performance of medical procedures do

[24] *Eraga* at para 67. [Emphasis added.]
[25] *Ralh* at para 47.
[26] *Eraga* at para 83.

not invite a costs judgment against the perpetrator. The same cannot be said of Dr. Wall's conduct, as discussed above.

51. In any event, the Complaints Director's own admissions in her submissions reveal a member attempting to comply with the College, not a serial offender: Dr. Wall has no discipline record,[27] Dr. Wall tried to comply with the Pandemic Directive by wearing a mask until he discovered he was unable,[28] the basis of the proceedings against Dr. Wall was a complaint to AHS untethered to his practice of chiropractic procedures,[29] Dr. Wall provided independent medical evidence of his disability at the College's request,[30] Dr. Wall submitted a religious exemption request at the College's request,[31] the College was required to effectively accommodate Dr. Wall by Dr. David Linford,[32] there is no evidence Dr. Wall failed to comply with the section 65 conditions placed on his continued practice,[33] Dr. Wall complied with the CMOH's orders for reopening his clinic,[34] and Dr. Wall installed the required Plexiglas barrier.[35]

Dr. Wall Did Not Engage in "Hearing Misconduct"

52. The fourth and final *Jinnah* factor inquires into whether the member engaged in hearing misconduct, which the court defines as "behavior that **unnecessarily** prolongs the hearing or otherwise results in increased costs of prosecution that are **not justifiable**".[36]

53. The Complaints Director interprets the concepts of "unnecessary" and "unjustifiable" differently than the Court of Appeal, arguing that costs associated with Dr. Wall's robust defence were unnecessary and unjustifiable. This departs significantly from what the Court contemplates as "hearing misconduct", citing as its example a doctor who "commenced 14 pre-hearing applications for various kinds of relief"; consumed "47

[27] CDS at para 35.
[28] CDS at para 29.
[29] CDS at para 29.
[30] CDS at para 29.
[31] CDS at para 29.
[32] CDS at para 29.
[33] CDS at para 40.
[34] CDS at para 39.
[35] CDS at para 1.
[36] *Jinnah* at para 144.

days" for the hearing; "called 50 witnesses"; and "generated 10,039 pages of transcript".[37]

54. The Complaints Director admits that Dr. Wall had "the advice of experienced legal counsel"[38]—presumably an acknowledgement that the calibre of counsel employed by Dr. Wall was in no particular way inferior to the quality of the Complaints Director's legal counsel. The cost of Dr. Wall's defence was approximately $85,000, including disbursements, and having called four expert witnesses and five fact witnesses. The Complaints Director claims costs of over $525,000, having called one expert witness and two fact witnesses. The Complaints Director chose to spend over a half million dollars to prosecute a chiropractor with no discipline history over one isolated complaint to a third party unrelated to patient care. The implication of foisting such excessive costs onto the member is that the "playing field" referred to by the Court of Appeal in *Jinnah* is no longer level.[39]

55. Each of Dr. Wall's four expert witnesses provided relevant and substantive contributions, and the fact the Tribunal "preferred" the evidence of the Complaints Director's expert witness in no way renders the evidence of Dr. Wall's expert witnesses irrelevant, unreasonable or excessive, as the tribunal tacitly admits: "[W]e do not dispute that there are differences of opinion amongst the experts as to the nature of the spread of the virus and the effectiveness of masks in controlling that speed [*sic*]".[40]

56. The notion that Dr. Wall ought to have mounted a lacklustre defence while the Complaints Director spent a half million dollars attempting to bury him plainly contradicts the *Jinnah* court's explicit statements on the subject, and misses the point.

57. The *Jinnah* court makes clear the professional should not be discouraged from mounting a robust defence when he has not run afoul of the "factors":

> He or she will not be pressured unduly to plead guilty to avoid the prospect of a burdensome costs order. A prospective costs sanction should not be the

[37] *Jinnah* at note 200.
[38] CDS at para 72.
[39] *Jinnah* at para 149.
[40] CDS at para 29.

> primary reason why a [professional] decides to plead guilty to a charge of unprofessional conduct. A [professional's] right to provide a full answer and defence should not be undermined by a potential large costs order. "The disciplinary system should not include a cost regime that precludes professionals raising a legitimate defence".[41]

58. The *Jinnah* court opines that more people are engaging in unprofessional conduct than are ever caught and the Complaints Director as much as admits the randomness of enforcement in her submissions: "The **only reason** the College became aware that Dr. Wall was not following the Pandemic Directive was a result of a patient complaining to AHS, who then contacted the College".[42] The presumption that the profession shares in the cost of prosecuting these rather randomly-selected offenders is the price to pay for the benefit of self-regulation.[43] In other words, paying a small portion to learn from someone else's mistake is a trade-off, and in the Court of Appeal's view, a fair price.

59. The Complaints Director offers a diluted version of what the *Jinnah* court is actually communicating in its decision *vis-à-vis* the onus on the "profession as a whole" to "bear the costs in most cases of unprofessional conduct".[44] In reality, the Court could not make any more plain that it means to protect professionals from overzealous regulators, stating the following:

> - [I]t will improve the position of a [professional] charged with an act that is not **serious** unprofessional conduct. A [professional] will know in advance what the costs consequences of an unsuccessful defence are very likely to be. He or she will not be pressured unduly to plead guilty to avoid the prospect of a burdensome costs order. A prospective costs sanction should not be the primary reason why a [professional] decides to plead guilty to a charge of unprofessional conduct. A [professional's] right to provide a full answer and defence should not be undermined by a potential large costs order. "The disciplinary system should not include a cost regime that precludes professionals raising a legitimate defence";[45]
>
> - [T]he presumption will mean that most [professionals] found guilty of unprofessional conduct will not be subject to a costs order. This, in effect,

[41] *Jinnah* at para 148.
[42] CDS at para 29. [Emphasis added.]
[43] *Jinnah* at paras 150, 134-37.
[44] *Jinnah* at para 145.
[45] *Jinnah* at para 148. [Emphasis added.]

> levels the playing field. **The governing legislation does not allow either the hearing tribunal or the appeal panel to order the College to pay costs to a [professional] who successfully defends a complaint. This one-sided norm is of questionable merit.**[46]

60. The Court expands on the justification for distributing the costs of enforcement across the membership since the likelihood that for every professional who is caught, other professionals involved in the same conduct escape the detection of the regulator (*supra*) thus:

> Whether or not a particular professional body has a zero-tolerance policy for any type of misconduct, the fact remains that only some cases will be subject to discipline proceedings. The situation is akin to the reality that only a small portion of traffic violations come to the attention of traffic law enforcement officers and that not all of these will be prosecuted. With this in mind, it is important to ask whether the imposition of the burden of the costs of enforcement on specific offenders who **happen to be prosecuted** is fair.[47]

61. The Court presents several more ideas around who benefits and how from sharing in the expenses of member misdeeds—in short, everyone **but** the guilty member:

- A regulator's decision adjudging a member to have committed unprofessional conduct communicates an unequivocal message to the public that the regulator protects the public's interest. This, in turn, increases the public's belief that the utilisation of professional services will protect their health and best interests. **This positive evaluation of the profession probably increases the public's utilization rate of [professional] services. Arguably, the professional found to have committed misconduct does not receive a benefit from this determination.**[48]

- The imposition of all or a significant percentage of the costs of self-regulation on the profession as a whole is fair because all members benefit from self-regulation. These **advantages include the profession's ability to limit competition by restricting who may enter the profession and implementing other anti-competitive measures** such as fee schedules

[46] *Jinnah* at para 149. [Emphasis added.]
[47] *Jinnah* at para 150. [Emphasis added.]
[48] *Jinnah* at para 134. [Emphasis added.]

and restrictions on advertising. These measures **increase the income and status** of the profession's members.[49]

- Most regulated members of a profession are **likely to benefit, in some way, from the public review of the conduct of members.** Some professionals may not appreciate that a specific behavior is inappropriate. They may never have turned their minds to it or, if they had, failed to appreciate the problems associated with the behavior. A decision of a hearing tribunal or an appeal panel may **remind a segment of the [professional] population of the high standards to which [professionals] must adhere. It may reinforce in the minds of regulated professionals the very existence of boundaries** that a member may not cross.[50]

The Law Post-*Jinnah*

62. Six decision makers have applied *Jinnah* in six cases in recent months: *Chaudhri*,[51] *Singh*,[52] *Beaver*,[53] *Kelley, Ralh* and *Eraga*.

63. Mr. Chaudhri satisfied three of the four *Jinnah* factors, having committed fraud, refused continued cooperation with law society investigators, and brought meritless applications which protracted his hearing. Mr. Singh was a serial perpetrator of fraud who likewise failed to cooperate with law society investigators and protracted his hearing, satisfying all four criteria. Mr. Beaver misappropriated trust funds, which the decision maker found equivalent to the *Jinnah* factor of fraud. Ms. Kelley engaged in prohibited activities enumerated in the *Real Estate Act*, including participation in fraud and failure to uphold fiduciary obligations **which caused substantial loss to her client** and which constituted marked departures from acceptable practice of her professional **realtor** duties, *supra*. Mr. Ralh committed forgery and fraud, then made **extensive** attempts to conceal his **crimes** from his law society, *supra*. Ms. Eraga was a serial offender with a discipline record who

[49] *Jinnah* at para 136. [Emphasis added.]
[50] *Jinnah* at para 137. [Emphasis added.]
[51] *Chaudhri (Re)*, 2023 ABRECA 1 (CanLII) [*Chaudhri*].
[52] *Singh (Re)*, 2023 ABRECA 10 (CanLII) [*Singh*].
[53] *Law Society of Alberta v Beaver*, 2023 ABLS 4 (CanLII) [*Beaver*].

committed forgery, including a false witness statement and false photo evidence, before failing to cooperate with law society investigators, *supra*.

64. Dr. Wall's case simply does not engage the *Jinnah* factors as the preceding distinguished cases do.

Serious Unprofessional Conduct Under the *Health Professions Act*

65. Apart from the preceding professional conduct cases that have applied *Jinnah*, Dr. Wall's case does not engage "seriousness" in the sense that term has routinely been used by the Alberta **health professions** tribunals: *Postnikoff, Re*[54] (sexual boundary violations); *Bhardwaj, Re*[55] (sexual boundary violations); *Ahmad, Re*[56] (sexual boundary violations); *Garbutt, Re*[57] (sexual boundary violations); *Kriel, Re*[58] (malpractice); *Imtiaz, Re*[59] (sexual boundary violations and fraudulent insurance claims); *Taylor, Re*[60] (sexual boundary violations); *Goswami, Re*[61] (sexual boundary violations); *Maritz, Re*[62] (sexual boundary violations); *Hudson, Re*[63] (sexual boundary violations); *Alcaraz-Limcangco, Re*[64] (failure to cooperate); *Iyer, Re*[65] (malpractice); *Odugbemi, Re*[66] (malpractice); *Adebayo, Re*[67] (medically-unsupported Botox administration, variety of **medical** billing practice concerns and inadequate **medical** treatment records); *Lycka, Re*[68] (failure to obtain informed consent for **medical** procedure); *Mausolf, Re*[69] (failure to cooperate).

66. Relegating a competent practitioner to the ranks of patient molesters, fraudsters and malpractitioners is not what the *Jinnah* court had in mind. Even factoring in that a) the

[54] 2021 CarswellAlta 2022, [2021] A.W.L.D. 3345, [2021] A.W.L.D. 3346.
[55] 2019 CarswellAlta 1465, [2019] A.W.L.D. 2925, [2019] A.W.L.D. 2926.
[56] 2021 CarswellAlta 1239, [2021] A.W.L.D. 2041, [2021] A.W.L.D. 2042.
[57] 2020 CarswellAlta 1538, [2020] A.W.L.D. 2813, [2020] A.W.L.D. 2814.
[58] 2020 CarswellAlta 2020, [2020] A.W.L.D. 3362, [2020] A.W.L.D. 3363, [2020] A.W.L.D. 3364.
[59] 2020 CarswellAlta 1808, [2020] A.W.L.D. 3119, [2020] A.W.L.D. 3124, [2020] A.W.L.D. 3129.
[60] 2021 CarswellAlta 3361, [2022] A.W.L.D. 450, [2022] A.W.L.D. 451.
[61] 2022 CarswellAlta 3289, [2022] A.W.L.D. 4648, [2022] A.W.L.D. 4650.
[62] 2018 CarswellAlta 2318, [2018] A.W.L.D. 4568, [2018] A.W.L.D. 4570.
[63] 2023 CarswellAlta 124, [2023] A.W.L.D. 457.
[64] 2022 CarswellAlta 524, [2022] A.W.L.D. 1006.
[65] 2021 CarswellAlta 2594, [2021] A.W.L.D. 4318, [2021] A.W.L.D. 4319, [2021] A.W.L.D. 4320.
[66] 2019 CarswellAlta 946, [2019] A.W.L.D. 1980, [2019] A.W.L.D. 1982, [2019] A.W.L.D. 1986.
[67] 2022 CarswellAlta 3780, [2023] A.W.L.D. 454, [2023] A.W.L.D. 456.
[68] 2020 CarswellAlta 2766, [2022] A.W.L.D. 3808.
[69] 2018 CarswellAlta 3380, [2020] A.W.L.D. 3200, [2020] A.W.L.D. 3201, [2020] A.W.L.D. 3203.

primary goal of the College is to protect the public,[70] b) the complaint process is crucial to protecting the public,[71] c) Dr. Jinnah obstructed the complaint process,[72] d) obstructing the complaint process harms the integrity of the profession,[73] and e) harming the integrity of the profession is tied to harming the public,[74]—going so far as to **analogize to the *Criminal Code* offence of obstruction**[75]—the Court still said Dr. Jinnah's unprofessional conduct was **not serious**.

67. This is also the case with Dr. Wall. He does not fit the "factors". He did not perform a chiropractic treatment below standard; he did not molest a patient; he did not defraud anyone; he did not practice while suspended. The overzealously layered charges the College made against him are more accurately characterized as "incidental" than "serial". He cooperated with the investigation. He did not engage in hearing misconduct. The Court of Appeal says his conduct is not "serious".

The College Is Not Entitled to Recover When It Acts Unreasonably

68. The former Complaints Director could have and should have resolved this case instead of recklessly proceeding to a hearing he knew would be highly contested and therefore very costly. The Complaints Director had already secured the safety of patients, if it was ever in jeopardy, by way of the practice conditions imposed by Dr. Linford on December 18, 2020.[76] Everything after that, the 2.5 years and counting of persecuting Dr. Wall and the $525,000, among other things, achieved nothing except perhaps political points. The Complaints Director was required but failed to "ascertain whether perceived shortcomings in the professional are serious enough to justify the expense of disciplinary proceedings".[77]

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[70] *Jinnah* at para 115.
[71] *Jinnah* at para 115.
[72] *Jinnah* at para 109-114.
[73] *Jinnah* at para 114.
[74] *Jinnah* at para 115.
[75] *Jinnah* at para 116.
[76] On December 18, 2020, Dr. David Linford denied the former Complaints Director's application for an interim suspension of Dr. Wall's practice permit and imposed a series of conditions that Dr. Wall complied with for the next 2.5 years they were in place.
[77] *Dr. Ignacio Tan III v Alberta Veterinary Medical Association*, 2022 ABCA 221 [*Tan III*] at para 44.

69. Even now, the Complaints Director could have elected to resolve the case instead of continuing to waste College resources. Such unreasonable, overzealous enforcement, bordering on abuse of power, must not be condoned with even a small costs order.

70. As the Court of Appeal recently stated, the College should:

> [C]arefully evaluate the investigative and prosecutorial options that it has in a given case and select the course ***that makes the most sense***, keeping in mind that the members as a whole will often ultimately bear the costs incurred. The College will probably have little or no appetite for expenditures that it must absorb itself unless they provide ***a significant benefit*** to the overall administration of the discipline process.
> …
> We encourage the College's complaints director to continue to take an active role in resolving complaints as soon as they reach the College… Resolution of complaints at the earliest opportunity ***is in the interest of patients, [chiropractors], the College, and the public***. ***Not only does timely resolution minimize the College's costs and resources, but it leads to more satisfactory outcomes and minimizes the psychological burden on patients and [chiropractors]. This is also in the public interest.***[78]

71. The Complaints Director is not entitled to costs that should not and would not have been spent had her predecessor acted reasonably. The Tribunal must not condone such unreasonable behaviour by awarding costs in favour of the Complaints Director. The College should not be able to avoid scrutiny from a profession rightly upset its dues were so wantonly spent by collecting from Dr. Wall.

72. Further, the College could have and should have spent significantly less on legal fees for the Tribunal. In a reckless disregard for the dues paid to the College by chiropractors, the College hired a lawyer to act as independent legal counsel to the Tribunal who charged between $685/hr and $785/hr, which is far above market rate.[79] In contrast, Dr. Wall's counsel charged him between $150/hr and $250/hr.[80] The public and the profession expects the College to hire reasonably priced lawyers, not the most expensive lawyers

[78] *Jinnah* at paras 147, 153. [Emphasis added.]
[79] Statement of Costs, CDS, Appendix A.
[80] Statement of Costs of Dr. Wall, Appendix A.

they can find as if they were a private, for-profit business taking a spare-no-expense approach to litigation.

73. The unreasonably high amount spent on the lawyer for the Tribunal **($252,080.49** in total, including anticipated amounts for the penalty hearing) is made all the worse by the fact this lawyer charged **157.2 hours** to assist the Tribunal in drafting a Findings Decision that did not even include citations to the evidentiary record. Again, in contrast, Dr. Wall's lawyer charged **64.3 hours** to prepare oral closing argument and 50 pages of written submissions which contained dozens of citations to the record.[81] Dr. Wall should not be responsible for the College being overbilled by its lawyer.[82]

74. As the Court of Appeal observed in *Jinnah,* "[m]ost people tend to be better stewards of their own money than that of others".[83] Elsewhere the Court of Appeal recently stated:

> Leaving some of the burden of the costs of disciplinary proceedings on the professional regulator helps to ensure that discipline proceedings are commenced, investigated, and conducted in a proportional manner, with due regard to the expenses being incurred…**Leaving residual costs on the regulator also serves to moderate the expenses incurred in investigating and prosecuting a complaint**.[84]

Conclusion on Costs

75. *Jinnah* is binding law on this Tribunal and is the controlling case regarding costs in professional discipline proceedings. This case does not fall within any of the exceptions to the rule laid down in *Jinnah* that disciplined professionals pay ***no costs***, even when all their defences fail. In fact, the type of situation created by the Complaints Director's unreasonable decision to first, prosecute this case instead of resolving it, and second, to spend over half a million dollars on it, is precisely the type of situation *Jinnah* is designed to address and prevent. No costs should be awarded against Dr. Wall.

[81] Statement of Costs of Dr. Wall, Appendix A.
[82] *Jinnah* at para 149.
[83] *Jinnah* at note 201. [Emphasis added.]
[84] *Tan III* at paras 43-44.

APPENDIX “A”

JSMK LAW

James S.M. Kitchen | Barrister and Solicitor

STATEMENT OF COSTS

Dr. Curtis Wall and College of Chiropractors of Alberta

December 4, 2020 to May 31, 2023			
Fees			
	Hours	**Rate**	**Amount**
	0.4	125.00	50.00
	21.7	150.00	3,255.00
	118.4	200.00	23,680.00
Oral and written closing submissions	64.3	200.00	12,860.00
	149.8	225.00	33,705.00
	14.4	250.00	3,600.00
	369.0		
	Total Fees		**77,150.00**
Expenses			
	Transcripts		3,028.73
	Other		5,170.16
	Total Expenses		**8,198.89**
Total			**85,348.89**

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