

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. ALLAN GARBUTT, A REGULATED MEMBER OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ALBERTA

**DECISION OF THE HEARING TRIBUNAL OF
THE COLLEGE OF PHYSICIANS
& SURGEONS OF ALBERTA**

I. INTRODUCTION

1. The Hearing Tribunal held a hearing into the conduct of Dr. Allan Garbutt, a regulated member of the College of Physicians and Surgeons of Alberta ("the College") on June 23, 2020. The hearing was held by videoconference.

2. In attendance at the hearing were:

Members of the Hearing Tribunal:

Dr. John Pasternak, Chair
Dr. Alasdair Drummond, member
Ms. June McGregor, public member

Also in attendance were:

Ms. Julie Gagnon, independent legal counsel for the Hearing Tribunal
Mr. Taylor Thiesen, student-at-law

Mr. Craig Boyer, legal counsel for the Complaints Director
Mr. Raymond Chen, student-at-law

Dr. Allan Garbutt, investigated person
Mr. Phil Nykyforuk, legal counsel for Dr. Garbutt
Ms. Shayla Stein, associate lawyer

Members of the public and media were also in attendance.

II. PRELIMINARY MATTERS

3. There were no objections to the composition of the Hearing Tribunal or its jurisdiction to proceed with the hearing.
4. The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 (the "HPA").
5. The hearing proceeded by way of an agreed statement of facts and admission of unprofessional conduct.

III. ALLEGATIONS

6. The Notice of Hearing listed the following allegations:
 1. Between August 2002 and April 2004 you did have an inappropriate sexual relationship with your patient, [the Complainant];
 2. Since August 2002 you have failed to report your sexual boundary violation with your patient, [the Complainant], to the College of Physicians and

Surgeons of Alberta (the "College") and since 2010 you have reported to the College on your annual renewal information form that you had not engaged in a sexual or inappropriate relationship with a patient when you knew that such answer was false.

IV. EVIDENCE

7. The following documents were entered as evidence during the hearing:

Exhibit 1 – Exhibit Book containing:

- Tab 1 Notice of Hearing, dated May 1, 2020
- Tab 2 Complaint Form from the Complainant dated October 9, 2018
- Tab 3 Undertaking by Dr. Garbutt dated November 30, 2018
- Tab 4 Letter of Response from Dr. Garbutt dated December 21, 2018 with patient records for the Complainant.
- Tab 5 Email from the Complainant to K. Ivans dated January 31, 2019
- Tab 6 Letter from P. Nykyforuk to K. Ivans dated February 4, 2019 with additional patient records
- Tab 7 Letter from P. Nykyforuk to K. Ivans dated February 28, 2019 re EMR and name of attending doctor
- Tab 8 Fax from Crowsnest Medical Clinic dated March 19, 2019 with patient Record of the Complainant
- Tab 9 Alberta Health Care billings by Dr. Garbutt for visits with the Complainant
- Tab 10 Memorandum by K. Ivans dated July 15, 2019 re interview of Dr. Garbutt
- Tab 11 Email from the Complainant to K. Ivans dated September 18, 2019
- Tab 12 Letter from Dr. Garbutt to K. Ivans dated September 27, 2019
- Tab 13 College of Physicians & Surgeons of Alberta Standard of Practice – Sexual Boundary Violations
- Tab 14 College of Physicians & Surgeons of Alberta Standard of Practice – Self-Reporting to the College
- Tab 15 Impact Statement from the Complainant – with contested portions identified

Exhibit 2 – Admission and Joint Submission Agreement

8. The Hearing Tribunal also received briefs of law on Impact Statements and Joint Submissions.

V. SUBMISSIONS

9. The Hearing Tribunal was provided with a written Admission and Joint Submission Agreement. The admissions include:
 - Between August 2002 and April 2004, Dr. Garbutt had an inappropriate relationship with his patient, the Complainant.
 - Since August 2002, he failed to report his sexual boundary violation to the College.
 - Since 2010 he reported to the College on his annual renewal information form that he had not engaged in a sexual or inappropriate personal relationship with a patient, when he knew this to be false.
 - The allegations in the Notice of Hearing are true and amount to unprofessional conduct.
10. Mr. Boyer noted that, under section 70 of the HPA, if there is an admission of unprofessional conduct, a Hearing Tribunal must still satisfy itself that there is enough evidence to support that admission.
11. Mr. Boyer then detailed some highlights of the Exhibit Book, including:
 - The Complainant submitted a description of the inappropriate sexual relationship that occurred between Dr. Garbutt and herself from 2002 to 2004.
 - The matter was brought to the College's attention in late 2018. Dr. Garbutt submitted a response acknowledging that the relationship occurred. There are some differences in recollection on some specific details, but these are not material to the essence of the allegation in the Notice of Hearing.
 - In late 2019, Dr. Garbutt informed the College that it was his intention not to renew his practice permit for 2020, and that he would be retiring.
12. Mr. Boyer proposed to the Hearing Tribunal that there was clear and concise evidence in the Exhibit Book to support the two allegations as being proven.
13. Mr. Nykyforuk submitted that Dr. Garbutt admitted both allegations set forth in the Notice of Hearing, and had admitted his conduct since the very initiation of the complaint.

VI. DECISION OF THE HEARING TRIBUNAL ON THE ALLEGATIONS

14. The Hearing Tribunal adjourned to review the evidence and consider the submissions of the parties. The Hearing Tribunal found that the allegations were proven and that Dr. Garbutt's conduct constitutes unprofessional conduct for the reasons set out below.
15. The Hearing Tribunal accepts the evidence in the Admission and Joint Submission Agreement (Exhibit 2), as supported by the documents in the Exhibit Book (Exhibit 1). The Hearing Tribunal notes that the improper sexual relationship between Dr. Garbutt and the Complainant lasted for years, and his failure to report and false reporting to the College continued for well over a decade. The conduct was only admitted after the Complainant's complaint was brought to the College's attention.
16. A regulated member of the College occupies a position of trust and responsibility in relation to his or her patients. An inherent power imbalance exists in the physician-patient relationship, carrying with it a special obligation for regulated members to maintain firm personal and sexual boundaries. Thus, the College's Standard of Practice: Sexual Boundary Violations (2010) specifically prohibits regulated members from initiating any form of sexual advance toward a patient, or responding sexually to a patient's advances.
17. Dr. Garbutt's failure to maintain this boundary is unacceptable conduct. Where, as here, a regulated member misuses the power inherent in the physician-patient relationship to subvert that relationship for personal sexual gratification, the patient frequently suffers lasting damage, the public loses the ability to trust in those entrusted with their most personal forms of care, and the integrity of the profession is harmed. For this reason, the avoidance of sexual relationships between physicians and their patients is critically important.
18. Further, Dr. Garbutt's failure to report the improper sexual relationship to the College from 2002-2010, and subsequent false reporting from 2010-2018 that he had not engaged in a sexual or inappropriate relationship with a patient, is also unacceptable. Where a regulated member makes a false report to the College or fails to report violations of professional duties, the College loses the ability to regulate its members, and thereby is unable to effectively protect the public. This conduct harms the integrity of the profession. Dr. Garbutt's conduct is a breach of the Standard of Practice: Sexual Boundary Violations and the Standard of Practice: Self-Reporting to the College (which came into effect in 2010).
19. Under section 1(1)(pp) of the HPA, contravention of standards of practice and conduct that harms the integrity of the profession are included in the definition of unprofessional conduct. The Hearing Tribunal finds that Dr. Garbutt's conduct is very serious and constitutes unprofessional conduct pursuant to section 1(1)(pp) of the HPA.

VII. SUBMISSIONS ON SANCTION

20. The Hearing Tribunal advised the parties during the hearing that it accepted the admissions by Dr. Garbutt and found that the conduct in the allegations was proven and constitutes unprofessional conduct. The Hearing Tribunal then heard submissions on sanction by the parties. Mr. Boyer and Mr. Nykyforuk presented a joint submission on sanction. They proposed that the following was appropriate:
 - a. Dr. Garbutt's unprofessional conduct would be worthy of a significant sanction had he not elected to retire and request cancellation of his registration effective December 31, 2019;
 - b. Dr. Garbutt shall be responsible for two-thirds of the costs of the investigation and the hearing before the Hearing Tribunal. The Complaints Director is agreeable to payment of the costs by 12 equal monthly instalments by post-dated cheques or pre-authorized payment beginning one month after the date the College notifies Dr. Garbutt in writing of the amount of costs to be paid and ending on the last day of the twelfth month after the date of the first instalment being due; and
 - c. Dr. Garbutt shall pay a fine in the amount of \$5,000.00. The fine is to be paid within 30 days after the date of the Hearing Tribunal's written decision is issued.
21. Due to the fact that the Complainant submitted an Impact Statement, the parties provided an agreed-upon Brief of Law on Impact Statements, as this concept is relatively new in the landscape of Alberta professional discipline.
22. Mr. Boyer noted that under the current s. 81.1 of the HPA, in cases where the Hearing Tribunal makes a finding of unprofessional conduct based on sexual abuse or sexual misconduct, the Hearing Tribunal must give the Complainant an opportunity to present an Impact Statement. Although the requirement did not apply in this case as the complaint was initiated before this provision came into effect, the College has nevertheless adopted a policy of asking Complainants if they wish to provide an Impact Statement in all such cases.
23. Although the Impact Statement before the Hearing Tribunal contained some disputed facts which were not admitted by Dr. Garbutt, as well as a suggestion by the Complainant about the sanction that should be imposed, Mr. Boyer noted that an Impact Statements is only meant to inform the Hearing Tribunal about the impact of the unprofessional conduct on the Complainant.
24. He went on to note that the disputed portions of the Impact Statement would not change the Complaints Director's position regarding the appropriate sanction, taking into account the 13 sentencing factors in *Jaswal v Medical Board (Newfoundland)* (1996), 138 Nfld & PEIR 181 (NL SC).

25. Mr. Boyer also provided a Brief of Law, containing excerpts of cases to support the proposition that where there is a joint submission, a decision-maker should only depart from the joint submission where the decision-maker finds that the proposed penalty is contrary to the public interest or would bring the administration of justice into disrepute. *R v Anthony-Cook*, 2016 SCC 43, confirms the principle that a joint submission should not be rejected unless it is manifestly unjust and it would be inappropriate to accept it.
26. Given that Dr. Garbutt has agreed to retire from practice permanently, Mr. Boyer did not ask for any further penalty beyond a \$5000 fine, and payment of two thirds of the hearing costs. He noted that fines are used to fund the College's program of counselling which is now offered to victims of sexual abuse and sexual misconduct by regulated members of the College.
27. Mr. Nykyforuk emphasized that Hearing Tribunals of the College have repeatedly followed *Anthony-Cook* when considering joint submissions, and that such submissions are to be encouraged, as they are in the public interest and help avoid lengthy and expensive hearings. In order for these joint submissions to be realistically possible, the parties must have a high degree of confidence that they will be accepted.
28. Mr. Nykyforuk also submitted that impact statements ought not to argue facts or provide recommendations as to the severity of the penalty, citing *R v Gabriel*, 1999 CanLII 15050 (ON SC). Rather, they should describe the impact of the wrongful conduct on the victim. Accordingly, certain statements in the Impact Statement before the Hearing Tribunal should not be considered in its decision on sanction.
29. He submitted that Dr. Garbutt had been entirely cooperative with the Complaints Director, resulting in avoidance of a lengthy hearing and need for the Complainant to testify. He added that Dr. Garbutt has not been the subject of any other boundary violations since 2004, and has had a long and otherwise distinguished career as a rural family physician.
30. Finally, Mr. Nykyforuk submitted that a \$5000 fine and responsibility for two thirds of the costs of this hearing were sufficient to promote both specific and general deterrence to other physicians in an effort to protect the public and maintain confidence in the integrity of the profession.

VIII. DECISION OF THE HEARING TRIBUNAL ON SANCTION

31. The Hearing Tribunal adjourned to consider the joint submission on sanction. The Hearing Tribunal accepts the joint submission on sanction for the reasons that follow.
32. The Hearing Tribunal considered the 13 sentencing factors in the *Jaswal* case. The Hearing Tribunal finds that Dr. Garbutt's conduct is very serious. Sexual boundary violations are among the most harmful to patients and most damaging to the integrity of the profession and the public trust the profession enjoys.
33. The Legislature has recognized this by enacting provisions requiring the automatic cancellation of a regulated member's practice permit and registration upon a finding of unprofessional conduct based on sexual abuse. Though these provisions do not apply to this case as they were not in effect at the time the complaint was made, they are nevertheless worth taking note of.
34. The Hearing Tribunal has considered the Complainant's Impact Statement and noted the negative impacts of the boundary violation on the Complainant, including a reduced ability to trust others and engage in healthy relationships, feelings of emptiness, and a need to seek counselling.
35. Had Dr. Garbutt not agreed to permanently withdraw from practice, the Hearing Tribunal would have considered imposing a lengthy suspension, giving consideration to the age difference and power differential between Dr. Garbutt and the Complainant, as well as the significant length of time that he failed to report, and later denied, this boundary violation to the College.
36. However, as Dr. Garbutt has permanently withdrawn from practice and given a written undertaking that he shall not apply for re-instatement, no suspension is possible. Following *Anthony-Cook*, the Hearing Tribunal finds that it is not manifestly unjust and inappropriate to accept the joint submission of the parties. The proposed sanction is reasonable and protects the public interest in the circumstances of this case.

IX. ORDERS OF THE HEARING TRIBUNAL

37. The Hearing Tribunal orders that:
 - a. Dr. Garbutt's unprofessional conduct would be worthy of a significant sanction had he not elected to retire and request cancellation of his registration effective December 31, 2019;
 - b. Dr. Garbutt shall be responsible for two-thirds of the costs of the investigation and the hearing before the Hearing Tribunal. The Complaints Director is agreeable to payment of the costs by 12 equal

monthly instalments by post-dated cheques or pre-authorized payment beginning one month after the date the College notifies Dr. Garbutt in writing of the amount of costs to be paid and ending on the last day of the twelfth month after the date of the first instalment being due;

- c. Dr. Garbutt shall pay a fine in the amount of \$5,000.00. The fine is to be paid within 30 days after the date of the Hearing Tribunal's written decision is issued.

Signed on behalf of the Hearing Tribunal by the Chair this 31st day of July, 2020.

A handwritten signature in black ink, appearing to read 'Pasternak', written over a horizontal line.

Dr. John Pasternak