

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
RSA 2000, c. H-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. BRADLEY STEWART

**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. Bradley Stewart on October 6-7, 2021. The members of the Hearing Tribunal were:

Dr. Vonda Bobart of St. Albert as Chair,

Dr. Don Yee of Edmonton,

Ms. Anita Warnick of Calgary (public member), and

Ms. Patricia Matusko of Beaumont (public member).

Ms. Mary Marshall acted as independent legal counsel for the Hearing Tribunal.

2. In attendance at the hearing was Mr. Craig Boyer, legal counsel for the Complaints Director of the College of Physicians & Surgeons of Alberta. Also present was Dr. Bradley Stewart and Mr. Tim Ryan, legal counsel for Dr. Stewart.

II. PRELIMINARY MATTERS

3. Neither party objected to the composition of the Hearing Tribunal or its jurisdiction to proceed with the hearing. There were no matters of a preliminary nature. There was no application to close the hearing. Counsel for the Complaints Director stated that the names of patients would not be referred to during the course of the hearing. There were no objections from counsel for Dr. Stewart, and this was agreed to by the Hearing Tribunal.

III. CHARGES

4. The Notice of Hearing listed the following allegations:

That on August 26, 2020 you did fail to comply with your March 24, 2016 Undertaking to the College of Physicians & Surgeons of Alberta by failing to have a chaperone present when seeing one or more of the following patients:

a. [Patient A];

b. [Patient B];

c. [Patient C];

IV. EVIDENCE

5. By agreement, the following Exhibits were entered into evidence during the hearing:

Exhibit 1: Exhibit Book Containing Tabs 1 to 9**Tab 1:** Notice of Hearing dated May 21, 2021**Tab 2:** Undertaking given by Dr. Stewart dated March 24, 2016**Tab 3:** Complaint Form by [Patient A] undated**Tab 4:** Letter of response by Dr. Stewart dated September 18, 2020**Tab 5:** Memo by K. Ivans regarding interview of [Volunteer A] on September 16, 2020**Tab 6:** Memo by K. Ivans regarding interview of [Patient A] on September 25, 2020**Tab 7:** Memo by K. Ivans regarding interview of [Patient B] on October 23, 2020**Tab 8:** Memo by K. Ivans regarding interview of [Patient C] on November 2, 2020**Tab 9:** Day Sheet for Dr. Stewart dated August 26, 2020**Exhibit 2:** No Contest and Joint Submission Agreement**Exhibit 3:** Joint Submission Agreement**Exhibit 4:** Sanction Exhibit Book**Tab 1:** Hearing Tribunal decision dated January 15, 2013**Tab 2:** September 19, 2020 Notice of Withdrawal from Practice**Tab 3:** January 19, 2021 Letter from J. West to Dr. Stewart re: conditions on practice**V. SUBMISSIONS****Counsel for the Complaints Director**

6. Counsel for the Complaints Director thanked counsel for the Investigated Member for his assistance in reaching an agreement in order to streamline the proceedings. The issue is failure to comply with an undertaking to have a chaperone present when seeing female patients as set out in Exhibit #1, Tab #1 (the "Allegations"). Exhibit #2 is a No Contest and Joint Submission Agreement. Essentially the Investigated Member takes no position on the Allegations or the evidence put before the Hearing Tribunal. The role of the Hearing Tribunal is very similar to the role when there is an admission pursuant to section 70 of the HPA. Pursuant to section 70, the Hearing Tribunal is still obligated to be satisfied that there is evidence to support the admission. When there is a No Contest and Joint Submission Agreement, the

Hearing Tribunal must be satisfied that the evidence put forward by the Complaints Director is sufficient to satisfy the proof of the allegations in the Notice of Hearing.

7. Counsel for the Complaints Director submitted that the following decision supports the use of the No Contest and Joint Submission Agreement:
 - *Decision of the Hearing Tribunal of the College of Physicians & Surgeons of Alberta dated September 20, 2020 in the Matter of a Hearing Regarding the Conduct of Dr. Barry Lycka*
8. Counsel for the Complaints Director reviewed the materials in Exhibit #1. He submitted that those materials provide ample evidence to support the Allegations. Pursuant to the No Contest and Joint Submission Agreement, the Investigated Member takes no position, takes no opposition to the evidence, and will make no comments about the evidence in Exhibit #1.
9. Counsel for the Complaints Director further submitted that failure to comply with an undertaking is conduct that harms the integrity of the profession in the sense that the public would lose confidence in the regulator's ability to regulate members of the profession through the use of an undertaking. As such, failure to comply with an undertaking constitutes unprofessional conduct pursuant to section 1(1)(pp)(xii) of the HPA.
10. The following three decisions support the argument that failure to comply with an undertaking constitutes unprofessional conduct:
 - *Ahmad (Re)*, 2021 CanLII 50719 (AB CPSDC)
 - *Collett (Re)*, 2010 CanLII 70013 (AB CPSDC)
 - *Dr. A08 (Re)*, 2008 CanLII 63408 (AB CPSDC)

Counsel for the Investigated Member

11. Counsel for the Investigated Member stated that he had no submissions on the Allegations in compliance with the No Contest and Joint Submission Agreement. He submitted that the role of the Hearing Tribunal when there is a no contest agreement is more similar to the situation when a member does not attend for a hearing. The College must prove any allegations on a balance of probabilities. Counsel for the Complaints Director has put in uncontested evidence, and the Hearing Tribunal is entitled to accept it as true.

VI. FINDINGS

12. The burden of proof in these proceedings is on the Complaints Director and the standard of proof is on a balance of probabilities. Based on the uncontested evidence before the Hearing Tribunal, the Hearing Tribunal determined that the Allegations were proven on a balance of probabilities.

13. The Hearing Tribunal found that the proven Allegations constituted unprofessional conduct under section 1(1)(pp)(xii) of the HPA as follows:

1(1) *In this Act,*

(pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable:

(xii) conduct that harms the integrity of the regulated profession;

14. The charge deals with breach of an undertaking dated March 24, 2016 ("2016 Undertaking"):

IN CONSIDERATION OF the College's duty to ensure the public safety and given the serious nature of these allegations, The College and Dr. Stewart agree to the following:

- 1. Dr. Stewart undertakes to have a chaperone present for all interviews and examinations of female patients until this matter is resolved.*
- 2. If the College receives a request for a Certificate of Professional Conduct or information concerning the status of the registration of Dr. Stewart with the College from any potential employer or another medical licensing authority, that the College will be at liberty to advise that person or entity that Dr. Stewart has a practice condition to use a chaperone for all sensitive examinations. ...*

15. The requirements in the 2016 Undertaking were clear. A chaperone must be present for all examinations of female patients. An undertaking between a physician member and the College of Physicians & Surgeons of Alberta is a serious matter. The College must be able to govern its members in order to protect the public. When a physician has signed an undertaking, the College must be able to rely on the physician to abide by the undertaking and regard it with the utmost seriousness.
16. Breach of an undertaking is conduct that is harmful to the integrity of the profession.

VII. ORDERS

17. The parties presented the Hearing Tribunal with a Joint Submission Agreement following the finding of unprofessional conduct that was marked during the hearing as Exhibit #3. The Hearing Tribunal heard submissions on the appropriate sanction.

Counsel for the Complaints Director

18. Counsel for the Complaints Director submitted that the principles of sanction are to achieve two results: specific and general deterrence, and rehabilitation or remediation.
19. The Investigated Member withdrew from practice following a complaint (Exhibit #4, Tab #2). The Investigated Member returned to practice in January 2021 and has been restricted to seeing only male patients. In effect, the Investigated Member was out of practice for four months.
20. Counsel for the Complaints Director submitted that the following decision supported a six-month suspension:
 - *Wachtler v. College of Physicians and Surgeons of Alberta*, 2012 ABCA 145
21. Dr. Wachtler had a previous discipline finding against him, and there were conditions on his practice. He did not comply with those restrictions and there was a finding of unprofessional conduct. The sanction was a six-month suspension. The Court of Appeal stated that a six-month suspension was not out of the range of appropriate sanctions.
22. Counsel for the Complaints Director submitted that the Joint Submission Agreement uses the term of six months but divides it between a period of active suspension, and gives credit for time already out of practice. The balance is being held in abeyance pending performance of the other proposed terms of the order.
23. There is also a more robust chaperone monitoring program. First, the chaperone has to be a regulated health professional with accountability to their regulator. If the chaperone is an unregulated individual and employed by the physician, then oversight or accountability may be lacking. Second, there has to be cross-referencing to billings. This will enhance the ability of the CPSA to monitor compliance. If the chaperone log and the billings don't match, the CPSA will be able to audit and investigate further.
24. Counsel for the Complaints Director submitted that the point of having an assessment done by a psychiatrist is to address three factors: what led to the conduct that is under consideration in this hearing; what is the risk of the conduct occurring again; and whether there are any recommended mitigation or rehabilitation steps that could be taken.
25. Counsel for the Complaints Director submitted that the proposed sanctions were appropriate to address the behaviour. The proposed sanctions will allow the Investigated Member to return to providing care to his full spectrum of patients, but with the proper oversight and a more robust chaperone program. The proposed sanctions do not contravene section 82(1.2) of the HPA, which stipulates that a Hearing Tribunal shall not make any order

directing the imposition of any gender-based conditions when there is a finding of sexual misconduct or sexual abuse. In this situation, there is a finding of non-compliance with an undertaking, and section 82(1.2) does not apply. The Hearing Tribunal will retain jurisdiction to determine any matter that arises out of the implementation or the terms of the sanction order, including the three months of suspension that are being held in abeyance.

26. In response to questions from the Hearings Tribunal regarding the requirement to pay one hundred per cent of the costs, counsel for the Complaints Director submitted six decisions where this was found to be appropriate:

- *Mowbrey (Re)*, 2020 CanLII 86677 (AB CPSDC)
- *Kriel (Re)*, 2020 CanLII 86673 (AB CPSDC)
- *Ng (Re)*, 2019 CanLII 94837 (AB CPSDC)
- *Barr (Re)*, 2019 CanLII 73594 (AB CPSDC)
- *Mausolf (Re)*, 2018 CanLII 119633 (AB CPSDC)
- *Watrich (Re)*, 2013 CanLII 14735 (AB CPSDC)

Counsel for the Investigated Member

27. Counsel for the Investigated Member submitted that the proposed sanctions achieve the right balance. The Investigated Member will be allowed to see all of his patient population, and the CPSA has mechanisms to protect the public. The Investigated Member has the ability to pay costs over twelve months, and that is an important factor.

28. In response to questions from the Hearing Tribunal, counsel for the Investigated Member submitted that the Investigated Member will start seeing female patients as soon as he can make arrangements for a chaperone. The assessment by a psychiatrist will not delay this. The Hearing Tribunal will not be involved automatically in the future, and will be reconvened if there is something in the sanction that needs to be reviewed or changed.

Order of the Hearing Tribunal

29. After hearing the sanction submissions of counsel for the Complaints Director and counsel for the Investigated Member, the Hearing Tribunal determined that the proposed sanction order was appropriate, was consistent with the factors in *Jaswal v. Newfoundland Medical Board*, (1996), 42 Admin L.R. (2d) 233, and consistent with previous College decisions dealing with breach of undertakings given to the College. The Hearing Tribunal was also mindful that joint submissions should not be interfered with lightly.

30. In *R. v. Anthony-Cook*, 2016 SCC 43 (S.C.C.), the Supreme Court of Canada set out the test against which to measure the acceptability of a joint submission. The bar is high to reject a joint submission on penalty. The Hearing Tribunal should accept a jointly proposed penalty, unless the proposed penalty would bring the administration of justice into disrepute or is otherwise contrary to the public interest. The Hearing Tribunal considered the jointly proposed penalty against that test, and after thorough deliberation, accepted the joint submission as appropriate.
31. The Hearing Tribunal was satisfied that the joint submission of sanctions was acceptable. The Tribunal is satisfied that these sanctions do protect the public, and reflect the interests of both the public and the remediation of the Investigated Member. In no way does the Hearing Tribunal find these agreed sanctions unfit, unjust, or unreasonable.
32. In reviewing the proposed sanction, the Hearing Tribunal considered the need to promote deterrence by imposing a penalty that reflects the seriousness of the unprofessional conduct. A six-month suspension with three months in abeyance is a severe sanction and a sign to both Albertans and the medical profession that similar behaviour will not be tolerated.
33. Counsel for the Complaints Director submitted previous decisions where the regulated member paid the full cost of the investigation and hearing. The Hearing Tribunal agreed that it was appropriate for Dr. Stewart to pay the full costs in these circumstances.
34. It is important that CPSA maintains the public's confidence in the integrity of the profession, and the College can only carry out its mandate to protect the public when it can effectively regulate its members. The part of the sanction where Dr. Stewart shall undergo, at his expense, an assessment in Alberta by a forensic psychiatrist to assess him and his current risk of re-offending, as well as recommendations for any risk mitigation strategies, will reassure the public that the College can protect the public and regulate its members.
35. Having the same Hearing Tribunal review matters will save time and costs and is a reasonable provision as this Hearing Tribunal will be knowledgeable about the charges and expectations for sanctions.
36. Accordingly, the Hearing Tribunal accepts the joint sanction proposal and makes the following orders:
 - a. Dr. Stewart's practice permit be suspended for a period of six months, of which three months shall be considered served by the period of time out of practice since September 19, 2020, and the remaining three months shall be held in abeyance pending performance of the terms of the sanction order of the Hearing Tribunal,
 - b. That Dr. Stewart shall, by January 7, 2022, or such later date acceptable to the Complaints Director, undergo, at his expense, an

assessment in Alberta by a forensic psychiatrist chosen and instructed by the Complaints Director to assess Dr. Stewart and his current risk of re-offending, as well as recommendations for any risk mitigation strategies.

- c. The assessment report from the psychiatrist shall be provided to the Hearing Tribunal for review and determination if the conditions outlined in paragraph (d) below should be revised or changed. That would be after hearing submissions from the parties.
- d. Subject to any changes ordered by the Hearing Tribunal under paragraph (c) above, Dr. Stewart shall be permitted to return to seeing/treating female patients on the conditions that Dr. Stewart;
 - i. shall have a chaperone, who has been approved in writing by the Complaints Director, present when attending with any female patient whether or not the patient's parent/adult guardian is also present.
 - ii. shall have the chaperone in attendance with any minor patient or dependent adult patient who has a female person accompany the patient during the visit with Dr. Stewart.
 - iii. shall ensure that the chaperone in attendance with each patient, whether seen in person, by phone or by online video meeting, shall:
 - 1. be a regulated health professional who has professional knowledge and understanding of the requirements of appropriate professional boundaries,
 - 2. be required to directly observe each patient encounter, including any physical examination undertaken by Dr. Stewart which involves touching or disrobing of the patient;
 - 3. be required to create and maintain a log for each patient encounter which shall be cross-referenced to billings submitted to Alberta Health.
 - iv. shall for any written electronic communication (e.g. email, text, other communication apps, social media) with a patient make that communication available to the chaperone for review that day or no later than the next business day and Dr. Stewart shall print or download a copy of the written communication and place it on the patient's office chart within 72 hours of the communication having been sent or received by Dr. Stewart.

- v. shall ensure that the chaperone shall report to the CPSA on a regular basis and as may be requested from time to time regarding the compliance with this practice condition and to provide a copy of the log required to be kept recording each patient encounter.
- vi. shall ensure that the clinic staff shall inform all female patients booking appointments and all physicians' offices referring female patients to Dr. Stewart for consultation that he is required to have a chaperone present during each patient encounter, and the requirements for inclusion of electronic communications in the medical record.
- vii. shall ensure a notice approved by the CPSA shall be placed in the patient care areas of Dr. Stewart's office including the reception and patient care rooms, and this notice shall be of a size not less than 8.5 inches x 11 inches and in the format/font as approved by the Complaints Director.
- e. If Dr. Stewart wishes to see or treat a patient outside of his office, he shall first obtain the written approval from the Complaints Director on terms consistent with the terms ordered by the Hearing Tribunal.
- f. Dr. Stewart shall be responsible for the costs of the investigation and hearing, which may be paid by monthly installments over a 12-month period following the date of statement of costs provided to Dr. Stewart by the Hearings Director.
- g. The Hearing Tribunal shall retain jurisdiction to determine any matter arising from the implementation or performance of the terms of the sanction order.

37. Signed on behalf of the Hearing Tribunal by the Chair:



Dr. Vonda Bobart

Dated this 1st day of November, 2021.