

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. DANIEL McKENNITT

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

INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Dr. Daniel McKennitt on August 16, 2018, pursuant to the provisions of the *Health Professions Act*, RSA 2000, c C-7 (the “HPA”). The members of the Hearing Tribunal were Dr. Alasdair Drummond of Stettler as Chair, Dr. Don Yee of Edmonton and Ms. Nancy Brook of Ryley (public member). Mr. Matt Woodley acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing was Mr. Craig Boyer, legal counsel for the Complaints Director of the College of Physicians & Surgeons of Alberta (the “CPSA”). Also present was Dr. Daniel McKennitt and Mr. Bruce Mellett, legal counsel for Dr. McKennitt.

There were no objections to the composition of the Hearing Tribunal or the jurisdiction of the Hearing Tribunal to proceed with a hearing.

CHARGES

The charges faced by Dr. McKennitt in the hearing were set out in the Notice of Hearing:

1. *You did violate the conditions on your practice imposed under your Continuing Care Agreement dated November 16, 2011, particulars of which include one or more of the following:*
 - a) *On November 24, 2015, you did prepare and present to a pharmacist at the Rexall Pharmacy at 11811 Jasper Avenue in Edmonton, a prescription for Adderall written in your name;*
 - b) *You did prescribe to Patient A on several occasions in 2015 and 2016 when he in a personal relationship with you.*
2. *You have deceived or attempted to deceive the College in the course of a complaint investigation, particulars of which include one or more of the following:*
 - a) *You were less than candid in your letter of response dated December 4, 2015;*
 - b) *You prepared a letter dated December 3, 2015 purporting to be from Patient B and containing information that you knew or ought to have known was not accurate.*
3. *You did violate the conditions on your practice imposed under your Continuing Care Agreement dated March 18, 2016, particulars of which include one or more of the following:*
 - a) *You prescribed Adderall and Clonazepam to Patient C on or about May 24, 2016 when you were not permitted to see patients outside of your postgraduate training program;*
 - b) *You prescribed Sublinox and Clonazepam to Patient D on or about March 22, 2106, Amoxicilin on or about March 26, 2016, Clonazepam on or about May 13, 2016, 2016 when you were not permitted to see patients outside of your postgraduate training program;*
 - c) *You prescribed Ativan and Zopliclone to Patient A on or about April 12, 2016, Ativan and Zopliclone on or about April 20, 2016 , Zopliclone, Ativan*

and Nicotine Transdermal Patch on or about May 17, 2016 and Sublinox and Tylenol #3 on or about June 17, 2016 when you were not permitted to see patients outside of your postgraduate training program.

4. *On May 24, 2016 you did represent to an Edmonton City Police officer, who was investigating a report of a forged prescription, that you had an agreement with Dr. William Han to use Dr. Han's prescription forms when you knew there was no agreement with Dr. Han for you to use his prescription form to prescribe medications.*
5. *You did use the prescription pad of Dr. William Han to prescribe medications to patients when you had no authority to do so independently and there was no doctor-patient relationship between Dr. Han and one or more of the following patients:*
 - a) *Patient C;*
 - b) *Patient D; and*
 - c) *Patient A;*
6. *In October 2015, you did inappropriately have a personal relationship with your patient, Patient B.*

Following confirmation of the charges set out in the Notice of Hearing, the Hearing Tribunal marked a collection of records collectively as Exhibit 1. Dr. McKennitt then acknowledged that the allegations set out in the Notice of Hearing were true, and that the records set out at Exhibit 1 contained true information, including with respect to the allegations and timelines. The Hearing Tribunal subsequently received a written Admission of Unprofessional Conduct pursuant to section 70 of the HPA.

I. PRELIMINARY MATTERS

As a preliminary matter, counsel for Dr. McKennitt applied pursuant to section 78(1)(a) of the HPA to hold the hearing in private. Specifically, Mr. Mellett submitted that the hearing should be held in private pursuant to section 78(1)(a)(iii), which permits the Hearing Tribunal to hear a matter in private where “not disclosing a person’s confidential personal, health, property or financial information outweighs the desirability of having the hearing open to the public”. In support of the application, Mr. Mellett pointed to the nature of the records contained in Exhibit 1, which include a significant number of records relating to the personal health and other sensitive information of patients of Dr. McKennitt and third parties. For example, the records contain text messages exchanged between Dr. McKennitt and a third party relating to intimate and sexual matters. Further, the records contain detailed information about records of prescription drugs taken by third parties over a period of several years. Mr. Mellett also submitted that there are similar records in relation to Dr. McKennitt, and that Dr. McKennitt’s status as a gay man of indigenous heritage complicates the matter further. Finally, he indicated that the ultimate decision of the Hearing Tribunal would be available to the public—in a redacted form—to enable members of the public to understand the nature of the decision.

In response, Mr. Boyer submitted that the Complaints Director supported the section 78(1)(a) application for the reasons articulated by Mr. Mellett.

The Hearing Tribunal adjourned the hearing to consider the matter, and indicated upon resumption of the hearing that the application to hold the hearing in private was granted, with reasons for its decision to follow. The Hearing Tribunal granted the application because it was satisfied upon a review of the records, that the risk of disclosing the private health and other personal information belonging to innocent third parties to the public created a significant risk of harm. While the Hearing Tribunal notes that the presumption under the HPA is that a hearing will be held in public, the circumstances in the case before it made it clear that the risks noted above outweighed the public interest in a public hearing. Further, the public will be in a position to review the decision of the Hearing Tribunal, to report on it, and to offer criticism of it without needing to have access to the exhibits, transcripts of proceedings, or identifying information of third parties.

The Hearing Tribunal also considered whether it was possible to avoid the risks noted above by closing only a part of the hearing. However, given the widespread nature of the intimate and personal health information contained in the records, and the need for legal counsel to refer to those facts in making their submissions to the Hearing Tribunal, a partial order would not sufficiently address the risks. Therefore, having due regard for the public interest in open hearings and the countervailing statutory direction to avoid risks arising from the disclosure of personal or health information, the Hearing Tribunal was satisfied that the balance favored the protection of innocent third parties. For those reasons, the Hearing Tribunal granted the application to hold the hearing in private.

EVIDENCE – EXHIBITS

Exhibit 1:

Tab 1	Notice of Hearing dated July 10, 2018
Tab 2	Member Practice Permit July 1, 2010 - June 30, 2015
Tab 3	Member Practice Permit July 14, 2014 to December 31, 2014
Tab 4	Member Practice Permit July 15, 2014 to December 31, 2015
Tab 5	Member Practice Permit July 25, 2016 to December 31, 2016
Tab 6	Continuing Care Agreement dated March 18, 2016
Tab 7	Continuing Care Agreement dated November 16, 2011
Tab 8	Dr. Susan Ulan letter dated June 1, 2016 to Dr. Michael Caffaro
Tab 9	Dr. Caffaro memo dated July 20, 2016 to Dr. Trevor Theman
Tab 10	Dr. Caffaro letter dated July 21, 2016 to Dr. Daniel McKennitt
Tab 11	Schulich Medicine & Dentistry letter dated September 26, 2016 to Dr. Michael Caffaro

Charge 1

Tab 12 Edmonton Police Service letter dated June 13, 2016 to Kristy Ivans enclosing case files 15-171444 and 16-076238

Charge 2

Tab 13 Patient B letter dated December 3, 2015 to Dr. Daniel McKennitt (created by Dr. McKennitt to deceive)

Tab 14 Dr. Daniel McKennitt letter dated December 4, 2015 to Katherine Jarvis

Tab 15 Dr. Daniel McKennitt letter dated March 11, 2016 to Katherine Jarvis

Charge 3

Tab 16 Undertaking of Dr. Daniel McKennitt dated March 18, 2016

Tab 17 United Health Centres letter dated May 26, 2016 to Sharon Barron

Tab 18 Rebecca Gaetz memo dated May 27, 2016 to Dr. Caffaro regarding conversation with Edmonton Police Service

Tab 19 Dr. Daniel McKennitt letter dated August 8, 2016 to Katherine Jarvis

Tab 20 Dr. Daniel McKennitt letter dated October 11, 2016 to Kristy Ivans

Tab 21 Dr. William Han letter dated February 22, 2017

Tab 22 Records from Safeway Pharmacy #8889

Tab 23 Records from Safeway Pharmacy #8889

Tab 24 Records from Shoppers Drug Mart Pharmacy #312

Tab 25 Records from Shoppers Drug Mart Pharmacy #365

Charge 4

Tab 26 Edmonton Police Service file C416076238 regarding incident on May 24, 2016

Charge 5

Tab 27 Billings by Dr. McKennitt regarding Patient A

Tab 28 Billings by Dr. McKennitt regarding Patient D

Tab 29 Billings by Dr. McKennitt regarding Patient C

Tab 30 Prescribing by Dr. McKennitt regarding Patient A

Tab 31 Prescribing by Dr. McKennitt regarding Patient D

Tab 32 Prescribing by Dr. McKennitt regarding Patient C

Charge 6

- Tab 33 Prescriptions between September 18, 2015 and October 24, 2015 for Patient B
- Tab 34 Dr. Daniel McKennitt letter dated October 23, 2015 Dominion Medical Centre regarding Patient B (image of letter)
- Tab 35 Alberta Health Services, Jennifer Minsos, email dated October 27, 2015 to James West
- Tab 36 Dr. Michael Caffaro memo dated October 29, 2015 to Dr. Daniel McKennitt
- Tab 37 Bruce Mellett letter dated December 10, 2015 to Katherine Jarvis
- Tab 38 Mr. TD email dated January 5, 2016 at 3:52 pm to Kristy Ivans with screen shots of Interac e-Transfers
- Tab 39 Mr. TD email dated January 5, 2016 at 4:33 pm to Kristy Ivans with screen shots of emails confirming bank deposits
- Tab 40 Mr. TD email dated January 5, 2016 at 4:25 pm to Kristy Ivans regarding Facebook message
- Tab 41 Bruce Mellett letter dated March 1, 2016 to Dr. Michael Caffaro
- Tab 42 Kristy Ivans memo to file dated March 11, 2016 regarding meeting with Patient B
- Tab 43 Kristy Ivans memo to file dated May 12, 2016 regarding meeting with Dr. Daniel McKennitt
- Tab 44 Dominion Medical Centres, Connie Russell, letter dated May 19, 2016 to Kristy Ivans
- Tab 45 Screen shots of text messages between Dr. Daniel McKennitt and Patient B
- Tab 46 Kristy Ivans letter dated June 23, 2017 to Heritage Rexall Pharmacy
- Exhibit 2 Agreed Statement of Facts
- Exhibit 3 Admission and Joint Submission Agreement
- Exhibit 4 Curriculum Vitae of Daniel W. McKennitt

EVIDENCE - SUBMISSIONS

The parties did not adduce oral evidence at the hearing, and asked the Hearing Tribunal to make the necessary findings based upon the agreed-upon records, including the Agreed Statement of Facts, which stated:

1. *At all material times, Dr. Daniel McKennitt has been a regulated member of the College of Physicians & Surgeons of Alberta.*
2. *Dr. McKennitt was served with the Notice of Hearing on July 10th, 2018.*

II. SUBMISSIONS

In his submissions, Mr. Boyer on behalf of the Complaints Director pointed to the overwhelming evidence before the Hearing Tribunal establishing that the allegations set out in the charges were proven. He reviewed the categories of documents set out in Exhibit 1 explaining how each of the sets of records established the allegations set out in the Notice of Hearing.

Dr. McKennitt, through legal counsel, agreed with the submission made by Mr. Boyer, indicating that the allegations were proven. Further, Dr. McKennitt directly acknowledged the factual accuracy of each of the charges in the Notice of Hearing, and confirmed that he did, in fact, engage in the conduct described therein.

III. FINDINGS

Charge 1

In relation to Charge 1, the Hearing Tribunal noted that Dr. McKennitt admitted that he failed to abide by the terms of the Continuing Care Agreement with the CPSA. In particular, the records demonstrate that on November 24, 2015, he presented a prescription for Adderall, which is inconsistent with the restriction in relation to prescribing set out in the Continuing Care Agreement. Further, the records demonstrate that Dr. McKennitt did prescribe medication to an individual who clearly falls into the “family or friends” category, which again violates the terms of the Continuing Care Agreement. The records therefore proven the facts set out in the allegations.

A continuing care agreement represents a positive covenant by a regulated member to abide by certain restrictions on his or her practice as part of an effort to return to active practice. The terms of those agreements are important for the successful reintegration of a regulated member into practice. Failing to abide by the terms of a continuing care agreement represents unprofessional conduct as set out in section 1(1)(pp) of the HPA.

Charge 2

In relation to Charge 2, the Hearing Tribunal has reviewed the contents of the initial letter from Dr. McKennitt to the CPSA on December 4, 2015 and the letter dated December 3, 2015 from Patient B. The Hearing Tribunal notes that the contents of Dr. McKennitt’s subsequent letter to the CPSA dated March 11, 2016 clearly supports a finding that Dr. McKennitt initially mislead the CPSA. Further, Dr. McKennitt has acknowledged that he prepared the letter apparently written by Patient B, which contained information that he knew or ought to have known was not accurate.

The Hearing Tribunal finds that this admitted conduct harms the integrity of the medical profession and is therefore unprofessional conduct under the HPA (s 1(1)(pp)(xii)).

Charge 3

The Hearing Tribunal also finds that Dr. McKennitt violated the conditions on his practice permit imposed under the March 18, 2016 Continuing Care Agreement. The records set out in Exhibit 1 clearly support a finding that various medications subject to that Agreement were prescribed at a time when Dr. McKennitt was not permitted to see patients outside of his postgraduate training program.

For the reasons set out above in relation to Charge 1, the Hearing Tribunal finds that these violations of the agreement are serious, and amount to unprofessional conduct pursuant to section 1(1)(pp) of the HPA.

Charge 4

The admitted conduct involves not only a misrepresentation by Dr. McKennitt to a law enforcement officer, but it includes a false allegation of an agreement with another regulated member. Such conduct is serious, falsely implicates another physician, and was intended by Dr. McKennitt to deceive and to cover up the fact that the record was a forgery. The admitted conduct also involves behavior which could have been subject to a prosecution and sanction under federal criminal laws.

The Hearing Tribunal concludes that this harms the integrity of the medical profession (s 1(1)(pp)(xii)) and represents evidence of a breach of another enactment that applies to the profession (s 1(1)(pp)(iii)), and is therefore unprofessional conduct.

Charge 5

Dr. McKennitt's acknowledgement that he used the prescription pad of another regulated member to prescribe medication to patients with no doctor-patient relationship constitutes conduct that harms the integrity of the medical profession (s 1(1)(pp)(xii)), is inconsistent with federal laws relating to controlled drugs and substances (s 1(1)(pp)(iii)) and is therefore unprofessional conduct.

Charge 6

Dr. McKennitt has admitted to having a personal relationship with a patient in October of 2015. The issue of Dr. McKennitt's intentional misleading of the CPSA in relation to the nature of the relationship was dealt with under Charge 2. The Hearing Tribunal concludes that this conduct represents a clear violation of the Standards of Practice regarding Sexual Boundary Violations in existence in October of 2015, and is therefore evidence of unprofessional conduct (s 1(1)(pp)(ii).

For those reasons, the Hearing Tribunal concludes that the allegations set out in the Notice of Hearing were proven, and that such conduct amounts to unprofessional conduct as defined in the sections of the HPA noted above.

IV. ORDERS / SANCTIONS

Following the acceptance of the admission of unprofessional conduct in relation to each of the charges set out in the Notice of Hearing, the parties presented to the Hearing Tribunal a proposed joint submission agreement, wherein the following sanction was proposed:

1. *Dr. McKennitt's practice permit should be suspended for a period of 24 months;*
2. *Dr. McKennitt should receive credit for the time he has been out of practice since the suspension of his practice permit on July 21, 2016.*
3. *Dr. McKennitt's practice permit should be subject to the following conditions:*
 - a. *No prescribing of any Triplicate Prescription Program monitored drugs, whether on Schedule 1 or Schedule 2, or tramadol products,*
 - b. *Practice only in a group setting approved by the College,*
 - c. *The other physicians and nurses in the group practice are to be informed of the decision of the Hearing Tribunal,*
 - d. *All patients are to be seen with a chaperone present, or parent or guardian in the case of a minor, and*
 - e. *Continued participation in and full cooperation with the College's Physician Health Monitoring Program until discharged from that program.*
4. *Costs of the investigation and hearing to be paid on terms acceptable to the Complaints Director over a period of 36 months following the date of the Hearing Tribunal decision.*

Mr. Boyer submitted that the proposed sanctions satisfy the objectives of general and specific deterrence on one hand, and the need for rehabilitation on the other hand. He stated that they are measured and appropriate sanctions, consistent with other comparable cases. Mr. Boyer referred the Hearing Tribunal to summaries of decisions from Alberta and British Columbia, and decisions from Ontario relating to boundary violations and prohibited prescription practices. He stated that but for the mitigating factors in this case, the Complaints Director could have sought revocation of Dr. McKennitt's license. Mr. Boyer pointed to the fact that Dr. McKennitt has been suffering from pre-existing medical issues that were subject to monitoring, and that relapses are unfortunately a part of addiction. He further stated that Mr. McKennitt, like the physician in *Jaswal v. Medical Board (Newfoundland)* (1996), 42 Admin L.R. (2) 233, was relatively young, which is a mitigating factor in determining an appropriate sanction. He also pointed to the fact that Dr. McKennitt's sexual orientation may not be supported in his community of origin, and that he has had a number of challenges in his life.

In response, Mr. Mellett agreed with the submissions made by Mr. Boyer, and submitted as Exhibit 4 Dr. McKennitt's curriculum vitae. He states that Dr. McKennitt has expressed his sincere regret to the CPSA for his conduct. He also states that the need for deterrence which is addressed in the *Jaswal* case is satisfied by the significant suspension. He states that Dr. McKennitt does not plan to return to practice immediately, and that he will still be subject to the monitoring program in place. He states that Dr. McKennitt's willingness to admit to unprofessional conduct has avoided the need for a hearing, and to have witnesses come to testify about very personal aspects of their lives. He states that Dr. McKennitt has also completed a boundary course at his expense offered by Western University, and that he has attended a program through the regulatory body in British Columbia. He states that Dr. McKennitt is remorseful, feels like he has let his community down, and is embarrassed by his own conduct.

In response to questions from the Hearing Tribunal, the parties clarified that the monitoring program condition (3(e)) will provide the CPSA with the ability to monitor Dr. McKennitt until such time as the CPSA is satisfied that further participation in the program is no longer required. Each program can be tailored to the individual's circumstances, and that treatment providers have a say in determining fitness for practice. In response to a question about Dr. McKennitt's age, he indicated that he is mid-30s. Further, Mr. Boyer indicated that the likely range of costs sought agreed to in the joint submission is in the \$12,000 to \$14,000 range.

The Hearing Tribunal also asked for the parties to explain how the proposed sanction deals with the dishonesty that existed in Dr. McKennitt's initial response to the CPSA in the context of an investigation into his conduct. The Hearing Tribunal noted that this factor was absent from the cases that were provided as comparable situations. In response, Mr. Boyer stated that the length of the suspension was the aspect of the sanction that addressed that issue. He stated that boundary violation cases typically attract a suspension of around 12 months, so the increase in the proposed length here is warranted as a result of the element of dishonesty. He stated that there were very few cases with suspensions of more than 24 months because at that point a hearing tribunal would be approaching the statutory timeframe when members who have had their license revoked can apply for readmission under the HPA in any event.

Mr. Mellett noted that the lack of candor from Dr. McKennitt also arose during the time that he was suffering from the relapse, which is disclosed in the records. He indicated that this is also a factor that should be considered in determining whether the sanction proposed is appropriate.

The Hearing Tribunal expressed a concern with respect to the possibility of Dr. McKennitt deciding to practice in a rural or isolated practice, and the risks that would be associated with that. Mr. Boyer indicated that the requirement to have the CPSA approve a practice arrangement (3(b)) dealt with this issue as the CPSA would be conscious of ensuring that adequate supports were in place. Further, the requirement for Dr. McKennitt's colleagues to be made aware of the Hearing Tribunal decision will address risks in relation to relapse and further unprofessional conduct.

The Hearing Tribunal carefully considered the proposed sanctions in light of the applicable legal test, which indicates that the Hearing Tribunal should only reject a joint submission where it concludes that it is contrary to the public interest or would bring the administration of the professional regulatory regime into disrepute.

The Hearing Tribunal views the conduct at issue to be extremely serious as it includes not only breaches of agreements between Dr. McKennitt and the CPSA, but also the misleading of a CPSA investigator and serious boundary violations. The Hearing Tribunal agrees that but for the mitigating factors identified by legal counsel, the conduct at issue here would have warranted the revocation of Dr. McKennitt's license. Specifically, the Hearing Tribunal considered the fact that Dr. McKennitt did eventually acknowledge his initial dishonesty, cooperated with the CPSA, and agreed to admit his unprofessional conduct which avoided a lengthy hearing involving vulnerable witnesses. The Hearing Tribunal's view is that Dr. McKennitt should consider himself fortunate that the Complaints Director of the CPSA did not choose to seek the revocation of his license, and that the opportunity provided by the CPSA for reintegration into practice would almost certainly not be repeated in the event of future infractions.

The Hearing Tribunal is satisfied that the lengthy suspension addresses the need for general and specific deterrence. The conditions proposed address the ongoing risks arising from Dr. McKennitt's medical issues, and the CPSA will be in a position to closely monitor the situation and respond accordingly. The sanction appropriately includes elements designed to assist Dr. McKennitt with rehabilitation under necessary and stringent conditions.

For those reasons, the Hearing Tribunal accepts the joint submission, and makes the orders set out above.

Signed on behalf of the Hearing Tribunal by
the Chair

A handwritten signature in black ink, appearing to read 'A. D. Drummond', with a horizontal line underneath.

Dated: September 17, 2018

Dr. Alasdair Drummond