

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

("THE COLLEGE")

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. MAX KLEIN

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

INTRODUCTION

1. Dr. Max Klein was found guilty of the charge of administering to a colleague, without her knowledge or consent, an illicit substance, which included Methylenedioxymethamphetamine (known as MDMA or Ecstasy), in a decision of the Hearing Tribunal, dated April 20, 2022.
2. The members of the Hearing Tribunal were:
 - Dr. Robin Cox of Calgary as Chair;
 - Dr. Oluseyi Oladele of Edmonton;
 - Ms. Juane Priest of Calgary (public member);
 - Ms. Archana Chaudhary of Edmonton (public member)
3. Mr. Gregory Sim acted as independent legal counsel for the Hearing Tribunal.
4. In the April 20, 2022 merits decision, the Complaints Director and Dr. Klein were invited to enter submissions on sanctions in written form, unless either party requested to submit orally. Ms. Stacey McPeek, legal counsel for the Complaints Director, entered a written submission, dated May 6, 2022.
5. Dr. Klein was informed of the merits decision of the Hearing Tribunal by registered mail dated April 25, 2022 to the last address on the College's register as well as the Sherwood Park address described in the Tribunal's April 20, 2022 decision. Ms. McPeek advised the Tribunal that these letters were returned to sender as "RTS unclaimed" on May 26 and June 13, 2022 respectively. No submission was received from Dr. Klein.
6. The Hearing Tribunal, with the same membership, met again *in camera* on June 23, 2022, to deliberate on sanctions. Mr. Gregory Sim was also present to advise on legal matters.
7. The Hearing Tribunal reviewed the submission from the Complaints Director, and then discussed appropriate sanctions, referencing the factors identified in *Jaswal v. Newfoundland Medical Board* [1996] N.J. No. 50 ("*Jaswal*").

SUBMISSION FROM THE COMPLAINTS DIRECTOR

8. Ms. McPeek, for the Complaints Director, reviewed the principles for determination of sanction, evaluated the proven conduct in light of the *Jaswal* factors, and proposed that the appropriate sanction would be cancellation. A less preferred alternative sanction would be suspension until Dr. Klein underwent a multi-disciplinary assessment and was found fit to practice medicine.

9. In considering the principles for determination of sanction, Ms. McPeek outlined the duties of the College as set out in section 3 of the *Health Professions Act (HPA)*. She submitted that the public interest is at the forefront of any consideration the Hearing Tribunal makes.
10. At paragraph 36 in *Jaswal*, the Court provides a non-exhaustive list of factors to consider when determining appropriate sanctions in a professional discipline matter.
11. Section 82(1) of the *HPA* lists the orders that may be made in a case of unprofessional conduct, including cancellation of the registration and practice permit of the investigated person.
12. Section 82 of the *HPA* also allows for the Hearing Tribunal to order the payment of costs for the investigation and hearing by the investigated person.
13. Paragraph 50 of *Jaswal* sets out factors to consider when determining costs.
14. Ms. McPeek then applied the 13 *Jaswal* factors to be considered when determining sanction.

APPLICATION OF THE JASWAL FACTORS BY THE COMPLAINTS DIRECTOR

15. *Factor 1 – Nature and gravity of the proven allegations.*

The Complaints Director submitted that the proven conduct, surreptitiously administering an illicit substance to another person without their knowledge, was among the most severe in nature and gravity. This action put the victim at risk, and was a breach of trust with the public, calling into question the integrity of the entire profession.

The Hearing Tribunal agreed with this analysis.

16. *Factor 2 – Age and experience of Dr. Klein.*

The Complaints Director recognized that Dr. Klein was a young and inexperienced physician in residency training, however this should not be a mitigating factor, as the conduct at issue was clearly wrong and a physician of any age or level of experience should have known that.

The Hearing Tribunal agreed with this analysis.

17. *Factor 3 – Dr. Klein’s prior history.*

There were no previous complaints or convictions. While this may be considered as a mitigating factor, this must be balanced against the seriousness of the conduct.

The Hearing Tribunal did consider this to be a mitigating factor, but we note that for a very new physician, still in residency training, the lack of a prior discipline history means little. The seriousness of the conduct is addressed in Factor 1, so would be included when the Hearing Tribunal weighs all the *Jaswal* factors.

18. *Factors 4 and 8 – Age and mental condition of the patient and impact on the patient.*

The Complaints Director recognized that there was no patient in this case, but the Hearing Tribunal should consider the impact on ██████, a colleague. This was a traumatizing event for ██████, as it would be for anyone. The effect of a colleague administering an illicit substance to you without your consent and knowledge is highly violating.

The Hearing Tribunal agreed with this analysis.

19. *Factor 5 – Number of times the offence was proven to have occurred.*

This was a single event; however, this must be balanced against the seriousness of the conduct.

The Hearing Tribunal did consider this to be a mitigating factor. The seriousness of the conduct is addressed in Factor 1, so would be included when the Hearing Tribunal weighs all the *Jaswal* factors.

20. *Factor 6 – The role of Dr. Klein in acknowledging what had occurred.*

Dr. Klein has not acknowledged what had occurred, always denying the allegation. The Complaints Director submitted that this denial is a neutral factor when determining sanction. However, Dr. Klein did not attend the hearing and failed to engage in the investigation and hearing process. The Complaints Director submitted that this is an aggravating factor.

Dr. Klein failed to engage in the investigation and hearing process. While Dr. Klein’s lack of participation and denial of the allegation at the merits stage is not an aggravating factor, the Tribunal was troubled that Dr. Klein has not engaged in the process at any stage. At the sanction stage Dr. Klein had notice of the Hearing Tribunal decision finding him guilty of unprofessional conduct but he still declined to participate. This suggests a

lack of respect for the College and the process and a lack of interest in remaining a regulated member of the College.

21. *Factor 7 – Other serious financial or other penalties suffered by Dr. Klein.*

The Complaints Director recognized that Dr. Klein has been subject to extensive penalties due to the same conduct that gave rise to the finding of unprofessional conduct. He has not practiced medicine since 2015, he received a four-year suspension from the University of Alberta, and his privileges with Alberta Health Services were revoked. The Complaints Director was unaware of specific financial penalties suffered by Dr. Klein. Although the penalties already imposed were extensive, they were in proportion to the seriousness of the conduct and should not be a mitigating factor.

The Hearing Tribunal has taken the other consequences that Dr. Klein faced into account and considered them to be mitigating. Dr. Klein's medical career came to a sudden halt in 2015, on the day after the event, albeit as a result of his actions.

22. *Factor 9 – Other mitigating factors.*

Dr. Klein did not complete his residency, therefore is not currently eligible for membership on the General Register and would first need to secure a position in a residency. This might be difficult to obtain, having been out of practice for seven years. This would be a mitigating factor.

The Hearing Tribunal agreed with this analysis.

23. *Factors 10 and 11 – Specific and general deterrence and the public confidence in the College's ability to regulate.*

There is little need for general deterrence, as most physicians should know that administering an illicit substance to anyone is unacceptable physician conduct.

Regarding specific deterrence, Dr. Klein's failure to attend the hearing or communicate with the College suggests a lack of respect for the College's authority. When a member does not respect the College's authority, the public may question the College's ability to regulate. The proven allegations and Dr. Klein's behavior since referral weigh in favor of a significant sanction.

The Hearing Tribunal agreed that in this case the need for specific deterrence and maintaining public confidence in the regulation of the medical profession are very important.

24. *Factor 12 – The degree to which the proven conduct would fall outside the range of permitted conduct.*

As stated in the merits decision, the conduct is well-outside the scope of appropriate behavior for a physician, and weighs in favor of a significant sanction.

The Hearing Tribunal agrees with this analysis.

25. *Factor 13 – Sanctions in other cases.*

The Complaints Director found no cases where a physician administered an illicit substance to another person without their knowledge and consent. However, there are some cases that may be able to inform the Hearing Tribunal on a likely range of sanctions.

In *CPSO v. Hwang, 2019 ONCPSD 33 (Hwang)*, a resident surreptitiously video-recorded individuals in sensitive locations such as the bathroom and bedroom. His registration was revoked, he received a reprimand, and was ordered to pay costs. The invasion of privacy involved is analogous to the administration of a drug to a person without consent. This was Dr. Hwang's first offence and he pled no contest to the hearing.

In *CPSO v. Shuen, 2018 ONCPSD 31 (Shuen)*, an obstetrician administered a drug to induce labor to patients without their consent. His registration was revoked, he received a reprimand, and was ordered to pay costs. There were several patients involved over a prolonged period and Dr. Shuen had a history of dishonesty.

In *Saskatchewan College of Pharmacy Professionals v. Yaholnitsky, 2020 SKCPPDC 2 (Yaholnitsky)*, a pharmacist was found in possession of an illicit substance, methamphetamine. She received a reprimand and a condition that, if she sought to be reinstated, she would have to practice under conditions. The matter only dealt with possession of the substance, not its use or administration to another person.

The Hearing Tribunal reviewed these cases and noted the similarities and differences between them and Dr. Klein's conduct. Overall, the *Hwang* and *Shuen* cases support an order for cancellation in this case. The Hearing Tribunal considered Dr. Klein's proven conduct to be at least as serious as in those cases. Dr. Klein's conduct interfered with [REDACTED] bodily autonomy without her knowledge or consent and for absolutely no medical reason.

26. Ms. McPeck then submitted that considering the seriousness of the conduct, and the need to maintain the public's confidence in the ability of the College to regulate the medical profession, cancellation is the

- appropriate sanction. Ms. McPeek also submitted that the sanction should include a reprimand, as was the case in the three cases cited.
27. Ms. McPeek submitted that membership in a profession is a privilege not a right, as stated by the Alberta Court of Appeal in *Fang v. College of Physicians and Surgeons of Alberta* [1985] A.J. No. 1080. The Court has also said in *Adams v. Law Society of Alberta*, 2000 ABCA 240 that disbarment is not reserved for only the very worst conduct engaged in by the very worst of lawyers. Similarly, cancellation is not reserved for the most serious of conduct by a physician. Rather, it is one of the options available to the Hearing Tribunal. A member does not have to be found ungovernable for cancellation to be considered. Cancellation may be considered for a resident and for a first offence, as in *Hwang*.
 28. Ms. McPeek submitted that when determining sanctions, the focus needs to be on the seriousness of the conduct, whether the physician is worthy of the privilege to practice medicine, and what sanction is in the public interest.
 29. The Complaints Director submitted that the nature of Dr. Klein's unprofessional conduct renders him unworthy of the privilege to practice medicine and therefore the appropriate sanction is cancellation and a reprimand. This sanction sends a message to the public and the profession that such behavior will not be tolerated.
 30. An alternative sanction would be to suspend Dr. Klein's registration until such time as he completes a multi-disciplinary assessment that finds him fit to return to practice.
 31. Nevertheless, the Complaints Director maintains that cancellation is the appropriate sanction.
 32. Ms. McPeek then made submissions regarding the investigation and hearing costs. In *Jaswal*, the Court (paragraph 50) outlines factors to consider when awarding costs. In the case of Dr. Klein, there was one charge which was not successfully defended, there were no unnecessary witnesses, and the hearing was the only option for the College, as Dr. Klein did not engage with the Complaints Director and the hearing process.
 33. Ms. McPeek submitted that the Complaints Director is unaware of Dr. Klein's financial circumstances, but may reconsider her position on costs if Dr. Klein provides evidence of mitigating factors.
 34. Absent such factors, the Complaints Director submitted that Dr. Klein should be responsible for 100% of the costs.

35. Ms. McPeek concluded that the following sanction should be imposed on Dr. Klein:
- a) Dr. Klein should receive a reprimand, with the Hearing Tribunal decision serving as the reprimand.
 - b) Dr. Klein should have his registration and practice permit cancelled.
 - c) Dr. Klein should be directed to pay 100% of the costs of the investigation and hearing of this matter.
36. Ms. McPeek also submitted that if the Hearing Tribunal does not find cancellation to be appropriate, Dr. Klein should receive a suspension until he participates, at his own cost, in a multi-disciplinary assessment, in a facility or program acceptable to the College, to address whether Dr. Klein is fit to practice medicine, be it with or without conditions, and if he requires a period of treatment:
- i. The nature and scope of any conditions or treatment would be outlined by the assessment.
 - ii. If the Assessment finds that Dr. Klein is not fit to practice, that his practice permit shall stand suspended until Dr. Klein is found fit to practice following a further assessment.

SUBMISSIONS FROM DR. KLEIN

37. No submissions were received from Dr. Klein or from anyone on his behalf.

DECISION OF THE HEARING TRIBUNAL, WITH REASONS

38. In weighing all the *Jaswal* factors in this case, the Hearing Tribunal took the view that Factor 1 – Nature and gravity of the proven allegation – was the most important to consider. The conduct that was proven on a balance of probabilities was egregious in nature. The administration of an illegal substance to a colleague, indeed to any person, without their knowledge and consent, particularly as the drug carried certain medical risks, falls way outside the range of acceptable behavior in a physician. The negative effect of his actions on the victim was likely to have been significant.
39. The Hearing Tribunal recognized that Dr. Klein was early in his career, however this was not considered to be a significant mitigating factor. Dr. Klein had completed university and medical school, and was in the final year of a five-year residency program. This life and professional experience should have given him the insight that his actions would be completely inappropriate.

40. The Hearing Tribunal did note that there were no previous complaints or convictions, however Dr. Klein was only a few years into his career. The seriousness of the conduct in question also outweighed this factor.
41. The Hearing Tribunal was troubled by Dr. Klein's failure to attend the hearing or to engage with the Complaints Director in the period leading up to the hearing. It appeared likely that Dr. Klein was trying to evade receiving notices from the College in relation to the allegation. Dr. Klein's decision not to engage in the sanction stage of the hearing suggests a lack of respect for the College's authority to regulate the profession. It also suggests a lack of interest in remaining a regulated member of the College.
42. The Hearing Tribunal did recognize some significant mitigating factors when considering sanction. Dr. Klein has undoubtedly been subject to very serious consequences as a result of his conduct. His medical career came to an abrupt halt the day after the events in question, he was subject to a four-year suspension by the University of Alberta, and his Alberta Health Services privileges were rescinded. Although no specific evidence was made available to the Hearing Tribunal, it would be reasonable to infer that he has sustained financial consequences following these events.
43. The Hearing Tribunal believed that the sanction to be imposed should send a very clear message to Dr. Klein, the profession, and the public, that there will be zero tolerance for the conduct in question, and the College will continue to regulate the profession effectively and protect the public.
44. The Hearing Tribunal carefully considered the options for sanction.
45. A reprimand was considered appropriate and in keeping with the cases presented by the Complaints Director.
46. The Hearing Tribunal also agreed with the Complaints Director that Dr. Klein should not be in practice in order to protect the public interest. The two options proposed were cancellation or suspension of Dr. Klein's practice permit pending completion of an assessment that found him fit to practice medicine. The Complaints Director favored cancellation.
47. The Hearing Tribunal carefully evaluated these two options and finally determined to order cancellation, primarily in light of the nature and gravity of the proven allegations. The Hearing Tribunal determined that it would undermine public confidence in the regulation of the medical profession if Dr. Klein were permitted to remain a regulated member. His proven unprofessional conduct was fundamentally inconsistent with the public's and the College's expectations for physicians.

48. Regarding costs, the Hearing Tribunal reviewed the factors in *Jaswal* as presented by the Complaints Director. There was one allegation that was found proven. The Complaints Director called no unnecessary witnesses and consumed no unnecessary hearing time. The Complaints Director also had no choice but to refer this matter to a hearing. Dr. Klein omitted to participate in the hearing and called no evidence and made no submissions. The Hearing Tribunal felt that this was a case in which it would be appropriate for Dr. Klein to bear the full costs of the investigation and the hearing. Ms. McPeck advised us that these costs were estimated to be in the approximate range of \$30,000.

ORDERS

49. The Hearing Tribunal therefore makes the following orders:
- a) Dr. Klein will receive a reprimand, with the Hearing Tribunal's decision serving as the reprimand.
 - b) Dr. Klein's registration and practice permit are cancelled.
 - c) Dr. Klein shall be responsible for 100% of the costs of the investigation and hearing.

Signed on behalf of the Hearing Tribunal by the Chair:



Dr. Robin G. Cox

Dated this 28th day of July, 2022.