

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. KEVIN MOWBREY

**DECISION OF THE HEARING TRIBUNAL OF
THE COLLEGE OF PHYSICIANS
& SURGEONS OF ALBERTA
JUNE 6, 2023**

I. INTRODUCTION

1. The Hearing Tribunal held a hearing into the conduct of Dr. Kevin Mowbrey on April 5, 2023. The members of the Hearing Tribunal were:

Dr. Douglas Faulder of Edmonton as Chair;
Dr. Fraulein Morales of Edmonton;
Mr. Kevin Kelly of Calgary (public member);
Ms. Sarah Gingrich of Calgary (public member);

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

Also in attendance at the hearing were:

Ms. Stacey McPeek and Ms. Tracy Zimmer, legal counsel for the Complaints Director;
Dr. Kevin Mowbrey;
Mr. Will Hembroff, legal counsel for Dr. Mowbrey.

II. PRELIMINARY MATTERS

2. 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. The hearing was open to the public pursuant to section 78 of the *Health Professions Act* ("HPA"). There was no application to close the hearing.

III. CHARGES

3. The Notice of Hearing listed the following allegation:

On March 31, 2021, you did plead guilty to one count of knowingly between July 1, 2018 and January 7, 2019 use a forged doctor's prescription contrary to section 368(1)(a) of the *Criminal Code of Canada*.

4. Dr. Mowbrey admitted the allegation as set out in the Notice of Hearing (the "Allegation") and agreed that the conduct set out in the Allegation amounted to unprofessional conduct. The hearing proceeded by way of an Agreed Exhibit Book and a Joint Submission on Sanction ("Joint Submission") by Dr. Mowbrey and the College, except for the issue of costs.

IV. EVIDENCE

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

- Exhibit 1:** Exhibit Book dated March 27, 2023
- Tab 1:** Notice of Hearing dated May 30, 2022
- Tab 2:** Memo of Complaint dated January 9, 2019
- Tab 3:** Fax from J. Debiasi with documents submitted to police
- Tab 4:** Transcript of Criminal Proceeding, dated March 31, 2021
- Tab 5:** Criminal Information, amended March 31, 2021
- Tab 6:** Certificate of Conviction, dated March 31, 2021
- Tab 7:** COAP Assessment for Dr. Kevin Mowbrey, dated December 30, 2022
- Exhibit 2:** Signed Admission and Joint Submission Agreement dated March 27, 2023

6. Counsel for the Complaints Director also filed the following materials:

- a. Brief of Law Regarding Joint Submissions dated March 28, 2022;
- b. Case Law:
- i. *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336;
 - ii. *Idahosa Re*, CPSA, March 6, 2022;
 - iii. *Khumree Re*, CPSA, March 2, 2022;
 - iv. *Timothy Edward Bradley v. Ontario College of Teachers*, 2021 ONSC 2303;
 - v. *Velestuk Re*, CPSS, January 24, 2020;
 - vi. *R. v. Anthony-Cook*, 2016 SCC 43;
 - vii. *Singh (Re)*, 2013 LSBC 17 (CanLII);
 - viii. *McAlpine (Re)*, 2012 CanLII 92549 (AB CPSDC);
 - ix. *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SC).

V. SUBMISSIONS REGARDING ALLEGATION

Submissions by Counsel for the Complaints Director

7. Ms. McPeek provided a summary of the evidence in Exhibit 1.
8. The Allegation relates to Dr. Mowbrey's criminal conviction of one count of use, trafficking, or possession of forged prescriptions between July 1, 2018 and January 7, 2019. Dr. Mowbrey did plead guilty to that charge on March 31, 2021.
9. Ms. McPeek referred to how the issue came to the notice of the College through a complaint from a community pharmacist, copies of prescriptions, and a witness statement (all contained in Exhibit 1).
10. Ms. McPeek also referred to the transcript of the criminal proceedings against Dr. Mowbrey found in Exhibit 1, including Dr. Mowbrey's plea of guilty to the criminal charge, the Agreed Statement of Facts, the submissions from criminal counsel, and the judge's sentence on the matter.
11. Ms. McPeek referred to the final item in Exhibit 1, the Certificate of Conviction confirming the conviction of the specific charge.
12. With respect to the charge in the Notice of Hearing, Ms. McPeek submitted that the evidence clearly supports the admissions by Dr. Mowbrey and that now the panel would need to consider whether that behaviour amounts to unprofessional conduct.
13. Ms. McPeek acknowledged that Dr. Mowbrey has a diagnosed mental health issue and that will be important when we are discussing sanctions, but it is less relevant at this point when the Hearing Tribunal is deciding only whether the conduct is proven and whether it amounts to unprofessional conduct.
14. Ms. McPeek submitted that the Complaints Director sees the conduct of Dr. Mowbrey as unprofessional under three sections of the definition in the HPA section 1(1)(pp).
15. The first, under section 1(1)(pp)(iii), a contravention of another enactment. In this case it would be the *Criminal Code of Canada*, and a specific conviction with a clear nexus to the medical profession.
16. The second, under section 1(1)(pp)(ii), a breach of a code of ethics or standard of practice. In this case the *CMA Code of Ethics* which firstly states that a physician should seek help and medical care from colleagues and other qualified professionals for personal problems that might affect their own health or their service to patients. Dr. Mowbrey did not seek help or appropriate medical care for substance abuse issues which ultimately led to criminal charges.

17. Secondly, the *CMA Code of Ethics* suggests that physicians must treat colleagues with dignity and respect. Dr. Mowbrey showed a lack of respect by taking a colleague's prescription pad to use for the forged prescriptions. Also, the *CPSA Standard of Practice, Drugs Associated with Substance Use Disorders and Substance-Related Harm* was breached as self-prescribing one of these medications is a failure to abide by the intent of this Standard of Practice.
18. The third, under section 1(1)(pp)(xii), is conduct that harms the integrity of the profession. In this case the Hearing Tribunal is not simply dealing with a criminal conviction but an offence relating to a primary function of the medical profession – the prescribing of medications.
19. Ms. McPeek submitted that the conduct outlined in the Notice of Hearing has been proven sufficiently for the Hearing Tribunal to accept the admission from Dr. Mowbrey and to find that the conduct amounts to unprofessional conduct.

Submissions by Counsel for Dr. Mowbrey

20. Mr. Hembroff related that he had no disagreement with the Complaints Director's position as outlined.
21. Mr. Hembroff outlined a chronology of events and personal information regarding Dr. Mowbrey.
22. Dr. Mowbrey graduated from medical school in 2014 and immediately started a residency. His initial appraisals in the residency were positive but less so before he left the residency after three completed years. He was married in 2016 and has two children. Since withdrawing from the medical profession Dr. Mowbrey is now working in management in a non-medical field with success.
23. Dr. Mowbrey would like again to be a practicing physician and asks for a second chance. He is now engaged in treatment and will continue to do so for his lifetime. He is well engaged with his family physician, medical specialists, a clinical psychologist, supportive counsellor physicians in the Physician Health Monitoring Program (PHMP), attends NA meetings and SMART recovery support programs.
24. At his own cost and volition, Dr. Mowbrey underwent a comprehensive multidisciplinary fitness-to-practice assessment in December 2022. Counsel encouraged the panel to review the conclusions of that assessment.

VI. FINDINGS REGARDING ALLEGATION

25. The Hearing Tribunal reviewed the evidence submitted by the parties and carefully considered the submissions. The Hearing Tribunal accepted Dr. Mowbrey's admissions and found the Allegation proven by the

incontrovertible evidence in Exhibit 1, and that it constituted unprofessional conduct under section 1(1)(pp)(ii), (iii), and (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:*

(ii) *contravention of this Act, a code of ethics or standards of practice; and*

(iii) *contravention of another enactment that applies to the profession;*

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

26. The failure to seek help for his substance abuse which culminated in self-prescribing benzodiazepines is a clear breach of a code of ethics. It was made worse by using another physician's prescription pad.
27. The criminal conviction for using a forged prescription is a contravention of another enactment, the *Criminal Code of Canada*.
28. The criminal conviction for using a forged prescription undoubtedly brings disrepute to the medical profession.

VII. SUBMISSIONS REGARDING SANCTION

29. The parties presented the Hearing Tribunal with a Joint Submission Agreement on sanction excluding the issue of costs.

Submissions by Counsel for the Complaints Director

30. Counsel for the Complaints Director reminded the Hearing Tribunal of the value and importance of a Joint Submission, and that the Hearing Tribunal should show significant deference to it. For a joint submission to be possible, it is necessary to have a high degree of confidence that it will be accepted. In this situation, the proposed sanction balances the seriousness of the conduct with a route back to practice.
31. Counsel for the Complaints Director reviewed the proposed penalties. The fundamental purpose of sanctions is to ensure that the public is protected and has confidence in the College's ability to regulate the profession.
32. Counsel for the Complaints Director reviewed the factors in the decision of *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SC) and how those factors applied to the present case.

33. There are a few aggravating factors. The conduct is very serious and there is a need to prevent misuse of medications. Dr. Mowbrey took a prescription pad from a colleague. There is a previous complaint but it does not deal with the conduct that is directly at issue in this hearing. As such, the previous complaint is an aggravating factor but not overly aggravating. There is a single criminal charge but it relates to 19 forged prescriptions over a period of time. The conduct falls far outside the range of permitted conduct.
34. There are some mitigating factors. Dr. Mowbrey had not yet completed residency. He was earlier in his career but there is no age or experience level that would make self-prescribing satisfactory. He acknowledged his conduct and there has been an admission and joint submission on penalty. He has already suffered other penalties. Dr. Mowbrey was criminally convicted, served six months incarceration in the community, and was given a one-hundred-dollar surcharge.
35. The most significant mitigating factor is that the conduct resulted at least in part from a substance abuse issue and a mood disorder. Mental health issues may have contributed to the conduct. The purpose of sanctions is not to punish someone for having a substance use disorder. The Hearing Tribunal should consider the illness or disability. The decision in *Singh* states that a sanction should be ordered against a member, but it must be tempered by the recognition of an illness or disability. The decision in *Veletuk* states that these situations deserve different considerations, and there is a need to factor in mental health issues. As such, this is a very significant mitigating factor but it does not mean that there should be no sanction. There should be a focus on potential rehabilitation.
36. The College decisions in *Idahosa* and *Khumree* address the final *Jaswal* factor. In *Idahosa* the doctor was self-prescribing and using another doctor's prescription pad. In *Khumree*, there was also a boundary violation. These decisions show that the proposed sanction is within the range of previous penalties and would not bring the administration of justice into disrepute. It would not shock the community and will send a clear message that the conduct is unacceptable.
37. Dr. Mowbrey has already been out of the profession for four years, and the Complaints Director is taking no position on whether the suspension proposed in the Joint Submission has already been completed. The proposed sanctions are sufficient to protect the public but there is enough flexibility so that Dr. Mowbrey will not be prevented from obtaining a residency position on a path to return to practice..

Submissions by Counsel for Dr. Mowbrey

38. Counsel for Dr. Mowbrey submitted that he agreed for the most part with submissions by counsel for the Complaints Director, and that it took a great deal of work to develop the Joint Submission. The COAP Assessment shows

that Dr. Mowbrey is dealing with a diagnosis of polysubstance abuse disorder and personality traits that affect how he copes.

39. When Dr. Mowbrey was coping with the stressors of residency and subsequent problems, he reacted by disengaging when things went wrong. During this process he has been significantly engaged and this has been a testament to his insight, treatment, and the support that he has received. He is committed to recovery and a return to residency.
40. Dr. Mowbrey wants to complete a residency in family medicine where his skill set and personal characteristics are well suited. Before he can start training he needs to complete a residential treatment program. The cost of a residential treatment program may be up to \$1,000 per day which will be a financial hardship for Dr. Mowbrey and his family. There is no guarantee that he will be found fit to practice or be able to find a position. Dr. Mowbrey has already been out of practice for four years, and he will not be practising medicine for at least another year. As such, treating the suspension as anything other than already served is not necessary.

Questions from the Hearing Tribunal

41. The Hearing Tribunal asked about Dr. Mowbrey's practice permit and whether it has been suspended. Counsel for the Complaints Director submitted that it has not been suspended and Dr. Mowbrey voluntarily undertook not to practice.
42. The Joint Submission states that Dr. Mowbrey will attend a Residential Program, or COAP. The Hearing Tribunal asked why he is not required to attend both. Counsel for the Complaints Director submitted that there should be some flexibility, and there may be options that will lead to the same outcome. Counsel for Dr. Mowbrey submitted that he must be found fit to practice and the options will be explored with the College in advance.
43. The Hearing Tribunal noted that Dr. Mowbrey will be required to follow any "reasonable" recommendations made by a psychotherapist, and questioned who decides what is reasonable. Counsel for Dr. Mowbrey submitted that if the treatment provider comes up with something that is not reasonable, they want to be able to challenge that recommendation. Counsel for the Complaints Director submitted that the psychotherapist will write to the Physician Health Monitoring Program, and this will provide some flexibility in the circumstances.
44. The Hearing Tribunal questioned how the six-month suspension was related to the ability to write prescriptions. Counsel for the Complaints Director submitted that the prohibition from prescribing is throughout the residency, and is not connected to the time period for the suspension.

VIII. FINDINGS REGARDING SANCTION

45. After hearing the sanction submissions of counsel for the Complaints Director and counsel for Dr. Mowbrey, the Hearing Tribunal determined the sanction orders were appropriate, were consistent with *Jaswal* factors, and consistent with previous College decisions dealing with similar unprofessional conduct.
46. The agreement between the Complaints Director and Dr. Mowbrey acknowledges the seriousness of the unprofessional conduct while still providing a route back to practice for Dr. Mowbrey.
47. The sanction outlined in the Joint Submission serves as a general deterrent by sending a message to other members of the profession that the conduct was unacceptable.
48. The sanction outlined in the Joint Submission serves as a specific deterrent to Dr. Mowbrey.
49. The acknowledgement of his unprofessional conduct by Dr. Mowbrey has greatly simplified this hearing.
50. The conduct was partly due to substance abuse and mental health issues, and Dr. Mowbrey has now made valid and substantial steps to address these.
51. Dr. Mowbrey has voluntarily withdrawn from medical practice for the last four years. As such, the Hearing Tribunal determined that the suspension proposed in the Joint Submission should be treated as already served.

IX. SUBMISSIONS REGARDING COSTS

Submissions by Counsel for the Complaints Director

52. Counsel for the Complaints Director outlined for the Hearing Tribunal the recent 2022 Alberta Court of Appeal decision in *Jinnah v. Alberta Dental Association and College*. This is a landmark case that has significantly changed the legal landscape for professional colleges with regard to cost orders against a regulated member. The *Jinnah* decision suggests that costs of investigations and hearings should be borne by a professional college. However, the *Jinnah* decision did list four compelling reasons that may make it appropriate to impose some costs on a regulated member. The first reason is where the regulated member engages in serious unprofessional conduct, and counsel for the Complaints Director submitted that Dr. Mowbrey's conduct falls within this category.
53. Dr. Mowbrey engaged in serious unprofessional conduct that he must have known would be completely unacceptable, forgery of a prescription and the resulting criminal conviction.

54. The Court of Appeal suggested that criminal behaviours such as fraud are situations where a substantial portion of the costs should be payable, and the forgery of prescriptions falls within a similar type of conduct.
55. Counsel for the Complaints Director advised the Hearing Tribunal that since November 2022, Dr. Mowbrey has been very cooperative with the investigation and hearing.
56. Counsel for the Complaints Director advised the Hearing Tribunal that neither *Jinnah* nor *Jaswal* addresses how mental health issues should factor into a costs award.
57. Therefore, it would not be unfair or unprincipled for Dr. Mowbrey to pay a portion of the costs of the investigation and hearing but ultimately it should not be a crushing blow.
58. Counsel for the Complaints Director suggested that between 50 to 75 percent of the costs of this hearing and investigation would be a reasonable portion of the costs.

Submissions by Counsel for Dr. Mowbrey

59. Counsel for Dr. Mowbrey submitted that there should be an order for no costs based on the unique circumstances of this case. He advised the Hearing Tribunal that the College has levied costs of about \$30,000 against Dr. Mowbrey in a previous hearing regarding this same conduct, and that this represents a substantial portion of all costs related to this same conduct. It was Dr. Mowbrey's mental health issues that led to his desperate and ill-advised actions.
60. Counsel for Dr. Mowbrey submitted that the conditions in the Joint Submission will have significant ongoing and future costs to Dr. Mowbrey. Further costs will be punitive and an obstacle to a hoped-for return to practice.
61. Mr. Hembroff suggested that no further costs should be awarded against Dr. Mowbrey.

X. FINDINGS REGARDING COSTS

62. The Hearing Tribunal carefully considered the submissions of counsel for the Complaints Director and counsel for Dr. Mowbrey.
63. The Hearing Tribunal finds that the regulated member engaged in serious unprofessional conduct that he must have known to be completely unacceptable.
64. Therefore, it is not unfair or unprincipled to have the regulated member pay a portion of the costs of the investigation and hearing.

65. The Hearing Tribunal finds that Dr. Mowbrey already has significant debt to the College for the same conduct and that further costs may be a punitive barrier to a return to practice.
66. A reasonable costs award against the regulated member should not be punitive or a further barrier to return to practice, and for that reason the Hearing Tribunal sets the costs at 10% of the total to a maximum of \$2,000.

XI. ORDERS

67. The Hearing Tribunal hereby orders pursuant to section 82 of the HPA:
- a. Dr. Mowbrey's practice permit shall be suspended for a period of 6 months. The suspension will be considered as already completed.
 - b. Before returning to practice, Dr. Mowbrey will provide evidence that:
 - i. He has attended an intensive, dual diagnosis residential program (the "Residential Program") and that the assessors of the Residential Program have concluded he is fit to resume a career in medicine and any further recommend practice conditions; or
 - ii. He has completed a new Comprehensive Occupational Assessment Program ("COAP") report, or an equivalent as approved by the Physician Health Monitoring Program ("PHMP"), that concludes he is fit to resume a career in medicine and that outlines any further recommended practice conditions (the "New Report");
 - c. Dr. Mowbrey's practice permit shall be subject to any further practice conditions that are recommended by the Residential Program assessors or the New Report;
 - d. During residency, in addition to any conditions imposed in 67.c.:
 - i. Dr. Mowbrey will be monitored by PHMP;
 - ii. Dr. Mowbrey will attend for insight-oriented psychotherapy with a psychotherapist or equivalent as approved by the PHMP (the "Psychotherapist") for the entire duration of the residency or until such time that the Psychotherapist reasonably determines the therapy necessary;
 - iii. Until the Psychotherapist determines continued psychotherapy not necessary, Dr. Mowbrey will direct the Psychotherapist to provide yearly reports to PHMP that:
 1. Confirm his attendance at psychotherapy; and

2. Outline any recommendations or practice conditions that would assist Dr Mowbrey to succeed or protect the public.
 - iv. Dr. Mowbrey will follow any reasonable recommendations made by the Psychotherapist;
 - v. Dr. Mowbrey will submit to regular and random toxicology monitoring for alcohol and opioids, as arranged by PHMP;
 - vi. Dr. Mowbrey will be prohibited from prescribing benzodiazepines and opioids, unless prescribed in an acute care or long-term care facility where the medication is kept locked, the inpatient pharmacy fills the prescription, and the nurses dispense the medication to the patients;
- e. Upon completion of residency:
- i. Dr. Mowbrey will be reassessed as reasonably directed by PHMP to determine whether further monitoring or conditions are required;
 - ii. Should the PHMP reasonably determine that post-residency monitoring or other conditions are required, Dr. Mowbrey's practice permit will be subject to those conditions;
- f. If there is a disagreement over the nature, scope, or duration of any practice conditions, the Hearing Tribunal shall retain jurisdiction to determine the issue; and
- g. Dr. Mowbrey shall be responsible for 10% of the costs of the investigation and hearing to a maximum of \$2,000 with payment terms to be arranged with the Complaints Director.

Signed on behalf of the Hearing Tribunal by the Chair:



Dr. Douglas Faulder

Dated this 6th day of June, 2023.