

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. KEVIN MOWBREY

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

## **I. INTRODUCTION**

[1] The Hearing Tribunal of the College of Physicians and Surgeons of Alberta (“CPSA”) held a hearing into the conduct of Dr. Kevin Mowbrey on January 7, 2020. The members of the Hearing Tribunal were:

Dr. Mark Chapelski of Lloydminster, as Chair;  
Dr. Neelan Pillay of Calgary; and  
Ms. Patricia Matusko of Beaumont, public member.

[2] Ms. Julie Gagnon acted as independent legal counsel for the Hearing Tribunal. Accompanying her was an associate from her office, present as an observer.

[3] In attendance at the hearing was Ms. Annabritt Chisholm, legal counsel for the Complaints Director and Dr. Michael Caffaro, Complaints Director. Also present was Dr. Kevin Mowbrey, investigated person.

## **II. PRELIMINARY MATTERS**

[4] The hearing was originally scheduled for and convened on December 5, 2019. At that time Dr. Mowbrey requested an adjournment. The Complaints Director did not object to this request. The Hearing Tribunal at that time adjourned the matter to a later date. The hearing reconvened on January 7, 2020.

[5] At the continuation of the hearing on January 7, 2020, Dr. Mowbrey was late. The Hearing Tribunal convened at 9:00 am but adjourned the proceedings to wait for Dr. Mowbrey to arrive. Dr. Mowbrey arrived and the hearing continued at 9:38 am.

[6] Dr. Mowbrey confirmed he was aware of his right to legal counsel. He informed the Hearing Tribunal that he had legal counsel, but that they were not able to be present at the hearing. However, Dr. Mowbrey indicated that legal counsel had assisted him in preparing for the hearing. The Chair confirmed that Dr. Mowbrey was waiving his right to have legal counsel present at the hearing.

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

[8] The Hearing Tribunal confirmed that the hearing was open to the public, pursuant to the *Health Professions Act*, R.S.A. 2000, c. H-7 (“HPA”), but that no members of the public were present.

### **III. CHARGES**

[9] The Notice of Hearing listed the following allegation:

IT IS CHARGED:

1. that you did fail to respond, in a timely manner or at all, to correspondence from the College of Physicians & Surgeons of Alberta regarding an investigation into your conduct, particulars of which include:
  - a) letter dated March 1, 2019 from the Complaints Director, Dr. Michael Caffaro;
  - b) letter dated March 1, 2019 from the Complaint Inquiry Coordinator, Ms. Katherine Damron;
  - c) letter dated April 23, 2019 from Ms. Katherine Damron;
  - d) email dated May 14, 2019 from Ms. Katherine Damron;
  - e) email dated June 4, 2019 from Dr. Michael Caffaro;
  - f) email dated June 5, 2019 from Dr. Michael Caffaro;
  - g) email dated July 9, 2019 from Dr. Michael Caffaro;
  - h) letter dated July 30, 2019 from Ms. Katherine Damron.

ALL OF WHICH is contrary to your duty to cooperate and the provisions of the HPA as amended, thereby constituting unprofessional conduct.

[10] The Hearing Tribunal asked Dr. Mowbrey whether he admitted or denied the allegation. Dr. Mowbrey admitted to all of the allegation.

### **IV. EVIDENCE**

[11] One exhibit was entered into evidence during the hearing (Exhibit #1). It consisted of the following documents:

1. Notice of Hearing;
2. Statutory Declaration of Process Server G.J. Biamonte dated October 28, 2019;
3. Letter from M.J. Redman to Dr. K Mowbrey dated November 4, 2019 enclosing Investigation Records;
4. Statutory Declaration of Process Server G.J. Biamonte dated November 6, 2019;
5. Witness Statement of J. Connell dated December 29, 2018;
6. Memorandum to File of Dr. Michael Caffaro dated January 7, 2019;
7. Memorandum to File of Dr. Michael Caffaro dated January 9, 2019;
8. Letter from K. Damron to Dr. K. Mowbrey dated March 1, 2019;

9. Letter from Dr. M. Caffaro to Dr. K. Mowbrey dated March 1, 2019;
10. Letter from Dr. M. Caffaro to Dr. K. Mowbrey dated March 18, 2019;
11. Email from Dr. K. Mowbrey to Dr. M. Caffaro dated March 19, 2019;
12. Email exchange between Dr. K. Mowbrey and S. Ink dated March 20, 2019;
13. Undertaking of Dr. K. Mowbrey to the College of Physicians & Surgeons of Alberta dated March 20, 2019;
14. Letter from K. Damron to Dr. K. Mowbrey dated April 23, 2019;
15. Email from K. Damron to Dr. K. Mowbrey dated May 14, 2019;
16. Email from Dr. M. Caffaro to Dr. K. Mowbrey dated June 4, 2019;
17. Email exchange between Dr. M. Caffaro to Dr. K. Mowbrey dated June 4-5, 2019;
18. Email from Dr. M. Caffaro to Dr. K. Mowbrey dated July 9, 2019;
19. Letter from K. Damron to Dr. K. Mowbrey dated July 30, 2019.

[12] Ms. Chisholm suggested that despite Dr. Mowbrey's admission, the Hearing Tribunal should still hear evidence on the substance of the allegation and the exhibit.

Dr. Michael Caffaro, Complaints Director

[13] Ms. Chisholm called one witness, Dr. Caffaro. Dr. Caffaro indicated that he is the Assistant Registrar and Complaints Director for the CPSA. He reviewed some of his previous qualifications, including that he completed a medical degree in 1990 at the University of Alberta. He has served as the CPSA Complaints Director since 2015.

[14] Dr. Caffaro explained the chronology of the lack of response by Dr. Mowbrey to the CPSA's continued correspondence to Dr. Mowbrey.

[15] Dr. Caffaro testified that he had received a phone call from a community based pharmacy in January 2019. The pharmacist reported that she had received a suspicious prescription. When she had tried to authenticate the signature by contacting the doctor whose name the prescription was in, the doctor indicated that he had not created the prescription. The pharmacist then contacted the police and the CPSA.

[16] When Dr. Caffaro received the complaint he confirmed the name of the person whose signature was purported to be on the prescription and that the prescription was issued for another person, related to Dr. Mowbrey. Dr. Caffaro contacted the doctor whose name the prescription was issued under, and he confirmed he had not written the prescription for the individual named on the prescription.

[17] Dr. Caffaro made reference to notes he had created contemporaneously to the events in question that were in the exhibit.

[18] Dr. Caffaro explained that when the Complaints Director is the complainant on a file, he creates a memo about his concerns about the regulated member in question. Dr. Caffaro stated that once a complaint is in process, the Complaint Inquiry Coordinator identifies the matter to the regulated member by sending a letter outlining the complaint and requesting a response. This step completes the inquiry stage of the process and allows the investigation into the complaint to be initiated. An investigator is only assigned after the CPSA receives a response from the regulated member. No investigation was ever commenced into Dr. Mowbrey in relation to the prescription because the Complaints Director never received a reply from Dr. Mowbrey.

[19] Ms. Damron is not an investigator. Her role is the Complaint Inquiry Coordinator. Ms. Damron sent a letter dated March 1, 2019, to Dr. Mowbrey. Dr. Caffaro also sent a letter to Dr. Mowbrey dated March 1, 2019.

[20] Dr. Caffaro confirmed that the letter from Ms. Damron asked Dr. Mowbrey to respond no later than March 29, 2019, almost a month later. Dr. Caffaro indicated that this was standard procedure.

[21] Dr. Caffaro stated that his first letter was delivered to Dr. Mowbrey through the physician portal which is firewalled on the CPSA website and only accessible to registered physicians with a password. Dr. Mowbrey would have received an email to let him know he had a letter on the portal. Dr. Caffaro indicated that he had an email address for Dr. Mowbrey because physicians are required to provide confidential and personal email addresses every year at registration.

[22] Dr. Caffaro also testified that in his letter of March 1, 2019, he requested that Dr. Mowbrey undertake to withdraw from the practice of medicine. Because of the significance of the complaint, he felt it was essential that Dr. Mowbrey withdraw from the practice of medicine until the investigation was complete. This withdrawal would include all aspects of training as well. In this letter to Dr. Mowbrey, Dr. Caffaro asked for a response within four business days. Dr. Caffaro confirmed that he did not receive a response within four business days. Dr. Caffaro testified that once he knew Dr. Mowbrey had not responded to the request for the undertaking, he got Dr. Mowbrey's cell phone number and left a voicemail message for him on March 18, 2019.

[23] Dr. Caffaro then sent a follow-up email on March 18, 2019, identifying the information and that the matter required Dr. Mowbrey's attention. Dr. Caffaro knew Dr. Mowbrey had received his communications because when material is in the portal, CPSA staff can see when it was placed there and also when a regulated member first accesses it. Dr. Caffaro testified that CPSA staff knew his first letter had been accessed on March 1, 2019, at 5:27 pm.

[24] Dr. Caffaro received a response from Dr. Mowbrey the following day, March 19, 2019, at 12:44 pm. Dr. Mowbrey indicated that he would have the form to Dr. Caffaro by the end of the day. Dr. Caffaro ultimately received the signed undertaking on March 20, 2019.

[25] Dr. Caffaro identified more documents in the exhibit as being from members of the College, including department staff, to Dr. Mowbrey.

[26] Dr. Caffaro identified a follow-up letter dated April 23, 2019 sent by Ms. Damron because she had not received a response from Dr. Mowbrey to her first letter. It was sent by post to Dr. Mowbrey's home address because of concerns about a lack of response from Dr. Mowbrey. In the follow-up letter, Dr. Mowbrey was asked to respond by May 7, 2019. Ms. Damron did not receive a response.

[27] Dr. Caffaro testified that Ms. Damron wrote again to Dr. Mowbrey on May 14, 2019 by email outlining correspondence from her office to Dr. Mowbrey and the steps taken to make him aware of the issue. It also reiterated the requirement for a response and identified the missed deadlines.

[28] When Ms. Damron informed Dr. Caffaro that she had not received a response from Dr. Mowbrey, Dr. Caffaro followed-up by email to Dr. Mowbrey and by leaving a voicemail message for him on June 4, 2019. In the voicemail, Dr. Caffaro indicated to Dr. Mowbrey that he was overdue for a response on the complaint and that the final deadline for a response was July 4, 2019. Dr. Caffaro advised Dr. Mowbrey that if he failed to reply by that date, the next step would be to initiate a new complaint. Dr. Caffaro also encouraged Dr. Mowbrey to contact the Canadian Medical Protective Association ("CMPA") for legal assistance.

[29] Dr. Caffaro stated that he received an email response from Dr. Mowbrey on June 5, 2019 in which he confirmed receipt of Dr. Caffaro's voicemail and that he had accessed the documents on the portal. Dr. Mowbrey said he needed to prepare a response and asked how to move forward. Dr. Caffaro replied to Dr. Mowbrey by email on June 5, 2019. In his email reply, Dr. Caffaro included instructions on how to download all the documents from the portal. Dr. Caffaro also reiterated to Dr. Mowbrey his recommendation to contact CMPA to request legal assistance, knowing there was an associated criminal matter. At the hearing, Dr. Caffaro confirmed that the criminal matter is ongoing and relates to the forgery of prescriptions.

[30] Despite Dr. Caffaro's deadline of a final reply by July 4, 2019, Dr. Mowbrey did not reply by that date. Dr. Caffaro emailed Dr. Mowbrey again on July 9, 2019. In that email, he briefly summarized events since March 1, 2019, including all the attempts at contact made by his office.

[31] Dr. Caffaro gave Dr. Mowbrey a final deadline of July 12, 2019 at 5:00 pm. Dr. Caffaro indicated that by that time, he expected either a complete response or notification that legal counsel had assumed the file. Dr. Caffaro indicated that at that date, if he had received no response, he would open an additional complaint. No response was received by the deadline.

[32] Dr. Caffaro indicated that his office issued another letter on July 30, 2019 after Dr. Mowbrey did not provide a response as per their previous request. Dr. Caffaro requested a response by August 29, 2019, but received none. Dr. Caffaro confirmed that no response was ever received in relation to either the initial complaint or the complaint about Dr. Mowbrey's failure to respond (which is at issue in this hearing). Dr. Caffaro confirmed that Dr. Mowbrey has withdrawn from practice in accordance with his undertaking.

[33] Dr. Mowbrey had no questions for Dr. Caffaro, although the Hearing Tribunal warned him that this was his only opportunity to put anything into evidence through Dr. Caffaro.

#### Dr. Kevin Mowbrey

[34] Dr. Mowbrey provided evidence on his own behalf. He began by acknowledging Dr. Caffaro's work and that he had been given many chances but had failed to act on them.

[35] Dr. Mowbrey took full accountability for his conduct. He stated it was his sincere hope that his subsequent statements would not be taken as excuses or refuting evidence.

[36] Dr. Mowbrey stated that, in retrospect, he viewed his conduct as unprofessional. However, he viewed his behaviour as anomalous and out of line with nearly seven years of examples of his true nature and genuine values.

[37] Dr. Mowbrey stated that problems began a few months into his third year residency when a severe family related event necessitated a three month medical leave. After he returned, he stated that his day-to-day functioning was impacted, although he did not notice initially.

[38] Dr. Mowbrey stated that he continued to fall beneath the standards a resident is expected to meet. He was eventually suspended from the residency program and went on long-term disability. He also underwent assessments which resulted in a recommendation that he enter a three-month inpatient program. Dr. Mowbrey testified that this led to worse depression that got so bad he could not get off his couch to brush his teeth for weeks at a time.

[39] Dr. Mowbrey testified that whenever the issue came up, he felt paralyzed, which was in sharp contrast to his previous years of hard work and prioritizing professional conduct at its highest level. Whenever he tried to read Dr. Caffaro's emails or listen to his voicemails, he found the

anxiety crippling. While at times he could address matters, at other times he was unable to cope with the anxiety.

[40] Dr. Mowbrey testified that more recently he had taken proactive steps to get better. He has been seeing a family physician and believes that he is capable of recovery, although he recognizes that he will need help. He stated that he is highly motivated to return to his previous high level of functioning and is willing to take the necessary steps to get there.

[41] Dr. Mowbrey did not present any documentation to support his statements.

[42] In response to questions from counsel for the Complaints Director, Dr. Mowbrey confirmed that he has still not provided any written response to the Complaints Director, has not provided any medical information to Dr. Caffaro, nor has he contacted the Physician Health Monitoring Program of CPSA. Dr. Mowbrey indicated that he has contacted one support program which was excellent in helping him navigate this process, and that he had received other counselling.

## **V. SUBMISSIONS**

### Complaints Director's Submissions

[43] Ms. Chisholm submitted that the hearing concerned an allegation that Dr. Mowbrey had failed to respond either in a timely manner or at all to correspondence from the Complaints Director regarding an inquiry into his conduct. She submitted that the Hearing Tribunal would need to decide if the CPSA had proven the allegation on a balance of probabilities, which means it is more likely than not that they occurred. If the allegation was proven factually, the Hearing Tribunal would need to consider if the proven allegation constitutes unprofessional conduct under the HPA.

[44] Ms. Chisolm submitted that Dr. Mowbrey consistently established a pattern of failing to respond to the Complaints Director. She argued that the evidence was undisputed and that Dr. Mowbrey admitted both the allegation was proven and that his behaviour was unprofessional. She argued that Dr. Mowbrey failed to respond in a timely manner or at all to the CPSA regarding an inquiry into his conduct on eight occasions between March 1 and July 30, 2019.

[45] Counsel for the Complaints Director submitted that the Complaints Director first wrote to Dr. Mowbrey on March 1, 2019, and followed up by phone and through the portal. She directed the Hearing Tribunal's attention to evidence that Dr. Mowbrey accessed the portal and that the email address the Complaints Director used is correct because Dr. Mowbrey responded on some occasions, although he never provided a fulsome response to the complaints. Ms. Chisholm submitted that the Hearing Tribunal could see Dr. Caffaro's recommendations on how to proceed,



but ten months later, Dr. Mowbrey had still failed to respond to the original complaint. In fact, she argued that he had still not responded to the second complaint, which was a failure to respond to the first complaint.

[46] Ms. Chisholm submitted that courts have long held it is important for members to respond to their college and part of the privilege of self-regulation. Ms. Chisholm provided two cases, *Kaburda v College of Dental Surgeons of British Columbia*, 2001 BCSC 1326 (CanLII) and *Artinian v College of Physicians and Surgeons of Ontario* (1990), 73 OR (2d) 704 (ONSC Div Ct), to the Tribunal to demonstrate that cooperating and responding to regulatory bodies is essential to the functioning of the body and failure to respond is unprofessional.

[47] Ms. Chisholm referred to the HPA, s 1(1)(pp)(vii)(B) which states that failing or refusing to comply with a request of or to co-operate with an investigator constitutes unprofessional conduct. The Complaints Director suggested that the Hearing Tribunal should make a finding of unprofessional conduct.

#### Dr. Mowbrey's Submissions

[48] In his closing statement, Dr. Mowbrey restated that he took full responsibility and accountability for the unprofessional behavior and misconduct that he demonstrated. Dr. Mowbrey expressed his remorse to the Hearing Tribunal and the Complaints Director. Dr. Mowbrey reiterated that there were extenuating circumstances that led to this behaviour, which he said was not normal for him. Dr. Mowbrey indicated that he was very motivated to return to his previous level of functioning.

#### Questions from the Hearing Tribunal

[49] In response to a question from the Hearing Tribunal as to whether Dr. Mowbrey had failed or refused to comply with a request of or cooperate with an investigator in accordance with the HPA, s 1(1)(pp)(vii)(B), counsel for the Complaints Director indicated that the conduct fell within the spirit of the legislation. Because Dr. Mowbrey did not cooperate, the process was never able to advance to the investigation stage. Further, counsel for the Complaints Director submitted that if the Hearing Tribunal was reluctant to apply the definition under s 1(1)(pp)(vii)(B), it could look to s 1(1)(pp)(ii) which indicates that contravention of the HPA, a code of ethics or standards of practice constitutes unprofessional conduct, or to s 1(1)(pp)(xii), which indicates that conduct that harms the integrity of the regulated profession constitutes unprofessional conduct. The Complaints Director also indicated that the Hearing Tribunal could rely on provisions in the CPSA Code of Ethics as it existed before July 2019 to find unprofessional conduct. However, no specific provision of the CPSA Code of Ethics was provided.

## VI. FINDINGS

[50] The Hearing Tribunal carefully considered the evidence of the witnesses and the documents entered as an exhibit. The Hearing Tribunal also carefully considered the written and oral submissions of the parties.

[51] The Hearing Tribunal finds that the allegation as outlined in the Notice of Hearing is factually proven. In making this finding, the Hearing Tribunal relied on the testimony of Dr. Caffaro and Dr. Mowbrey, the evidence in Exhibit #1 and the admission by Dr. Mowbrey made at the outset of the hearing.

[52] The Hearing Tribunal further finds that Dr. Mowbrey's failure to respond to the Complaints Director constitutes unprofessional conduct under the HPA, as follows:

s. 1(1)(pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable:

...

(vii) failure or refusal  
(B) to comply with a request of or co-operate with an investigator,

...

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

[53] Dr. Mowbrey failed to cooperate with the requests of the Complaints Director or his designate on several occasions. While an investigation had not yet been officially initiated on the initial complaint, there was an obligation by Dr. Mowbrey to respond to the complaint so that the complaint and investigation process could be followed. There is an obligation on a regulated member to respond to the Complaints Director or his designate in relation to a complaint received. The failure to respond in this case constitutes a failure to respond in the complaint process, which is closely related to a failure to cooperate with an investigation. It is sufficiently linked to constitute a breach under section 1(1)(pp)(vii)(B) and is unprofessional conduct.

[54] Dr. Mowbrey's failure to respond is very serious. Cooperating and responding to regulatory bodies is essential to the functioning of the professional regulatory body and failure to respond undermines the ability of the CPSA to regulate its members and undermines the integrity of the profession. The conduct is unprofessional under HPA, section 1(1)(pp)(xii). Because Dr. Mowbrey failed to respond to the communications from the Complaints Director or his designate, the initial complaint has not yet been addressed by the CPSA. A regulated member cannot simply fail to refuse to respond to a complaint. The Hearing Tribunal finds that such conduct erodes public trust and confidence in the CPSA's ability to regulate its members and harms the integrity of the profession. As such, regardless of whether the conduct is sufficiently linked to section 1(1)(pp)(vii)(B), it is unprofessional conduct under section 1(1)(pp)(xii) of the HPA.

**VII. ORDERS**

[55] The Hearing Tribunal will hear submissions on sanction from the parties. The Hearing Tribunal asks that the parties consult each other to determine whether submissions will be made in writing or in person, and the timing of such submissions. The parties may request that the Hearing Tribunal make further directions regarding submissions on sanction, if needed.

[56] The Hearing Tribunal strongly encourages Dr. Mowbrey to seek legal advice at this stage and in advance of any submissions on sanction or any further evidence being presented in the hearing. The Hearing Tribunal also strongly encourages Dr. Mowbrey to seek legal advice about putting forward any evidence, including documentation or records to support his oral evidence, that may be relevant to sanction.

Signed on behalf of the Hearing Tribunal  
by the Chair

Dated: March 25, 2020



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Dr. Mark Chapelski, Chair