

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

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

## **I. INTRODUCTION**

[1] The hearing on sanction involving Dr. Kevin Mowbrey, a regulated member of the College of Physicians and Surgeons of Alberta (“CPSA”), was held by way of written submissions. The members of the Hearing Tribunal were:

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

[2] Ms. Julie Gagnon acted as independent legal counsel for the Hearing Tribunal.

## **II. PRELIMINARY MATTERS**

[3] The Hearing Tribunal issued its decision on the merits on March 25, 2020 (“Merits Decision”). The Hearing Tribunal found Dr. Mowbrey guilty of unprofessional conduct as alleged in the Notice of Hearing as follows:

### **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.

[4] In the Merits Decision, the Hearing Tribunal asked the parties to consult each other to determine whether submissions on sanction would be made in person or in writing, and the timing

of such submissions. The Hearing Tribunal further directed that the parties were permitted to request further direction from the Hearing Tribunal regarding submissions on sanction, if needed.

[5] On June 19, 2020, counsel for the Complaints Director wrote to the Hearing Tribunal to request that the Hearing Tribunal provide further direction to the parties as contemplated in the Merits Decision. Counsel for the Complaints Director indicated he had written to Dr. Mowbrey on three occasions (April 18, 2020, May 25, 2020 and June 16, 2020) with respect to submissions on sanction and received no response.

[6] By way of a letter from independent legal counsel for the Hearing Tribunal dated June 25, 2020, the Hearing Tribunal directed the parties to proceed by way of written submissions with the following schedule:

Complaints Director's written submissions due: July 31, 2020 by 4 p.m.

Dr. Mowbrey's written submissions due: August 31, 2020 by 4 p.m.

Complaints Director's reply written submissions due: September 8, 2020 by 4 p.m.

[7] Each party was directed to provide its written submissions electronically to the Hearing Director by the dates listed above. The Hearings Director was tasked with distributing written submissions to the other party. The Hearings Director was also tasked with forwarding all written submissions to the Hearing Tribunal following September 8, 2020, after which the Hearing Tribunal would convene to consider the written submissions. In the event that a party chose not to provide written submission, the Hearing Tribunal indicated that it might proceed with its decision on sanction.

[8] Counsel to the Complaints Director provided written submissions to the Hearings Director that is dated July 31, 2020. No written submissions were received from Dr. Mowbrey. The Hearings Director forwarded the written submissions to the Hearing Tribunal.

[9] The Hearing Tribunal convened on September 28, 2020 to consider the written submissions on sanction and to determine an appropriate sanction under s. 82 of the *Health Professions Act*, RSA 2000, c. H-07 ("HPA").

### **III. DOCUMENTS BEFORE THE HEARING TRIBUNAL**

[10] The following were entered as exhibits during the sanctions hearing:

Exhibit #2 – Letter dated June 19, 2020, from counsel for the Complaints Director to the Hearing Tribunal.

Exhibit #3 – Affidavit of Service sworn June 27, 2020 and attached letter dated June 25, 2020 from independent legal counsel for the Hearing Tribunal to Mr. Joseph Redman, counsel to the Complaints Director, Dr. Mowbrey, and Dr. Susan Ulan, Hearings Director.

[11] The following written submissions were provided to the Hearing Tribunal:

Written submissions of the Complaints Director dated July 31, 2020 attaching the following authorities:

- a. *Jaswal v Newfoundland (Medical Board)* (1996), 42 Admin LR (2d) 233 (NL SC);
- b. *Re Lasaleta*, 2018 CanLII 85973 (AB CPSDC);
- c. *Re Mausolf*, 2018 CanLII 119633 (AB CPSDC);
- d. *Re Barr*, 2019 CanLII 73594 (AB CPSDC).

[12] Dr. Mowbrey provided no written submissions to the Hearing Tribunal.

#### **IV. PROCEEDING IN THE ABSENCE OF WRITTEN SUBMISSIONS FROM DR. MOWBREY**

[13] As a preliminary matter, the Hearing Tribunal was concerned about whether Dr. Mowbrey had notice of the procedure for providing submissions on sanction, and whether he was aware of the timeline that had been set by the Hearing Tribunal. The Affidavit of Service noted that the letter of June 25, 2020 was left with Dr. Mowbrey's wife. The Hearing Tribunal asked independent legal counsel to confirm with the Hearings Director that the address to which the letter dated June 25, 2020 from independent legal counsel for the Hearing Tribunal was personally served and which outlined the procedure and timeline, was still the address Dr. Mowbrey had listed in his CPSA profile. The Hearings Director indicated that the CPSA Registrar had confirmed that the address to which the letter was delivered is still the address Dr. Mowbrey lists as his home address in the CPSA records.

[14] In addition, the Hearing Tribunal noted that this is not the beginning of the hearing process, and that Dr. Mowbrey is aware of the proceedings against him, as he attended at both instances of the Hearing Tribunal convening to consider the allegations against him.

[15] The Hearing Tribunal noted that Dr. Mowbrey did not respond to the correspondence from the counsel for the Complaints Director, which is in keeping with the nature of the allegation proven against him.

[16] As a result, the Hearing Tribunal was satisfied that Dr. Mowbrey did have notice of the process and the timeline, and was therefore prepared to proceed with its decision on sanction.

## V. SUBMISSIONS BY THE PARTIES

### Submissions on behalf of the Complaints Director on Sanction

[17] Mr. Redman, on behalf of the Complaints Director, asked the Hearing Tribunal to impose on Dr. Mowbrey an order:

- a. Requiring Dr. Mowbrey to complete a fitness to practice assessment;
- b. Requiring Dr. Mowbrey to respond to the Complaint Inquiry Coordinator within 30 days of the date of the order to allow the underlying complaint process to progress; and
- c. If Dr. Mowbrey fails to comply with the requirement to respond in subsection b. in a timely manner, requiring the payment of a fine to the College in the amount of \$500.00.

[18] Mr. Redman argued that the proposed sanction was appropriate in the circumstances and was consistent with the evidence, the law, and the protection of the public interest.

[19] Mr. Redman submitted that to determine the appropriate sanction, the Hearing Tribunal must consider the underlying principles of sanction: protection of the public, deterrence both generally and specifically; rehabilitation; and punishment. He further submitted that an appropriate sanction builds and maintains public trust by looking out for the public interest.

[20] Mr. Redman submitted that where a finding of unprofessional conduct is made, the sanction must be tailored to the individual. He further submitted that the proposed sanction sought to recognize Dr. Mowbrey's circumstances and to strike a balance between remediation and punishment.

[21] Mr. Redman submitted that the relevant factors in determining sanction come from *Jaswal v Newfoundland (Medical Board)* (1996), 42 Admin LR (2d) 233 (NL SC), and include:

- a. Nature and gravity of the proven allegations
- b. Dr. Mowbrey's age and experience
- c. The presence or absence of prior complaints or findings of unprofessional conduct
- d. The number of times the offence was proven to have occurred
- e. Whether Dr. Mowbrey has acknowledged what occurred

- f. Whether Dr. Mowbrey has suffered other serious financial or other penalties as a result of the allegations
- g. The presence or absence of any mitigating circumstances
- h. The need for specific and general deterrence
- i. The need to maintain public confidence in the integrity of the profession
- j. The degree to which the proven conduct was clearly regarded as falling outside the range of permitted conduct
- k. The range of sanctions in other, similar cases

[22] In relation to the requirement of a fitness to practice assessment, Mr. Redman submitted that the importance of protecting the public is the first and foremost role of the CPSA and must guide every decision it makes.

[23] Mr. Redman submitted that given the personal challenges alluded to by Dr. Mowbrey in his testimony in the merits hearing, the completion of an independent assessment should be ordered to assess whether Dr. Mowbrey is fit to practice and can do so in a safe and professional manner.

[24] Mr. Redman submitted that although Dr. Mowbrey had testified about his condition and that he had undergone assessments, no documentation was provided to support his statements, and it was not clear that he had taken any steps to follow-up on any recommendations.

[25] The Complaints Director submitted that in light of the serious concerns regarding Dr. Mowbrey's health that were alluded to in the merits hearing, a fitness to practice assessment was necessary to ensure the public is protected, and to promote Dr. Mowbrey's rehabilitation.

[26] Regarding the requirement to respond to the Complaint Inquiry Coordinator, Mr. Redman submitted that an appropriate sanction must also address the underlying cause of the complaint. In this case, the Hearing Tribunal's finding of unprofessional conduct came out of Dr. Mowbrey's failure to respond to correspondence from the Complaints Director and the Complaint Inquiry Coordinator. Undisputed evidence presented at the merits hearing indicated that Dr. Mowbrey never responded to the initial complaint or to the complaint about his failure to respond which was the basis of the finding against him.

[27] Therefore, Mr. Redman submitted that in order for the CPSA to fulfill its role and investigate the underlying complaint, Dr. Mowbrey must respond to the correspondence of the Complaints Director and Complaints Inquiry Coordinator regarding the original complaint, which

was originally sent to Dr. Mowbrey on March 1, 2019. Because the current finding of unprofessional conduct is based on Dr. Mowbrey's failure to respond, Mr. Redman submitted that a specific amount of time to reply should be provided to Dr. Mowbrey. Mr. Redman submitted that 30 days from the date of this Order would be appropriate.

[28] Regarding the fine that the Complaints Director proposed Dr. Mowbrey should be subject to if he did not respond to the underlying inquiry, Mr. Redman submitted that more than 16 months had passed between when Mr. Redman made his submissions and the original correspondence from the Complaints Director to Dr. Mowbrey. Since the date of the hearing, the Complaints Director has written to Dr. Mowbrey on three occasions but has received no reply from Dr. Mowbrey.

[29] Mr. Redman submitted that a conditional fine might serve to motivate Dr. Mowbrey to respond in a timely fashion, and also provides an additional deterrent for continued failure to comply with the mandatory provisions of the HPA. A fine would also reiterate to the CPSA's membership the importance of cooperating with the CPSA. Mr. Redman submitted that a fine in the amount of \$500.00 would serve to satisfy these goals.

#### Submissions on behalf of the Complaints Director on Costs

[30] On the matter of costs, counsel for the Complaints Director submitted that Dr. Mowbrey should be required to pay the full costs associated with the hearing, once again in consideration of the *Jaswal* factors.

[31] Mr. Redman submitted that Dr. Mowbrey was found guilty of the only charge considered. The matter was required to proceed by way of a contested hearing because Dr. Mowbrey failed to respond to correspondence regarding either the investigation itself or from counsel or the Complaints Director regarding the hearing. On the morning the merits hearing convened, Dr. Mowbrey appeared to request an adjournment.

[32] That adjournment was granted, and the merits hearing reconvened on January 7, 2020. In the hearing, the Complaints Director only called one witness, but this was necessary because the Complaints Director did not know whether Dr. Mowbrey would admit the charge against him until the day of the hearing. During the course of the merits hearing, Dr. Mowbrey admitted the allegations against him.

[33] Mr. Redman submitted that since the hearing, Dr. Mowbrey has again failed to acknowledge or respond to correspondence from counsel for the Complaints Director. As a result, additional correspondence with the Hearing Tribunal was required to seek further direction and to set timelines for submissions.

[34] Mr. Redman submitted that this is not a case where it is appropriate for the CPSA membership to subsidize the costs of the hearing. A hearing was only necessary because of Dr. Mowbrey's actions and inactions, and the costs of the hearing were increased because of his conduct.

[35] In addition, Mr. Redman submitted that an order for full costs would be consistent with previous Hearing Tribunal decisions where the regulated member failed to respond to the CPSA. In this regard, Mr. Redman cited three decisions: *Re Lasaleta*, 2018 CanLII 85973 (AB CPSDC), *Re Mausolf*, 2018 CanLII 119633 (AB CPSDC), and *Re Barr*, 2019 CanLII 73594 (AB CPSDC).

## **VI. DECISION AND REASONS OF THE HEARING TRIBUNAL**

[36] The Hearing Tribunal carefully considered the documents entered as exhibits and the available written submissions.

[37] The Hearing Tribunal considered the *Jaswal* factors, including the nature and gravity of the proven allegations, Dr. Mowbrey's age and experience, Dr. Mowbrey's previous character and the presence or absence of any prior complaints or convictions, the impact on any offended patient, the number of times the offence was proven to have occurred, Dr. Mowbrey's role in acknowledging what had occurred, whether Dr. Mowbrey has already suffered other serious financial or other penalties, the presence or absence of any mitigating circumstances, the need for specific and general deterrence, the need to maintain public confidence in the integrity of the profession, and the degree to which the proven conduct was clearly regarded as falling outside the range of permitted conduct.

[38] The Hearing Tribunal considers the findings against Dr. Mowbrey to be very serious. Cooperating and responding to a regulatory body is essential to the functioning of the professional regulatory body. Any failure to respond undermines the ability of the CPSA to regulate its members and undermines the integrity of the profession. Because Dr. Mowbrey has still not responded to the communications from the Complaints Director or his designate, the initial complaint has not yet been addressed by the CPSA. Such conduct erodes public trust and confidence in the CPSA's ability to regulate its members and harms the integrity of the profession.

[39] The Hearing Tribunal notes that at the merits hearing, the Complaints Director testified that he had confirmed that Dr. Mowbrey had withdrawn from practice in accordance with his undertaking. This fact was considered by the Hearing Tribunal in determining the appropriate sanction.

[40] The Hearing Tribunal agreed with counsel for the Complaints Director that to determine an appropriate sanction, the Hearing Tribunal must consider the underlying principles of sanction, including protection of the public, both general and specific deterrence; rehabilitation; and



punishment. The Hearing Tribunal also considered that it is appropriate to tailor a sanction to the individual member. The appropriate sanction must recognize Dr. Mowbrey's circumstances and strike a balance between remediation and punishment.

[41] In relation to the requirement of a fitness to practice assessment, the Hearing Tribunal finds that protecting the public is the first and foremost role of the CPSA and must guide its every decision. Although Dr. Mowbrey alluded to personal challenges in his testimony at the merits hearing, no documentation has been provided to support his statements, and it is not clear what, if any, steps he has taken to address any recommendations. The Hearing Tribunal finds that an independent assessment is appropriate to determine whether Dr. Mowbrey is fit to practice in a safe and professional manner. This order takes into consideration the personal challenges alluded to by Dr. Mowbrey in his testimony at the merits hearing, as well as the fact that Dr. Mowbrey has been out of practice for several years. It also serves the goals of protecting the public and promoting Dr. Mowbrey's rehabilitation.

[42] The Hearing Tribunal also finds that it is appropriate to require Dr. Mowbrey to respond to the Complaint Inquiry Coordinator so as to address the underlying cause of the complaint. In order for the CPSA to fulfill its role and investigate the underlying complaint, Dr. Mowbrey must respond to the correspondence of the Complaints Director and Complaints Inquiry Coordinator regarding the original complaint, which was sent to Dr. Mowbrey on March 1, 2019. The Hearing Tribunal finds that 30 days from the date of this Order is an appropriate time to allow Dr. Mowbrey to respond.

[43] In addition, the Hearing Tribunal finds that a conditional fine is appropriate. The Hearing Tribunal hopes that this will provide additional motivation for Dr. Mowbrey to respond in a timely fashion, but also reiterates to the CPSA's membership the importance of cooperating with the CPSA.

[44] The Hearing Tribunal considered a higher fine than that proposed by the Complaints Director. However, having regards to the particular circumstances of this case, specifically the personal issues alluded to by Dr. Mowbrey in his testimony at the merits hearing, and the fact that Dr. Mowbrey is not currently practicing and has not practiced in several years, his fitness to practice is the more pressing issue, and the \$500.00 proposed by the Complaints Director is considered to be an appropriate fine.

[45] On the issue of costs, the Hearing Tribunal considered that the matter had proceeded as a contested hearing, yet at the merits hearing itself, Dr. Mowbrey admitted the conduct at issue. The costs associated with proceeding by way of a contested hearing, including the investigation, convening the hearing, and calling the Complaints Director as a witness, could all have been avoided if Dr. Mowbrey had cooperated with the Complaints Director in advance of the hearing. This is not a case where it is appropriate for the CPSA membership to cover any of the costs of the

hearing. A hearing was only necessary because of Dr. Mowbrey's actions and inactions, and the costs of the hearing were increased because of his conduct.

[46] Further, an order for full costs is consistent with the prior CPSA Hearing Tribunal decisions provided by counsel for the Complaints Director.

[47] The Hearing Tribunal finds that requiring Dr. Mowbrey to pay up the full costs of the investigation and hearing is appropriate in this case.

## **VII. ORDERS**

[48] The Hearing Tribunal orders as follows:

- a. Dr. Mowbrey shall complete a fitness to practice assessment;
- b. Dr. Mowbrey shall respond to the Complaint Inquiry Coordinator within 30 days of the date of this order so that the underlying complaint process can progress;
- c. If Dr. Mowbrey fails to comply with the requirement to respond in subsection b., Dr. Mowbrey shall pay a fine to the CPSA in the amount of \$500.00; and
- d. Dr. Mowbrey shall pay the full costs of the investigation and hearing into the allegations against him payable within 60 days from service of the written decision of the Hearing Tribunal.

Signed on behalf of the Panel this 13<sup>th</sup> day of October, 2020.



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Dr. Mark Chapelski, Chair