

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. JUNG HWA LEE

**HEARING TRIBUNAL OF THE COLLEGE OF
PHYSICIANS & SURGEONS OF ALBERTA
DECISION ON SANCTION
May 22, 2024**

I. INTRODUCTION

1. The Hearing Tribunal of the College of Physicians & Surgeons of Alberta (the "Tribunal") met by video conference on March 5, 2024 to consider written submissions on sanction. The members of the Hearing Tribunal were:

Dr. Ralph Strother of Calgary as Chair;
Dr. Melanie Stapleton of Calgary;
Mr. Kwaku Adu of Edmonton (public member);
Ms. Barbara Rocchio of Edmonton (public member);

Ms. Natasha Egan was also present and acted as independent legal counsel for the Tribunal.

II. BACKGROUND

2. The Tribunal issued its decision on the merits on September 7, 2023 (the "Merits Decision"). The Notice of Hearing listed the following allegation:
 - a. On or about June 19, 2020, you did access the personal health information record regarding ■■■ at the University of Calgary Student Wellness Services without an authorized purpose for doing so.
3. The Tribunal found that the allegation set out in the Notice of Hearing was proven on a balance of probabilities. The Hearing Tribunal found that the proven conduct constituted unprofessional conduct under section 1(1)(pp) of the *Health Professions Act, RSA 2000, c. H-7* ("HPA"), as follows:

1(1)(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;
- (iii) contravention of another enactment that applies to the profession;

1. In the Merits Decision, the Tribunal requested that the parties discuss the timing and method of providing submissions on penalty to the Tribunal and write to the Hearing Director with a proposal for making submissions on sanction. The Tribunal noted that if the parties were unable to agree on a proposed procedure and timing, the Tribunal would make further directions on this point.
2. On November 17, 2023 the Hearings Director's office wrote to the Tribunal to enquire whether or not the Tribunal wished to receive written submissions on sanction and advised that the parties intended to make a joint submission on sanction. By email the Tribunal agreed to accept joint written submissions.

3. The Hearings Director's office provided joint written submissions on sanction to the Tribunal on January 10, 2024.

III. DOCUMENTS BEFORE THE TRIBUNAL

4. The Tribunal received the following written submissions from the parties:
 - a. Joint Submissions on Sanction dated January 10, 2024 with List of Authorities. The List of Authorities included:
 - i. CPSA Hearing Tribunal Decision, dated September 11, 2023
 - ii. *R. v. Anthony-Cook*, 2016 SCC 43
 - iii. *Ontario (College of Physicians and Surgeons of Ontario) v. Zadra*, 2017 ONCPSD 24
 - iv. *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303
 - v. *Ontario (College of Physicians and Surgeons of Ontario) v. MacNeil*, 2017 ONCPSD 3
 - vi. *Ontario (College of Physicians and Surgeons of Ontario) v Bélanger*, 2018 ONCPSD 18
 - vii. *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SC)
 - viii. *Kolodenko (Re)*, 2018 CanLII 31994 (AB CPSPDC)
 - ix. *Jinnah v Alberta Dental Association and College*, 2022 ABCA 33
 - b. Agreed Exhibit Book for Sanction:
 - i. Joint Submission Agreement, dated January 10, 2024; and
 - ii. University of Calgary Investigation Summary dated December 18, 2020.

IV. SUBMISSIONS ON SANCTION

5. The Joint Submission Agreement requests that the following orders be made by the Tribunal:
 - a. Dr. Lee is to receive a written reprimand with the hearing decision serving as the reprimand; and
 - b. Dr. Lee, at her own expense, shall participate in and unconditionally pass the "Privacy and Confidentiality" course provided by the CMPA (acknowledged to have already been completed).
6. In their Joint Submissions, the parties noted that the Supreme Court of Canada has confirmed the legal test for a decision maker in considering a joint submission is *R. v. Anthony-Cook*. The court confirmed that the public interest test is the proper legal test to be applied by trial judges when considering a joint submission. Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring

the administration of justice into disrepute or would otherwise be contrary to the public interest.

7. The parties submitted that the public interest test also applies to disciplinary proceedings (*Ontario (College of Physicians and Surgeons of Ontario) v. Zadra and Bradley v. Ontario College of Teachers*). The Divisional Court of Ontario has confirmed that any disciplinary body that rejects a joint submission on penalty must apply the public interest test and must show why the proposed penalty is so “unhinged” from the circumstances of the case that it must be rejected. Hearing Tribunals for the CPSA have consistently followed *R. v. Anthony-Cook* when considering joint submissions.
8. The fundamental purpose of sanction in the professional regulatory context is to ensure the public is protected from the proven unprofessional conduct.
9. Tribunals frequently rely on the non-exhaustive list of 13 factors in *Jaswal v. Nfld. Medical Board*. The parties point out that the University of Calgary privacy investigation confirmed that Dr. Lee’s actions “were not driven by plain curiosity or a desire to infringe on the privacy of any of the individuals affected”. They further note that there is no evidence that Dr. Lee intentionally set out to learn personal health information about a patient or colleague and that the conduct itself was for a short amount of time.
10. With respect to the other *Jaswal* factors, there is no evidence of prior complaints or convictions, Dr. Lee acknowledged her conduct from the start and, although she contested that the conduct constituted unprofessional conduct, cooperated with an agreed statement of facts and exhibit book as well as with this Joint Submission on Sanction. Finally, other parties with significant powers for intervention have not implemented any sanction other than admonishing the conduct, acknowledging that Dr. Lee took a privacy and confidentiality course and monitoring her access to information for six months. With the exception of the below, the remainder of the *Jaswal* factors are largely neutral.
11. The single aggravating factor is the impact that Dr. Lee’s conduct had on the offended patient. In her complaint, the Complainant indicated that her privacy was invaded, the conduct was disconcerting, that she had a right to keep some traumatic health concerns private, and that it shook her sense of security at the workplace. The parties ask that the Tribunal consider that Complainant was not cross-examined when determining what weight to put on this evidence.
12. With respect to similar cases that might assist the Tribunal in determining a range for sanction, there were no cases specifically on point. All privacy breach cases that the parties reviewed ordered sanctions that required additional privacy training and most included a reprimand. Where the sanction was more serious the conduct contained elements of snooping or manipulation. The

parties considered whether a suspension in this case would be appropriate and agreed that Dr. Lee's conduct clearly fell below the threshold for a suspension.

13. The parties submit that Dr. Lee should not bear the costs of this hearing because Dr. Lee's conduct does not fall within the four listed compelling reasons under *Jinnah v. Alberta Dental Association and College*.

V. DECISION OF THE HEARING TRIBUNAL

14. Under s. 82 of the HPA, the Tribunal has the authority to order the sanctions agreed to by the parties in this matter. The Tribunal confirms that it accepts the Joint Submission on Sanction as presented.

VI. REASONS OF THE HEARING TRIBUNAL

15. The Tribunal carefully considered the Joint Submission Agreement, Joint Submission on Sanction and the Authorities provided. In so doing, the Tribunal specifically recognizes the deference it should have for Joint Submissions on Sanction as outlined in *Anthony-Cook* and subsequent cases applicable to joint submissions in disciplinary matters.
16. The intentional unauthorized access of confidential patient information which formed the unprofessional conduct in this matter was very brief. Importantly, there is no evidence that Dr. Lee sought to use the information in the chart in an exploitive way. As such, the unprofessional conduct in question was properly characterized as falling at the lower end of the spectrum of unprofessional conduct.
17. The Tribunal did not find any evidence to suggest that accepting the Joint Submission would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. The Tribunal agrees that the sanction as proposed is appropriate when all the circumstances are considered.
18. The Tribunal agrees that Dr. Lee should not bear the costs of this hearing and accepts the parties' submissions that Dr. Lee's conduct does not fall within the four listed compelling reasons under *Jinnah*.
19. The sanctions as ordered will help to ensure that the public has confidence in the profession and its ability to regulate its members.

VII. ORDERS

20. For the above reasons, the Tribunal hereby orders:
 - a. Dr. Lee is to receive a written reprimand with the hearing decision serving as the reprimand; and

- b. Dr. Lee, at her own expense, shall participate in and unconditionally pass the "Privacy and Confidentiality" course provided by the CMPA (acknowledged to have already been completed).

Signed on behalf of the Hearing Tribunal by the Chair:

A handwritten signature in black ink, appearing to read "R Strother". The signature is written in a cursive, flowing style.

Dr. Ralph Strother

Dated this 22nd day of May, 2024.