

ALBERTA COLLEGE OF PHARMACISTS

IN THE MATTER OF
THE *HEALTH PROFESSIONS ACT*

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF **CYRIL BRIGHT**
A REGULATED PHARMACISTS

DECISION OF THE HEARING TRIBUNAL

I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Mr. Cyril Bright. In attendance on behalf of the Hearing Tribunal were Ms. Dianne Veniot, Chairperson; Mr. Hugo Leung, Pharmacist; and Mr. Peter Kawalilak, Public Member.

The following persons were also in attendance at the hearing: Mr. James Krempien, Complaints Director; Mr. David Jardine, counsel for the Complaints Director; and Ms. Katrina Haymond, independent counsel for the Hearing Tribunal.

The hearing took place on October 8, 2015 at the office of the Alberta College of Pharmacists (ACP). The hearing was held under the terms of Part 4 of the *Health Professions Act* (“HPA”).

II. ALLEGATIONS

The Notice of Hearing was entered as Exhibit 4, and stated the following:

IT IS ALLEGED THAT:

1. On or about March 1, 2013, you were mailed a letter notifying you that you were selected for competence assessment as part of the Alberta College of Pharmacists’ (“ACP’s”) Continuing Competence Program (“CCP”);
2. On May 9, 2014, you wrote the previously offered Knowledge Assessment (“KA”) examination at Step 1 of the CCP;
3. On or about May 13, 2014, the ACP sent you a letter notifying you that you were unsuccessful in passing the previously offered KA examination (Step 1 of the CCP), and providing you with the following options to complete your competence assessment at Step 2 of the CCP:
 - a. Complete the KA examination during the August 8 or 9, 2014 sittings; or
 - b. Submit a Professional Portfolio/Practice Enhancement Record under the revised CCP program, which would consist of completing one Practice Enhancement Record (“PER”) by December 15, 2014 and a second PER by May 30, 2015;
4. You did not:
 - a. Attempt the KA examination on the August 8 or 9, 2014 sittings; or

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- b. Submit a Professional Portfolio/Practice Enhancement Record under the revised CCP program, which would have involved submitting a first PER by December 15, 2014 and a second PER by May 30, 2015;
5. On November 7, 2014 you received an email from Denise Brooks advising you that your Step 2 competence assessment document was due at the ACP on December 15, 2014 and you were provided with a further option of providing two on-line implementation records (“IRs”) in lieu of the PP/PERs with the submission deadline for the first IR to be December 15, 2014 as the KA examination was now discontinued;
6. In the November 7, 2014 email, you were asked to notify the ACP by November 14, 2014 as to your decision regarding the type of submission you would be making (IR or PP/PER) by December 15, 2014;
7. You did not:
 - a. Notify the ACP by November 14, 2014 about your decision; or
 - b. Submit a PP/PER or IR by December 15, 2014;
8. On January 8, 2015, you were provided with a non-compliance letter from the Competence Director advising that as the deadline for all the options provided had passed, this letter of non-compliance was being issued and the matter would be considered by the Competence Committee on January 21, 2015 and that you could submit information for consideration by the Competence Committee;
9. You did not submit any information for consideration by the Competence Committee and on January 29, 2015 you received a letter from the Complaints Director advising that the Competence Committee had referred the matter to the Complaints Director;
10. As of March 12, 2015, you were still not compliant in providing your first PP/PER or IR at Step 2 of the CCP to the ACP; and
11. You have stated that you do not agree that any requirements for Step 2 submissions should have been imposed and that you will not be providing the required submissions.

IT IS ALLEGED THAT compliance with the Continuing Competence Program established by the ACP to demonstrate ongoing competence is a fundamental duty of registered pharmacists and that your ongoing refusal to comply with the Continuing Competence Program undermines the integrity of the profession and raises the question of whether or not you are governable.

IT IS ALLEGED THAT your conduct constitutes a breach of the following statute and

Code of Ethics governing the practice of pharmacy:

- Sections 1(1)(pp)(vi)(A) and 1(1)(pp)(xii) of the *Health Professions Act*; and
- Principle IX(5) of the ACP Code of Ethics;

and that your conduct set out above and the breach of some or all of these provisions constitutes unprofessional conduct pursuant to the provisions of sections 1(1)(pp)(vi)(A) and 1(1)(pp)(xii) of the *Health Professions Act*.

Included in the Notice of Hearing was the following instruction:

AND FURTHER TAKE NOTICE THAT pursuant to section 72(1) of the *Health Professions Act*, you are required to attend the said time and place and in person, you may be compelled to testify and you are entitled to be represented by counsel. In the event that you do not attend at the said time and place, the Hearing Tribunal may proceed in your absence pursuant to section 79(6) of the *Health Professions Act*.

III. PRELIMINARY MATTERS

Mr. Bright did not attend the hearing. Procedurally, the hearing was originally set for June 4, 2015, adjourned shortly beforehand with the consent of the parties, and directed that October 8, 2015 would be a preemtory date and he would be expected to appear.

Decision to proceed in the absence of the investigation person

Ms. Margaret Morley, Hearings Director for the ACP was called as a witness by Mr. Jardine in order to show both service and ongoing communications up to and including the morning of the hearing, October 8, 2015, when Mr. Bright sent an email indicating he would not be attending. Exhibit 1 was introduced as a documented summary of all communication between Mr. Bright and Ms. Morley with regard to scheduling the original hearing, request for an adjournment and the rescheduling to the October 8, 2015 date which was confirmed June 29, 2015. Exhibit 2 was introduced as a memo prepared by Ms. Morley regarding a phone conversation with Mr. Bright on October 6, 2015 about his ambivalence in attending and confirmation that surgery would not prevent him from participating. Finally, Exhibit 3 was marked as an email from Mr. Bright to Ms. Morley advising he has decided not to attend the hearing.

The panel confirmed that Mr. Bright was served with the Notice to Attend, was aware of the hearing, and chose not to attend or to seek an adjournment. The Hearing Tribunal determined that it had the authority to proceed in Mr. Bright's absence pursuant to section

79(6) of the *Health Professions Act*, and that it was appropriate to proceed in this case given that the investigated person was aware of the hearing, and made a deliberate choice not to attend.

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

IV. **EVIDENCE**

Mr. Jardine made a brief opening statement. He stated that this matter arose because of a complaint raised by the Competence Director, on behalf of the Competence Committee for failure to comply with the requirements of the Continuing Competency Program; failure of the Knowledge Assessment examination and subsequent refusal to provide any further evidence of continuing competence in the practice of the profession of pharmacy. Mr. Jardine informed the Tribunal that he would be calling three witnesses: Mr. Krempien, Complaints Director for the ACP; Ms. Debbie Lee, the Competence Director, and Mr. Dale Cooney, Deputy Registrar, who was asked to provide background on how the examination was developed, evaluated and retired.

James Krempien, Complaints Director

Mr. Jardine called Mr. Krempien, Complaints Director, as his first witness. Mr. Krempien established the following key points in his direct evidence:

- Mr. Krempien received an email complaint from Ms. Lee on January 29, 2015 for Mr. Bright's failure to complete the activity prescribed by the Competence Committee, at the request of the Competence Committee at their January 21, 2015 meeting.
- Mr. Bright had been randomly selected to complete Step 1 of the RxCEL Continuing Competence Program in March 2013, and was provided up to 1 year to make and complete his selection of the 2 options available as to what avenue of competence review he would undertake (KA or PP/PER).
- After some initial technical and scheduling issues, Mr. Bright elected to undertake the KA examination May 9, 2014 and did not successfully meet the standard cut score, and thus did not pass the test.
- The results were mailed to Mr. Bright May 13, 2014 at which time he was notified of his options and deadlines for either re-challenging the KA examination for a second attempt or submitting 2 PPs/PERs in order to complete Step 2 of the CCP. It must be noted that the KA examination was being phased out in 2014 and the final sittings of

the test were being held August 8 and 9, 2014 as the CCP was in transition.

- There is a record of communication between Mr. Bright and Mr. Cooney in June 2014 in which Mr. Bright refused to believe he failed the KA examination and questioned the validity of the test.
- In November 2014, as the final examination date had passed and Mr. Bright did not re-challenge the KA test, his only remaining option to demonstrate his continued competence to be licensed on the ACP clinical register was to submit 2 PPs/PERs, with the first due on December 15, 2014. Ms. Lee's assistant, Ms. Denise Brooks emailed a reminder of the pending deadline to Mr. Bright, and provided a third option to meet the Step 2 requirements of the CCP. This additional option was the online submission of 2 IRs; the first of which would be due December 15, 2014.
- Mr. Bright failed to submit either a PP/PER or an IR by the December 15, 2014 deadline. He was notified January 8, 2015 of his failure of Step 2 of the CCP and that his file was to be referred on an anonymous basis to the Competence Committee at their next scheduled meeting of January 21, 2015, and to which he was invited to submit or present information the Committee could take into consideration in their decision regarding consequences of failing Step 2 of the CCP.
- At the January 21, 2015 Competence Committee meeting the decision was made to direct Ms. Lee to refer the matter to the complaints department for investigation. Upon investigation by Mr. Krempien and his finding there was no basis for dismissing the complaint, it was not trivial or vexatious, the matter was referred to the Hearings Director for a hearing. The Record of Decision to refer the complaint was marked Exhibit 5.
- Mr. Krempien began his investigation with both written and telephone communication with Mr. Bright regarding the complaint of unprofessional conduct in his failure to demonstrate continued competency in the practice of pharmacy, and the requirement that Mr. Bright must respond in writing by March 2, 2015.
- Mr. Bright responded via email on March 10, 2015, and raised the question of the validity of the KA examination as a measurement of clinical knowledge and he suspected it was a psychological examination. Psychometric analysis in this context is a method for standardizing and validating individual test questions that are used on the examination, rather than any measurement of the individual person taking the examination.
- Noted in the original complaint made by Ms. Lee, there was also a second allegation regarding a random professional declaration audit in October 2014 that was resolved by investigation by the complaints director and the matter was not referred to this Hearing Tribunal.

During the course of Mr. Krempien's testimony, an additional exhibit was entered into evidence, consisting of a binder of documents, Exhibit 6, which included the Sequence of Events Report prepared by Mr. Krempien, the letter of complaint from Ms. Lee, and documentation of communication as described above.

Debbie Lee, Competence Director

Mr. Jardine called Ms. Lee as the next witness. Ms. Lee established the following key points in her direct evidence:

- Ms. Lee assumed her duties as Competence Director in November, 2014 at which time Mr. Bright was in Step 2 of the RxCEL CCP. Ms. Lee is responsible for the programs and procedures related to continuing competence requirements for pharmacists to remain on the clinical register at the ACP. She also oversees the Competence Committee which is composed of pharmacists and one pharmacy technician.
- On July 1, 2014 a new CCP was implemented and the former RxCEL CCP was phased out. Mr. Bright was one of 10 outstanding cases of pharmacists who were selected in the former program and was to be transitioned into the new program. These pharmacists had the option of either completing the KA examination at the final sitting in August, 2014 or submit 2 PPs/PERs or IRs under the new program; one due December 15, 2014 and the second due May 31, 2015.
- Ms. Lee directed her assistant, Ms. Brooks to send a reminder to the individuals of the requirements, including Mr. Bright on November 7, 2014.
- When the December submission deadline had been missed, Ms. Lee sent a notification to Mr. Bright that his case would be anonymously referred to the Competence Committee and he was offered the opportunity to submit information for consideration by the Committee before January 19, 2015.
- The Competence Committee met January 21, 2015 at which time nothing at all had been received from Mr. Bright. The decision of the Competence Committee members was to instruct Ms. Lee to refer Mr. Bright's case to the Complaints Director for non-compliance with the deadline, which resulted in the written complaint dated January 29, 2015.
- Ms. Lee clarified that the selection process for the Professional Declarations audit is random, from the entire pool of registrants, and results in 10% of pharmacists selected to present documentation to prove their declarations to be true. Selection for the Competence audit is also random, initially from the entire pool of registrants, and results in 10% of pharmacists selected to demonstrate their continued competence. If a member was successful in demonstrating their competence, they were exempt from being randomly selected for a period of five years. It was possible for the same pharmacist to be randomly selected to participate in both very different processes, or to

be selected in more than one year running for the declarations audit.

- Under the RxCEL program when a pharmacist was randomly selected to demonstrate their continued competence, this is Step 1. There were two options: challenge the KA examination or submit a PP. Successful candidates would have their case closed at Step 1. Unsuccessful pharmacists automatically default into Step 2 and could re-challenge the test or submit the PP. If still unsuccessful, they would be placed into Step 3.
- Mr. Bright challenged the KA examination in May, 2014. There were ten candidates of whom eight were successful in meeting the ‘cut score’. The cut score indicates the pharmacist has met the requirements of the exam and was developed via a very rigorous process by subject matter experts and then through psychometric review.

Mr. Jardine had no further questions, and the Hearing Tribunal did ask some clarifying questions, and Ms. Lee provided the following additional testimony:

- Ms. Lee explained the current CCP that began July 1, 2014 does not have the same steps or options to demonstrate continuing competency. Currently all pharmacists on the clinical register must submit a portfolio each year. The portfolio must include a number of learning records as well as one IR.

Dale Cooney, Deputy Registrar

Mr. Jardine called Mr. Dale Cooney as his third witness. During Mr. Cooney’s testimony he established the following key points:

- Mr. Cooney, in his role as Deputy Registrar was over-seeing the Competence program during the period of vacancy between June and November, 2014, and was acting Competence Director for this period of time. In addition, he is responsible for overall quality practice, the registration department and the professional practice department.
- The KA examination had been in place since 2010 under the RxCEL CCP. The other component of PP/PER included conducting a self-assessment, undertaking professional development, then completing the template documentation to demonstrate how they incorporated the learning into their practice by describing three projects they completed using the new information.
- The KA examination was developed by a subcommittee of the Competency Committee, the Knowledge Assessment Panel, (“KAP”) consisting of ten pharmacists. Questions were submitted to the KAP by question writers, in addition to those developed previously by the College of Pharmacists of British Columbia. The KAP continually reviewed new questions from 2009 to 2012. The examination was piloted by a number of volunteer pharmacists.
- A psychometrician, Dr. Gregg Sadesky from the company now known as Yardstick,

was contracted to statistically evaluate each of the 70 multiple-choice questions and the test in entirety to determine the validity and reliability of those questions. For example if there were four options, A, B, C and D and D was an incorrect answer yet most or all pharmacists chose D then the KAP would be instructed that the question is not a good question and should be removed, or the distractor should not be used, or perhaps the answer is incorrect.

- Of the 70 questions on the examination, only 60 questions counted toward the results. The remaining ten questions were continually being piloted and analyzed for confirmation each would be a strong question, and were randomly distributed throughout the test. This allowed for the questions to continually be updated and no sitting of the examination to be exactly the same as the previous one.
- Mr. Cooney confirmed that there was nothing in the KA examination to psychologically analyze the pharmacists writing the test. The psychometric evaluation was of the questions themselves and the validity of the examination in providing a measurement of clinical knowledge. It is recognized there is no single measure of competency and the KA examination is a surrogate validated, peer reviewed measurement.
- The cut score was set by the KAP and is the threshold for differentiating between pharmacists who demonstrated the level of performance that was acceptable versus the level of performance that would be deemed not acceptable, and was never intended to be made public. From the design of the project and included in the registrant instruction manual was the fact, clearly indicated that the challenger would never receive an actual score on the examination; rather they would be informed that they either met the acceptable level or had not. Additionally, they would be informed of the therapeutic areas of practice where they performed strongly and those where they had not performed as well. This decision of the KAP was to protect the integrity of the examination, and in order for pharmacists to focus on identifying areas of practice where they needed to build their knowledge, rather than ‘did I get this question right or wrong?’ or ‘did I attain 78% versus 82%?’.
- The RxCEL program was reviewed by ACP Council and the Competence Committee in 2012 because feedback from pharmacists included a high level of discomfort in undertaking an examination, even though the large majority of those randomly selected for a competence assessment selected the KA examination rather than the submission of a PP. It was recognized that neither option was an absolute measure of competence and that the development of a portfolio and the demonstration of implementation of learning was far more beneficial to pharmacists and a better indicator of maintenance or improvement in competence.
- There was also recognition that the KA examination was very broad in scope while many pharmacists have a practice that is quite narrow in scope. If a pharmacist practiced in pediatrics or oncology, they may not have in-depth knowledge about cardiology and ophthalmology not normally addressed on a daily basis.

- Mr. Bright requested proof of his failure of the KA examination as he did not believe he could have failed to achieve the cut score. Mr. Cooney responded in writing in June 2014 and further explained the framework of the test and how to interpret the feedback that had been provided to Mr. Bright with his notification of failure and thus his automatic placement in Step 2 of the CCP. The feedback included information on the therapeutic areas where he received full marks, those areas of partial marks between 1 to 50 percent, 50 to 75 percent or greater than 75 percent, and those areas where the candidate received zero marks. This is intended to provide examples of areas where, if Mr. Bright were to re-challenge the examination, he may want to focus his attention and preparation.
- A score that failed to meet or exceed the cut score would not indicate incompetence; rather it is an indication that the ACP will require more information in order to determine the pharmacist is in fact maintaining their competence. This is the reason Step 2 includes the option to challenge the next iteration of the KA examination, or provide a PP in order to demonstrate their competency again.
- The new CCP that came into effect July 1, 2015 requires all pharmacists on the clinical register to annually complete continuing education and submit an IR identifying how they have implemented at least one continuing education unit's worth of that learning into their practice. Mr. Bright was offered this option as an alternative to re-challenging the KA examination at the final sitting August 8 or 9, 2014, or submitting a PP/PER before December 15, 2014 and a second document before May 31, 2015.
- The *Health Professions Act* and the *Pharmacists and Pharmacy Technicians Regulation* indicates that refusal to comply with the competence program may be considered unprofessional conduct.
- The Competence Committee was informed that a candidate, identified only as Case 1005 had been unsuccessful on the KA examination, had been notified of their options, and had not submitted a PP/PER or IR before the December 2014 deadline.

The Hearing Tribunal asked some clarification questions of Mr. Cooney and Mr. Krempien. The following information was obtained or clarified during this time:

- Mr. Krempien confirmed that Mr. Bright graduated from the University of Saskatchewan Pharmacy program in 1974. He initially registered with the former Alberta Pharmaceutical Association in September 1987 and came onto the actively practicing roster in October 1987. On January 1, 1996 Mr. Bright voluntarily moved to the non-practicing register and returned to the clinical register on July 1, 2002, until July 1, 2015.
- Mr. Bright was selected for a competence review under the RxCEL CCP only once. There was a provision that once a pharmacist was selected to enter Step 1, they would

not be asked to demonstrate their competence again within the next five years.

- Mr. Jardine asked Mr. Krempien to share Mr. Bright's employment history as self-reported by the pharmacist or by the pharmacy licensee:
 - from January 1991 to September 1995 he was a pharmacy manager at a Shoppers Drug Mart;
 - there is no employment activity between 1995 and 2005, during which time information publicly available through the Alberta Law Society is the time Mr. Bright was at the University of Saskatchewan, obtained a law degree, and became a member of the Alberta Law Society in 2002;
 - from July to October 2005 the ACP's records show employment at a Shoppers Drug Mart; and
 - between June 2008 and July 2009 the ACP was informed he was employed at a Shoppers Drug Mart.
- The ACP does not verify that a member is actually working as a pharmacist, nor if they are working full-time, part-time, relief, or only a single shift during any of those periods.

Mr. Jardine then indicated that the evidence on behalf of the Complaints Director was concluded. As the member had chosen to not be present, there was no cross-examination of any witnesses.

V. SUBMISSIONS

Submissions on Behalf of the Complaints Director

Mr. Jardine began his submissions by defining the burden of proof as being based on the balance of probabilities. In addition he re-emphasized that the Hearing Tribunal must conduct a two-step analysis. The Hearing Tribunal must first determine if the allegation is factually proven based on the balance of probabilities and second, if it is proven, the Tribunal must determine whether the conduct reached the degree of seriousness to be determined to be unprofessional conduct.

Mr. Jardine summarized the allegations and the evidence in relation to each of the allegations. He provided the Hearing Tribunal with a book of Statutory Authorities, including excerpts from the ACP's Standards of Practice, the HPA, the *Pharmacy and Drug Act*, and the Food and Drug Regulation.

Mr. Jardine submitted the evidence in this case is clear that there was a notice of selection for competence assessment March 1, 2013, found on Tab 1, section B of Exhibit 6. The KA examination was undertaken by Mr. Bright on May 9, 2014 as proven by testimony from Mr. Cooney and Ms. Lee and record of discussion of the test software in Tab 1, section C and the results letter in section D. Mr. Bright was notified on May 13, 2014 that he was unsuccessful in passing the KA examination and setting out two options as found in sections D, E and F. Mr. Jardine submitted that these facts support Allegations 1, 2 and 3.

Allegation 4 states Mr. Bright did not attempt the final sitting of the KA examination in August, 2014 and did not submit either a PP or PER before the December 15, 2014 deadline, or a second one by May 30, 2015, as referenced in Tab G in a letter dated January 8, 2015.

Allegation 5 is that Mr. Bright was given a further option to complete an IR in lieu of the PP/PER with a reminder of the December deadline as part of the Step 2 competence assessment, as the KA examination had been discontinued. This evidence is found in an email addressed to Ms. Brooks and blind copied to Mr. Bright dated November 7, 2014 in Tab F. Mr. Bright's email response to this message was not until December 6, 2014 and is found in Tab 7. The November 7, 2014 email from Ms. Brooks requests a response from Mr. Bright by November 14, 2014 regarding the type of submission (on-line IR or PP/PER); this is Allegation 6.

Allegation 7 states Mr. Bright did not notify the ACP of his selection before November 14, 2014 nor submit the required documentation before December 15, 2014. There is documentation of a conversation between Mr. Krempien and Mr. Bright found in Tab 10 confirming these details.

In the eighth allegation, Mr. Bright was provided with a non-compliance letter advising him that all options provided had passed and his case would now be passed to the Competence Committee. The Committee was next meeting January 21, 2015 and information could be submitted by Mr. Bright for the committee to take into consideration. A copy of this notice is found in Tab 4 and confirmed by Ms. Lee's testimony.

As no information was submitted for consideration to the Competence Committee before their meeting, the directive from the Committee was that Mr. Bright's case be referred to the Complaints Director for investigation. This documentation confirming allegation nine is found in Tab 4 and confirmed by Mr. Krempien's statements.

As of March 12, 2015, Mr. Bright was still non-compliant in providing any documentation to satisfy Step 2 of the CCP, as found in Tab 17, in which Mr. Krempien met with Ms. Lee to update her on the preliminary investigation findings. This is set out as allegation 10.

In the final allegation, 11, Mr. Bright stated he should not have been asked to submit any documentation, should not have been placed in Step 2 and would not be providing any documents to the CCP. This email written by Mr. Bright is found in Tab 15.

Compliance with the CCP established by ACP to demonstrate ongoing competence is a

fundamental duty of registered pharmacists. Mr. Bright's steadfast refusal to comply with the CCP undermines the integrity of the profession and raises the question of whether or not he is governable.

The legislation and standards governing pharmacists clearly requires pharmacists to maintain and demonstrate continued competence. A failure or refusal to comply with the requirements of the CCP constitutes unprofessional conduct as per HPA section 1(1)(pp)(vi)(A), and supported by the Code of Ethics Principle IX(5) in which a pharmacist responds constructively to the outcomes of competence assessments and practice visits, as well as other appraisals and reviews of their professional performance and undertakes further training when necessary.

Section 3 of the HPA specifically states the primary duty is the protection of the public, and thus mandates that a college must establish a CCP. It is a fundamental requirement of a health professional, a duty to ensure its members undertake some form of competence assessment. A self-regulating profession protects the public by admitting only those who are qualified, and then has duties to ensure continuing competence. Mr. Jardine submitted that the evidence is overwhelming in demonstrating either a failure or refusal to comply with the requirements of the CCP and the allegations were clearly proven and the conduct in issue constitutes unprofessional conduct.

Mr. Jardine provided a quotation from a similar case involving the Law Society, *Lenhardt v. Law Society of Alberta* in which Mr. Lenhardt refused to answer standard questions in a three year investigation because he questioned the process and fairness and refused to cooperate with an investigator. The Alberta Court of Appeal held that "Mr. Lenhardt appears to believe that he regulates the Law Society." A member with a problem with the process cannot simply refuse to do it.

Unprofessional Conduct is defined in section 1(1)(pp)(xii) of the HPA as conduct that harms the integrity of the regulated profession. As the fundamental duty of the ACP is to protect the public; and the fundamental part of that is having the cooperation of members to carry out their obligations and their duties. If the ACP were not to enforce this statutory requirement it would impact the integrity of the profession and the confidence of the public in the ACP's ability to regulate the profession. This provision is also breached by a single member refusing to comply with a mandatory competence assessment.

In summary, Mr. Jardine felt that the allegations were proven and that those provisions have also established a breach of those sections of the Act and the Code of Ethics and that those are serious matters, and that Mr. Bright's conduct clearly constitutes unprofessional conduct.

Closing Submissions by Mr. Bright

As Mr. Bright deliberately decided not to attend the hearing, there were no closing submissions available on his behalf. The parties were advised that the Hearing Tribunal would adjourn to deliberate, and would provide an oral decision in due course.

VI. FINDINGS

The Hearing Tribunal carefully considered the evidence provided during the course of the hearing in relation to each of the allegations made. The Tribunal also reviewed the material presented in each of the exhibits in relation to each allegation.

Based on its review, the Hearing Tribunal was satisfied that the allegations are supported by the evidence.

Allegation 1: On or about March 1, 2013, you were mailed a letter notifying you that you were selected for competence assessment as part of the Alberta College of Pharmacists’ (“ACP’s”) Continuing Competency Program (“CCP”);

The Hearing Tribunal finds that Allegation 1 was proven on the balance of probabilities. The evidence clearly established that Mr. Bright was randomly selected from the entire pool of registrants to undertake the CCP. The letter sent to Mr. Bright on March 1, 2013 is found in Exhibit 6, Tab 1(B) (page 5) and referenced in Ms. Lee and Mr. Cooney’s testimony.

Allegation 2: On May 9, 2014, you wrote the previously offered Knowledge Assessment (“KA”) examination at Step 1 of the CCP;

The Hearing Tribunal finds that Allegation 2 was also proven on the balance of probabilities. There is evidence presented in Tab 1(C), page 12 and 13, Mr. Bright scheduled to sit the KA examination at 0900h on April 11, 2014 at the Calgary examination site, but did not show up (page 11). He then agreed to be re-scheduled at 0900h on May 9, 2014 (page 7). The results of Mr. Bright’s challenge of the KA examination on May 9, 2014 were mailed to him on May 13, 2014 as found in Tab 1(D), page 14. Mr. Bright himself references the sitting of this test during a transcribed telephone conversation with Mr. Krempien, in which he is surprised and disbelieving that he could have failed said test, found in Tab 10, page 84, and again in a written response in Tab 15, pages 126 and 127. This is also further confirmed by testimony provided by Mr. Cooney and Ms. Lee.

Allegation 3: On or about May 13, 2014, the ACP sent you a letter notifying you that you were unsuccessful in passing the previously offered KA examination (Step 1 of the CCP), and providing you with the following options to complete your competence assessment at

Step 2 of the CCP:

- a. **Complete the KA examination during the August 8 or 9, 2014 sittings; or**
- b. **Submit a Professional Portfolio/Practice Enhancement Record under the revised CCP program, which would consist of completing one Practice Enhancement Record (“PER”) by December 15, 2014 and a second PER by May 30, 2015;**

The Hearing Tribunal finds that there is a significant amount of evidence, as outlined above, which demonstrates that, Allegation 3, including particulars (a) – (b) are proven on a balance of probabilities. A copy of the original notification, dated May 13, 2014 including the next options available to Mr. Bright is found in Tab 1(D), page 14 and 15, and referenced in a faxed response from Mr. Bright to Ms. Baker who was Ms. Debbie Lee’s predecessor (the previous Competence Director), dated May 22, 2014 and found in Tab 16(A). Even though Mr. Bright expressed surprise that he had these options in his written response provided to Mr. Krempien on March 10, 2015, found in Tab 15, page 127, the Tribunal finds sufficient evidence to prove this allegation.

Allegation 4: You did not:

- a. **Attempt the KA examination on the August 8 or 9, 2014 sittings; or**
- b. **Submit a Professional Portfolio/Practice Enhancement Record under the revised CCP program, which would have involved submitting a first PER by December 15, 2014 and a second PER by May 30, 2015;**

The Hearing Tribunal found there is evidence stating Mr. Bright did not meet either of the above option deadlines in particulars (a) and (b), as found in a registered letter mailed to Mr. Bright on January 8, 2015 from Ms. Lee, found in Tab 1(G) and thus the allegation is proven.

Allegation 5: On November 7, 2014 you received an email from Denise Brooks advising you that your Step 2 competence assessment document was due at the ACP on December 15, 2014 and you were provided with a further option of providing two on-line implementation records (“IRs”) in lieu of the PP/PERss with the submission deadline for the first IR to be December 15, 2014 as the KA examination was now discontinued;

The evidence to support this allegation is found in Tab 1(F) in an email to Ms. Denise Brooks (Ms. Lee’s administrative assistant) and blind copied to Mr. Bright, in which he references in a response dated December 6, 2014 on page 75, Tab 7, and confirmed by witness Ms. Lee. The Tribunal found this allegation was proven.

Allegation 6: In the November 7, 2014 email, you were asked to notify the ACP by

November 14, 2014 as to your decision regarding the type of submission you would be making (IR or PP/PER) by December 15, 2014;

This allegation is found to be proven. Again, the written evidence of request was found in Tab 1(F) and Mr. Bright's response, including the original email to and from Ms. Brooks is found in Tab 7, dated after the November 14, 2014 deadline.

Allegation 7: You did not:

- a. **Notify the ACP by November 14, 2014 about your decision; or**
- b. **Submit a PP/PER by December 15, 2014 and a second PER;**

The deadline to respond was not met by Mr. Bright as proven in his email response to Ms. Brooks, dated December 6, 2014, found in Tab 7. The Tribunal finds that allegation 7(a) is proven. In a conversation with Mr. Krempien and transcribed March 3, 2015, Mr. Bright confirmed that he has not submitted either a PP or PER by the December 15, 2014 deadline. This is found in Tab 10. While Mr. Bright did submit some documents to ACP on March 5, 2015, neither a PP nor PER was included then either. Mr. Krempien's written response dated March 6, 2015 and Mr. Bright's further reply dated March 10, 2015 confirms these deadlines were passed as found in Tab 15, pages 126 to 131. Allegation 7(b) is also proven.

Allegation 8: On January 8, 2015, you were provided with a non-compliance letter from the Competence Director advising that as the deadline for all the options provided had passed, this letter of non-compliance was being issued and the matter would be considered by the Competence Committee on January 21, 2015 and that you could submit information for consideration by the Competence Committee;

This allegation was found to be factually proven via the documentation found in Tab 1(G), a registered letter delivered to Mr. Bright's Calgary address.

Allegation 9: You did not submit any information for consideration by the Competence Committee and on January 29, 2015 you received a letter from the Complaints Director advising that the Competence Committee had referred the matter to the Complaints Director;

The supporting documentation of this letter informing Mr. Bright of the decision of the Competence Committee to initiate the Competence Assessment Case #10005 as a Complaint for further investigation was written by Mr. Krempien and is found in Tab 4. The Hearing Tribunal also finds that Allegation 9 is proven.

Allegation 10: As of March 12, 2015, you were still not compliant in providing your first PP/PER or IR at Step 2 of the CCP to the ACP; and

This allegation is found to be supported by a Memo created by Mr. Krempien regarding a meeting with Ms. Lee in which she was provided with an update and summary of the information gathered during the investigation of this complaint, in Tab 17. This was further supported by Ms. Lee's testimony in which she confirmed the ACP had not received a PP/PER nor an IR from Mr. Bright as of March 12, 2015.

Allegation 11: You have stated that you do not agree that any requirements for Step 2 submissions should have been imposed and that you will not be providing the required submissions.

The evidence establishes that Mr. Bright initially attempted to comply with the requirements of the Competence Program as demonstrated in his undertaking of his first unsuccessful sitting of the KA examination, as found in Tab 1(C), and that Mr. Bright was asking what the PP looked like, as found in Tab 7 correspondence with Ms. Brooks, and her response in Tab 16(B). However, further conversation and written communication with Mr. Krempien supports the allegation that Mr. Bright did not agree he should be subject to Step 2 of the CCP. A transcript of a telephone conversation held March 3, 2015 in Tab 10, and an email response of March 10, 2015 in Tab 15 are evidence that he did not agree that the Step 2 requirements should have been imposed, and support this allegation. As confirmed by Ms. Lee, to the date of this hearing there still has been no documentation to support the CCP submitted by Mr. Bright. The explanation of the history, development, scoring and evaluation of the CCP and KA examination was explained by Mr. Cooney's testimony.

Conduct is found to be “Unprofessional Conduct”

For the reasons outlined above, the Hearing Tribunal finds that Allegations 1 through 11 are factually proven on a balance of probabilities.

The Hearing Tribunal also considered whether Mr. Bright's conduct constitutes "unprofessional conduct" as defined in section 1(1)(pp) of the HPA, which includes failure or refusal to comply with the requirements of the Continuing Competence Program, breaching a code of ethics or standards of practice, and conduct that harms the integrity of the profession.

The ACP has established a Continuing Competence Program in accordance with the HPA. Participation in the program is a fundamental duty of registered pharmacists. The evidence establishes that Mr. Bright failed and refused to comply with his duty to complete the Continuing Competence Program.

Principle 9 of the ACP Code of Ethics requires members to "respond constructively to the outcomes of competence assessments and practice visits, as well as other appraisals and reviews of my professional performance and undertake further training when necessary." Mr. Bright did not respond constructively when he was advised that he had not passed the KA, and in fact,

declined to participate in any further continuing competence activities. Mr. Bright's conduct clearly breaches the ACP Code of Ethics.

The Hearing Tribunal also finds that Mr. Bright's conduct impairs the integrity of the profession. The Continuing Competence Program is a necessary part of ensuring that registered members continue to demonstrate their clinical skill and ongoing competence to practice pharmacy. The program is not optional, and members are obliged to comply. Pharmacy is a self-regulating profession. When a member refuses to abide the requirements that all members must follow, it suggests that the requirements are optional, which is not the case, and undermines the ACP's ability to engage in self-regulation.

The Hearing Tribunal did consider whether Mr. Bright had a legitimate excuse that might exonerate him from complying with his obligations, including whether there was some unfairness with respect to the KA. Although the witness testimony established that some pharmacists did not like the KA, and that the KA was discontinued and is no longer being used, that does not establish that the KA was inappropriate or unfair. In fact, the evidence established that the exam was designed in consultation with a psychometrician, Yardstick, and that most people who chose to take the KA passed it. There is no evidence that the KA was inappropriate, unfair, or invalid.

Moreover, even if Mr. Bright felt that the examination was somehow unfair, he was provided with other options after being advised that he had not passed in order to complete the continuing competence requirements. He elected not to do so, and simply declined to take any further steps.

In *Lenhardt v. Law Society of Alberta*, 2001 ABCA 147, a member of the Law Society received a complaint alleging that he had acted improperly, and was subject to an investigation. The investigator requested that Lenhardt respond to a number of questions. Lenhardt refused to answer any of the questions, raising a number of objections regarding the relevance and appropriateness of the questions and demanding that the Law Society provide him with certain information before he would consider responding. The Court of Appeal noted that his conduct was improper, stating:

“Mr. Lenhardt’s correspondence demanding various kinds of information from the Law Society about a variety of people and topics tends to suggest that Mr. Lenhardt thinks that he regulates the Law Society. That is not so. The Legislature of Alberta has made the opposite choice.”

Mr. Bright's conduct here is similar. Mr. Bright had an obligation to comply with the Continuing Competence Program, regardless of his views on whether or not the KA was valid or flawed.

While the Hearing Tribunal is aware that not every breach is sufficient to rise to the level of unprofessional conduct, the repeated refusal by Mr. Bright to comply with the

established requirements to maintain licensure on the active clinical register establishes that Mr. Bright's conduct is unprofessional. Moreover, his refusal to participate in the program raises a concern that he may be ungovernable.

VII. **SANCTIONS**

The decision of the Hearing Tribunal and finding of unprofessional conduct was provided orally to those in attendance. While Mr. Jardine was prepared to proceed with submissions on sanctions, the Tribunal agreed that Mr. Bright should have the opportunity to respond in writing to the suggested sanctions. The hearing was adjourned, and the Tribunal directed Mr. Jardine to provide the written submission on penalty on behalf of the Complaints Director by October 16, 2015 and Mr. Bright had until October 30, 2015 to have the opportunity to respond in writing.

The Hearing Tribunal convened (in the absence of the parties) via teleconference on November 4, 2015 at 9 a.m. to deliberate with respect to penalty. Mr. Bright did not provide any response in any way to the written submission on sanctions provided by Mr. Jardine.

As outlined in section 82 of the *Health Professions Act* the legislation gives the Hearing Tribunal a broad range of powers to make the orders that it considers most appropriate to deal with the circumstances of the particular case and the investigated person who has been found to have engaged in unprofessional conduct.

Purpose of Sanctions

In his written submissions, Mr. Jardine referred to an excerpt from *Regulation of Professions in Canada*, pages 14-5 to 14-8 which summarizes the purpose of sanctions in the professional discipline context, which include protection of the public, maintaining the integrity of the profession, fairness to the member, and deterrence.

Relevant Factors in Assessing Sanctions

The Hearing Tribunal considered the written submissions on behalf of the Complaints Director with respect to factors that are relevant to sanction in this case, and finds that the following factors are relevant:

A. The Nature and Gravity of the Proven Allegations

In this case the allegations proven were very serious. The Hearing Tribunal determined that the above allegations, 1 to 11 were proven. These proven allegations go to the heart of the professional and ethical obligations of a pharmacist. To refuse to comply with the

continuing competence requirements expected of all pharmacists is a breach of Mr. Bright's duty to the public, and the profession of which he is a member.

B. The Age and Experience of the Member

Mr. Bright is an experienced pharmacist and a lawyer. His conduct cannot be excused on the basis of lack of experience. The evidence at the hearing indicated that he graduated from Pharmacy at the University of Saskatchewan in 1974 and was licensed as a pharmacist in Alberta in 1987.

C. The Presence or Absence of Prior Complaints Convictions

There have been no prior discipline findings in respect to Mr. Bright by the ACP.

D. The Number of Times the Offence was Proven to Have Occurred

The evidence at the hearing established that the conduct in question was ongoing conduct and not a single isolated mistake. Mr. Bright was given numerous opportunities to address the outstanding continuing competence issues.

E. The Presence or Absence of any Mitigating Circumstances

The Hearing Tribunal is not aware of any particular mitigating circumstances.

F. The Need to Impose Specific and General Deterrence

In terms of specific deterrence, it is vital that Mr. Bright understand that his conduct was seriously unprofessional and unacceptable. Although he has recently transferred to the associate register he is eligible to apply for reinstatement onto the clinical register and the orders in this case must recognize that point.

In terms of general deterrence, the sanction imposed must deter other members of the profession from engaging in similar unprofessional conduct, and must understand that the ACP cannot and will not tolerate this type of conduct, and that the sanctions imposed will be significant.

G. The Need to Protect the Public

The Hearing Tribunal agrees that the orders must ensure that the public is protected from conduct of similar nature in the future.

H. The Need to Maintain the Public's Confidence in the Integrity of the Profession of Pharmacy in Alberta

The ACP must be able to demonstrate to the public that it is willing and able to regulate

and govern the conduct of each member of the profession and to ensure that every member meets the minimum continuing competence requirements. Conduct such as that shown by Mr. Bright in this case can seriously undermine public confidence unless it is fully addressed by appropriate orders in this case.

The public must be able to see that the ACP takes this conduct very seriously and that such conduct will not be tolerated and will have serious consequences. The public must also be able to see that steps have been taken to sanction the conduct and to ensure that it does not recur in the future. The public cannot maintain confidence in the ACP's integrity as a self-governing profession if the ACP tolerates or permits this conduct.

I The Degree to Which the Conduct is Clearly Outside the Range of Permitted Conduct

The conduct in this case is far beyond the range of permitted conduct.

J. The Range of Sentences in Other Similar Cases

Mr. Jardine provided the Hearing Tribunal with one previous Hearing Tribunal decision involving a member who was convicted of failing to respond to an investigation conducted by the Complaints Director. The Hearing Tribunal in that case imposed a fine of \$5,000, and imposed other orders in relation to other conduct that the member was convicted of.

The Orders Proposed by the ACP and accepted by the Hearing Tribunal

The Complaints Director requested that the Hearing Tribunal impose the following orders and conditions under section 82 of the *Health Professions Act*. For the reasons referred to in this decision, the Hearing Tribunal agrees with submissions on behalf of the Complaints Director, and hereby makes the following orders pursuant to section 82:

- a. Mr. Bright shall receive a reprimand and the decision of the Hearing Tribunal shall serve as the reprimand;
- b. Mr. Bright shall pay a fine of \$5,000 to be paid within 60 days from the date the decision of the Hearing Tribunal is served on him;
- c. Mr. Bright shall pay all of the expenses, costs and fees related to the investigation and hearing, to a maximum of \$20,000 on a payment schedule satisfactory to the ACP; and
- d. Mr. Bright must satisfy all requirements of the Competence Committee prior to being permitted to apply to be placed onto the clinical pharmacist register.

Reasons for the Requested Orders

The Request for a Reprimand

In his submissions, Mr. Jardine noted that the ACP would normally request a suspension of at least 2 months for conduct of a similar nature. However, in this case Mr. Bright has transferred to the associate register so a suspension would have no practical purpose. The Hearing Tribunal agreed that in the circumstances, a reprimand and other significant sanctions were appropriate.

The Fine

The appropriate conduct schedule in the *Health Professions Act* permits fines of up to \$10,000 for each proven finding of unprofessional conduct. The ACP is requesting a fine of \$5,000 to emphasize the degree to which Mr. Bright's conduct was unacceptable. A similar fine was imposed for failure to co-operate with the Competence Committee in the case referred to above. The Hearing Tribunal determined that it is also appropriate that there be a significant fine to recognize that a suspension has no practical effect in this circumstance where Mr. Bright has transferred to the associate register.

The Order for Payment of Costs

Mr. Jardine indicated that he anticipated that the total costs of the investigation and hearing would be in the range of \$15,000 to \$20,000.

The Hearing Tribunal agreed with the submissions on behalf of the Complaints Director that it was appropriate for Mr. Bright to bear the costs of the investigation and hearing. The Hearing Tribunal found that all of the allegations referred to in the Notice of Hearing were proven. The hearing was required because of the serious unprofessional conduct of Mr. Bright. In these circumstances, it is reasonable and proper that Mr. Bright be ordered to pay the costs of the investigation and hearing. The ACP and its members should not be forced to bear the expense of the hearing when the need for the hearing arose as a direct result of the unprofessional conduct of Mr. Bright.

The Hearing Tribunal imposes a maximum amount of costs to be ordered of \$20,000 so that there is some certainty with respect to the total amount of costs payable by Mr. Bright.

The Order Regarding the Competence Committee Requirements

The Hearing Tribunal agrees with the submissions on behalf of the Complaints Director that an order requiring Mr. Bright to complete Competence Committee requirements prior to any attempt to reinstate his practice permit is appropriate and

necessary. The proposed order is appropriate because it will protect the public if Mr. Bright ever attempts to transfer back to the clinical register. Before such a transfer can be considered the public and the profession must be assured that Mr. Bright has met all the requirements of the Competence Committee and is competent to practice. In addition, the ACP must be assured that Mr. Bright will comply with the requirements of the ACP including the requirements of the Competence Committee.

VII. **CONCLUSION**

In conclusion the Hearing Tribunal finds that Allegations 1 to 11 were proven on the balance of probabilities, and that the conduct in issue is “unprofessional conduct” as defined in the HPA and the orders outlined above are appropriate for the reasons provided.

Signed on behalf of the Hearing Tribunal
by the Chair

Dated: January 21, 2016 Per: [Dianne Veniot]

Dianne Veniot