

Alberta College of Pharmacists

In the Matter of the *Health Professions Act*

And in The Matter of a Hearing Regarding

The Conduct of

BRYAN McINTYRE

(Complaint 1697)

DECISION OF THE HEARING TRIBUNAL

1. Introduction

The Hearing Tribunal held a hearing into the conduct of Bryan McIntyre (Registrant)(ACP Registration Number 6160). In attendance on behalf of the Hearing Tribunal was Bob Sprague (the Chair), Pauline Ly (Pharmacist), Peter Macek (Pharmacist), and Nancy Brook (Public Registrant). Independent Counsel for the Tribunal was Bonnie Bokenfohr.

In attendance were David Jardine (legal counsel representing the College) and Jim Krempien (Complaints Director).

In attendance for the registrant was Bob Aloneissi (legal counsel representing the registrant), the registrant and his wife.

The Hearing took place on April 19th, 2011 at the Alberta College of Pharmacists office, Edmonton, Alberta. The Hearing was held under the terms of Part 4 of the *Health Professions Act*.

2. Allegations

The allegations are as set out in the Notice of Hearing (NOH), Appendix One. The Notice of Hearing appended to this decision has substituted the initials D.B. for the name of the third party involved in this matter.

The NOH was distributed to the Tribunal at the commencement of the hearing. The Tribunal broke for caucus to review the NOH.

3. Preliminary Matters

At the commencement of the hearing, the Chairman asked if there were any objections to the composition or the jurisdiction of the Hearing Tribunal. Both legal counsel for the College and registrant replied there were no objections.

Counsel for the registrant asked the Hearing Tribunal to hold the hearing in private. The College objected, arguing that the hearing should be open to the public.

Section 78 of the *Health Professions Act* provides that:

78(1) A hearing is open to the public unless

- (a) the hearing tribunal holds the hearing or part of the hearing in private on its own motion or on an application of any person that the hearing or part of the hearing should be in private
 - (i) because of probable prejudice to a civil action or a prosecution of an offence,
 - (ii) to protect the safety of the person or of the public,
 - (iii) because not disclosing a person's confidential personal, health, property or financial information outweighs the desirability of having the hearing open

- to the public,
- (iv) because the presence of the public or complainant could compromise the ability of a witness to testify, or
- (v) because of other reasons satisfactory to the hearing tribunal,

or

- (b) another Act requires that the hearing or part of the hearing be held in private.

Mr. Aloneissi argued that the hearing should be held in private because of probable prejudice to a prosecution of an offence. Acknowledging that there was no pending prosecution arising out of these matters, Mr. Aloneissi argued that the remaining possibility of a prosecution was sufficient to engage the protection contemplated in s.78(1)(a)(i). In terms of prejudice, Mr. Aloneissi suggested that a public hearing may jeopardize the ability to secure an unbiased jury in the future.

The College argued that s.78(1)(a)(i) is intended to protect real prosecutions – prosecutions that exist. As of the date of the hearing, there was no pending prosecution. The registrant was not facing criminal charges. Adopting Mr. Aloneissi's argument would mean that the same argument could be made in any hearing where there was the potential that the investigated registrant could face criminal prosecution. Furthermore, neither the police nor prosecuting agency was objecting to the hearing being open to the public on the basis that a future prosecution would be prejudiced.

Both parties invited the Tribunal to consider the issue and render its decision at any point in the proceedings up to and including in its decision on the merits of the matter. Both parties asked that the hearing proceed with this preliminary matter outstanding. Practically, neither party objected to the presence of any of the individuals in the hearing room.

While it may be unusual for a party to raise this issue but encourage the Tribunal to proceed with the hearing without deciding it, the Tribunal does recognize that whether a hearing or part of a hearing was held in private will impact the rights of different individuals to examine the record pursuant to s.85 of the HPA.

The Tribunal orders that the hearing is open to the public. The reasons for keeping the hearing open to the public are:

- The registrant was not facing any criminal charges or criminal prosecution at the time of the hearing.
- The Tribunal does not want to give the appearance of hiding those that have done wrong from the public.
- The guiding spirit of the HPA is to keep the proceedings of the hearing open to the public.
- The registrant has not established probable prejudice to any future, possible prosecution.

4. Evidence

Brief opening statements from both legal counsels was presented to the Tribunal. The College and registrant then submitted an Agreed Statement of Facts (ASF) as their evidence in the hearing. Both parties indicated that the ASF contained all of the evidence that both parties were putting before the Tribunal. Neither party intended to call any witnesses. The ASF was distributed to the Tribunal and entered as an exhibit. The Tribunal broke for caucus to review the ASF, Appendix two. The ASF appended to this decision has substituted the initials D.B. for the name of the third party involved in this matter.

Upon reconvening, the College confirmed that the reference to a "Revised Notice of Hearing" at para. 3 of the ASF were in error. There was no Revised Notice of Hearing in this matter.

The College also confirmed that it accepted the calculations of the registrant with respect to the amount of tablets that were provided to D.B. These calculations amend the chart included at para. 26 of the ASF. By the Registrant's calculations, during the period from December 10, 2009 to December 10, 2010 he diverted the following narcotics to individual D.B.:

- Endocet – 1,138 tablets
- Oxycontin
 - 1,468 tablets (20mg)
 - 14,950 tablets (40 mg)
 - 14,650 tablets (80 mg)
- Ratio-Oxycocet – 200 tablets
- Metadol – 1,900 tablets (25 mg)

These new calculations should replace the calculations identified in Column D of the chart at para. 26.

The Tribunal accepted the ASF as entered into evidence, with the above noted amendments, and therefore proceeded with the Hearing.

5. Submissions

The College provided the following statutory authorities to the Tribunal:

- Section 1(1)(pp) of the *Health Professions Act*;
- Sections 1 to 5 of the *Pharmacy and Drug Act* Standards for Operating Licensed Pharmacies;
- Standard 1 of the Standards for Pharmacist Practice;
- Sections 1(p), 10(1), and 31 of the *Pharmacy and Drug Act*;

- Section 5 of the *Controlled Drugs and Substances Act* together with the definition of "traffic" as set out in s.2(1);
- Sections 30 to 53 of the *Narcotic Control Regulations*; and
- Alberta College of Pharmacists Code of Ethics;

In their submissions, both counsel for the College and counsel for the registrant reinforced the admissions of the registrant. The registrant has acknowledged that his conduct:

- harmed the integrity of the profession as a whole,
- had the potential to place the public at risk, and
- had the potential to decrease the public's trust in the profession.

The registrant also acknowledges that he abused his position of trust and authority as a pharmacy licensee by altering the pharmacy's electronic inventory records.

The registrant admits that his conduct breached provisions of the Standards for Pharmacist Practice, Standards for Operating Licensed Pharmacies, the *Health Professions Act*, *Pharmacy and Drug Act*, *Controlled Drugs and Substances Act*, and *Narcotic Control Regulations*.

Finally, the registrant admits that his conduct constitutes unprofessional conduct pursuant to the *Health Professions Act*.

In response to a question from the Tribunal, counsel for the College clarified that the following specific sections of the Code of Ethics are the sections alleged to have been breached: Principles I 1, I2, X1, X2, and XI6. Counsel for the registrant did not have any concerns with the specific sections identified by the College.

6. Findings

The Hearing Tribunal advised the parties at the hearing that it accepted the registrant's admission of unprofessional conduct and found that the registrant's conduct constituted unprofessional conduct as defined in s. 1(1)(pp) of the *Health Professions Act*. The Hearing Tribunal undertook to provide its written reasons for this finding together with its decision on penalty. The reasons for the Tribunal's finding of unprofessional conduct are as follows:

Allegation #1 – Diversion of large quantities of narcotics

The evidence clearly establishes that during the period from December 10, 2009 to December 10, 2010 the registrant gave D.B. large quantities of narcotics on a frequent and regular basis without a prescription. While D.B. would sometimes pay the pharmacy's costs of the medication, he often paid nothing.

Allegation #2 – Knew or should have known that the narcotics were not for personal use and were being distributed to others

The volume of medications given to D.B. by the registrant is not consistent with the therapeutic guidelines for pain management and was beyond the amount an individual could logically consume. This exceeded the Canadian Guidelines for Safe and Effective Use by approximately 3,000 times. As an experienced pharmacist the registrant either knew or should have known that D.B. was further trafficking the medication.

The registrant has admitted to knowing that D.B. was giving the medication to other people, in particular family members, without a proper prescription.

The registrant should have questioned the amounts being used and should have followed up with his findings.

Allegation #3 – Practising outside scope of practice

The registrant has admitted that he provided D.B. with narcotics in an attempt to treat his pain and opioid dependency. He tried to wean D.B. off Oxycontin by providing him with Metadol for pain and addiction and Percocet [Endocet] for pain. All narcotics require a prescription in order to be dispensed to a patient. In addition, Metadol requires specialized medical training and a Health Canada exemption in order to prescribe it. Specifically to the Metadol, the registrant was providing a medication that only a select group of physicians are able to prescribe, due to extra safety issues associated with this medication.

Attempting to treat D.B.'s pain with narcotics was clearly outside the registrant's scope of practice. Similarly, attempting to treat D.B.'s apparent opioid dependency was outside the registrant's scope of practice. The registrant has admitted that both actions are beyond his scope of practice. The duty to act within the scope of one's practice as a pharmacist is enshrined in the Standards for Pharmacist Practice. Acting outside one's scope of practice is a breach of the Standards of Pharmacist Practice.

Allegation #4 – Conduct harmed the integrity of the profession and had the potential to place the public at risk and decrease public trust in the profession

By engaging in the above activities referenced in Allegations #1 to #3 over a prolonged period of time, the registrant has harmed the integrity of the profession and had the potential of placing the public at risk. Furthermore, performing these activities over a prolonged time period in a role beyond his scope of practice has the potential to decrease the public's trust of the profession. The reasons why are as follows:

- The complaint was not based on a single event. The registrant continued providing narcotics to D.B. for an extended period of time. This action did not stop until ACP was informed by local law enforcement in which they then contacted the registrant. Pharmacy is a self-regulated profession – pharmacists are required to understand what the rules are and to follow them. By providing narcotics without a prescription, the registrant put D.B. at risk of harm and those D.B. was trafficking the narcotics to as well. These actions by the registrant did put the public at risk. The integrity of the profession was also harmed by the Registrant by putting the public at risk because of his actions. The public needs to trust that pharmacists will respect their roles and abide by all codes, standards, and regulations applicable to them. When a registrant does not do this, it reflects poorly on all registrants of the profession.

Allegation #5 – Abuse of position of trust and authority as pharmacy licensee

The evidence establishes that the registrant manually altered electronic inventory records. These alterations had the effect of concealing his diversion of narcotics to D.B. and thus prolonging his ability to divert narcotics to D.B. The registrant betrayed his position of trust and authority as a pharmacy licensee through his engagement in these activities. The position of pharmacy licensee has additional responsibilities in addition to those required by all pharmacists. One of the main roles is to oversee all aspects of pharmacy practice performed at the pharmacy. This position of additional responsibility made it easier for the registrant to conceal his actions. Hence, the registrant used his knowledge and position of access to the computer records to make alterations to the records.

Summary of Findings

By engaging in the above activities and conduct, the registrant has breached the following:

- Section 1 and s. 1.1, 1.2, 1.5(d), 1.11(a), 1.12, and 1.14 of the Standards for Pharmacist Practice;
- Sections 4 and 5 of the Standards for Operating Licensed Pharmacies;
- Sections 1(1)(pp)(ii), 1(1)(pp)(iii), and 1(1)(pp)(xii) of the *Health Professions Act*;
- Sections 1(1)(p)(i), 1(1)(p)(ii), 1(1)(p)(iv), 1(1)(p)(ix), 10(1)(a), 10(1)(d)(i), and 31(2)(a) of the *Pharmacy and Drug Act*;
- Principles I 1, I2, X1, X2, and XI6 of the ACP Code of Ethics Bylaw;
- Section 5(1) of the *Controlled Drugs and Substances Act*; and
- Section 31(1) of the *Narcotic Control Regulations*.

The Hearing Tribunal finds that the breaches of the above noted provisions constitute unprofessional conduct pursuant to s.1(1)(pp) of the *Health Professions Act*.

7. Penalty

Upon being advised by the Hearing Tribunal of its finding that the registrant's conduct constituted unprofessional conduct as defined in s. 1(1)(pp) of the *Health Professions Act*, the parties commenced their submissions on penalty. Once a hearing tribunal has decided that the conduct of a registrant constitutes unprofessional conduct, the tribunal may make one or more of the orders under section 82(1) of the *Health Professions Act*. Although the parties had proceeded by way of an ASF and admissions, the parties did not agree on the appropriate penalty.

a. Submissions

A summary of David Jardine's submissions on behalf of the College are as follows.

The discipline and complaint process is an important aspect of any self-regulating profession. The primary purpose of any sanction is the protection of the public. Deterrence is necessarily an element of public protection. Both the specific deterrence of the registrant from engaging in the same conduct in the future and general deterrence directed at the general membership. The College's focus in this matter is on general deterrence. Given the registrant's cooperation to date, there is no evidence that he is at risk of repeating his conduct.

D.B. was a rogue and exploited the registrant. The College accepts that the registrant was relieved to see the Complaints Director from the College, Jim Krempien, and the RCMP which halted his dispensing actions. This is a unique case. Mr. Jardine encouraged the Tribunal to keep an open mind. The registrant has cooperated with the RCMP. The registrant had no financial gain and takes full responsibility. The College has not alleged that the registrant had the intent to traffic but he did supply narcotics without a proper prescription. While the registrant has admitted breaches of the *Controlled Drugs and Substances Act* and *Narcotic Control Regulations* this is not an admission of criminal intent. The College is not alleging a criminal intent. Only the Courts can determine criminal matters. This is a professional conduct hearing pursuant to the *Health Professions Act*. Counsel asked, based on the registrant's actions, what message does this send to the public?

The College sought the following orders:

- Suspension of the registrant's practice permit for a time period in the range of 18 – 24 months;
- The registrant shall provide proof that he has passed the College's jurisprudence and ethics exam at the conclusion of his suspension;
- Conditions on practice permit for the five (5) years subsequent to the suspension:
 - the registrant not act as a licensee;
 - the registrant provide his employer(s) with a copy of the Hearing Tribunal's decision;

- the registrant provide the licensee of the pharmacy that he is employed at with a copy of the Hearing Tribunal's decision; and
- the licensee of the pharmacy must agree to quarterly audits of the pharmacy's inventory records.
- Fine in the amount of \$2,000; and
- Costs of the investigation and hearing.

In seeking a suspension, the College argued that the starting point in this matter should be a cancellation of the registration and practice permit of the registrant. It is only the mitigating circumstances that make a suspension as opposed to cancellation appropriate.

A summary of Mr. Aloneissi's submissions on behalf of the registrant are as follows.

The registrant derived no benefit from providing D.B. with the narcotics. The registrant stopped dispensing all strengths of Oxycontin December 10th, 2010. There hasn't been any risk to the public during the last four months as the registrant continues to be a dispensing pharmacist. There is no evidence that D.B. was hurt. The registrant has been married for ten years and they have three children. Their lives are on hold because of this matter. The registrant and his family have been threatened and D.B. is a known person to the police. In the beginning the registrant acted out of compassion towards D.B. Finally, a suspension would put a considerable hardship on the pharmacy and his patients. The registrant has known many of his patients for up to nine (9) years. There is nobody to take over the pharmacy.

Mr. Aloneissi argued that a suspension was not warranted in these circumstances.

The registrant asked for an opportunity to make submissions directly to the Hearing Tribunal. A summary of his submissions are as follows:

The registrant admitted there are no excuses for his actions and he takes full responsibility; stating that he is not a bad guy, just an idiot. He is sorry to himself but especially to his family. He referred to having a black spot on his heart and acknowledges that he is responsible for the tremendous amount of stress he has caused his wife and himself. As a pharmacist he has always provided a high level of care and compassion to his patients. He wishes he had the courage to have stopped his actions. He is requesting to keep the pharmacy open until a Licensee can be found due to the shortage of pharmacists. He needs time until July or August, 2011. He feels remorse and is willing to "face the music".

b. Orders

The orders from the Tribunal are as follows:

1. The registrant shall pay the maximum fine of \$10,000 for the finding of unprofessional conduct.
2. The registrant's practice permit shall be suspended for a period of thirty (30) months effective 30 days from the date of receipt of this decision with the latter twenty four (24) months stayed. Any breach of these Orders by the Registrant will cancel the stayed suspension immediately. Any breach of these Orders may lead to a new investigation at the discretion of the Complaints Director.
3. At the end of the first six months of the suspension, prior to commencing the stayed suspension period , the registrant must do the following in order to be eligible for re-instatement:
 - a. challenge the College's jurisprudence exam and provide proof to the College that he has passed it; and
 - b. comply with the current registration requirements of the College.
4. The registrant shall pay to the College all the costs, expenses, and fees attributed to this Hearing. The total (fine plus costs) are to be paid over a five year period to commence 30 days from the date of receipt of this decision in a payment schedule acceptable to both parties.
5. Commencing 30 days from the date of receipt of this decision, the registrant shall provide a copy of this written decision to all his pharmacy employers for a period of five (5) years and provide written proof to the College that employers have reviewed the decision.
6. It shall be a condition of the registrant's practice permit that, following reinstatement of the registrant's practice permit, he shall only be employed at a pharmacy that has agreed to submit to a quarterly audit of all narcotics for a period of 24 months. The College shall be responsible for arranging and coordinating these audits. The costs and expenses of these audits will be the registrant's responsibility.

c. Reasons for Decision on Penalty

The Hearing Tribunal recognizes that it's Orders with respect to the decision must be fair, reasonable, and proportionate when considering all the facts of this matter. In deciding on the Orders the Tribunal considered the following factors:

1. The nature and gravity of the proven allegations have been taken into consideration.

The medications dispensed in this matter are controlled by the *Controlled Drugs and Substances Act* and the *Narcotic Control Regulations*. The conduct of the registrant seriously breaches both of these regulations. Pharmacists are entrusted with the safe and legal handling of such medications, and therefore, occupies a position of trust and this trust was breached in this matter.

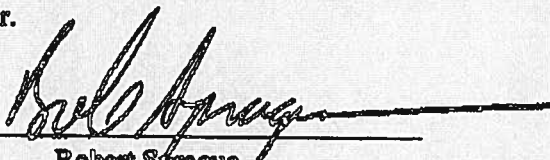
2. The Tribunal considered the registrant's professional experience, he has been a registrant since 2002, and is of the opinion that he knows the regulations of the profession and therefore should not have breached those regulations.
3. The Tribunal was informed that the registrant does not have any past misconduct, prior complaints, or findings of unprofessional conduct. Therefore, this matter was considered to be a first time event.
4. This was not a one-time event only but rather an ongoing practice. It was important to consider the number of times the offending conduct was proven to have occurred over approximately a one year period.
5. The registrant fully cooperated with the College in developing an Agreed Statement of Fact. The Tribunal recognizes the registrant's self-reflection in this matter and therefore believes that he is unlikely to engage in this type of conduct again.
6. There is the consideration of the community and its need for a pharmacist. The registrant practices in a rural community where there is not a large pool of pharmacists available to replace him. This situation has been considered by the Tribunal regarding the suspension of 6 months with an additional 24 months suspension stayed. Therefore, this will be assistance to the community while recognizing the serious finding of unprofessional conduct. Furthermore, the suspension begins 30 days from the date this decision is received to allow for the pharmacy to procure a Licensee replacement. The College asked for a 24 month suspension with no stay. The Tribunal considered this in its Orders but contends that a six month suspension with an additional 24 months stayed is sufficient penalty towards the registrant while balancing the needs of the community.
7. The College asked that the registrant be restricted from being a Licensee for a period of five years. However, as noted above by the Tribunal, the registrant practices in a rural community where there is not a large pool of licensees available to replace him. The Tribunal considered the need for deterrence (both to the membership and the registrant individually) and the public in the small center that the registrant serves as a pharmacist. The Tribunal is confident that the audit requirements ordered will sufficiently address any future risk to public safety and is convinced that the registrant will not repeat his actions again.

- 8. The registrant's motivation was not for profit. In some instances, the medication was given free to D.B. Although misguided by his feelings that he could help D.B., the registrant engaged in conduct he thought was a helping gesture and by the time he realized what was going on he believed he was in too deep to get out. The registrant indicated he was relieved that he was caught. He cooperated to the fullest extent possible during the investigation.

- 9. Pharmacists occupy a position of trust with the public. The registrant broke this trust with the public by providing narcotics without the proper authority along with tampering with the inventory management system at the pharmacy. These are both serious breaches that reflect badly on the profession and the public's trust of the profession. This was considered in the Tribunal's Orders.

Dated: Aug 26/11
August 26, 2011

Signed on behalf of the Hearing Tribunal by
the Chair.

Per. 
Robert Sprague