

**IN THE MATTER OF THE *HEALTH PROFESSIONS ACT*,
R.S.A., 2000, c. H-7 and
THE PHARMACY AND DRUG ACT,
R.S.A., 2000, c. P-13**

-and-

**IN THE MATTER OF AN APPEAL PURSUANT TO
SECTION 87 of the *HEALTH PROFESSIONS ACT*
of orders made by the Hearing Tribunal against
Mr. Bryan McIntyre in its written decision dated August 26, 2011**

DECISION OF THE COUNCIL OF THE ALBERTA COLLEGE OF PHARMACISTS

1. INTRODUCTION

Council of the Alberta College of Pharmacists convened to hear an appeal pursuant to section 87 of the *Health Professions Act* on December 12, 2011, at the Rutherford I room of the Varscona Hotel located at 8208 106 Street Northwest, Edmonton, Alberta.

In attendance were:

Members of Council:

Anjli Acharya, President
Kaye Moran, President-elect
Kelly Olstad, Vice President
Chelsey Cabaj, Council Member
Pat Matusko, Public Member
Joan Pitfield, Public Member
Vi Becker, Public Member
Clayton Braun, Council Member
Wilson Gemmill, Council Member
Ahmed Metwally, Council Member
Krystal Wynnyk, Council Member

Also present were:

Bryan McIntyre - Registrant
Mrs. McIntyre - Registrant's wife
Bob Aloneissi - Legal counsel representing Mr. McIntyre
David Jardine - Legal counsel for the College
Jim Krempien - Complaints Director
Fred Kozak - Independent legal counsel to Council

There were no objections to the composition of Council present to the hear the appeal. There were no preliminary objections or jurisdictional issues brought forward by either counsel.

2. HISTORY

On April 19, 2011 a Hearing Tribunal reviewed the conduct of the registrant, Mr. Bryan McIntyre. On August 26, 2011, the Hearing Tribunal issued its written decision, finding that the registrant's conduct constituted unprofessional conduct, and made the following written orders:

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 reinstatement:
 - 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.

3. ISSUES APPEALED

On September 23, 2011 the Complaints Director of the Alberta College of Pharmacists issued and served a Notice of Appeal of two aspects of the orders made by the Hearing Tribunal, appealing:

1. the decision to stay all but 6 months of a 30 month suspension of Mr. McIntyre's practice permit imposed by the Hearing Tribunal; and
2. the decision to decline to place conditions on Mr. McIntyre's practice permit subsequent to his suspension being served that would prohibit Mr. McIntyre from acting as a licensee for a period of 5 years and that would require him to provide the licensee of the pharmacy at which he was employed with a copy of the Hearing Tribunal's decision.

4. STANDARD OF REVIEW

There are two standards of review developed by the courts to guide appeal bodies in decision making:

- a. Correctness – no deference is given and the appeal body can substitute its view if it considers that the Hearing Tribunal made an error; and
- b. Reasonableness – a deferential standard, which recognizes that there may not be a single correct answer to a question but a range of acceptable outcomes in terms of the facts and the law. If the decision of the Hearing Tribunal falls within that range, it should not be disturbed, even if the appeal body would have decided the case differently.

Council acknowledges that the Supreme Court of Canada and the Alberta Court of Appeal have made clear that in cases of appeals or reviews of a decision of a professional discipline tribunal the “correctness” standard is used very rarely and that in most cases the proper standard of review will be “reasonableness”. Council agreed with the submissions of counsel that the appropriate standard of review for the issues on appeal in this case was “reasonableness”.

5. GROUNDS OF APPEAL

The Complaints Director submits that aspects of the orders made by the Hearing Tribunal were unreasonable in that the Hearing Tribunal:

- a. established and applied a different principle and standard of sanctions to Mr. McIntyre than that which would be applied to pharmacists who were not practicing in a rural community;
- b. applied the same new and more lenient principle and standard for sanctions it had established for a pharmacist practicing in a rural community to determine that the conditions prohibited Mr. McIntyre from acting as a licensee for a stated period of time was not required
- c. significantly reduced the period of actual suspension of Mr. McIntyre’s practice permit they imposed on the basis that he practiced in a rural community;
- d. declined to place a condition on Mr. McIntyre’s practice permit prohibiting him from acting as a licensee for a stated period of time despite having found that he abused a position of trust and authority as pharmacy licensee.
- e. in applying a new and more lenient principle and standard of sanctions for pharmacist practicing in a rural community, failed to have the necessary regard for the need for general deterrence and the need to maintain the confidence and protection of the public and the profession in the ability of the complaints process of the College to impose sufficient sanctions for such a large diversion of narcotics.

6. SUBMISSIONS

Written submissions were provided to all parties on November 30, 2011 by Mr. Jardine on behalf of the Complaints Director. Mr. Jardine provided an overview of his written submission at the appeal.

Mr. Jardine indicated that the general finding of unprofessional conduct is not in issue. However, he submitted that the Hearing Tribunal made it clear in its findings that it used a different standard based on where the member was practicing. He indicated that the decision clearly stated that because the registrant practiced in a small centre, and to balance the public interest, the suspension should be substantially reduced. He submitted that the Hearing Tribunal reached the same conclusion on the finding that there would be no restriction on Mr. McIntyre's ability to act as a licensee in the future. In doing so, Mr. Jardine submitted that the Hearing Tribunal misdirected themselves, and set a standard that was wrong in at least two fundamental ways:

1. It was wrong and unreasonable to say that the conduct of a member of the College will be treated in substantially different ways, depending on where the member practices. The principle premise that Hinton is a "small centre" or "rural" was not canvassed and there was no evidence before the Hearing Tribunal about Hinton's population or the number of pharmacies or pharmacists.
2. The member was not restricted in his ability to act as a licensee, even though the Hearing Tribunal found the member guilty of abuse of trust and authority in the member's misappropriation of a large quantity of narcotics. Further, the assumption inherent in the decision to not restrict the member's practice as a licensee was that the member would continue to practice in Hinton. No restrictions on where the member could practice were imposed, and there was nothing that would prevent the member from practicing anywhere in the province as a licensee.

Mr. Jardine indicated that decisions must always be balanced between trying to fashion something that is fair to the member, and meeting the broader responsibilities of protection of the public and integrity of the profession. He submitted that in focusing so much on the location of the member's practice at the time of the unprofessional conduct, the resulting decision was unreasonable. A different standard of practice or sanction should not be applied based on where a member practices.

Mr. Jardine also submitted that if Mr. McIntyre had not been cooperative and had not shown remorse, the College would have asked the Hearing Tribunal to cancel his licence and permit. He stressed that a very important part of any decision is the message it sends to the public and the profession. Decisions are often boiled down to an action that resulted in an outcome. In this decision, he submitted that the message being sent was because you work in a smaller location we will take what in previous cases would have been a suspension of two or more years, including interim suspensions, and reduce that to six months. Mr. Jardine indicated that the unprofessional conduct involved a very large quantity of narcotics and was not a onetime event. It was a quantity that was large enough to clearly not be for personal use, over the course of a year, that only stopped after the member was caught. This was a very serious public concern and a very serious professional concern. A six month suspension, he submitted, was not in line with

similar cases where the member's actions resulted in a large quantity of narcotics being made available without authorization.

Mr. Jardine provided Council with the following cases:

- Decision of an Investigating Committee Regarding Leanne Rogalsky, January 26, 2009
- Decision of the Hearing Tribunal Regarding Bassam Soufan, November 17, 2008
- Dismissal of Appeal of a Decision of a Hearing Tribunal Regarding Bassam Soufan, April 8, 2009
- Decision of the Hearing Tribunal Regarding Philip Leung, March 1, 2011

On behalf of Mr. McIntyre, Mr. Aloneissi submitted that the Hearing Tribunal had taken great care in making its decision. The Hearing Tribunal was made up of four members, men and women, that were from both large and small centres of practice. The decision was clearly stated, and did not misrepresent any of the positions of the parties. The decision contained an order with six interlocking parts. The Hearing Tribunal balanced all the factors that needed to be considered. Mr. Aloneissi indicated that the decision did not state that if you practice in a smaller centre you are going to be held to a different standard nor did it state that your penalty will be reduced if you practice in a smaller community. He submitted that it was a very nuanced decision, and that Council should look at the decision as a whole.

Mr. Aloneissi stated that when looking at the decision as a whole, the first thing to note is that the Hearing Tribunal imposed the maximum fine of \$10,000, the costs of the hearing, and a 30 month suspension, with all but six months to be stayed. Mr. Aloneissi indicated that this was a very significant period of time for his client, especially given that if anything were to happen in the subsequent 24 months, Mr. McIntyre could be suspended for any further portion of the stayed suspension.

Mr. Aloneissi submitted that the decision on staying the suspension was discussed at proceedings before the Hearing Tribunal and that Mr. Jardine had addressed how a suspension and stay might work, and had provided an example of that (page 149 of transcript from the Hearing Tribunal). It was further clarified during that discussion that the College would "hold the hammer" during the term of the stay. Mr. Aloneissi submitted that this decision was a result of an open discussion, where there was an example given and the Hearing Tribunal felt it was appropriate, taking into consideration all of the circumstances. Further, Mr. McIntyre could not simply complete a 6 month suspension and start working again. The Hearing Tribunal required him to challenge the jurisprudence exam and comply with the current registration requirements.

The fifth condition the Tribunal imposed was that for a period of 5 years, Mr. McIntyre was required to provide a copy of the decision and proof that his employer had received and reviewed that decision. Mr. Aloneissi asserted that this was a very long time for Mr. McIntyre to carry a punishment of this nature around with him, especially since any prospective employer would have to agree to have quarterly audits for 2 years, for which Mr. McIntyre would bear the costs.

Mr. Aloneissi indicated that of all of the case precedents reviewed by the Hearing Tribunal, the case of John Ross Beach was a case that had many similar facts, and appeared to be the case that the Hearing Tribunal relied upon most. He provided Council with a copy of the Beach decision, and argued that for similar unprofessional conduct, Mr. Beach had also received a six-month suspension, with three years of practice restrictions similar to those imposed on Mr. McIntyre. Mr. Aloneissi argued that, as in the Beach case, there was no evidence in this case that medication went to anyone other than D.B., and that there was no public safety issue as a result.

Mr. Aloneissi asserted that if you look at the decision as a whole, the community in which Mr. McIntyre practiced was a consideration but not the reason for the decision. This was only one factor that they weaved into their decision. The Hearing Tribunal also indicated that they considered limiting Mr. McIntyre's permit as a licensee, but were confident that the audit requirements would be sufficient to address the future risk to the public. They stated that they were convinced that the registrant would not repeat his actions again.

Mr. Aloneissi submitted that when looking at the entire order of the Hearing Tribunal, this was not a slap on the wrist, it was a very harsh but measured decision by the Hearing Tribunal. In response to the concern that the decision might set a precedent on how it may be viewed in a smaller community, Mr. Aloneissi stressed that every case is unique, that this was a well measured decision, and he submitted that this appeal should be dismissed.

In a response to a query from Council, both Mr. Jardine and Mr. Aloneissi agreed that there was no evidence before the Hearing Tribunal about the size or population of Hinton, or why it was considered by the Hearing Tribunal to be a "rural community". Similarly, counsel agreed that there was no evidence before the Hearing Tribunal about the number of pharmacies or pharmacists in Hinton.

7. REASONS FOR DECISION

Council of the Alberta College of Pharmacists was asked in this appeal by the College to review the orders of the Hearing Tribunal and determine whether two aspects of its decision were reasonable. Council allows the appeal.

Mr. McIntyre's practice permit is to be suspended for 24 months from the date when his suspension began, with no stay.

The decision of the Hearing Tribunal stated:

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 to replace him. The 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.

Upon reviewing the decision of the Hearing Tribunal, Council felt the decision to stay all but 6 months of a 30 month suspension was unreasonable. The reasoning employed by the Hearing Tribunal was based on an irrelevant consideration (size and needs of the community), for which it had no evidence in any event. Consideration of the member's place of practice and the needs of the community were the definitive reasons given by the Hearing Tribunal. Council agrees that imposing a more lenient sanction because a pharmacist has a rural practice is unreasonable, even if there had been evidence to support that assertion. Differential treatment of pharmacists based solely on where they practice would negatively impact the integrity of the profession. Defining a standard or range of sanction that varies based on the location of a professional's practice is an error in principle, even if there had been evidence adduced that Hinton was a "rural" or "small centre".

It is important to stress that the error in principle extends to patient safety. It is unreasonable to assume that patients in a rural environment are less at risk of being impacted by unprofessional conduct than those in non-rural centres. The standards of practice and thus the sanctions that protect the safety of the public must be the same no matter where in the province the pharmacist practices.

Council reviewed the past decisions referred to by counsel. While the Beach case has similarities to Mr. McIntyre's case, the fact that Mr. Beach only received a 6 month suspension is somewhat misleading, given that at the time the suspension was imposed, Mr. Beach had already been prohibited from practicing for two years while on bail. The total time Mr. Beach was unable to work as a pharmacist (2.5 years) falls within the range of penalty requested initially by the College and is also consistent with other similar cases.

Council considered the argument that Mr. Beach received a lesser sentence partially because none of the medication diverted was accessed by the public. Council reviewed the quantities dispensed over the course of a year by Mr. McIntyre in the agreed statement of facts which state:

During the period from December 10, 2009 to December 10, 2010 Mr. McIntyre diverted the following narcotics to individual D.B.

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

Council agrees with the Hearing Tribunal's statement that this quantity of narcotics exceeds the Canadian Guidelines for Safe and Effective Use by an individual by approximately 3000 times. As an experienced pharmacist the registrant either knew or should have known that the medication dispensed was moving beyond D.B's personal use. It would be reasonable to assume in this situation that the medication dispensed did put the public safety at risk. Of significant

concern to Council was Mr. McIntyre's blatant disregard for the public and his patients' safety by dispensing, without authorization, Metadol (methadone) which is a highly controlled narcotic that can only be prescribed by limited authorized physicians.

Mr. McIntyre's conduct amounts to very serious unprofessional conduct, and the suspension imposed must make clear to the member, to the profession and to the public that such conduct is unacceptable. The current suspension imposed by the Hearing Tribunal is unreasonable, and fails to serve as adequate general deterrence to help prevent similar unacceptable conduct in the future. For those reasons, Council allows the appeal and substitutes a suspension of 24 months.

Subsequent to the expiry of the suspension of Mr. McIntyre's practice permit:

- a. Mr. McIntyre is not permitted to act as pharmacy licensee for a period of 3 years once his practice permit is reinstated; and**
- b. For the period of time during which he cannot act as a licensee, Mr. McIntyre must provide the licensee of any pharmacy where he is employed with a copy of Council's decision.**

The decision of the Hearing Tribunal stated:

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 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.

Council finds the decision of the Hearing Tribunal to not restrict Mr. McIntyre's practice permit to be unreasonable. The Hearing Tribunal did not restrict Mr. McIntyre's future location of practice, yet determined that the community he currently served would be underserved if he was not allowed to be a licensee. There was no evidence before the Hearing Tribunal that Hinton was a "small centre" nor was there any evidence provided that would indicate that the community had a lack of licensees. The order of the Hearing Tribunal did not contemplate that the member could choose in the future to work in a community other than Hinton. Again, a sanction that varies based primarily on the location of the member's place of practice is an error in principle and is unreasonable, even if there had been evidence adduced to support it.

The Hearing Tribunal found that Mr. McIntyre abused his position of trust and authority as pharmacy licensee stating that "this position of additional responsibility made it easier for the registrant to conceal his actions." It is clear from the decision that no restriction was imposed on the registrant's practice permit because the Hearing Tribunal felt that the registrant practiced in a "small centre". Practice location should not influence the severity of a sanction, or determine whether a practice restriction is imposed.

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.

Council has determined that restricting Mr. McIntyre's future permit as a licensee for 3 years is in line with historical decisions, and will serve as an appropriate general deterrent, and will address the need to protect the public and prevent future abuse of trust. Council notes that Mr. McIntyre confirmed, through his counsel at the appeal, that he had no need to be a licensee in any event.

Council reduces the time period that Mr. McIntyre will be required to provide a copy of decision to future employers from 5 years to 3 years, which is also the period within which Mr. McIntyre will be unable to act as a licensee.

8. DECISION:

Council allows the appeal, and varies the decision of the Hearing Tribunal, orders 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 24 (twenty-four) months, commencing on September 9, 2011.
3. At the end of the suspension and prior to becoming eligible for re-instatement, the registrant must:
 - a. challenge the College's jurisprudence exam and provide proof to the College that he has passed it; and
 - b. comply with the then current registration requirements of the College.
4. The registrant shall pay to the College all the costs, expenses, and fees attributed to proceedings below. The total (fine plus costs) is to be paid over a five year period to commence 30 days from the date of receipt of the decision of the Hearing Tribunal in a payment schedule acceptable to both parties.
5. Subsequent to the expiry of the suspension and following re-instatement of Mr. McIntyre's practice permit:
 - a. Mr. McIntyre is not permitted to act as pharmacy licensee for a period of 3 years; and
 - b. For the period of time for which he cannot act as a licensee, Mr. McIntyre must provide the licensee of any pharmacy where he is employed with a copy of the Hearing Tribunal's decision as varied by this decision of Council.

6. The registrant, once re-instated, must not only provide a copy of this written decision to all his pharmacy employers for a period of three (3) years, but must also provide written confirmation to the College that employers have reviewed the decision.
7. 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.

DATED this 15 day of February, 2012.

Signed by the Chair on behalf of the Council of the Alberta College of Pharmacists



Anjali Acharya, President