

ALBERTA COLLEGE OF PHARMACISTS

IN THE MATTER OF
THE *HEALTH PROFESSIONS ACT*

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF **COLIN POROZNI**

DECISION OF THE HEARING TRIBUNAL
(Stage II – Sanction)

January 27, 2015

I. Introduction

In its written decision dated November 17, 2014 the Hearing Tribunal described its findings with respect to the allegations of unprofessional conduct as set out in the Notice of Hearing dated April 21, 2014 against Colin Porozni. In summary, the Hearing Tribunal found that Allegations 1, 2, 5 and 6 were proven on the balance of probabilities, and that the conduct in issue is “unprofessional conduct” as defined in the HPA

The Hearing Tribunal found that Allegations 3 and 4 were not proven.

Based on the findings of “unprofessional conduct” the Tribunal met in person at the ACP offices in Edmonton on December 2, 2014 for oral submissions on sanctions. In attendance on behalf of the Hearing Tribunal were Mr. Jim Johnston, Chairperson; Ms. Carin Jensen, Pharmacist; Mr. Naeem Ladhani, 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; Mr. Colin Porozni, investigated member; and Ms. Katrina Haymond, independent counsel for the Hearing Tribunal.

II. Summary of Submissions on Sanction by the College

Mr. Jardine started by sharing that the purpose of sanctions is to protect the public, protect the integrity of the profession and to be fair to the member. He discussed the need for both specific and general deterrence to prevent similar cases in the future. After these introductory comments Mr. Jardine took the hearing tribunal through the factors referenced in *Jaswal v. Newfoundland (Medical Board)* (1996), 42 Admin. L.R. (2d) 233 and described the application of the factors in this case. Key points made by Mr. Jardine were:

- **Nature and Gravity of the proven allegations:** This is a serious case. There were many records that could not be produced and they still have not been produced. Although there was no known injury to the public there is potential for patient harm and a duty to maintain proper records.
- **Age and Experience of the Offending member:** Mr. Porozni is a senior pharmacist and licensee. This was not a factor of inexperience, rather he made a conscious decision to act in the manner in which he did.
- **Presence of any prior complaints or convictions:** Mr. Jardine supplied a copy of the Decision of Hearing Tribunal, Complaint 2144 dated May 10, 2012 against Mr. Porozni. This previous case was not directly related but did share some similarities with inappropriate record keeping and involved an issue of third party payer payback.

- **The number of times the offence was proven to have occurred:** This was not an isolated case. These issues were identified in previous audits and spanned several years.
- **Role of the member in acknowledging what had occurred:** Mr. Jardine indicated that Mr. Porozni has been cooperative throughout the investigation. Although he did not admit the allegations, Mr. Porozni was entitled to contest the allegations and to defend himself. Therefore, he cannot be penalized more severely and this is a neutral factor.
- **Whether the member had already suffered other serious financial or other penalties as a result of the allegations:** In this case Mr. Porozni did have to pay back the insurer.
- **Impact of the incident on the offended patient:** While there was no specific patient impact there was potential impact identified in the findings of the Hearing Tribunal.
- **Need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of pharmacy:** Mr. Jardine indicated this is a significant factor. This is an example of ongoing conduct. Mr. Porozni said he would rather make a business decision to pay than to fix the problem. This case has a broader interest than the insurer and needs to keep in mind the rest of the profession and the public. This conduct cannot be accepted.
- **The need to maintain the public's confidence in the integrity of the pharmacy profession:** Mr. Jardine suggested that conscious deviations from the Standards of Practice cannot be accepted and the sanction imposed must send a message that such conduct is unacceptable.
- **The degree to which the offensive conduct was outside the range of permitted conduct:** Mr. Jardine commented that this conduct was clearly outside the range of normal conduct but not at the extreme end of the range.
- **The range of sentence in other similar cases:** Mr. Jardine said it is difficult to find cases that are the same as this but did present the Hearing Tribunal with some older cases that had some similarities. Those are outlined as below.
 - Series of three cases that arose due to Alberta Blue Cross audits and were similar in that they related to prescriptions dispensed without a proper prescription and there were significant prescriptions that could not be found.
 - Case 1 regarding ■■■ from 1998 resulted in suspension, costs of hearing, \$250 fine and publication of the findings.
 - Case 2 regarding ■■■ from 1998 resulted in suspension, costs of hearing, three inspections from the College that would be charged to the member at \$750 each, and publication of the findings.

- Case 3 regarding unnamed pharmacist from 1998 resulted in suspension, costs of the hearing and an inspection from the College charged at \$250.
- Case 4 regarding ■■■ from 2003 dealt primarily with methadone and compounding issues but there were examples of dispensing without proper prescriber authorization, lost records and lost prescriptions and dispensing discrepancies and billing irregularities which caused the third party payer to doubt the records. There was negligence in this case and it resulted in an order to cancel registration for the member but that this cancellation could be stayed based on a series of conditions. It also resulted in paying for the hearing at a cost of \$30,000.
- Case 5 from 2010 referred to two members and it arose as a result of a Blue Cross Audit. There were issues of prescriptions billed without prescriptions, especially around Ensure. This case resulted in the following sanctions for each member:
 - ■■■ received a written reprimand, paid a fine of \$2000, paid 50% of the hearing costs, rewrote the ACP jurisprudence exam and could not act as a licensee for 4 months.
 - ■■■ received a written reprimand, paid a fine of \$3500, paid 50% of the hearing costs, rewrote the ACP jurisprudence exam and could not act as a licensee for 2 years.
- Case 6 regarding ■■■ from 2013 had portions of the case relating to record keeping issues. Allegations 4 and 5 in this case referenced an inability to locate or produce narcotic invoices, transaction hardcopies, original prescriptions, Health Canada narcotic loss documentation, and narcotic perpetual inventory records and also showed examples of non-existent documentation for many narcotics in the pharmacy. In this case these two allegations resulted in the following sanctions:
 - A 12 month suspension;
 - A \$10,000 fine;
 - Unable to be a proprietor or licensee for a period of five years;
 - Practice under direct supervision for a period of one year after serving suspension; and
 - To provide a copy of the decision to any employer for five years after practice.

After walking through these cases Mr. Jardine pointed out that many of them had other complicating factors. The 1998 cases and the orders issued were governed by an Act that is no longer in place. At that time a maximum fine of \$250 was all that could be issued.

Mr. Jardine then presented the orders proposed by the ACP as follows:

1. In respect to Allegation 1 the following order:

- a. A fine of \$10,000 to be paid within 90 days from the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni.
2. In respect to Allegation 2 the following order:
 - a. A fine of \$10,000 to be paid within 90 days from the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni.
3. In respect to the proven Allegations 1, 2, 5 and 6 the following orders:
 - a. A suspension of 1 month to commence upon the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni;
 - b. An order that Mr. Porozni pay 80% of the costs of the investigation and hearing in this matter starting 90 days from the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni and payable thereafter in monthly payments satisfactory to the Complaints Director for a period not to exceed two years;
 - c. An order that Mr. Porozni cannot be a proprietor or a licensee of a pharmacy for a period of 3 years from the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni;
 - d. An order that Mr. Porozni provide a copy of the decision and orders of the Hearing Tribunal to any employer and any licensee in any pharmacy in which he practices for a period of 3 years from the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni; and
 - e. An order that for a period of 3 years from the date that the Hearing Tribunal's decision on sanctions is served on Mr. Porozni, he must notify the Complaints Director within 10 days of commencing practice at any pharmacy and confirm to the Complaints Director that he has provided the licensee and the proprietor with a copy of the Hearing Tribunal's decision and orders.

Mr. Jardine explained that under the current Act a maximum fine of \$10,000 per allegation can be ordered. The College feels that Allegations 1 and 2 were the most significant and that there is a need to emphasize there are serious consequences for inappropriate record keeping and that you cannot make a decision not to comply with standards of practice or commercial terms of agreements signed.

With respect to the order for a suspension Mr. Jardine suggested that suspensions are common with these cases. Mr. Jardine acknowledged that a suspension is significant but the impact of a one-month suspension is not as significant since Mr. Porozni is only working intermittently.

With respect to paying costs, Mr. Jardine felt that 80% was a fair number due to the fact that two of the allegations were not proven. He said that amount of time spent in the hearing on Allegations 3 and 4 was not more than 20% and therefore the 80% was reasonable.

With respect to order 3(e) above Mr. Jardine explained that this is a product of negative experience where members have worked as locums during their suspension without the Complaints Director being aware.

Mr. Jardine submitted that the proposed orders are serious but appropriate. The College feels that record keeping and documentation are not minor matters.

The Hearing Tribunal questioned Mr. Jardine as to whether these proposed orders adequately protect the public with no orders around monitoring or proof of correction of filing practices or documentation. Mr. Jardine stated that a significant amount of time has passed since Mr. Porozni was a proprietor or licensee and that practically monitoring may be difficult when he is not in these roles. He indicated he feels the knowledge is there and that Mr. Porozni will be working under a licensee and proprietor who can monitor these issues.

III. Summary of Submissions on Sanction by Mr. Porozni

Mr. Porozni did not make any specific submissions regarding the orders that he felt would be appropriate in the circumstances, however, he stated that he did not agree with a number of the orders suggested by Mr. Jardine. He felt that the six prior cases referenced by Mr. Jardine were very different and had little similarity to his. He also pointed out that Mr. Jardine said his actions were nowhere near the severe end of the spectrum, and as such it would be inconsistent to order the maximum fines on Allegations 1 and 2.

With respect to proposed order 3a he feels that a suspension is too severe but did not elaborate any further.

With respect to proposed order 3(b) he felt it should be a cost share equally split 50/50 for Mr. Porozni and the College. He specifically felt that the College should not have paid for Mr. Krempien to fly to Toronto to meet with Express Scripts and he felt they did not need to pay the expense of bringing Ms. Clayton to Edmonton to witness in person but that she could have testified in a remote manner.

With respect to proposed order 3(c) he feels it should be excluded but did not provide any reasons why.

With respect to proposed order 3(d) and 3(e) he felt it should be changed to a timeframe of one year but he did not provide any reasons why.

Mr. Porozni also mentioned that he feels the impact of this case has already been very extreme to him as a result of a poorly written press article about these allegations.

Mr. Jardine made a brief reply in response to Mr. Porozni's submissions and highlighted that a maximum fine is not on the severe end of the spectrum. He indicated that cancellation of a practice permit is the most severe penalty. Mr. Jardine also explained that Mr. Krempien did not charge the cost of his trip to Toronto to the investigation costs in this case. He met with Express Scripts while he was out in Toronto on other business. Finally he stated that publicity is nothing to do with the College and the press article does not factor into these orders.

IV. Orders

The Hearing Tribunal has carefully considered the submissions of both Mr. Jardine and Mr. Porozni and makes the following orders pursuant to Section 82 of the *Health Professions Act*:

1. Mr. Porozni shall pay a fine of \$10,000 to be paid within 90 days from the date that the Hearing Tribunal's decision on sanction is served on Mr. Porozni, or within such other period of time as agreed to by the Complaints Director;
2. Mr. Porozni's practice permit will be suspended for a period of 1 month to commence upon a date agreed to by the Complaints Director but no later than 30 days after these orders are served on Mr. Porozni;
3. Mr. Porozni will pay 80% of the costs of the investigation and hearing in this matter up to a maximum of \$35,000. The first payment will be due 90 days from the date that the Hearing Tribunal's decision on sanction is served on Mr. Porozni and shall be payable thereafter in monthly payments satisfactory to the Complaints Director for a period not to exceed two years;
4. Mr. Porozni cannot be a proprietor or a licensee of a pharmacy for a period of 3 years from the date that the Hearing Tribunal's decision on sanction is served on Mr. Porozni;
5. Mr. Porozni will provide a copy of the decision and orders of the Hearing Tribunal to any employer and any licensee in any pharmacy in which he practices for a period of 3 years from the date that the Hearing Tribunal's decision on sanction is served on Mr. Porozni; and
6. For a period of 3 years from the date that Mr. Porozni is served with a copy of the Hearing Tribunal's decision, he must:
 - a. Notify the Complaints Director within 10 days of commencing practice at any pharmacy; and
 - b. Confirm to the Complaints Director that he has provided the licensee and the proprietor with a copy of the Hearing Tribunal's decision and orders.

V. Reasons

In determining the appropriate orders to impose, the Hearing Tribunal considered the evidence presented at the hearing as well as the submissions of the College and the submissions from Mr. Porozni with respect to sanction.

With respect to the combined set of orders, the Hearing Tribunal felt that sanctions needed to be more serious due to the fact that a previous finding of unprofessional conduct has already

been made against Mr. Porozni. Although the circumstances in the previous matter are different there are still some similarities. In particular, the previous case also included findings relating to the failure to create and maintain appropriate records, and failing to comply with the College's standards of practice. The Hearing Tribunal's decision in the previous matter is dated May 14, 2012. The audit at issue in these proceedings took place in March of 2013, and covered the period of time between September 9, 2011 and October 29, 2012. The Tribunal expects that Mr. Porozni would have learned from his previous experience and that he would have understood the importance of record keeping at the time of the audit. The Tribunal feels that he exercised poor judgment in making a business decision to stop looking for the records, and that he ought to have known his decision was inappropriate in light of the Hearing Tribunal's previous findings around record keeping and other issues.

The Hearing Tribunal also focused on the magnitude of the offense. As referenced in the decision dated November 17, 2014, there was a very large amount of records that were never found or produced. These issues spanned a significant length of time and they were intentional, to the point where Mr. Porozni made a business decision to ignore a contract. Difficulty or the cost of complying with the audit does not override his obligation to the profession or to the public.

Record keeping and documentation is fundamental to protecting the public and the Hearing Tribunal felt there was a strong need to consider general deterrence. Mr. Porozni's actions are examples of behaviour that cannot be accepted or condoned. All pharmacists need to know that ineffective record keeping and inappropriate or missing documentation is unacceptable.

With respect to the fine, the Hearing Tribunal felt that a maximum fine of \$10,000 on both Allegations 1 and 2, which would amount to total fines of \$20,000, was not justified given that these two allegations were quite similar and that the evidence to support one allegation was the same evidence used for the other. Therefore, the Hearing Tribunal felt that it was appropriate to treat Allegations 1 and 2 as one allegation, for the purpose of sanction. The Tribunal then considered whether the maximum fine should be ordered, or whether a lesser fine should be considered. Looking at the cases presented by Mr. Jardine most of the parties received the maximum fine allowed in the Act that was in effect at the time. In the case of [REDACTED] the maximum fine of \$10,000 was issued with respect to the allegations around ineffective record keeping. Given the seriousness of the conduct, and the previous cases showing that the maximum fines allowable under the governing legislation were typically ordered in similar cases, the Hearing Tribunal felt that the maximum fine of \$10,000 was appropriate.

With respect to the suspension, the Hearing Tribunal noted that there was no suspension in Mr. Porozni's previous matter. Since this is the second finding of unprofessional conduct and since this is a serious example of unprofessional conduct there is a need to include a suspension, as a deterrent to Mr. Porozni, and to other members of the public. In most of the cases referenced by Mr. Jardine there was a suspension issued and this order seems in accordance with previous decisions. The Hearing Tribunal also changed the proposed suspension to commence within 30 days of being served the orders on a date agreed to by the Complaints Director. Since Mr. Porozni lives and works in a rural setting the Hearing Tribunal could foresee a situation where Mr. Porozni may be the sole pharmacist working at

the time that he receives the orders. To commence the suspension immediately may present challenges to the licensee if he was relying on Mr. Porozni to keep the pharmacy open. The Tribunal felt it would benefit the public to have a small degree of flexibility in the start date of this suspension.

With respect to the order requiring Mr. Porozni to pay costs of the investigation and hearing, the Hearing Tribunal agreed with Mr. Jardine's recommendation of 80%. While costs are discretionary, the Tribunal feels that Mr. Porozni should bear a significant portion of the costs of the hearing. While Mr. Porozni is entitled to contest the allegations, there are costs associated with the hearing, and it is unfair to expect members of the profession to bear the majority of those costs through payment of their membership fees. Allegations 3 and 4 were not the main focus of the investigation and they did not take more than 20% of the hearing. Having said that, there were two allegations that were not proven so Mr. Porozni should not have to pay 100% of the costs. The Hearing Tribunal also added the maximum of \$35,000 to the order proposed by the College. The reason for this was to aid in general deterrence by ensuring that the total costs payable are clearly stated in the Hearing Tribunal's decision, which ensures that members understand the potential costs that may be ordered as a result of a hearing. In addition, the order is also to be fair to Mr. Porozni by giving a finite maximum. The \$35,000 was determined to be an estimate of costs already incurred by the date of the oral submissions on sanction.

With respect to the order preventing Mr. Porozni from acting as a proprietor or licensee the Hearing Tribunal feels that this order is fair and helps protect the public. This will ensure that Mr. Porozni practices under a different licensee for some time which will allow him time to learn from others and demonstrate his adherence to the standards of practice with respect to documentation and record keeping. This order provides some assurance that others will be monitoring Mr. Porozni's practice for a period of time.

Signed on behalf of the hearing tribunal by
the Chair

Dated: January 27, 2015.....

Per: [Jim Johnston]