

COLLEGE OF ACUPUNCTURISTS OF ALBERTA

IN THE MATTER OF  
A HEARING UNDER THE HEALTH PROFESSIONS ACT,  
RSA 2000, CH-7

AND IN THE MATTER OF A HEARING REGARDING  
THE CONDUCT OF MS. JENNIFER HENDRICKEN

DECISION OF THE HEARING TRIBUNAL  
OF THE COLLEGE OF ACUPUNCTURISTS  
OF ALBERTA

I. INTRODUCTION

1. The Hearing Tribunal held a hearing into the conduct of Jennifer Hendricken on September 7, 2022. The members of the Hearing Tribunal were:

Douglas Dawson (Public Member and Chair of the Panel)  
Wendy Powell  
Shaomei (Sarah) Shen  
Pat Matusko (Public Member)

Mary Marshall acted as independent legal counsel for the Hearing Tribunal.

Also present were:

Julie Gagnon, legal counsel for the Complaints Director

Jennifer Hendricken (sometimes hereinafter referred to as "the Registrant")

II. PRELIMINARY MATTERS

2. Neither party objected to the composition of the Hearing Tribunal or its jurisdiction to proceed with the hearing. There were no matters of a preliminary nature.
3. Pursuant to section 78 of the Health Professions Act, RSA 2000, C. H-7 ("HPA"), the hearing was open to the public. There was no application to close the hearing.
4. The Registrant was aware of her right to be represented by counsel and chose not to be represented by counsel.
5. Counsel for the Complaints Director confirmed that the matter was proceeding by agreement.

III. CHARGES

6. The Revised Notice to Attend & Produce listed the following allegations:
1. On or about September 27, 2021, when providing care for new patient IH, you failed to complete adequate documentation, including but not limited to:
- a. complete health history; and
  - b. Patient's physical condition including pulse; and
  - c. documentation of consent for treatment.
2. On or about October 6, 2021, when providing care for patient IH, you failed to:
- a. obtain and/or document the patient's physical condition, including pulse; and
  - b. appropriately manage adverse reactions when you failed to:

- i. appropriately assess or intervene when the patient complained of pain and shortness of breath, which you knew or ought to have known may be clinical indications of a pneumothorax;
  - ii. refer the patient for appropriate health care practitioner intervention after becoming aware of her distress; and
  - iii. adequately document your treatment and assessment of adverse reaction.
7. The Registrant has admitted to the conduct in the allegations in the Agreed Statement of Facts and Admission of Unprofessional Conduct (the "Allegations"), and that her conduct constituted unprofessional conduct.

#### IV. EVIDENCE

8. The following Exhibits were entered into evidence during the hearing:
  - Exhibit 1: Agreed Statement of Facts and Admission of Unprofessional Conduct
    - Tab 1: Email complaint from IH dated October 12, 2021
    - Tab 2: J. Hendricken's response to complaint dated November 11, 2021
    - Tab 3: Patient record for IH
    - Tab 4: Revised Notice to Attend & Produce dated August 5, 2022
    - Tab 5: College of Acupuncturists of Alberta Code of Professional Conduct effective May 1, 2014
    - Tab 6: College of Acupuncturists of Alberta Patient Records Standards effective January 1, 2019
    - Tab 7: College of Acupuncturists of Alberta Standards of Competency and Practice Revised April 20, 2005
  - Exhibit 2: Joint Submission on Sanction dated September 6, 2022
9. Counsel for the Complaints Director also filed the following materials:
  - a. Book of Authorities of the Complaints Director:
    - i. Section 82 of the Health Professions Act, RSA 2000, c. H-7;
    - ii. *Jaswal v. Medical Board* (Nfld.), 1996 CanLII 11630 (NL SC);
    - iii. *R v. Anthony-Cook*, 2016 SCC 43;
    - iv. *Bradley v Ontario College of Teachers*, 2021 ONSC 2303.

## V. SUBMISSIONS

### Submissions by Counsel for the Complaints Director

10. Counsel for the Complaints Director thanked the Registrant for her cooperation in reaching an agreement.
11. The hearing concerns two allegations. Counsel for the Complaints Director reviewed the Allegations, and the Agreed Statement of Facts and Admission of Unprofessional Conduct ("Agreed Statement"). The patient sent an email to the College, and the Complaints Director dealt with this as a complaint. An investigation resulted, and the Registrant provided a response.
12. The Registrant has been a member of the College since July 1, 2019. The first allegation relates to failure to complete adequate documentation on or about September 27, 2021. The second allegation relates to failure to obtain and / or document the patient's physical condition, and appropriately manage adverse reactions on or about October 6, 2021. The Registrant admits to the conduct as set out in the Allegations and this is allowed under section 70 of the HPA.
13. Counsel for the Complaints Director submitted that the conduct constitutes unprofessional conduct under sections 1(1)(pp)(i) and (ii) of the HPA. The conduct contravened Article 5 of the College of Acupuncturists of Alberta Code of Professional Conduct; sections 2(a) and 3(b) of the College of Acupuncturists Patient Record Standards and the sections relating to Patient Information and Informed Patient Choice and Patient Records; parts IV(B) and VI(2) of the College of Acupuncturists of Alberta Standards of Competency and Practice.

### Submissions by the Registrant

14. The Registrant submitted that she agreed with the submissions made by counsel for the Complaints Director, and that she had nothing to add.

### Questions from the Hearing Tribunal

15. What is the Registrant's background including education and years in practice?
16. Counsel for the Complaints Director submitted that the Registrant has been registered since July 1, 2019.
17. The Registrant stated that she has her degree from MacEwan University. The acupuncture program is a three-year program which she attended from 2015-2018. The College also requires continuing education and has a set number of hours that the Registrant must complete.

## VI. FINDINGS REGARDING ALLEGATIONS

18. The Hearing Tribunal reviewed the exhibits and considered the submissions made by the parties.

19. The Hearing Tribunal considered the definition of unprofessional conduct under section (1)(1)(pp) of the HPA. The Hearing Tribunal finds that the Allegations are proven and that the Registrant's conduct constitutes unprofessional conduct under section (1)(1)(pp) of the Health Professions Act, as follows:

1(1) In this Act,

(pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable:

- (i) displaying a lack of knowledge of or lack of skill or judgment in the provision of professional services;
- (ii) contravention of this Act, a code of ethics or standards of practice;

20. The Hearing Tribunal finds that the proven conduct breached the following provisions in the Code of Professional Conduct: Articles 5.2 and 5.3.

#### ARTICLE 5 PATIENT RECORDS

5.2 All information acquired during intake, including medical history or other professional referral, diagnosis, treatment plan shall be placed in patient's file.

5.3 For each treatment session, the selection of acupuncture points, use of other permitted mode of practice, as well as subjective/objective responses to treatment shall be noted in patient's record.

21. The Hearing Tribunal finds that the proven conduct breached the following provisions in the Standards of Competency and Practice: IV(B) and VI(2), Patient Information and Informed Patient Choice, and Patient Records.

#### Competencies of Registered Acupuncturists

#### IV. Treatment Techniques

B. Acupuncturists have the ability to:

- 1) position the patient appropriately based on the location(s) of selected points
- 2) locate the selected points
- 3) select and use appropriate therapeutic technique(s) according to the indications, contraindications and precautions including:
  - a. using needling techniques appropriately by
    - i. inserting acupuncture needles

- a) the appropriate depth
- b) the appropriate duration
- c) the appropriate angle
- ii. withdrawing acupuncture needles
- iii. using needle manipulation techniques including
  - a) tonifying
  - b) reducing
  - c) even method

## VI. Equipment and Safety

Acupuncturists have the knowledge and skills necessary to:

- 2) manage adverse reactions to acupuncture treatment (fainting, needle bending/breaking, emergency medical conditions during therapy) or initiate emergency measures and refer to physician or emergency care provider when appropriate.

### Standards for Acupuncture Practice

#### Patient Information and Informed Patient Choice

An Acupuncturist shall obtain informed consent for any treatment by having the patient sign a consent form confirming understanding of the risks and benefits of treatment, and shall obtain the patient's written consent to any significant changes to the treatment.

#### Patient Records

An Acupuncturist shall retain any and all informed consent forms for each patient as part of the patient record.

22. The Hearing Tribunal finds that the proven conduct breached the following provisions in the Patient Records Standards: Sections 2(a) and 3(b).

#### Standards on Patient Records

- 2. Patient records must be accurate, complete and legible.
  - a. Registered acupuncturists are required to record all patient visits and professional services that they provide to a patient. Patient records must be accurate, complete and legible.
- 3. Contents of patient records (paper and electronic)
  - b. Specifically, patient records shall also include a cumulative patient profile, which contains a summary of information relevant to the treatment, condition,

follow-up and identification of the patient and more detailed information gathered during the course of consultations. This cumulative patient profile is commonly collected in an intake form during the first patient visit, and needs to be updated whenever there is a change in data.

Patient records shall include the following information:

- J Identification (name, address, phone number, email)
- J Name of family physician
- J Personal and family information (occupation, relationship status, habits, family medical history, addictions)
- J Past medical history (past serious illnesses, operations, accidents)
- J Allergies
- J Current medication
- J Contact person in case of emergencies
- J Written, scanned, digital, photographic, radiological or other forms of chronicled or documented patient information
- J Intake forms, documentation of consent<sup>1</sup>, procedure explanation, patient comments and responses, observations, diagnostic processes, clinical recommendations, findings, and emails, records of telephone conversations or text messages directly or indirectly related to the patient's condition or treatment with the date and time
- J Detailed clinical notes regarding the provided treatments and modalities, recommendations to the patient, patient reactions to treatments (past, present, subjective and objective) and immediate patient response to treatments.

23. The material in the Agreed Statement shows the following deficiencies in the patient record relating to the first meeting with IH on September 27, 2021:
- a. There is no contact information for IH or her emergency contact;
  - b. The family physician of IH is not identified;
  - c. There is insufficient health/medical history documented;
  - d. IH's physical condition, including pulse is not adequately documented;
  - e. There are no allergies or current medications documented;

- f. There are insufficient clinical notes regarding the provided treatments and modalities, recommendations to patient, and reaction to treatment;
  - g. There is no documentation of IH's consent to treatment.
- 24. In relation to the second treatment on October 6, 2021 the material in the Agreed Statement further shows that the Registrant failed to:
  - a. Appropriately assess or intervene when IH complained of pain and shortness of breath;
  - b. Use appropriate therapeutic techniques according to the indications, contraindications, and precautions presented by IH's pain and shortness of breath;
  - c. Recognize that shortness of breath is a clinical indication of pneumothorax; and
  - d. Refer the patient to an appropriate health care practitioner after becoming aware of the pain and shortness of breath experienced by IH.
- 25. The Registrant failed to obtain and document IH's physical condition, including pulse, and failed to adequately document the treatment and assessment of the adverse reaction. The Registrant did not take detailed clinical notes regarding IH's physical condition, treatments and modalities, recommendations to patient, and patient reactions to treatment.
- 26. The Registrant has admitted to these deficiencies and that they constitute unprofessional conduct.
- 27. The breaches of the Code of Professional Conduct, Patient Record Standards, and Standards of Competency and Practice are serious. They are an important foundation for patient safety, and failure to adhere to these requirements can have a negative impact on patient care. The Registrant displayed a lack of skill or judgment in the provision of professional services.

## VII. SUBMISSIONS REGARDING PENALTY

### Submissions by Counsel for the Complaints Director

- 28. Counsel for the Complaints Director reviewed the Joint Submission on Sanction (Exhibit 2). The Registrant has already completed the course on documentation. The Registrant must complete a paper that reflects on what has occurred and the changes and learnings from this experience. The Registrant is required to pay costs in the amount of \$2,000.
- 29. The range of orders that the Hearing Tribunal may impose is set out in section 82 of the HPA. The Hearing Tribunal should take into account the need to deter the member and the membership at large, protection of the public, and the need to maintain the public's confidence in the integrity of the profession.



30. Counsel for the Complaints Director reviewed the factors in the decision of *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (“Jaswal”) and how those factors applied to the present case:
- i. The nature and gravity of the proven allegations: The Allegations deal with record keeping and failure to assess. Although the Allegations are serious, they are not at the most serious end of the spectrum.
  - ii. The age and experience of the member: The Registrant had been registered for approximately two years at the time of the conduct. She was a relatively inexperienced and junior member of the College and this is something that can be considered when determining the appropriate penalty.
  - iii. The previous character of the member: There is no other finding of unprofessional conduct, and that weighs in the Registrant’s favour.
  - iv. The age and mental condition of the offended patient: There is an email from the patient indicating the impact that it had on her.
  - v. The number of times the offence was proven to have occurred: The Allegations relate to one patient, and treatment on two separate dates.
  - vi. The role of the member in acknowledging what occurred: The Registrant has acknowledged the conduct from the earliest stages of this matter, and this is an important factor. The Registrant was cooperative since the beginning, and since the referral to the hearing the Registrant has wanted to have an opportunity to admit her conduct and move on. Members have the right to defend themselves and they should not be punished for exercising that right. However, the cooperation and acknowledgment by the Registrant can weigh in favour of imposing a lesser sanction.
  - vii. Whether the member has already suffered other serious financial or other penalties: Counsel for the Complaints Director was not aware of any other serious financial or other penalties.
  - viii. The impact on the offended patient: There is no evidence other than what is in the Agreed Statement.
  - ix. The presence or absence of any mitigating factors: Counsel for the Complaints Director was not aware of any additional factors.
  - x. The need to promote specific and general deterrence: It is important to make sure that the sanctions send a message to the Registrant so that the conduct will not reoccur, and send a message to the membership at large that the conduct is unacceptable and will attract a sanction.

- xi. The need to maintain public confidence: A member of the public reviewing this matter would be confident that it has been taken seriously.
  - xii. Degree to which offensive conduct is outside the range of permitted conduct: Record keeping and informed consent are basic expectations for all members. The ability to assess and intervene is expected of all members. The conduct is outside the range of permitted conduct.
  - xiii. Range of sentences in similar cases: There are no similar cases from this College. However, the Complaints Director did apply her expertise and judgment when determining the sanction that will meet the principles of sentencing.
31. Counsel for the Complaints Director submitted that there is a high threshold to depart from a joint submission, and reviewed the principles set out in the decision of the Supreme Court of Canada in *R v. Anthony Cook*, 2016 SCC 43 (Anthony-Cook), and the decision of the Ontario Superior Court in *Bradley v Ontario College of Teachers*, 2021 ONSC 2303 (“Bradley”). The Complaints Director knows the case and what is necessary to protect the public interest. Members of the College are entitled to a fully contested hearing and give up the right to fully defend themselves when they enter into a joint submission. The role of the Hearing Tribunal is to look at the proposed order and determine whether it meets the high threshold that is established in case law.
  32. There is not a specific course that would address the issues in the second allegation, and the paper is an opportunity for reflection and is a remedial component of the proposed sanction. The remedial nature of the proposed order is appropriate. The Registrant is very early in her career and she has had enough insight to acknowledge the deficiencies and take steps to ensure that they will not happen again. This experience before the College and Hearing Tribunal will have a high deterrent effect.

#### Submissions by the Registrant

33. The Registrant submitted that she did not have much to add and that she understands how serious this all is. She has learned a great deal throughout the whole process and over the last several months. The sanctions that have been discussed with the Complaints Director are being proposed to enable her to continue learning and to have an opportunity to become better.
34. The Hearing Tribunal questioned the Registrant about the resources that she will use to write the reflective paper. The Registrant confirmed her willingness to examine a resource regarding red flags in acupuncture practice.

## VIII. DECISION AND REASONS OF THE HEARING TRIBUNAL ON SANCTION

35. The Hearing Tribunal has carefully considered the joint submissions on sanction, and the submissions of the parties. The Hearing Tribunal also considered the penalty in light of the principle that joint submissions should not be interfered with lightly.
36. The legal test for a decision maker in considering a joint submission was stated in Anthony-Cook. The Supreme Court of Canada held that the public interest test is the proper legal test to be applied by trial judges.

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

37. The Divisional Court of Ontario emphasized the stringent nature of the public interest test that applies to discipline panels that consider rejecting a joint submission in Bradley.

13 In this case, the Discipline Committee referred to the Anthony-Cook decision as the guiding authority on the issue of whether it could reject the joint submission on penalty, but it misunderstood the stringent nature of the public interest test and thereby misapplied it. In particular, the Discipline Committee did not find that or articulate any basis for finding that serving the two month penalty in the summer was so “unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down”.

[...]

14 The public interest test in Anthony-Cook applies to disciplinary bodies. Any disciplinary body that rejects a joint submission on penalty must apply the public interest test and must show why the proposed penalty is so “unhinged” from the circumstances of the case that it must be rejected. In this case, the Discipline Committee clearly misunderstood the stringent public interest test, and impermissibly replaced the proposed penalty with its own view of a more fit penalty.

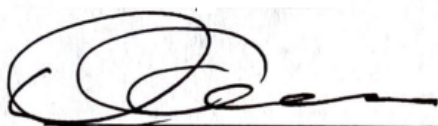
38. Anthony-Cook outlines the public interest test. The Hearing Tribunal should not depart from a joint submission unless it would bring the administration of justice into disrepute or otherwise depart from the public interest. This is a stringent test. Parties require a high degree of confidence that the joint submission will be accepted. The parties are in the best position to know the strengths and weaknesses of their respective positions. For these reasons it is very important that deference is given to joint submissions.

39. The Hearing Tribunal understands that the penalty ordered should protect the public and enhance public confidence in the ability of the College to regulate acupuncturists. This is achieved through a penalty that addresses specific deterrence, general deterrence and, where appropriate, rehabilitation and remediation. The Hearing Tribunal has considered the factors noted in Jaswal and accepts the joint recommended sanction. The joint recommendations take into account the nature of the findings of the Hearing Tribunal. They also address the issues that brought this Registrant before the Hearing Tribunal. The Hearing Tribunal finds that this recommended sanction appropriately considers the factors in Jaswal. Rehabilitation and remediation are addressed through the course requirements and reflection paper. These proposed sanctions also serve to protect the public. It is appropriate that the Registrant bear some costs in relation to the investigation and hearing.
40. Publication of this decision will be within the discretion of the Registrar.

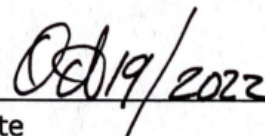
IX. ORDER OF THE HEARING TRIBUNAL

41. The Hearing Tribunal made the following orders pursuant to section 82 of the Health Professions Act:
- a. Ms. Hendricken shall complete a course on documentation acceptable to the Interim Complaints Director at her own cost. Ms. Hendricken has already completed the course Protecting Yourself Through Proper Charting, which is a course acceptable to the Interim Complaints Director as meeting this requirement.
  - b. Ms. Hendricken will write a paper (1000 word minimum), within three months of the date she is served with the written decision of the Hearing Tribunal. The paper will confirm that Ms. Hendricken has reviewed the Standards of Practice and Code of Ethics and will reflect on what occurred in this case that led to the allegations in the hearing and what changes she has incorporated in her practice, and the learnings from this experience. The paper will be provided to the Complaints Director for review and approval;
  - c. Ms. Hendricken will be responsible for payment of \$2,000 of the costs of the investigation and hearing. The costs shall be paid within 18 months of receipt by Ms. Hendricken of the written decision of the Hearing Tribunal and can be paid in monthly installments or on a schedule agreeable to the Complaints Director.

Signed on behalf of the Hearing  
Tribunal by the Chair



Douglas Dawson



Date