

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. AMY LEUNG

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 Amy Leung on November 9, 2022. The members of the Hearing Tribunal were:

Douglas Dawson, Public Member and Chair of the Panel
Ann Zee, Acupuncturist
Terry Engen, Public Member
Patricia Hull, Public Member

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

Also present were:

Ms. Julie Gagnon, legal counsel for the Complaints Director
Amy Leung, Registrant
Ms. Anika Winn, legal counsel for Amy Leung

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. Counsel for the Complaints Director confirmed that the matter was proceeding by agreement.

III. CHARGES

5. The Amended Notice to Attend dated October 24, 2022 listed the following allegations:

On or about October 13, 2021, when providing initial acupuncture treatment for the Complainant, your patient, who was experiencing shoulder pain, you:

1. Failed to follow appropriate "fire cupping" protocol which resulted in burn injuries to the Complainant, including one or more of the following:
- (a) failed to ensure that you were sufficiently knowledgeable, or were aware of, the potential consequences or risks of the use of essential oils when using fire cupping;
 - (b) used essential oils that were flammable on the Complainant during the fire cupping procedure; and
 - (c) failed to respond appropriately to the adverse incident.

2. Failed to obtain written consent of the Complainant prior to commencing treatment; and
3. Failed to accurately and/or completely document the incident.
6. The Registrant admitted to the conduct in the allegations in the Agreed Statement of Facts and Admission of Unprofessional Conduct (the "Allegations") and that they constituted unprofessional conduct.

IV. EVIDENCE

7. The following Exhibits were entered into evidence during the hearing:
 - Exhibit 1: Agreed Statement of Facts and Admission of Unprofessional Conduct
 - Exhibit 2: Joint Submission on Sanction
8. Counsel for the Complaints Director also filed the following materials:
 - a. Timothy Edward Bradley v. Ontario College of Teachers, 2021 ONSC 2303;
 - b. R. v. Anthony-Cook, 2016 SCC 43 (CanLII);
 - c. Jaswal v. Medical Board (Nfld.), 1996 CanLII 11630 (NL SC).

V. SUBMISSIONS ON THE ALLEGATIONS

Submissions by Counsel for the Complaints Director

9. Counsel for the Complaints Director reviewed Exhibit 1 and the chronology of events. The College file was opened based on self-disclosure by the Registrant. The patient launched a complaint.
10. The Allegations all arise out of one incident while the Registrant was providing treatment to the complainant. The complainant was receiving physiotherapy for her neck and shoulder injuries and was referred to the Registrant. The Registrant received verbal consent to treatment but not written consent.
11. The Registrant applied an essential oil which ignited causing burns. The complainant was referred to a medical clinic across the street where she was sent to a hospital emergency department. The Registrant made notes but they were not sufficient to accurately document the incident.
12. Counsel for the Complaints Director submitted that the conduct constitutes unprofessional conduct under sections 1(1)(pp)(i) and (ii) of the HPA.

Submissions by Counsel for the Registrant

13. Counsel for the Registrant confirmed her agreement to the facts as presented. The Registrant became a member of the College on July 26,

2021. She graduated in 2019 and did a student apprenticeship. She completed her licensing exam in 2021. The Registrant was working during the pandemic by primarily preparing for her licensing exam and working as a receptionist. The Allegations relate to a single incident that occurred three months into practice. The Registrant feels significant remorse and she will use this as a learning opportunity in order to move forward.

VI. FINDINGS REGARDING ALLEGATIONS

14. The Hearing Tribunal has reviewed the exhibits and considered the submissions made by the parties.
15. 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)(i) and (ii) of the HPA 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; ...
16. The Hearing Tribunal finds that the proven conduct breached the following provisions in the Code of Professional Conduct: 3.1, 3.2, 4.1, 5.1, 5.2, and 5.3:

ARTICLE 3 COMPETENCE

- 3.1 Generally, competence is the combined knowledge, skills, attitudes, experiences and judgement required for providing professional services. Registrants have an obligation to maintain competence throughout their career and to comply with the continuing education requirements of the CAAA. All registrants shall keep up-to-date on their knowledge of their profession and practice in accordance with currently applicable professional standards.
- 3.2 Registrants must practice within the scope of permitted modes as defined by the Acupuncture Regulation. Registrants must not provide any advice or treatment for which the registrant does not possess the necessary degree of training, skill, knowledge and experience to provide the advice or treatment in an appropriate and safe manner.

ARTICLE 4 INFORMED CONSENT TO TREATMENT

- 4.1 Registrants shall discuss treatment plans with patients including diagnosis, prognosis and significant risks, as well as reasonable alternatives and associated costs to allow patients to make informed treatment decisions unless the condition of the patient makes it impossible to do so and the need for consent is otherwise addressed. Registrants must not, either by statement or implication, make unsupportable statements as to the effect of any treatment. The written consent to treatment shall be placed in patient's file.

ARTICLE 5 PATIENT RECORDS

- 5.1 Registrants must maintain complete and accurate patient records for a period of at least five (5) years after the patient receives treatment from or consults with the practitioner.
- 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.

17. The Hearing Tribunal finds that the proven conduct breached the following provisions in the Standards of Competency and Practice: IV(B)(3)(e) and VI, Patient Information and Informed Patient Choice, and Patient Records:

IV. Treatment Techniques

(B) Acupuncturists have the ability to:

(3) select and use appropriate therapeutic technique(s) according to the indications, contraindications and precautions, including:

(e) using cupping techniques appropriately

...

VI. Equipment and Safety

Acupuncturists have the knowledge and skills necessary to:

1) appropriately select and maintain acupuncture equipment, including gauges, types, manufacturer quality, inspection for safe operation, cleanliness, sterilization and disposal

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.

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 treatment.

...

Patient Records

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

18. The Hearing Tribunal finds that the proven conduct breached the following provisions in the Patient Records Standards 3(a) and (b):
 3. Contents of patient records (paper and electronic)
 - a. Generally, patient records, not including financial records, shall include sufficient detail to allow other registered acupuncturists to continue the care of the patient in case of a transfer of the patient to another registered acupuncturist. In case of a review by the CAAA patient records can be used to assess the member's ability to provide quality care and to identify areas that may need improvements; in case of an investigation, patient records can be used as evidence of decisions, treatments provided, and to verify issues of a complaint.
 - 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.
 - ...
 -) 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.
19. The material in the Agreed Statement of Facts and Admission of Unprofessional Conduct outlines the deficiencies in treatment and in the patient record. The Registrant has admitted to these deficiencies and that they constitute unprofessional conduct. The breaches of the Code of Professional Conduct, Standards of Competency and Practice, and Patient Record Standards are serious. They are an important foundation for patient safety. The Registrant did not provide the cupping procedure in an

appropriate and safe manner. The Registrant displayed a lack of skill or judgment in the provision of professional services when she used essential oils and failed to respond appropriately to the adverse incident. The Registrant failed to obtain written consent and breached Article 4.1 of the Code of Professional Conduct.

VII. SUBMISSIONS ON SANCTION

20. After the Hearing Tribunal advised the parties of its findings in relation to the Allegations, the Hearing Tribunal invited the parties to make submissions with respect to sanction. The parties presented a Joint Submission on Sanction ("Joint Submission").

Submissions by Counsel for the Complaints Director

21. Counsel for the Complaints Director reviewed the Joint Submission (Exhibit 2). The range of orders that the Hearing Tribunal may impose is set out in section 82 of the HPA. The proposed sanction falls within section 82 and involves a reprimand, educational modules, a paper, and costs.
22. When considering a penalty 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.
23. 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 are not the most extreme but they are serious. Flammable oils were used for fire cupping, and the Registrant failed to appropriately document the incident in accordance with the requirements in the Code of Professional Conduct and applicable standards.
 - ii. The age and experience of the member: The Registrant was a very new member of the profession. She was registered in July 2021 and the incident occurred in October 2021. Her conduct arises out of a lack of experience.
 - iii. The previous character of the member: There is no other finding of unprofessional conduct.
 - iv. The number of times the offence was proven to have occurred: The Allegations arise out of one visit on one date with one patient. There is no pattern of conduct.
 - v. The role of the member in acknowledging what occurred: The Registrant has admitted to the conduct and entered into an agreement and that weighs in her favour. It

shows that she has reflected on the conduct and understands the seriousness. The Registrant self-disclosed, cooperated, and took responsibility.

- vi. 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.
 - vii. The impact on the offended patient: The incident had a serious impact on the complainant.
 - viii. The presence or absence of any mitigating factors: Counsel for the Complaints Director was not aware of any additional factors.
 - ix. 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 recur, and send a message to the membership at large that the conduct is unacceptable and will attract a sanction.
 - x. The need to maintain public confidence: It is important to ensure that the public sees that College takes the conduct seriously.
 - xi. Degree to which offensive conduct is outside the range of permitted conduct: There is a basic expectation that when using essential oils, it is important to ensure that they are appropriate for the treatment. There are also basic expectations for obtaining consent. The Registrant's conduct is clearly outside the range of permitted conduct.
24. 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.
25. The reprimand is meant to acknowledge the departure from the College standards. The requirements for education and a paper are remedial in nature in recognition of how junior the Registrant is in the profession. The paper is an opportunity for reflection. The costs are a small portion of the actual costs and are appropriate in the circumstances.

Submissions by Counsel for the Registrant

26. Counsel for the Registrant agreed with the law as set out by counsel for the Complaints Director. The proposed sanction meets specific deterrence and also takes a rehabilitative approach. The responsibility for a portion of the costs is a burden considering the Registrant's age and experience. This has been a very stressful experience for the Registrant and she has taken it very seriously. She is looking to use this as an opportunity for improvement. The mitigating factors are the immediate self-report, cooperation throughout the process, and the admission which prevented a contested hearing. The proposed penalty will protect the public and should be accepted by the Hearing Tribunal.

Question from the Hearing Tribunal

The Registrant is required to take courses offered by the Canadian Medical Protective Association. How were those courses chosen?

27. Counsel for the Complaints Director responded that the courses were suggested by the Registrant. Counsel for the Registrant submitted that the four courses were created by the Canadian Medical Protective Association and they are targeted at physicians. However, the content is applicable to other health professions. The focus is on four components which are broadly applicable, and these courses have been accepted in hearings involving other health professions as sufficient to address the required skill set.

VIII. DECISION AND REASONS OF THE HEARING TRIBUNAL ON SANCTION

28. 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.
29. 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.
30. 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.

31. 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 important that deference is given to joint submissions.
32. 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 Submission on Sanction. The Joint Submission takes into account the nature of the findings of the Hearing Tribunal. They also address the issues that brought this Registrant before the Hearing Tribunal. Rehabilitation and remediation are addressed through the course requirements and the reflection paper. These proposed sanctions also serve to protect the public. The Registrant is a very new member of the College and the penalty will help her to develop the skills to ensure that the conduct is not repeated. It is appropriate that the Registrant bear some costs in relation to the investigation and hearing.
33. Publication of this decision will be within the discretion of the Registrar.

IX. ORDER OF THE HEARING TRIBUNAL

34. The Hearing Tribunal hereby orders pursuant to section 82 of the HPA:
 - a. Ms. Leung shall receive a reprimand and the written decision of the Hearing Tribunal shall serve as the reprimand.
 - b. Ms. Leung shall complete, at her own cost, the following Canadian Medical Protective Association modules: (1) Informed Consent; (2) Documentation; (3) Medical letters, forms and reports; and (4)

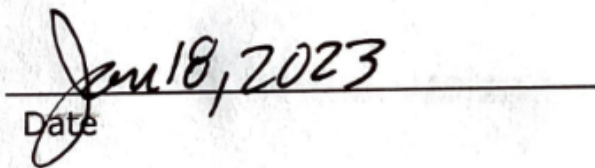
Disclosing harm from healthcare delivery, within three months of the receipt by Ms. Leung of the written decision of the Hearing Tribunal.

- c. Ms. Leung will write a paper (1000 word minimum), within three months of the receipt by Ms. Leung of the written decision of the Hearing Tribunal. The paper will confirm that Ms. Leung 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.
- d. Ms. Leung 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. Leung 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