

**IN THE MATTER OF A HEARING BEFORE THE HEARING TRIBUNAL
OF PHYSIOTHERAPY ALBERTA COLLEGE + ASSOCIATION
INTO THE CONDUCT OF SCOTT SHERMAN
PURSUANT TO THE *HEALTH PROFESSIONS ACT*, RSA 2000, c. H-7**

DECISION OF THE HEARING TRIBUNAL ON SANCTION

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I. Introduction

- [1] The Hearing Tribunal of Physiotherapy Alberta College + Association (the “**College**”) met by video conference on May 8, 2023 to consider the written submissions on sanction from the Complaints Director and Scott Sherman (“**Mr. Sherman**”). The following individuals were present:

Hearing Tribunal:

Todd Wolansky, PT, Tribunal Member, Chair
Jo-Anne Ogle, PT, Tribunal Member
Doug Dawson, Tribunal Member, Public Member
David Rolfe, Tribunal Member, Public Member

Also present was:

Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal

II. Background

- [2] In its decision dated February 28, 2023, the Hearing Tribunal found the following allegation proven:

Allegation 2: Mr. Sherman engaged in sexual abuse toward patient SB the particulars of which include:

- a. He provided physiotherapy treatment to SB on a number of occasions between February 5, 2014 – September 3, 2019;
- b. On or about March 17, 2020, he commenced a sexual relationship with SB and engaged in conduct of a sexual nature with her while she was still a “patient” as defined in Physiotherapy Alberta’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct;
- c. He provided further treatment to SB on or between October 7, 2020 to November 23, 2020, while continuing to engage in a sexual relationship with her and when SB was still a “patient”.

- [3] The Hearing Tribunal dismissed the following allegations:

Allegation 1: On or between December 2019 and March 2020, Mr. Sherman failed to maintain appropriate boundaries during his therapeutic relationship with client SB by meeting with her on one or more occasions in a personal capacity for coffee.

Allegation 3: Further or in the alternative to allegations #2, Mr. Sherman's conduct in engaging in an intimate and/or sexual relationship with SB constitutes an inappropriate boundary violation.

III. Exhibits

- [4] Additional documents were provided by the parties for the sanction phase of the hearing. The Complaints Director asked that these documents be marked as exhibits in a closed portion of the hearing pursuant to section 78(1) of the *Health Professions Act*, RSA 2000, c. H-7 ("**HPA**"). The Hearing Tribunal determined that it would hold the hearing in private for the portion of the hearing where these additional documents were entered as Exhibits:

Exhibit 10 – Statement of Costs and Field LLP Invoices

Exhibit 11 – RMRF LLP Invoices

- [5] The Hearing Tribunal noted the application of the Complaints Director and the consent of Mr. Sherman to close this portion of the hearing. The Hearing Tribunal considered the confidential nature of the information and determined that the solicitor-client privilege of the Complaints Director and the Hearing Tribunal warranted holding that portion of the hearing in private where Exhibits 10 and 11 were marked as Exhibits.

IV. Written Submissions

- [6] The Hearing Tribunal received the following written submissions from the parties:

- a. Written Submissions of the Complaints Director dated February 28, 2023;
- b. Written Submissions of the Member dated March 31, 2023;
- c. Written Reply Submissions of the Complaints Director dated April 21, 2023;
- d. Letter from Mr. Sim, Field Law, dated April 21, 2023;
- e. Letter Ms. Stys, Gowling WLG, dated April 24, 2023.

V. Submissions

Submissions of the Complaints Director

- [7] Counsel for the Complaints Director provided a Statement of Costs to date showing the investigation and hearing costs to date for the hearing held July 13 to 15, August 9 and 10, and September 9, 2022 were \$128,203.14.
- [8] Counsel for the Complaints Director reviewed the relevant legislative provisions of the HPA and the purposes of sanction in disciplinary hearings. The fundamental purpose is to ensure that the public is protected from unprofessional conduct.
- [9] Counsel for the Complaints Director noted that there was mandatory cancellation required in this case. Section 82(1.1)(a) of the HPA requires that, in addition to any order made under s. 82(1), where a decision of unprofessional conduct is based in whole or in part on sexual abuse, the Hearing Tribunal must order the cancellation of the investigated person's practice permit and registration.
- [10] Counsel for the Complaints Director reviewed the factors in *Jaswal v Newfoundland Medical Board*, 1996 CarswellNfld 32 ("*Jaswal*") and reviewed decisions in similar cases. Counsel for the Complaints Director also submitted it was appropriate for Mr. Sherman to bear a significant portion of the costs of the investigation and hearing.
- [11] Counsel for the Complaints Director noted the decision of the Alberta Court of Appeal in *KC v College of Physical Therapists of Alberta*, 1999 ABCA 235 ("*KC*") for the proposition that costs awarded on a full indemnity basis should not "be the default", nor in the cases of mixed success, should costs be a straight mathematical calculation. Counsel also noted the subsequent decision of the Alberta Court of Appeal, including *Alsaadi v Alberta College of Pharmacy*, 2021 ABCA 313 that a Hearing Tribunal should consider if costs are warranted in the circumstances of the case. Finally, counsel reviewed the recent case of *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 ("*Jinnah*") noting that costs are an inevitable part of self-regulation and that it may not be appropriate to impose a significant portion of costs unless a compelling reason to do so exists. A compelling reason exists if a registrant has engaged in serious unprofessional conduct; was found to have engaged in unprofessional conduct on two or more occasions; failed to cooperate with the investigation and forced the College to expend more resources than otherwise necessary, or engaged in hearing misconduct.
- [12] Counsel for the Complaints Director noted that sexual abuse is, by itself, serious unprofessional conduct and a compelling reason for Mr. Sherman to pay the entirety, or a substantial portion of, the costs of the investigation and hearing. It was further submitted that while Allegation 1 was not proven, the costs of the investigation and hearing associated with Allegation 1 were minimal and largely indistinguishable in the totality of the case.

- [13] Counsel for the Complaints Director submitted that the Hearing Tribunal should impose the following orders under section 82 of the HPA:
- a. Cancellation of Mr. Sherman's registration and practice permit as of the date of the Hearing Tribunal's written decision; and
 - b. Mr. Sherman shall pay the full costs of the investigation and hearing to be paid on or before 12 months from the date of the Hearing Tribunal's written decision or on payment terms approved in advance by the Complaints Director in writing.
- [14] Counsel for the Complaints Director submitted that, in the alternative, if the Hearing Tribunal determines that Mr. Sherman should not pay the full costs of the investigation and hearing, Mr. Sherman should bear a significant portion of the costs, and that an order for costs of no less than 75% of the total costs would be warranted.

Closing Submissions of the Investigated Member

- [15] Counsel for Mr. Sherman acknowledged that due to the finding of sexual abuse, the Hearing Tribunal must cancel Mr. Sherman's practice permit and registration pursuant to section 82(1.1)(a) of the HPA. It was noted however that the Hearing Tribunal has broad discretion with respect to making further orders under section 82(1), particularly as it relates to costs.
- [16] Counsel for Mr. Sherman noted that any sanction must be appropriate, fair and reasonable in the circumstances of the member and the nature of the proven allegations. The objective in imposing a sanction is to punish the member; not to destroy them. An order for sanction should seek to satisfy the following needs: deterrence to the member, deterrence to the general profession, maintenance of the public's confidence, public protection and rehabilitation of the member.
- [17] Counsel for Mr. Sherman reviewed the *Jaswal* factors as they relate to sanction. Counsel submitted that as Mr. Sherman faced the risk of revocation, and given the ambiguity existing with the Sexual Abuse Standard and its application to his relationship with SB, Mr. Sherman exercised his right to fully respond to the charges.
- [18] In terms of costs, counsel for Mr. Sherman stated that the burden is on the Complaints Director to justify the costs incurred. Mr. Sherman noted that there was delay in the hearing in the original three days, unrelated to Mr. Sherman's conduct, including a member of the Hearing Tribunal losing an internet connection, the refusal of the Complaints Director to agree to the admission of the expert report, and the failure by the Complaints Director to work on an Agreed Statement of Facts with Mr. Sherman, or to contact Mr. Sherman for the purposes of reaching an agreement on sanction.
- [19] Counsel for Mr. Sherman also points to the degree of success of the Complaints Director, noting the Complaints Director was only successful on one allegation (Allegation 2) and

that the Hearing Tribunal placed little weight on the treatment period in Allegation 2(c). Counsel for Mr. Sherman disputed that minimal costs were incurred on Allegation 1. Finally, counsel for Mr. Sherman notes that the evidence of the expert was presented in part as a response to the evidence of the Executive Director.

- [20] Counsel for Mr. Sherman submitted that the Complaints Director should only be entitled to 50% of any costs assessed by the Hearing Tribunal. Further, it was submitted that only certain costs should be allocated against Mr. Sherman and he should not be responsible for the costs incurred for July 13 to 15, 2022. Counsel for Mr. Sherman provided a revised Statement of Costs, calculating costs to be \$65,528.71.
- [21] Counsel for Mr. Sherman submitted that the Hearing Tribunal should order the following:
- a. Cancellation of Mr. Sherman's registration and practice permit; and
 - b. Costs of the investigation and hearing capped at \$65,000 and Mr. Sherman shall pay 50% of that amount within a 24 month period from the date the College sends him a letter advising him of the final amount of costs, in accordance with a payment schedule agreed to by the Complaints Director.

Reply Submissions of the Complaints Director

- [22] Counsel for the Complaints Director took the position that Mr. Sherman's written submissions improperly assert that there are "varying degrees" of sexual boundary violations, conflate non-aggravating factors as mitigating factors, and mischaracterize facts in an attempt to minimize the severity of the conduct.
- [23] Counsel for the Complaints Director acknowledged there are more egregious cases of repeated sexual abuse, and that the conduct in such cases may be considered aggravating. However, the inherent nature of sexual abuse is still at the most serious end of the range of unprofessional conduct. The Sexual Abuse Standard clearly establishes that there is an inherent power imbalance between the patient and the physiotherapist and it is because of this inherent power imbalance that sexual relationships are prohibited even if the patient purports to consent to the sexual relationship.
- [24] Counsel for the Complaints Director disputed the characterization by Mr. Sherman regarding Mr. Sherman's seniority in the profession and confusion around the Sexual Abuse Standard, the number of times the offence occurred, the impact of the incident on the patient, the fact that Mr. Sherman has not practiced as a physiotherapist since the sale of the clinic in November 2021, and his acknowledgement of the facts versus an acknowledgement of unprofessional conduct.
- [25] With respect to the costs order, counsel for the Complaints Director submitted that the revised Statement of Costs provided by counsel for Mr. Sherman should be disregarded. The proceedings on July 13 to 15, 2023 were important to the Hearing Tribunal's

deliberations. The Hearing Tribunal should be guided by the *Jinnah* decision in awarding costs.

VI. Decision of the Hearing Tribunal

[26] The Hearing Tribunal carefully considered the written submissions of the parties, the letters dated April 21, 2023 and April 24, 2023 from counsel and Exhibits 10 and 11.

[27] The Hearing Tribunal determined that the following orders would be made:

- a. Cancellation of Mr. Sherman's registration and practice permit as of the date of the Hearing Tribunal's written decision pursuant to section 82(1.1)(a) of the HPA; and
- b. Mr. Sherman shall pay 10% of the full costs of the investigation and hearing, to be capped at \$13,000, to be paid on or before 12 months from the date of the Hearing Tribunal's written decision on sanction or on payment terms approved in advance by the Complaints Director in writing.

VII. Findings and Reasons of the Hearing Tribunal

[28] The Hearing Tribunal noted that the HPA requires mandatory cancellation of a member's registration and practice permit where there is a finding of sexual abuse (section 82(1.1)(a) of the HPA). The Hearing Tribunal considered whether other orders should be made pursuant to section 82(1) of the HPA. The Hearing Tribunal determined that this was an appropriate case to order costs under section 82(1)(j) of the HPA and considered the amount of costs to be ordered.

[29] The Hearing Tribunal considered the factors in the *Jaswal* decision, as follows:

- a. Nature and gravity of the proven allegations: The Complaints Director took the position that sexual abuse is on the most serious end of the spectrum of unprofessional conduct and that purported consent does not mitigate the finding of unprofessional conduct given the inherent power imbalance in the relationship between physiotherapist and patient. Mr. Sherman took the position that the facts of this case are on the least severe end of the spectrum. The Hearing Tribunal found that any finding of sexual abuse is very serious. However, the Hearing Tribunal also found that there is a spectrum of conduct, even in sexual abuse cases. Factors which would move the conduct toward the more severe end of the spectrum, such as multiple patients, particularly vulnerable patients, or conduct that is criminal in nature, were not present here. The Hearing Tribunal did view that this was an important distinction. The legislation mandates cancellation of registration and this is out of the hands of the Hearing Tribunal, however, the conduct here is on the lower end of the spectrum of sexual abuse. Had Mr. Sherman not seen SB at the September 3, 2019 appointment or had Mr. Sherman

and SB waited a further 60 or so days to commence their sexual relationship, there would not have been a finding of sexual abuse.

- b. Age and experience of the member: The Hearing Tribunal viewed this as a neutral factor. Any member, regardless of age and experience, is required to be aware of and abide by the Standards of Practice.
- c. The previous character of the member: There are no prior findings of unprofessional conduct against Mr. Sherman.
- d. The age and mental condition of the offended patient: SB was not a particularly vulnerable patient (for example, she was not a minor or suffering from a mental or other disability).
- e. The number of times the offence was proven to have occurred: The Hearing Tribunal agreed with Mr. Sherman's characterization that this was one offence. There was one patient and one relationship at issue.
- f. The role of the member in acknowledging what occurred: The Hearing Tribunal considered that Mr. Sherman was entitled to vigorously defend himself.
- g. Whether the member has suffered other serious financial or other penalties: Mr. Sherman stated that he has not practiced as a physiotherapist since November 2021. The Hearing Tribunal placed limited weight on this factor and noted this was Mr. Sherman's choice rather than a College imposed sanction. In addition, Mr. Sherman did not put forward evidence of financial hardship.
- h. The impact of the incident on the patient: The Hearing Tribunal noted that SB was called as a witness in the hearing, but chose to not provide an impact statement to the Hearing Tribunal in accordance with section 81.1(2) of the HPA.
- i. The presence or absence of any mitigating circumstances: There were no further mitigating factors presented to or considered by the Hearing Tribunal.
- j. The need to promote specific and general deterrence: The Hearing Tribunal considered that mandatory cancellation achieves both specific and general deterrence in this case.
- k. The need to maintain the public's confidence in the integrity of the profession: As with deterrence, the Hearing Tribunal considered that mandatory cancellation achieves this objective.
- l. The degree to which the offensive conduct was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct: The Hearing Tribunal noted that any finding of sexual abuse is serious. However, as noted above, in the absence of the September 3, 2019 clinic visit or had the

sexual relationship commenced some 60 days later, the conduct would not have been considered sexual abuse in breach of the Sexual Abuse Standard.

- m. The range of sentence in other similar cases: The Hearing Tribunal considered the costs ordered in the College decision in Mohrenberger. That case involved an admission of unprofessional conduct, although the amount of costs was disputed. The member was ordered to pay \$5,000 in costs. Another decision (Alberta College of Occupational Therapists v Nelson) was presented. That case also involved an admission of unprofessional conduct. Costs of 50% to a maximum of \$12,000 were ordered. The Hearing Tribunal found that those two cases involved much clearer violations of the standards of practice.

- [30] The parties advanced different positions with respect to what costs should be included in the Statement of Costs. The Hearing Tribunal did not consider it necessary to undergo a detailed analysis or to breakdown the costs in the manner suggested by Mr. Sherman. The Hearing Tribunal took a broader approach to costs and accepted the Statement of Costs presented by the Complaints Director.
- [31] The Hearing Tribunal considered Mr. Sherman's position that costs of certain hearing days should not be included in the Statement of Costs (that is for the hearing days of July 13 to 15, 2022). The Hearing Tribunal rejected this position. While Mr. Sherman had a right to fully defend himself and vigorously contest the allegations, such an approach requires the Complaints Director, who bears the onus of proof, to call evidence to establish the case. The Hearing Tribunal found that it was reasonable for the Complaints Director to call its witnesses. In addition, the Complaints Director was entitled to contest the expert report provided by Mr. Sherman.
- [32] The Hearing Tribunal also considered the amount of time necessary for one of the Hearing Tribunal members to relocate offices following a loss of internet connection. The length of time to address this was relatively short in relation to the hearing. While the Hearing Tribunal did not undergo a detailed review of the costs to determine what costs to exclude from the Statement of Costs for this brief interruption in the hearing, this was a factor taken into account by the Hearing Tribunal in determining the amount of costs to be ordered.
- [33] The Hearing Tribunal considered the decision in *KC* (in particular, paragraph 94) and noted that full indemnity costs should not be the default, nor should costs be a straight mathematical calculation based on the number of convictions divided by the number of charges. As noted by the Court of Appeal, the Hearing Tribunal should consider such factors as "the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts." The costs order should not create a crushing financial blow for the member. The Hearing Tribunal considered the Court of Appeal's direction in assessing the amount of costs.

- [34] The Hearing Tribunal also considered that there was mixed success in proving the allegations. While Allegation 1 did not take up a significant portion of hearing time, it was an allegation that was pursued by the Complaints Director throughout the hearing and in closing submissions.
- [35] The Hearing Tribunal also considered that Mr. Sherman has lost his ability to earn a livelihood as a physiotherapist. This is significant for any member and would be expected to have a serious financial impact on Mr. Sherman's ability to earn a livelihood.
- [36] The Hearing Tribunal noted the changes to the HPA make permanent cancellation of the registration and practice permit mandatory where there is a finding of sexual abuse, as that is defined in a college's standards of practice. These amendments to the HPA have removed a Hearing Tribunal's discretion or ability to consider the severity of the conduct or the circumstances of the case in determining whether or not cancellation of practice permit and registration are required. However, these factors can be considered as they relate to whether other orders should be made under section 82(1) of the HPA, including costs. In the circumstances of this case, the Hearing Tribunal chose to exercise that discretion in considering the amount of costs to be awarded. The Hearing Tribunal concluded that an order for full costs in this case was not reasonable.
- [37] The Hearing Tribunal considered the four compelling reasons as set out in *Jinnah* for awarding a significant portion of costs: serious unprofessional conduct, a serial offender, failure to cooperate in the investigation phase, or hearing misconduct. Mr. Sherman engaged in serious unprofessional conduct. However, he is not a serial offender nor did he fail to cooperate in the investigation phase or engage in hearing misconduct.
- [38] The Hearing Tribunal considered the seriousness of the conduct. As noted previously, sexual abuse of any kind is serious, however, there are varying levels of severity. Mr. Sherman took the training and advised the College that he understood the Sexual Abuse Standard. He is not blameless in this matter. However, Mr. Sherman has received the most severe punishment that can be imposed in a professional disciplinary hearing, being the permanent cancellation of his practice permit and registration. Absent the changes to the legislation, the Hearing Tribunal would not have ordered the cancellation of his practice permit and registration in the circumstances of this case.
- [39] In addition, the Hearing Tribunal considered that while the College has had Standards of Practice in place for many years regarding boundaries and prohibiting sexual relationship with patients, this was a novel case in interpreting some of the definitions in the Sexual Abuse Standard, including the definition of "episodic care". No prior decision of the College was presented to the Hearing Tribunal that considered the specific issues in this case.
- [40] The Hearing Tribunal wishes to be clear that, in making this cost award, it is not being critical of the Complaints Director bringing this case to a hearing. The College is mandated to protect the public and must enforce the HPA. The College created the Sexual Abuse

Standard as it was mandated to do and provided education to the membership about the Standard. In addition, there is no question there was a duty on the Complaints Director to bring this matter to a hearing. However, the hearing did involve a novel issue around interpreting the Sexual Abuse Standard which justifies a lower award of costs.

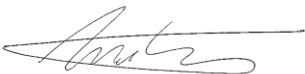
- [41] This decision will serve an important educational role for the membership and will provide guidance and benefit to the membership in understanding a member's obligations under the Sexual Abuse Standard. In particular, this decision will assist members in understanding what constitutes or does not constitute episodic care. Given this, the Hearing Tribunal considered that this was an appropriate case to make a lower award of costs.
- [42] After considering all of the circumstances of the case and the relevant decisions of the Court of Appeal of Alberta, the Hearing Tribunal determined that 10% of the Statement of Costs presented by the Complaints Director, capped at \$13,000, was appropriate and reasonable.

VIII. Conclusion

- [43] In accordance with section 82 of the HPA, the Hearing Tribunal hereby orders:
- a. Cancellation of Mr. Sherman's registration and practice permit as of the date of the Hearing Tribunal's written decision; and
 - b. Mr. Sherman shall pay 10% of the full costs of the investigation and hearing, to be capped at \$13,000, to be paid on or before 12 months from the date of the Hearing Tribunal's written decision on sanction or on payment terms approved in advance by the Complaints Director in writing.

Dated this 7 day of June, 2023.

Signed on behalf of the Hearing Tribunal



Todd Wolansky, PT, Chair