



Sanction Decision of the Hearing Tribunal

ACMDTT Member #7112



**IN THE MATTER OF A HEARING into the conduct of [REDACTED]
pursuant to the *Health Professions Act*, R.S.A. 2000, c. H-7**

SANCTION DECISION OF THE HEARING TRIBUNAL

A hearing of the Hearing Tribunal was held on September 12, 2017 at the offices of the Alberta College of Medical Diagnostic & Therapeutic Technologists (the "College" or "ACMDTT") at Suite #800, 4445 Calgary Trail, Edmonton, Alberta.

The Hearing Tribunal issued a written findings decision dated November 7, 2017 in relation to the allegations against [REDACTED]. In its findings decision, the Hearing Tribunal concluded that allegations 1, 2 and 5 had been proven and that allegation 4 had been partially proven. Subsequently, the Hearing Tribunal received written submissions from the Complaints Director and [REDACTED] in relation to sanction arising from its findings decision.

Following receipt of the written submissions, the Hearing Tribunal deliberated by teleconference. In attendance at the deliberations were:

Christy McIntyre, MRT (NM), Hearing Tribunal chair and regulated member
Marlene Chambers, MRT (R), Hearing Tribunal member and regulated member
James Lees, public member
Blair Maxston, independent legal counsel for the Hearing Tribunal

The Hearing Tribunal issues the following decision in relation to sanction.

I. Complaints Director's Submissions

[1] In documents dated January 12, 2018 legal counsel on behalf of the Complaints Director provided submissions on sanction. She notes that the primary purpose of any sanction order must be to protect the public. She referred the Hearing Tribunal to factors which should be should considered when evaluating the appropriateness of sanctions, many arising from the case of *Jaswal v. Newfoundland (Medical Board)*. Legal counsel for the Complaints Director provided the following submissions:

- *The nature and gravity of the proven allegation:* While there is no intent to deceive on [REDACTED]'s part, lack of compliance to the CPP program and failure to comply with an investigation by the regulator, along with disrespectful communication about the ACMDTT are very serious behaviours. This behaviour relates to the ACMDTT's ability to protect the public and to ensure that the conduct of its members meets acceptable standards.
- *Age and Experience:* [REDACTED] has been working within the profession for over 16 years. With this level of experience, she should be aware of

her regulatory requirements, and be able to communicate in an accurate and respectful manner.

- *Previous character of the technologist and any prior complaints or convictions:* [REDACTED] has had no prior findings of unprofessional conduct while registered with the ACMDTT.
- *Number of times the offence was proven to have occurred:* With regards to allegation 1 multiple opportunities were given to address compliance to the CCP program. There are also multiple allegations of [REDACTED]'s conduct and with respect to allegation 5 there were 3 separate occasions of improper communication. Multiple incidents of misconduct suggest a more serious sanction.
- *Role of the technologist in acknowledging the conduct occurred:* [REDACTED] signed an Agreed Statement of Facts which made a qualified acknowledgment that she engaged in unprofessional conduct as alleged in allegations 2 and 5. However, [REDACTED] contested allegations 1 and 4.
- *Previous financial or other penalties:* The ACMDTT is not aware of [REDACTED] having suffered any financial or other penalties as a result of her conduct.
- *Need to promote deterrence:* [REDACTED] had multiple opportunities to comply with the requirements of the mandatory CCP but failed to do so. The orders sought by the Complaints Director are significant. However, this is necessary to deter [REDACTED] and the profession at large from similar conduct and thus protecting the public.
- *Need to maintain the public's confidence in the integrity profession:* The ACMDTT is a self-regulating organization and [REDACTED]'s lack of compliance, her inaccurate declaration, her failure to cooperate with the investigation, and her engagement in communications which demonstrated contempt and/or disrespect for the ACMDTT all undermine the efforts of the ACMDTT to regulate its members and to ensure public safety.
- *Degree to Which Conduct Was Outside the Range of Permitted Conduct:* Given the Tribunal's findings, the conduct in issue is clearly unacceptable and was a deviation from the range of permitted conduct. [REDACTED]'s conduct was not "borderline" and it did not fall into a "grey" area.
- *Range of Sentences in Similar Cases:* The ACMDTT has recently addressed the issues of regulated members failing to comply with the CCP, making

false declarations on a permit renewal, and failing to cooperate with the ACMDTT during the investigation.

The penalties sought are comparable to those ordered by ACMDTT Hearing Tribunals for other ACMDTT regulated members who engaged in similar unprofessional conduct, as demonstrated in the decisions of Mr. [REDACTED], Mr. [REDACTED], Ms. [REDACTED], and Ms. [REDACTED].

In addition, other regulatory bodies have also considered similar types of conduct. The following cases were summarized and may be of assistance to the Hearing Panel: the Hearing Tribunal of the College of Physical Therapists of Alberta regarding H.G., the Hearing Tribunal of the Alberta College of Pharmacists regarding C.B., and the Hearing Tribunal of the Alberta College of Pharmacists regarding M.E.

- [2] The Complaints Director submitted that a review of the cases indicates that a failure to meet the requirements of a continuing competence program, the making of a false declaration, and a failure to cooperate with the regulatory body during an investigation may warrant a suspension, a fine, a reprimand, being subject to an audit, and the payment of costs.
- [3] The Complaints Director further submitted that outcome depends on specific facts of the case including admission of unprofessional conduct and the presence or absence of mitigating factors. This suggests that there is no "formulaic approach" to determining penalty and it is necessary to weigh all of the factors having regard to the specific facts in a particular case.
- [4] In the ACMDTT Hearing Tribunal decisions concerning [REDACTED] and [REDACTED], those persons failed to meet the CCP requirements, made false declarations, and failed to cooperate with the ACMDTT during their investigations. The Hearing Tribunal in those cases ordered significant suspensions (14 and 10 days), as well as remedial sanctions including the submission of a two-page essay, completion of ACMDTT's Regulation Education module, and a mandatory CCP audit for two years, as well as the payment of full costs of the investigation and hearing up to \$15,000.00.
- [5] The Complaints Director submitted that [REDACTED] was found to have committed the same conduct as these ACMDTT regulated members. While [REDACTED] made qualified admissions which neither of these regulated members did, [REDACTED] was also found to have engaged in inappropriate communications with the ACMDTT which raised concerns regarding her governability. Neither Mr. [REDACTED] nor Mr. [REDACTED] were the subject of an allegation regarding inappropriate communications with the ACMDTT.
- [6] With respect to the 14-day suspension ordered in the case of Mr. [REDACTED], the ACMDTT submitted that [REDACTED] should receive the same length of suspension. On the one hand, it is arguable that [REDACTED]'s suspension should be lengthier than Mr. [REDACTED]'s. Specifically, while Mr. [REDACTED] did not comply with his CCP obligations in the same manner

as [REDACTED], he did not make statements or comments to ACMDTT staff which showed a blatant disregard for the ACMDTT as the regulator, as did [REDACTED]. However, Mr. [REDACTED] did not acknowledge responsibility for any of his unprofessional conduct and in [REDACTED]'s case, she did provide at least tacit admissions of unprofessional conduct with respect to two of the allegations. Balancing these factors, a 14-day suspension is appropriate for [REDACTED].

[7] Further, while there was no fine ordered in the case of either Mr. [REDACTED] or Mr. [REDACTED], it is important in [REDACTED]'s case to denounce in particular her conduct in Allegation 5, which demonstrated, in the words of the Hearing Tribunal, a fundamental disrespect for her governing body. This type of conduct was absent in the cases of both Mr. [REDACTED] and Mr. [REDACTED]. In [REDACTED]'s case, a \$500.00 fine is appropriate to emphasize the degree to which [REDACTED]'s conduct as set out in Allegation 5 was unacceptable.

[8] Legal counsel for the Complaints Director attached to her submissions the orders sought by the Complaints Director arising out of the Hearing Tribunal's decision on unprofessional conduct. The orders sought are:

1. [REDACTED] *will be suspended for a period of fourteen (14) days. The period of suspension will commence fourteen (14) days after the Tribunal's written decision on sanction is provided to her.*
2. Subject to 6 below, [REDACTED] *will pay a fine of \$500.*
3. [REDACTED] *will, within thirty (30) days of being given a copy of the Tribunal's written decision on sanction, submit an essay in a form that is satisfactory to the Hearings Director of approximately two pages in length outlining her responsibilities as a member of the ACMDTT and confirming the importance of complying with her regulatory responsibilities, including:*
 - i. *Compliance with the CCP;*
 - ii. *Being candid, respectful, professional, forthright and honest in all dealings with the ACMDTT and its staff; and*
 - iii. *Cooperating with investigations conducted under the HPA and responding to correspondence received from the ACMDTT in a timely manner.*
4. *A copy of the Decision and a copy of the Tribunal's written decision on sanction will be provided to the ACMDTT Director of Education, and [REDACTED] will be subject to a mandatory CCP audit for the next two (2) CCP cycles (i.e. 2017/2018 and 2018/2019).*

5. Subject to 6 below, [REDACTED] will pay \$15,000.00 of the costs of the investigation and the hearing

6. [REDACTED] must advise the Hearings Director within thirty (30) days of being provided with a copy of the Tribunal's written decision on sanction whether she wishes to pay the fine and costs in a lump sum or whether she wishes to pay in instalments:

i. If [REDACTED] elects to pay the fine and costs in a lump sum:

1. the fine and costs will be due and owing sixty (60) days after [REDACTED] is provided with a copy of the Tribunal's written decision on sanction.

ii. If [REDACTED] elects to pay the fine and costs in installments:

1. the fine and costs shall be paid in equal monthly installments over a period of eighteen (18) months

2. [REDACTED] must provide the Hearings Director with 18 postdated cheques made out to the ACMDTT for each monthly installment; and

3. the first installment must be paid within sixty (60) days after the Tribunal's written decision on sanction is provided to [REDACTED] and the remaining post-dated cheques must be provided at that time.

7. The deadlines referred to in 3 and 6 may be extended for a reasonable period of time, in the sole discretion of the Hearings Director. If [REDACTED] is seeking an extension, [REDACTED] must contact the Hearings Director to request an extension in advance of the deadline, must indicate why [REDACTED] cannot comply, and must confirm the date of the newly proposed deadline.

8. In the event that [REDACTED] fails to successfully comply with any of the deadlines set out above, or by such other date as agreed to by the Hearings Director, her permit to practice will be automatically suspended pending compliance.

[9] In conclusion, the Complaints Director submitted the orders that the Tribunal imposes pursuant to s. 82 should be aimed at protecting the public. The orders sought are intended to reinforce to [REDACTED] her professional obligations and the role of the ACMDTT, as well as to deter her from engaging in similar conduct. The proposed orders are also intended to protect members of the public from similar conduct in the future.

At the same time, the proposed orders are necessary to uphold the integrity of the profession in the eyes of the public.

- [10] The Complaints Director submitted that given the significant efforts made by the ACMDTT to remediate non-compliance, the seriousness of the conduct, and the limited acknowledgment by [REDACTED] that her conduct was unprofessional, the 14-day suspension, the \$500.00 fine, and the additional remediation orders, while serious penalties, reflect a proper consideration of the Jaswal factors and are appropriate in the circumstances.
- [11] With respect to costs, the Complaints Director stated that it is generally appropriate that regulated members who have engaged in unprofessional conduct bear the costs relating to the investigation and hearing. Here, the Complaints Director's legal counsel advised that the requested costs are less than one half of the actual costs incurred.
- [12] Regarding costs, the Complaints Director also cites *Lysons v Alberta Land Surveyors' Association, 2017 ABCA 7*, the Alberta Court of Appeal commented on the inclusion of costs in professional disciplinary sanctions. There, the investigated member appealed the finding of unprofessional conduct and the sanction imposed on him. He argued that it was unreasonable, particularly that he pay such a large portion of the costs of the hearing and appeal to the Council. The Court of Appeal held (at para. 13):
- Requiring the professional to pay all or a portion of hearing and investigation costs is a common part of professional disciplinary sanctions. It is not an error of principle to include in those costs the fees of counsel retained by the appeal panel and the Association.
- [13] The rationale for this is that the discipline process is undertaken by the ACMDTT as part of its public protection mandate to ensure that the public is being served by competent and ethical practitioners. The cost of doing so is properly borne by the member whose conduct has been found wanting, as outlined in *Hoff v. Alberta Pharmaceutical Association, 1994 CanLII 8950 (AB QB)* at para. 22.
- [14] Further, the Courts have recognized that where a member of a profession is found guilty of unprofessional conduct, it is appropriate that they bear the costs. Otherwise all the compliant members of the profession will have to finance the costs in the long run: *Cartledge v. Alberta Veterinary Medical Association, 1999 ABCA 131* at paras. 13 – 15.
- [15] In *Jaswal*, at para. 50, the Court provided a non-exhaustive list of factors that are relevant in determining whether to exercise the discretion to order payment of all or part of the costs of the hearing. The Complaints Director argued that these factors support her request for seeking \$15,000.00 in costs for the following reasons:
- *Degree of success in resisting the charges:* The Complaints Director successfully proved allegations 1, 2, and 5 in their entirety. However, the Complaints Director did not prove all particulars of allegation 4.

The costs of the hearing were not increased by pursuing the particulars of allegation 4 that were not proven. All of the witnesses who attended the hearing would have been required to testify in any event and to provide the same testimony.

The fact [REDACTED] was unsuccessful in resisting the remaining allegations indicates that she should bear a significant portion of the costs.

- *Necessity of calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing:* Although [REDACTED] made qualified admissions to allegations 2 and 5, she contested allegations 1 and 4.

Dacia Richmond, the Director of Education for the ACMDTT, and [REDACTED] were called as witnesses and both provided relevant and necessary testimony. Ms. Richmond's testimony in particular was necessary to the ACDMTT being able to establish Allegation 1.

As of the date of the Complaints Directors written submissions, the actual costs incurred in this matter amount to approximately \$25,241.02. And a further \$8,200.00 in costs in this matter are projected as time and expenses are incurred on the penalty portion of the hearing. In seeking a costs award of \$15,000.00, the Complaints Director is reasonably asking for less than 50% of the total anticipated costs of this matter.

- *Whether the persons presenting the case could reasonably have anticipated the result based on what they knew prior to the hearing:* The proven allegations demonstrate a significant departure from the conduct expected of members of the ACMDTT. As observed by the Tribunal, [REDACTED]'s actions were contradictory to the expectations and the governability required of all members of the profession. This is not a situation involving a "grey area" but is instead one that involved conduct that was clearly wrong.

Accordingly, the findings made by the Tribunal could reasonably have been anticipated prior to the hearing.

- *Whether [REDACTED] cooperated with respect to the investigation and offered to facilitate proof by admissions:* [REDACTED] did not fully cooperate with the investigation as demonstrated by allegations 4 and 5. However, [REDACTED] cooperated during the course of the hearing by agreeing to an Agreed Statement of Facts and by making qualified admissions to allegations 2 and 5. These are factors that are relevant to the issue of costs and should be considered.

While [REDACTED] was entitled to contest the remaining allegations, there are costs associated with such a process and the hearing with witnesses. These are costs which should be borne by [REDACTED].

- *Financial Circumstances of [REDACTED] and the Degree to which her Financial Position has already been affected by other aspects of any penalty that has been imposed:* This is not a situation where [REDACTED] was subject to an interim suspension pending the hearing and was therefore unable to practice. [REDACTED] has been able to continue to practice throughout the disciplinary proceedings.

In the absence of any specific evidence of [REDACTED]'s financial circumstances, [REDACTED] should be responsible for the hearing costs sought by the Complaints Director.

- [16] In Conclusion on costs the Complaints Director submitted the costs being sought are not insignificant. However, the position of the Complaints Director is consistent with the principles established by the Courts and previous Hearing Tribunals in relation to costs. Accordingly, the costs sought are appropriate given the circumstances. This is particularly so given the costs sought are only a portion of the full amount incurred to date. The order being sought reflects less than 50% of the total anticipated costs of this matter.
- [17] The allegations against [REDACTED] were serious, the conduct was clearly wrong, [REDACTED] was unsuccessful in resisting the significant majority of all particulars of the allegations, and all of the witnesses were required.
- [18] In all of the circumstances, it is appropriate for [REDACTED] to bear \$15,000.00 of the costs of the investigation and hearing.

II. [REDACTED]'s Submissions

- [19] Legal counsel for [REDACTED] submitted that she has been a regulated member of the ACMDTT since 2001. Other than this matter, [REDACTED] has not been the subject of any complaints to the ACMDTT and has not been disciplined by the ACMDTT.
- [20] The investigation and hearing has had a significant impact on [REDACTED]'s professional and personal life creating significant obstacles for [REDACTED] due to the public notice of the disciplinary hearing. As a result, [REDACTED]
- [21] Presently, [REDACTED] is practicing part-time in Edmonton, Alberta at the [REDACTED] Hospital, which is operated by Alberta Health Services. She has also been studying the ACMDTT Standards of Practice and Code of Ethics.
- [22] Further, in a letter to Karen Stone, the prior Complaints Director of the ACMDTT, [REDACTED] acknowledged her misunderstanding of her obligations and that her communications with the ACMDTT were unprofessional.

- [23] In the context of this complaint, [REDACTED] submitted that she has cooperated with the ACMDTT's investigation. She entered into an Agreed Statement of Facts and Acknowledgement of Unprofessional Conduct which obviated the need for a potentially lengthy and costly hearing and demonstrates that she takes responsibility for her behavior.
- [24] [REDACTED] pointed out that when exercising its discretion in making a penalty order, the Hearing Tribunal must consider each of the primary parties:
- (a) The Public - The purpose of the College is to protect the public. One measure of appropriateness of an order is whether it is adequate to protect the public and to maintain the confidence of the public.
 - (b) The Profession - General deterrence of the remainder of the profession is regarded as an important purpose of the order.
 - (c) The Member - The order should be suitable for the member as well. Consideration should be given to the member which includes crafting an order that will effectively rehabilitate whenever possible.
- [25] Sanctions run the full range of an unrecorded reprimand, to a written reprimand, to loss of one's ability to practice.
- [26] Although the protection of the public is the primary purpose of discipline proceedings, it has been held that the interests of the profession as a whole as well as the particular circumstances of the defendant member must be given consideration by discipline committees during the penalty analysis and determination. As stated at *Ontario (College of Pharmacists) v Oduro, 2013 ONCPDC*:
- The penalty must be appropriate, fair and reasonable in the particular circumstances of the member as well as to the nature of the allegations proved or admitted.
- [27] Jaswal sets out 13 principles that should be used to guide the Tribunal in imposing an appropriate penalty for inappropriate conduct;
- (a) The nature and gravity of the proven allegations;
 - (b) The age and experience of the offending physician;
 - (c) The previous character of the physician and in particular the presence or absence of any prior complaints or convictions;
 - (d) The age and mental condition of the offended patient;
 - (e) The number of times the offence was proven to have occurred;

- (f) The role of the physician and acknowledging what had occurred;
- (g) Whether the offending physician had already suffered other serious financial or other penalties as a result of the allegations having been made;
- (h) The impact of the incident on the offended patient;
- (i) The presence or absence of any mitigating circumstances;
- (j) The need to promote specific and general deterrence; and thereby, to protect the public and ensure the safe and proper practice of medicine;
- (k) The need to maintain the public's confidence and the integrity of the medical profession;
- (l) The degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct; and
- (m) The range of sentences in other similar cases.

[28] The courts have repeatedly emphasized that the objective of imposing a sanction "is to punish not to destroy" (as referenced in *Wakeford v. College of Physicians of B.C., 1992 CanLII 231 at p. 13*).

[29] [REDACTED] has no prior discipline complaints or convictions.

[30] Further, [REDACTED] has made a number of admissions on key issues. As noted by the Court in *Jaswal*, while a denial of guilt is not an aggravating circumstance an admission is an exceptionally important mitigating circumstance.

[31] [REDACTED] also submitted that there was no intent to harm anyone. Moreover, it is clear that these actions do not go to the root of [REDACTED]'s character. If it did, she would not have cooperated with the ACMDTT and she would have refused to make any admissions or accept responsibility for her acts.

[32] There can be no doubt that [REDACTED] is taking responsibility for her acts. She is willing to accept a reasonable punishment and is not trying to escape from that punishment.

[33] [REDACTED] was under no obligation to admit the allegations made against her and her choice to defend some of the charges at the Hearing cannot be taken as justification for an increased penalty. An MRT charged with an offence of unprofessional conduct is entitled to have the case against her proven and to make full answer in defence without fear of the threat of increased penalty.

- [34] [REDACTED] included the following cases for review by the Tribunal: *Hayes, Re*, 2016 CanLII 98637, *Zakhary, Re*, 2012 CanLII 10849, *Bajwa v British Columbia Veterinary Medical Association*, 2010 BCSC 848, *Ontario (College of Physicians and Surgeons of Ontario) v Lowe*, 2015 ONCPSD 21.
- [35] [REDACTED] also submitted that the ACDMTT relies on prior decisions of the ACDMTT Hearing Tribunals in support of its proposed in penalty. [REDACTED] submitted that there is significant concern with institutional bias on the part of the Hearing Tribunal in this case given the Hearing Tribunal's role in other cases involving regulated members' non-compliance with the ACDMTT's CCP requirements. In the cases that counsel for the Complaints Director relies on, the regulated members were all self-represented. More importantly, the Hearing Tribunal is not bound by previous decisions of the Discipline Committee. Further, the Hearing Tribunal must consider the facts of this specific case and not be biased by its prior decisions in determining the appropriate sanction.
- [36] [REDACTED] submitted the following proposed penalties:
- (a) A reprimand.
 - (b) Preparation of an essay, in a form that is satisfactory to the Complaints Director, that is two pages in length outlining her responsibilities as a member of the ACDMTT and confirming the importance of complying with her CCP requirements, being candid and cooperating with the ACDMTT.
 - (c) Participate in a mandatory CCP audit for 2017/2018 and 2018/2019.
 - (d) A fine of \$500.00.
- [37] Any penalty imposed on [REDACTED] should be a reflection of the allegations against [REDACTED] as a whole and not simply an aggregate of acceptable penalties for each allegation. The interrelationship and temporal concurrency of all issues should be considered and mitigating factors should be taken into account.
- [38] The penalty must be reflective of the improvement made by [REDACTED] to date, her cooperation with this process and her willingness to participate in remediation to improve her practice.
- [39] With regards to a reprimand [REDACTED] submitted it is an acceptable penalty because it is a sanction of deterrence and intended to present a formal statement that the misconduct is unacceptable and will not be tolerated in the future.
- [40] [REDACTED]'s professional reputation and livelihood are on the line. Unprofessional behaviour is adequately addressed by a reprimand.
- [41] By issuing a reprimand, the Hearing Tribunal is directly expressing to [REDACTED] its disapproval of her unprofessional behaviour towards the ACDMTT.

- [42] With regards to the awarding of costs, [REDACTED] submitted the following for review by the Hearing Tribunal. The Alberta Court of Appeal in *C. (K.) v College of Physical Therapists (Alberta)*, 1999 ABCA 253, stated at paragraph 94:

The fact that the Act and Regulation permit the recovery of all hearing and appeal costs does not mean that they must be ordered in every case. Costs are discretionary, with the discretion to be exercised judicially. Costs awards to disciplinary bodies are subject to Judicial review on a standard of reasonableness ... Costs awarded on a full indemnity basis should not be the default, nor, in the case of mixed success, should costs be a straight mathematical calculation based on the number of convictions divided by the number of charges. In addition to success or failure, a discipline committee awarding costs must consider such factors as the seriousness of the charges, the conduct of the parties and the reasonableness of the amounts. Costs are not a penalty and should not be awarded on that basis. When the magnitude of a costs award delivers a crushing financial blow, it deserves careful scrutiny.

- [43] It is submitted on behalf of [REDACTED] that the Hearing Tribunal should direct that [REDACTED] not pay any costs of the investigation or hearing because she acknowledged her responsibility. She cooperated with the ACMDTT, she did not dispute the facts [REDACTED]
- [44] Contrary to the submissions by counsel for the Complaints Director, this is not a case of multiple incidents of misconduct. The evidence shows that [REDACTED] was out of country and upon returning in April 2017, [REDACTED] attempted to bring herself into compliance with her continuing education reporting requirements.
- [45] With regard to charge 4, which concerned allegations that [REDACTED] failed and/or refused to meaningfully comply and/or cooperate with multiple requests of the Complaints Director in a timely manner or at all, the ACMDTT failed to call the Complaints Director as a witness. The Hearing Tribunal held that the allegation had not been proven in its entirety and that, with the exception of the "No Comment" responses in Exhibit 2, Tab 23, the Hearing Tribunal accepted that all other responses made by [REDACTED] in context of the complaints Director's investigation were meaningful and cooperative and therefore did not constitute unprofessional conduct. [REDACTED] should not pay costs for matters where she was found not guilty.
- [46] In the alternative, [REDACTED] submitted that if the Hearing Tribunal directs the payment of any costs by [REDACTED], the amount should be substantially less than \$15,000.00 and the Hearing Tribunal should direct that [REDACTED] be given time to pay the costs over an extended period of time.
- [47] In conclusion, [REDACTED] submitted that she has been punished for her wrongdoing. She has been subject to an intense and extremely stressful investigatory and hearing

process. She has had to deal with the emotional and mental toll of realizing her wrongdoing and she has had to deal with the embarrassment of informing her colleagues and family members of her misbehaviour. This difficult process in of itself is likely sufficient to deter anyone from repeating such conduct. However, if the ACMDTT is of the view that a further specific deterrence is necessary it should be sensitive to the penalties already imposed on [REDACTED] as a result of the process.

- [48] The penalty proposed by [REDACTED] properly protects the public interest in maintaining confidence that the profession will police itself in the best interests of the community. The penalty reflects censure of [REDACTED]'s conduct and fulfills the objectives of both general and specific deterrence. It also addresses the principles of rehabilitation of the member and maintenance of the integrity of the profession. The penalty will adequately ensure that the public interest is protected, and sends a clear message that misconduct will not be tolerated.

III. [REDACTED]'s Submissions and Evidence: Financial Circumstances

- [49] On February 15, 2018 [REDACTED]'s legal counsel provided a letter in response to a request made by the Complaints Director for additional information regarding [REDACTED] financial situation (including [REDACTED] efforts to increase from part-time to full-time employment in light of her recent separation and secondly [REDACTED]).

- [50] In an affidavit dated February 8, 2018 [REDACTED] submitted [REDACTED] [REDACTED] has not begun the process of [REDACTED]. Further, with regard to employment, full time positions are difficult to come by. [REDACTED] is doing the best that she can in difficult times. [REDACTED] argued that to suggest that in the circumstances [REDACTED] and at the same time secure a full-time position is, in her respectful submission, unreasonable

IV. [REDACTED]'s Submissions and Evidence: Complaint Directors Reply

- [51] Although a costs order may have a significant impact on a member, costs are not intended to be a penalty. Costs are indemnification to the College for expenses incurred in connection with the hearing.
- [52] [REDACTED]'s Affidavit indicated that her annual income in 2017 from her part-time position was \$[REDACTED]. While the pay advice attached as Exhibit "A" to her Affidavit is a bit difficult to read, it would appear that [REDACTED]'s deductions from her pay in 2017 totaled \$[REDACTED], meaning that [REDACTED]'s net pay for 2017 amounted to \$[REDACTED]. This would leave [REDACTED] with a monthly net pay of \$[REDACTED].

█████ attests at paragraph 6 of her Affidavit that her monthly expenses amount to \$ █████. Subtracting her monthly expenses from her monthly net pay leaves █████ with \$ █████ per month.

- [53] The Complaints Director recognized that one way for the impact of a costs order on a regulated member to be mitigated is for the Hearing Tribunal to order that the costs be paid over a period of time. Providing an appropriate time to pay would ensure that the costs award is not an insurmountable financial barrier. Initially, the Complaints Director indicated that the costs should be payable over a period of eighteen (18) months. In light of the financial information now provided by █████, the Complaints Director would have no objection to extending the repayment period up to a period of forty-eight (48) months.
- [54] If a repayment period of forty-eight (48) months were ordered, this would amount to a monthly costs payment for █████ of \$312.50 (\$15,000.00/48 months). In the Complaints Director's submission, these circumstances do not amount to a "crushing financial blow", to borrow the term used by the Alberta Court of Appeal in *C. (K.) v. College of Physical Therapists (Alberta)*, 1999 ABCA 253.
- [55] In █████'s Submissions, she submitted that there is "significant concern with institutional bias on the part of the Hearing Tribunal in this case given the Hearing Tribunal's role in other cases involving members' non-compliance with the ACMDTT's CCP requirements".
- [56] The Complaints Director's submitted that it is improper for █████ to raise any concern about bias on the part of the Tribunal at this stage. If █████ had concerns about the Tribunal's composition, they should have been raised prior to the hearing commencing. However, as noted by the Tribunal at paragraph 2 of its findings Decision, "there were no objections to the jurisdiction or composition of the Hearing Tribunal".
- [57] Further, legal counsel for █████ specifically raised at the outset of the hearing the fact that some members of the Tribunal were members of prior Tribunals who had dealt with CCP non-compliance issues. In response, the Tribunal provided █████ with an assurance that the allegations involving █████ would be dealt with independently and based on evidence in the hearing and not any other case. (Decision at paragraph 5).
- [58] The Complaints Director recognizes that the Tribunal is not bound by previous decisions. However, these decisions are relevant as a central principle in natural justice and determining an appropriate sanction is to "treat like cases alike".
- [59] █████ also submitted, that she has already been punished for her wrongdoing because she has been "subject to an intense and extremely stressful investigatory and hearing process" and that she has had to deal with the "emotional and mental toll of realizing her wrongdoing" and the "embarrassment of informing her colleagues and family members of her misbehaviour".

- [60] The Complaints Director acknowledged that investigations and discipline hearings can be extremely stressful for members who are the subject of a complaint. However, the law is clear that negative consequences related to being subject to a complaint and/or discipline hearing are not themselves punishment and are not part of the sanctions determination. These consequences are simply part of the public accountability that comes from being a professional. As stated in *Levesque v. Nova Scotia College of Optometrists, 2014 NSSC 22 [enclosed]* at paragraph 17:

... a public hearing involving alleged unprofessional conduct might be harmful to the reputation of a professional; however, that is part of the price that has to be paid for practicing in a self-regulating profession. Gone are the days when professional disciplinary hearings could be conducted behind closed doors. Any profession which chooses to regulate itself has an obligation to ensure that members of the public are able to see the discipline process in action. It is simply part of the public accountability that comes from the privilege of self regulation.

- [61] Accordingly, the Hearing Tribunal should not weigh these natural consequences when determining the appropriate sanction.

V. Hearing Tribunal Decision and Orders

- [62] The Hearing Tribunal carefully considered the submissions from both the Complaints Director and [REDACTED] and concluded that the sanctions proposed by the Complaints Director are fair, reasonable and proportionate. For the reasons that follow in this decision, the Hearing Tribunal adopts the sanctions advanced by the Complaints Director.
- [63] Bearing in mind the applicable *Jaswal* factors, the Hearing Tribunal concluded that as a regulated member of the College it was [REDACTED]'s responsibility to complete all regulatory requirements and to conduct herself in accordance to the ACMDTT Code of Ethics and Standards of Practice.
- [64] The Hearing Tribunal considered all mitigating factors submitted by [REDACTED] in her written submissions penalty and her affidavit.
- [65] With regards to the unfortunate [REDACTED], the Hearing Tribunal empathized with the emotional and financial stress [REDACTED] is suffering due to this dramatic change in her personal life. However, this event occurred after the events in the allegations and had no bearing on [REDACTED]'s prior actions and therefore is not a significant relevant mitigating factor in this case.
- [66] The Hearing Tribunal appreciated that [REDACTED] entered an Agreed Statement of Facts at the hearing. In that document [REDACTED] took responsibility and admitted guilt for certain allegations. However, [REDACTED] contested some of the allegations and did not make full admissions to all of the allegations. As a result, a partial contested

hearing was still required. Therefore, although the Agreed Statement of Facts was helpful in simplifying the hearing and decision process it did not completely negate the necessity of a hearing and therefore weighs less when considering penalties then if [REDACTED] took full responsibility for her actions at the onset of the hearing. [REDACTED] had the right to contest aspects of the allegations, but she must bear a measure of responsibility if her defence is wholly or partially unsuccessful.

- [67] In Paragraph 47 of her submissions [REDACTED] submitted that she had successfully passed the CCP Audit in 2017 for the 2016/2017 year. Although the Hearing Tribunal commends [REDACTED] on her corrective actions, this fact was not considered to be of significant weight in the consideration of penalties for past conduct.
- [68] [REDACTED] also expressed concerns regarding bias on the part of the Hearing Tribunal due to the fact that members of the Hearing Tribunal had heard and decided on similar cases of unprofessional conduct regarding CCP non-compliance. This issue was addressed at the September hearing as a preliminary matter. At that time, the Hearing Tribunal advised the parties that it could discharge its duties fairly and impartially. There was no objection by [REDACTED] to the Tribunal Members or to the hearing proceeding. Therefore, the reference to bias in terms of penalty was given no weight when considering penalties in this case.
- [69] Moreover, the Hearing Tribunal is required to consider relevant cases to ensure fairness and consistency in the decisions being made and penalties being ordered where similar facts exist. This consideration should not be viewed as "bias" but due diligence on behalf of the Hearing Tribunal.
- [70] In her submissions on penalty [REDACTED] has requested a written reprimand in lieu of a fourteen (14) day suspension. The Hearing Tribunal considered this request and also reviewed other available penalties available in Section 82 of the HPA. After much discussion the Hearing Tribunal concluded that a reprimand is not a sufficient consequence for [REDACTED]'s serious unprofessional conduct.
- [71] [REDACTED] was non-compliant concerning mandatory CCP (which is in place to ensure public safety) and also engaged in highly unprofessional communication involving Karen Stone and the ACMDTT and failed to recognize the importance of communication from her regulating body.
- [72] The Hearing Tribunal supported the Complaint Director's position that that [REDACTED]'s conduct is equal to or more grievous than the other cases of unprofessional conduct presented by the Complaints Director in her submission on penalties.
- [73] Therefore, the Hearing Tribunal does not accept the recommendation of a written reprimand as an appropriate sanction, including the fact that it does not have an appropriate level of deterrence.

- [74] On the matter of costs, the Hearing Tribunal carefully considered [REDACTED]'s position that she not be responsible for costs and also considered the financial information in her affidavit.
- [75] Based on her own submissions [REDACTED] has acknowledged aspects of her responsibility, and she has cooperated by submitting an Agreed Statement of Facts. As well she was only found partially guilty of allegation 4.
- [76] It is well established that costs are awarded at the discretion of a Hearing Tribunal, not as a penalty but as an indemnification to regulatory body such as the ACMDTT for expenses incurred during an investigation and hearing process.
- [77] The Hearing Tribunal concluded that it is not appropriate for the remainder of the ACMDTT membership to bear the entire costs resulting from one member's unprofessional conduct. The Hearing Tribunal recognized that [REDACTED] has taken actions to streamline the hearing and decision process by taking a measure of accountability and providing an Agreed Statement of Facts and that is a mitigating factor in terms of costs.
- [78] The Hearing Tribunal also agreed with the Complaints Director's analysis of [REDACTED]'s affidavit and financial circumstances. In specific, the Hearing Tribunal agreed that the calculation of [REDACTED]'s net pay and the Complaints Director agreeing to a 48-month time period for payment of the costs is fair and reasonable and is not a "crushing blow" for [REDACTED].
- [79] However, contesting aspects of the allegations resulted in a partially contested hearing and therefore expenses on behalf of the ACMDTT. The ACMDTT has been fair by requesting less than 50% of the total costs and by suggesting a 48-month repayment schedule to ensure [REDACTED] will not experience a crushing financial blow.
- [80] In her submissions on penalties [REDACTED] reviewed the emotional and mental toll she has had to deal with in realizing her wrongdoing and that she has had to deal with the embarrassment of informing her colleagues and family members of her misbehaviour.
- [81] The Hearing Tribunal again sympathized with [REDACTED] and the challenges she continues to face in her personal life. Unfortunately, these challenges are consequences of the public accountability associated with being a professional, and therefore are not a significant mitigating factor and bear little weight when considering penalties for unprofessional conduct.
- [82] [REDACTED] submitted that the investigation and hearing has had a significant impact on her professional and personal life creating significant obstacles for her due to the public notice of the disciplinary hearing.

- [83] The Hearing Tribunal considered this potential mitigating factor very closely, because public notice of a disciplinary hearing or its findings would be a great challenge for any professional.
- [84] Having said that, there was no evidence before the Hearing Tribunal of any pre-hearing publication of ██████'s name or publication of the hearing findings concerning the allegations. As well, the Complaints Director did not request a publication order. Similarly, no evidence was provided to the Hearing Tribunal indicating that the ACMDTT publishes Hearing Tribunal decisions and orders with the name of the Regulated Member.
- [85] As a result, any impact on ██████'s professional and personal life is again a consequence of the public accountability of being a professional and not the direct actions of the ACMDTT or the Hearing Tribunal. Accordingly, this impact on ██████ was not considered to be a significant mitigating factor.
- [86] After reviewing all of the alleged mitigating factors presented by ██████ the Hearing Tribunal concluded that the sanction submissions made by the Complaints Director are compelling and meet the criteria set out in the *Jaswal* decision.
- [87] Specifically, the Hearing Tribunal agreed with the Complaints Director that ██████'s lack of compliance with the CCP program and disrespectful communications about the ACMDTT demonstrate serious professional misconduct. ██████'s behavior was inconsistent with the ACMDTT's statutory public protection role and could affect the integrity of the profession in the eyes of the public in terms of a regulated member's obligation to engage in continuous learning.
- [88] Additionally, and as the Complaints Director mentioned, many opportunities were given to ██████ for her to address compliance with the CCP program. The Hearing Tribunal agreed with the Complaints Director that multiple incidents of unprofessional actions warrant a more serious penalty or penalties.
- [89] As well, the need to maintain the public's confidence in the integrity of the profession was adversely affected by ██████'s lack of compliance with the CCP, her inaccurate CCP declaration, her failure to cooperate with the investigation and her disrespectful communications. The Hearing Tribunal agreed with the Complaints Director that those actions undermine the ability of the ACMDTT to regulate its members and to ensure public safety.
- [90] The Hearing Tribunal also agreed that ██████'s conduct was not "borderline" and did not fall into a "grey area". More specifically, ██████'s conduct was entirely inconsistent with her obligations as a member of a professional regulatory body and seriously deviated from the conduct expected and required of regulated members. ██████'s lack of honesty and accuracy in her dealings with the ACMDTT, her failure to cooperate with the investigation and her engaging in communications which showed

disrespect for the College as her regulatory body clearly demonstrated contempt or disrespect or, at a minimum, a failure to acknowledge the vital role of the ACMDTT.

[91] The Hearing Tribunal also concluded that the cases provided to it from the Complaints Director concerning similar unprofessional conduct were of assistance in determining appropriate penalties. The Hearing Tribunal acknowledged that the penalties in each case are a function of the specific facts of each case and the presence or absence of mitigating factors. However, it was appropriate for the Hearing Tribunal to consider similar Hearing Tribunal decisions given the need for a measure of consistency concerning penalties relating to similar conduct.

[92] Importantly, the facts in this case relate to similar unprofessional conduct committed by other ACMDTT members who failed to comply with the CCP program but also involve inappropriate communications and non-compliance with an investigation. Those additional factors were not present in the similar cases presented to the Hearing Tribunal and warrant more significant penalties. In specific, the Hearing Tribunal agreed with the Complaints Director that the sanctions imposed on [REDACTED] should be similar in nature to those imposed against Mr. [REDACTED] and Mr. [REDACTED] but also need to take into account that [REDACTED] engaged in additional unprofessional conduct which showed a fundamental disrespect for the ACMDTT.

[93] Additionally, the imposition of a \$500.00 fine is warranted and appropriate in [REDACTED]'s situation since, again, the fundamental disrespect that she showed for her governing body was not present in the [REDACTED] or [REDACTED] cases.

[94] As a result, the Hearing Tribunal hereby makes the following orders pursuant to section 82 of the HPA:

1. [REDACTED] *will be suspended for a period of fourteen (14) days. The period of suspension will commence fourteen (14) days after the Tribunal's written decision on sanction is provided to her.*
2. *Subject to order 6 below, [REDACTED] will pay a fine of \$500.00.*
3. [REDACTED] *will, within thirty (30) days of being given a copy of the Tribunal's written decision on sanction, submit an essay in a form that is satisfactory to the Hearings Director of approximately two pages in length outlining her responsibilities as a member of the ACMDTT and confirming the importance of complying with her regulatory responsibilities, including:*
 - a. *Compliance with the CCP;*
 - b. *Being candid, respectful, professional, forthright and honest in all dealings with the ACMDTT and its staff; and*

- c. *Cooperating with investigations conducted under the HPA and responding to correspondence received from the ACMDTT in a timely manner.*
4. *A copy of the Hearing Tribunal's findings decision and a copy of the Tribunal's written decision on sanction will be provided to the ACMDTT Director of Education, and [REDACTED] will be subject to a mandatory CCP audit for the next two (2) CCP cycles (2017/2018 and 2018/2019).*
5. *Subject to order 6 below, [REDACTED] will pay \$15,000.00 of the costs of the investigation and the hearing*
6. *[REDACTED] must advise the Hearings Director within thirty (30) days of being provided with a copy of the Tribunal's written decision on sanction whether she wishes to pay the fine and costs in a lump sum or whether she wishes to pay in instalments:*
 - a. *If [REDACTED] elects to pay the fine and costs in a lump sum:*
 - i. *the fine and costs will be due and owing sixty (60) days after [REDACTED] is provided with a copy of the Tribunal's written decision on sanction.*
 - b. *If [REDACTED] elects to pay the fine and costs in installments:*
 - i. *the fine and costs shall be paid in equal monthly installments over a period of forty-eight (48) months*
 - ii. *[REDACTED] must provide the Hearings Director with 18 postdated cheques made out to the ACMDTT for each monthly installment; and*
 - iii. *the first installment must be paid within sixty (60) days after the Tribunal's written decision on sanction is provided to [REDACTED] and the remaining post-dated cheques must be provided at that time.*
7. *The deadlines referred to in orders 3 and 6 may be extended for a reasonable period of time, in the sole discretion of the Hearings Director. If [REDACTED] is seeking an extension, [REDACTED] must contact the Hearings Director to request an extension in advance of the deadline, must indicate why [REDACTED] cannot comply, and must confirm the date of the newly proposed deadline.*
8. *In the event that [REDACTED] fails to successfully comply with any of the deadlines set out above, or by such other date as agreed to by the*

Hearings Director, her permit to practice will be automatically suspended pending compliance.

Signed on behalf of the Hearing Tribunal this 19 day of April 2018.



Christy McIntyre, Chair