

**IN THE MATTER OF THE *HEALTH PROFESSIONS ACT*, BEING CHAPTER H-7  
OF THE REVISED STATUTES OF ALBERTA, 2000**

**AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF LINDA TUTILA,  
REGULATED MEMBER OF THE COLLEGE OF OPTICIANS OF ALBERTA**

**DECISION OF THE HEARING TRIBUNAL OF  
THE COLLEGE OF OPTICIANS OF ALBERTA**

The hearing of the Hearing Tribunal was held on March 9, 2023, via videoconference.

Present were:

The members of the Hearing Tribunal of the College of Opticians (the “College”):

G. Bromley, Regulated Member (Chair),  
L. Lazenby-Pashko, Regulated Member,  
K. Adu, Public Member, and  
M. Bennett, Public Member.

Also present were:

J. Theroux-Zechel, Deputy Registrar & Complaints Director for the College  
G. Sim, Counsel for the Complaints Director

L. Tutila, Regulated Member  
L. Dolgoy, Counsel for the Regulated Member

P. Hale, Independent Legal Counsel for the Hearing Tribunal  
T. Zimmer, Independent Legal Counsel for the Hearing Tribunal

J. Bertrand, Chief Executive Officer & Registrar for the College  
K. Murray, Operations Manager & Hearings Director for the College  
Z. Gee, Student-at-Law  
V. Earley, Court Reporter

**Opening of the Hearing**

1. The hearing opened and all persons present introduced themselves for the record. The hearing was recorded by the Court Reporter, who was also online.

2. Before the hearing, the Hearing Tribunal was provided documents with consent from both parties. The documents included a Notice of Hearing and an Agreed Statement of Facts and Acknowledgment of Unprofessional Conduct (the “Agreed Statement of Facts”).

### **Preliminary Issues**

3. There were no objections to the members of the Hearing Tribunal and no jurisdictional or procedural issues were raised.

4. There were no applications to hold the hearing or part of the hearing in private. The hearing was a public hearing in accordance with section 78(1) of the *Health Professions Act* (the “Act”).

### **Evidence And Documents Before the Hearing Tribunal**

5. The documents and evidence before the Hearing Tribunal were submitted by agreement of all parties. The documents were marked as Exhibits as follows:

Exhibit 1: Notice of Hearing dated January 23, 2023;

Exhibit 2: Agreed Statement of Facts and Acknowledgment of Unprofessional Conduct, signed October 18, 2022; and

Exhibit 3: Joint Submissions on Penalty, signed October 18, 2022.

6. No witnesses were called at this hearing.

### **Notice of Hearing**

7. The allegation against the Regulated Member reads:

While practicing as a Registered Optician the Regulated Member engaged in unprofessional conduct by:

1. On or about June 16, 2020 to March 23, 2021, copied individually-identifying health information from the complainant’s Visual-Eyes patient information system to her own IFILE patient information system unnecessarily and without authorization, contrary to the *Health Information Act*, RSA 2000, c. H-5 and the *Health Professions Act*, section 1(1)(pp)(iii).

(the “Allegation”)

## Submissions of the Complaints Director

8. Mr. Sim entered the Notice of Hearing and Agreed Statement of Facts in as Exhibits, with permission by all parties.

9. Mr. Sim explained that the hearing was proceeding by agreement and the Agreed Statement of Facts contained all information that the Hearing Tribunal required to determine the allegation. The Complaints Director did not expect to introduce any additional information.

10. Mr. Sim then stated the key facts as follows:

- a. The Regulated Member has been registered with the College since 1989.
- b. The complaint was received in April 2021 and arose from a dispute around the custodianship of records under the care of the complainant. The dispute arose after the complainant moved their practice from the Regulated Member's practice to a different practice within the same community.
- c. The Regulated Member admitted to copying individually identifying health information from the complainant's Visual-Eyes patient information system into her own IFILE patient information system between June 16, 2020 and March 23, 2021.
- d. The Regulated Member believed that the complainant was aware of her actions and believed she was entitled to copy this information to her patient information system as doing so would assist her in providing continuity of care for the patients who had been seen at the clinic by the complainant and who would require corrective lenses in the future.
- e. The Regulated Member was not authorized to copy this information nor was it necessary to do so since not all of the complainant's patients could be expected to obtain eyewear from the Regulated Member after the two practices had separated.

11. Mr. Sim directed the Hearing Tribunal to section 58 of the *Health Information Act*, RSA 2000, c H-5, which provides that custodians may collect and use only the amount of health information that is essential to enable the custodian or the recipient of the information to carry out their intended purpose. He also noted that sections 20 and 27 permit the collection and use of individually identifying health information such as optical prescriptions for authorized purposes.

12. Mr. Sim submitted that since the Regulated Member's purposes in collecting the patients' health information were not authorized purposes, her conduct contravened the *Health Information Act*. He noted that the Regulated Member did not however, intend to contravene the *Health Information Act*.

13. Mr. Sim submitted that the conduct of the Regulated Member is unprofessional conduct and that the Hearing Tribunal should accept the admission of unprofessional conduct. He advised that the *Health Information Act* applies to the practice of opticianry and that the definition of "unprofessional conduct" in the Act includes a breach of any other statute that applies to the profession. Mr. Sim further submitted that by collecting information without an authorized purpose in a situation which it was unnecessary to do so, there was a breach of the *Health Information Act*.

14. Mr. Sim suggested that the severity of the conduct was on the low end of the severity scale but noted that the conduct still constituted a breach. Mr. Sim explained the importance of protecting health information and for opticians to understand their obligations to do so and observe the requirements of the *Health Information Act*.

15. Mr. Sim submitted that where information is accessed, used, or disclosed when it is not authorized constitutes a risk to the public's interest and would undermine the public confidence in the opticianry profession and the regulation of it. He submitted that such actions would be considered unprofessional conduct and that was the reason for the admission by the Regulated Member and why the Hearing Tribunal should accept the admission.

#### **Submissions of the Regulated Member**

16. Mr. Dolgoy began his submissions by noting that the parties had come to an agreement based on the facts and an admission of those facts.

17. Mr. Dolgoy explained that the unprofessional conduct of the Regulated Member was inadvertent, it had been an ongoing practice by the Regulated Member for years but had only become an issue for the complainant after they left the practice and set up an office in the same community.

18. Mr. Dolgoy reiterated that the Regulated Member was a long-standing member of the profession and had taken the matter very seriously. She acknowledged the breach and admitted to unprofessional conduct. He urged the Hearing Tribunal to consider this and accept the agreement.

19. Mr. Dolgoy then read a statement from the Regulated Member dated March 8, 2023 with the agreement of Mr. Sim. In the letter, the Regulated Member stated:

- a. She was not aware that she needed a formal agreement with the complainant and had not had one in the past.
- b. That based on past practices of other optometrists, she believed it was normal practice for optometrists to leave their patient files in her office upon leaving and it was their choice to do so.

- c. She advised that she now understands the optometrists are the custodians of the patient files and opticians are the custodians of the eyeglass records completed by the optician.
- d. She noted that she has been a member of the College for 41 years and had never had a complaint previously. She expressed her gratitude for being a member of the profession and College and advised that this experience improved her knowledge and helped her grow as a professional.

### **Questions from the Hearing Tribunal**

20. Before adjourning, the Hearing Tribunal indicated they had some initial questions about information not contained within the Agreed Statement of Facts. The Hearing Tribunal asked for the number of patients affected and to what extent the patient files were copied.

21. Mr. Sim explained that the reason some information is not contained in the Agreed Statement of Facts is because there was either no agreement on the fact or the investigation did not uncover those things. He noted that the Agreed Statement of Facts was the product of discussions and negotiations between the parties about what they could and could not agree upon and that the Complaints Director made the decision to agree and was comfortable with doing so. He advised that the parties agreed to rely on the Agreed Statement of Facts in the hearing and therefore did not have the information being asked for by the Hearing Tribunal.

22. Mr. Dolgoy agreed with Mr. Sim and suggested that it would be inappropriate for the Hearing Tribunal to infer anything negative from the absence of that information.

### **Decision of the Hearing Tribunal on the Issue of Unprofessional Conduct**

23. The Hearing Tribunal adjourned to consider the parties' submissions and to review the Agreed Statement of Facts.

24. The Hearing Tribunal finds that the allegation against the Regulated Member is founded and constitutes unprofessional conduct.

### **Reasons for Findings of Unprofessional Conduct**

25. The Hearing Tribunal finds that the admission and evidence support a finding of unprofessional conduct for the allegation.

26. In this case, the facts are not in dispute. There is an acknowledgment from the Regulated Member that the alleged conduct occurred which is supported by the Agreed Statement of Facts (as summarized above).

27. With respect to Allegation, the Hearing Tribunal noted the Regulated Member's admission to copying patient information unnecessarily and without authorization. The Hearing

Tribunal agreed that such conduct is a breach of the *Health Information Act* and therefore constitutes unprofessional conduct under the *Health Professions Act*.

28. The Hearing Tribunal accepts and agrees with the Regulated Member's admission that her conduct constitutes unprofessional conduct.

### **The Joint Submission regarding Penalty**

29. Mr. Sim provided the Joint Submission on Penalty (the "Joint Submission") to the Hearing Tribunal.

30. Mr. Sim explained that the Joint Submission was an agreement between the Complaints Director and the Regulated Member on what the appropriate sanctions ought to be however, it was ultimately up to the Hearing Tribunal to decide what sanctions to impose.

31. The Joint Submission proposed the following sanctions:

1. The Regulated Member will receive a caution, with the Hearing Tribunal's written decision to serve as the caution;
2. The Regulated Member will undertake to ensure compliance with the *Health Information Act* going forward;
3. The Regulated Member will submit to a practice visit pursuant to section 51 of the Act on a date determined by the Complaints Director; and
4. The Regulated Member shall pay 25% of the investigation and hearing costs in this matter, to a maximum of \$5,000, on terms acceptable to the Complaints Director.

32. Mr. Sim explained that a practice visit from the College consists of an individual attending the Regulated Member's practice and work with her to review how she is conducting her practice and ensure everything is in compliance.

33. Mr. Sim referred the Hearing Tribunal to the case of *R v Anthony-Cook*, 2016 SCC 43, in which the Supreme Court of Canada held that when considering joint submissions, the public interest test should be applied. This is a deferential test meaning joint submissions should be treated with deference unless it would not be in the public interest to do so. The public interest test has a very high threshold, implying that a hearing tribunal would have to be satisfied that a joint submission was wholly inappropriate before it could deviate from it. The Court stated that joint submissions should only be rejected where the administration of justice is brought into disrepute. He indicated that *Anthony-Cook* is applicable to professional discipline proceedings.

34. Mr. Sim submitted that the parties were jointly proposing the four-part sanction and felt it was entirely appropriate.

35. Mr. Sim also referred the Hearing Tribunal to the case of *Jaswal v Medical Board (Nfld)*, 1996 CanLII 11630, which describes a non-exhaustive list of factors that discipline tribunals may consider in determining an appropriate sanction. Mr. Sim's submissions regarding the application of specific factors were as follows:

1. Nature and gravity of the proven allegations: The Regulated Member's conduct was at the very low end of the severity scale. There is no suggestion that the conduct harmed any patients nor that any patient information was disclosed outside the practice. Therefore, the College proposed the lowest possible sanction, a caution.
2. Age and experience of the member: The Regulated Member has been practicing for a significant period of time. Although she was not inexperienced, her conduct was inadvertent, and she was unaware it was improper. Mr. Sim submitted that this was neither an aggravating nor mitigating factor.
3. Previous character of the member and the presence or absence of any prior complaints or convictions: The Regulated Member has no prior disciplinary history.
4. The age and mental condition of the offended patient: There were no effects on patients.
5. Number of times an offence has occurred: The conduct occurred over a period time, and it is inferred that it happened more than once.
6. Role of the member in acknowledging what had occurred: The Regulated Member admitted that her conduct amounted to unprofessional conduct, which assisted with the investigation of the matter and avoided a contested hearing; this is a mitigating factor.
7. Whether the member had already suffered other serious financial or other penalties as a result of the allegations having been made: There is no evidence of this.
8. Impact of the incident on the patient: There were no impacts on patients to speak of.
9. The presence or absence of any mitigating circumstances: The Complainant moved to a different practice within the same community, effectively becoming a competitor, and then made the complaint.

10. The need to promote specific and general deterrence to protect the public and ensure safe and proper practice: Mr. Sim advised that the College did not doubt that the Regulated Member learned from the experience and had no concerns that she needed to be specifically deterred from the same conduct in the future. He submitted that others in the profession would learn from this experience by having the decision published and nothing further was necessary.
11. The need to maintain the public's confidence in the integrity of the profession: Mr. Sim submitted that the proposed sanctions adequately address the technical breach of the *Health Information Act*, and the College was confident that the public would agree.
12. The degree to which the offensive conduct was regarded by consensus as falling outside the range of permitted conduct: Mr. Sim reiterated that the conduct was a clear breach of the *Health Information Act* but acknowledge that the Regulated Member was acting inadvertently and without intent to breach the legislation. He submitted that this breach was on the low end of the severity scale.
13. The range of sentences in other similar cases: Mr. Sim indicated that although there are cases where a breach of the *Health Information Act* occurred, none of the reported cases considered were of the same low severity. The cases dealt with access to information for nefarious or illegitimate purposes whereas, in this case, the Regulated Member was trying to provide continuity of care for her patients.

36. Mr. Sim submitted that the proposed sanctions were an appropriate and justifiable response to the conduct.

#### **Submissions of the Regulated Member on Penalty**

37. Mr. Dolgoy agreed with the Complaints Director's submissions of the law on joint submissions and sanctions. He reaffirmed the *Anthony-Cook* decision and reiterated that the bar to reject a joint submission is very high and it should not be rejected unless the sanctions fail to protect the public interest.

38. Mr. Dolgoy noted that the Regulated Member had learned from the experience and taken responsibility for her actions. He also promoted the publication of the decision to educate other members of the profession.

#### **Decision of the Hearing Tribunal on Penalty**

39. After hearing from both counsel and reviewing the Joint Submission, the Hearing Tribunal accepted the Joint Submissions but sought clarification of when the practice visit would be and if the intent of the visit was to ensure compliance with the *Health Information Act*.



40. Mr. Sim confirmed that compliance with the *Health information Act* was the intent of the practice visit and that it would be completed within the next year.

### **Reasons for Decision on Penalty**

41. The Hearing Tribunal carefully considered the Joint Submission in light of the *Jaswal* factors and the law on joint submissions. The Hearing Tribunal recognized that it owed deference to the parties and should not deviate from the proposal unless the Joint Submission would bring the College's discipline process into disrepute or otherwise be contrary to the public interest.

42. The Hearing Tribunal finds the sanctions are appropriate and that the public interest is protected.

### **Orders**

43. The Hearing Tribunal makes the following orders:

1. The Regulated Member will receive a caution, with the Hearing Tribunal's written decision to serve as the caution;
2. The Regulated Member will undertake to ensure compliance with the *Health Information Act* going forward;
3. The Regulated Member will submit to a practice visit pursuant to section 51 of the Act on a date determined by the Complaints Director within one year of the date of this decision; and
4. The Regulated Member shall pay 25% of the investigation and hearing costs in this matter, to a maximum of \$5,000, on terms acceptable to the Complaints Director.

Signed on behalf of the Hearing Tribunal by the Chair,



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Georgina Bromley, Chair

Dated May 26, 2023