**IN THE MATTER OF THE**
***HEALTH PROFESSIONS ACT*, R.S.B.C. 1996, c. 183**

**AND**

**IN THE MATTER OF A CITATION ISSUED BY THE COLLEGE OF REGISTERED PSYCHIATRIC NURSES OF BRITISH COLUMBIA AGAINST**

# MUHAMMAD NADEEM MAMDEEN

## PRELIMINARY APPLICATION – REASONS FOR DECISION

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| Panel of the Discipline Committee | Tim Holmes, Chair<br>Dave Bhauruth<br>David Axon |
| Counsel for the Panel | Efrem Swartz |
| Counsel for the Registrant | Stephen Hutchison |
| Counsel for the College | James Kondopulos<br>Julie Menten |
| Place of Hearing | Vancouver, BC |
| Date of Application | January 20, 2014 |
| Date of Decision | March 5, 2014 |

**WRITTEN REASONS BY:**

Tim Holmes, Chair

**CONCURRED IN BY:**

Dave Bhauruth, David Axon

## A. Introduction

1. On June 25, 2013, the Inquiry Committee of the College of Registered Psychiatric Nurses of British Columbia (the "College") directed a Citation to be issued against the registrant, Muhammad Nadeem Mamdeen, under section 37 of the *Health Professions Act*, R.S.B.C. 1996, c. 183, (the "*Act*"). The Citation was served on the registrant by registered mail dated July 9, 2013. Under section 38(1) of the *Act*, the Discipline Committee must hear and determine the matter set for hearing.

2. Schedule "A" to the Citation sets out the following allegations against Mr. Mamdeen:

    1. On or about March 18 to 22, 2010, inclusive, you:

        (a) Engaged in inappropriate behavior, remarks and touching of a sexual nature and sexual intercourse with a patient ("Ms. X");

        (b) Failed to provide a therapeutic environment for Ms. X and otherwise maintain appropriate professional standards and boundaries;

        (c) Failed to properly document the psychiatric nursing care of Ms. X; and

    2. Following the hospitalization and discharge of Ms. X in March 2010, you continued an inappropriate relationship with Ms. X.

3. The purpose of the hearing is for the Discipline Committee to determine, under s. 39(1) of the *Act*, whether the registrant:

    (a) has not complied with this Act, a regulation or a bylaw,

    (b) has not complied with a standard, limit or condition imposed under this Act,

    (c) has committed professional misconduct or unprofessional conduct,

    (d) has incompetently practised the designated health profession, or

    (e) suffers from a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs their ability to practise the designated health profession.

## B. Prior Proceedings and Relationship to the Citation

4. The allegation of a sexual relationship with a patient, as described in the Citation, was reported to the College by letter dated March 14, 2011. The registrant's employer, the Fraser Health Authority, initiated its own investigation into the allegation. After concluding that there was evidence that the registrant had breached several standards of practice established by the College, the registrant's employment was terminated effective April 14, 2011.

5. On April 27, 2011, the College wrote to the registrant and notified him that he was the subject of a complaint by his employer to the College that he was terminated from his employment "for having engaged in sexual intercourse with a patient." The registrant gave his undertaking to the College not to practice as a psychiatric nurse and not to seek employment as a psychiatric nurse until the investigation was complete. On November 21, 2011, the College wrote to Mr. Hutchison, the registrant's lawyer, and enclosed a summary of the College's preliminary investigation which was substantially the same as the issues addressed in the grievance (discussed below). By letter dated January 17, 2012, the College advised Mr. Hutchison that the decision to issue a Citation would be delayed until the grievance proceeding was concluded. As noted above, the Citation dated June 25, 2013 was served on the registrant on July 9, 2013. The registrant has remained on his undertaking throughout and is still subject to that undertaking.

6. The Health Sciences Association of British Columbia, the registrant's union, grieved the termination on behalf of the registrant. The grievance came before Arbitrator Moore under the provisions of the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*"). The hearing went for nine days, the first day being December 6, 2011 and the remaining eight days between May 29 and September 13, 2012. The Health Employers Association of British Columbia represented the Fraser Health Authority as the employer. Counsel at the grievance hearing for the employer and counsel for the College in this proceeding is the same lawyer. Counsel for the union and the registrant before the arbitrator and counsel for the registrant in this proceeding is the same lawyer.

7. The arbitrator delivered lengthy written reasons. He concluded that the employer had just cause to discipline the registrant and that termination was not excessive. The arbitrator found that: the registrant had engaged in an inappropriate sexual relationship with Ms. X, a patient at the hospital where the registrant was employed; sexual relations between the registrant and the patient had taken place; normal and acceptable boundaries between patient and psychiatric nurse had broken down; the registrant's out-of-hospital contact with the patient was outside the norm and inappropriate;

and the registrant had failed to document certain events and verbal interactions with the patient and that his failure, in the circumstances, was unacceptable and outside usual nursing practice.

8. In reaching his conclusions, the arbitrator was faced with evidence from the patient and the registrant which ran contrary to each other in many, if not most material respects. He also found that some of the evidence of both witnesses was either internally inconsistent or frail. Indeed, in one aspect of her evidence, the arbitrator found that the patient was plain wrong. Nevertheless, after weighing each piece of significant evidence from both sides, and comparing that evidence with the evidence of other witnesses and after applying the legal test for assessing the credibility of witnesses, the arbitrator concluded that the registrant's testimony was 'not in harmony with the preponderance of probabilities'. He went on to write:

> There are simply too many unexplained or inconsistent explanations for his unusual interactions with a vulnerable patient.

9. For the purpose of deciding the issue before us on this application we do not adopt the arbitrator's findings and conclusions or make any assumption as to the correctness of his decision. We are asked to determine a preliminary legal question, not to decide the merits of the Citation.

## C. Issues to be Decided and Positions of the Parties

10. The College set down one day of hearing to argue a preliminary issue. The evidentiary part of the hearing is scheduled to take place on March 10, 2014 for four days.

11. The College seeks to bar the registrant from relitigating issues which were previously decided by the arbitrator on the basis that the arbitrator has already made findings of fact which dispose of the issues set out in the Citation. The College argues that the committee should adopt all of the findings of the arbitrator for the purpose of this hearing. The College argues that not to do so would offend against the principle of finality in litigation and the doctrine of abuse of process. The College relies on the principles established in the Supreme Court of Canada decision in *Toronto (City) v. Canadian Union of Public Employees, Local 79,* 2003 SCC 63.

12. Alternatively, the College says that the committee should accept and admit the evidence of the patient, as recorded by the arbitrator, without the necessity of recalling her to give her testimony again. The College submits that the evidence should be admitted by operation of the committee's power under section 38(4.2)(b) of the *Act* and as well, as a principled exception to the hearsay rule.

13. The registrant opposes the application and says that fairness demands that the hearing of the Citation should be a fresh process. The registrant argues that the purpose and possible outcomes and the legislative schemes which govern the two processes, the grievance versus the Citation, are sufficiently different that this panel should rely only on first hand evidence, make its own findings of fact, and not import evidence as recorded by another tribunal or the facts found by that other tribunal.

14. Counsel for the registrant argues that the preferable analysis is to follow the doctrine of issue estoppel. He submits that, properly applied, the fairness principle embedded in the doctrine of issue estoppel must operate in favour of the registrant such that this panel should exclude the arbitrator's findings. He relies on the decisions of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44 and *Penner v. Niagara Regional Police Services Board,* 2013 SCC 19.

## D. The Law

15. The common law has developed a number of interrelated doctrines which are aimed at policy considerations intended to prevent duplicate litigation, to avoid potential inconsistent results and to promote confidence in the conclusiveness of legal proceedings. The prime objective of these doctrines is the goal of finality in litigation.

16. Essentially, these exclusionary doctrines operate to bar a party who hopes for a better outcome from relitigating a matter unless the primary decision resulted in an injustice or was conducted in a way that was manifestly unfair. In *Danyluk,* at paragraph 20, Binnie J. described the concept as "the idea that a dispute once judged with finality is not subject to relitigation."

### Issue estoppel

17. The oldest of these doctrines is *res judicata*. The doctrine holds that once a matter is finally decided, a litigant cannot pursue it further in a new action unless special circumstances exist. *Res judicata* takes two forms, issue estoppel with which we are concerned and cause of action estoppel. Issue estoppel refers to a litigant being estopped, or prevented from relitigating an issue arising in a proceeding, while cause of action estoppel refers to the entire cause. The principles of estoppel can be applied against either side in a dispute, that is, either the person who advances a claim or who prosecutes a cause, or the respondent who seeks to reframe a reply or to recycle a defence.

18. The policy goals of issue estoppel were described by Cromwell and Karakatsanis JJ. in *Penner,* at paragraph 28 as follows:

> Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up an administrative scheme.

19. In *Danyluk,* the Court set out the preconditions to issue estoppel, quoting Dickson J. in *Angle v. Minister of National Revenue,* [1975] 2 S.C.R. 248 at 254:

> ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies...

20. The first element of the test, the 'same question' issue, is fundamental and critical. It means that once a question in issue and the material facts in dispute have been tested and directly decided by a court or tribunal of competent jurisdiction, the same issue cannot be relitigated in subsequent proceedings by the same parties. (See *Danyluk* at paragraph 54).

21. The second element, the finality of the prior decision, means that all available avenues of review and appeal provided for in the legislative framework governing the prior proceeding have been exhausted, even when a party fails to take those steps. (See *Danyluk* at paragraph 56 and *British Columbia (Worker's Compensation Board) v. Figliola,* 2011 SCC 52 at paragraph 51).

22. The third element, the 'same parties' test, is intended to assure mutuality and to prevent a person gaining an unfair advantage. For instance, it would be unfair to permit a non-party in the first action using that decision to later restrict an opponent who was a party at first instance, in a subsequent proceeding without the non-party being bound in the same manner. A person with an interest in a matter, a 'privy', can in some circumstances fall within the definition of 'same party'. (See *Danyluk* at paragraphs 59 and 60). An insurer with a subrogated interest or a union with a duty of representation would probably qualify as a 'privy'.

23. These three preconditions are linked by the common fundamental requirement that the decision under consideration must have been *judicial* in nature. That is, the decision maker must be capable of receiving and exercising adjudicative authority, the decision is required to be made in a judicial manner and the decision was in fact made in a judicial manner. (See *Danyluk* paragraph 35).

24. In *Danyluk,* at paragraph 1, Binnie J. said that a "judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice". At paragraph 33 in *Danyluk,* the Court said that "the underlying purpose (of issue estoppel) is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case". The Court went on to explain that even when a party establishes that the preconditions to the operation of issue estoppel are met, the subsequent decision maker must still determine, as a matter of discretion, if issue estoppel *ought* to be applied.

25. The residual power of a court or tribunal to exercise its discretion whether to apply estoppel, once the preconditions have been met, depends upon a consideration of whether it would be unjust or unfair to a party whose interests are engaged. In *Danyluk,* the Supreme Court identified a number of factors going to the exercise of discretion in that case. The court noted that the list is not exhaustive and each case must be looked at in its own context. (Paragraphs 62 to 80). The court also noted that when prior court proceedings are at issue, the exercise of discretion should be "very limited", but the discretion is "necessarily broader" when dealing with administrative tribunals because of the "enormous range and diversity of the structures, mandates and procedures of administrative decision-makers". (See paragraph 62).

26. The factors relating to the exercise of discretion considered in *Danyluk* are:

    1. The wording of the statute from which the power to issue an administrative order derives.
    2. The purpose of the legislation.
    3. The availability of an appeal.
    4. The safeguards available to the parties in the administrative procedure.
    5. The expertise of the decision maker.
    6. The circumstances giving rise to the prior administrative proceedings.
    7. The potential injustice.

27. The Supreme Court in *Penner* reviewed the *Danyluk* factors and undertook an analysis of discretion framed in the context of fairness. (See paragraphs 36 to 68).

28. In *Penner,* the court pointed out that even where the prior proceeding may have been conducted fairly and properly having regard to its purpose, it might still be unfair to a party to use the results in a subsequent proceeding.

29. It is the second aspect of fairness that is most commonly under scrutiny. If there is a significant difference between the process, purpose and the stakes involved between the two types of hearing, then unfairness may result by applying the doctrine. Unfairness can also result where a party whose reasonable expectations about the scope and effect of the proceedings, and their potential impact upon his or her other legal rights, have been shaped such that he or she did not participate actively or vigorously in the proceedings. Where that same party later finds the result of the prior proceeding binding on him or her in a subsequent proceeding in which the stakes are higher and his jeopardy greater, unfairness could result. Part of the consideration of shaping expectations will also include whether the legislation establishing the prior proceeding was intended to be conclusive.

30. The court made it clear in *Penner* that "there will always be differences in purpose, process and stakes between administrative and court proceedings". In order for those differences to be counted as unfair, they must be "significant". The court noted that the objective of finality, for courts and administrative tribunals alike, should not be lightly set aside. (See paragraph 42).

**Abuse of Process**

31. Compared to *res judicata* and the estoppel doctrines, the doctrine of abuse of process is a very recent development in the common law. It first emerged as a distinct approach to finality in litigation and separate from issue estoppel in the 1980's in England. Canadian courts endorsed the concept shortly afterwards. While issue estoppel requires mutuality of parties, abuse of process does not.

32. The leading case in Canada is the Supreme Court's decision in the *Toronto* case. The court explains that the doctrine extends beyond the strict parameters of *res judicata* while absorbing some of its rationales and constraints. The court acknowledges that the doctrine of abuse of process is defined in reaction to the 'settled rules' of issue estoppel and is an adjunct doctrine rather than an independent one. In contrast to issue estoppel, the focus of the doctrine of abuse of process is less on the interests of the parties and more on the integrity of judicial decision making as a branch of the administration of justice. However, the underlying goals of the two doctrines are essentially the same.

33. Justice Arbour summarized the doctrine at paragraph 42:

> The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while

offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process.

34. In discussing the underlying policy of abuse of process, Arbour J. wrote at paragraph 38, (quoting D.J. Lange, *The Doctrine of Res Judicata in Canada*):

> The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra,* at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results and to protect the principle of finality so crucial to the proper administration of justice.

35. Arbour J. continues at paragraph 51:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

36. In paragraph 52, Arbour J. contemplates situations where relitigation might be necessary to enhance the credibility or effectiveness of the adjudicative process as a whole, although she also points out that relitigation carries serious detrimental effects and should be avoided. The court identified three possible scenarios where relitigation would not offend the basic policy goals: where the first proceeding is tainted by fraud or dishonesty; when fresh evidence not previously available would conclusively impeach the earlier result, and; where fairness dictates the original result should not be binding in the new context.

37. And in paragraph 53, on the topic of fairness, Arbour J. remarks that the discretionary factors which prevent issue estoppel from working an injustice or unfairness "are equally available to prevent the doctrine of abuse of process from achieving the same undesirable result". As an example, where the stakes are minor in the first proceeding such that a party lacks incentive to advance a robust response and the stakes in the later proceeding are considerably higher, it could be unfair or unjust not to permit relitigation. Other examples are the discovery of new evidence in some circumstances or a tainted process.

### Application of the Doctrines to Administrative Tribunals

38. There is no doubt that the doctrines of issue estoppel and abuse of process are available and apply equally to courts and administrative tribunals, whether the decision in question is that of a court or a tribunal or whether the prior decision is being considered by a court or a tribunal. It is fundamental of course that the prior decision must have been *judicial* in nature. This is confirmed by the Supreme Court of Canada in *Danyluk* at paragraphs 54 and 62, in *Penner* at paragraphs 28 and 42 and in *Toronto* at paragraph 16.

39. In *Figliola* the Supreme Court acknowledged that the common law doctrines of issue estoppel and abuse of process apply as between tribunals and boards which exercise concurrent jurisdiction over the same issues.

## E. Analysis

40. In reaching our decision whether we should apply either issue estoppel or abuse of process, we start with the preconditions to the operation of issue estoppel.

### Discussion

41. First, we note that the factual questions to be determined by this panel are precisely the same as those which were before the arbitrator. Did the registrant engage in inappropriate sexual relations, including intercourse, with his patient? Did he fail to document significant interactions between himself and the patient? Did he fail to maintain professional standards and boundaries between himself and the patient?

42. The registrant did not take the position that there is a different question or issue to be determined.

43. Next, we note that the arbitrator's decision was final. Section 101 of the *Labour Relations Code,* R.S.B.C. 1966, c. 244 states as much, subject to the appeal provisions under section 99, to the Labour Relations Board and

section 100 to the Court of Appeal. The registrant acknowledges his right, as a 'party affected', to appeal or review the decision, but he did not do so.

44. The registrant submits that an appeal from an arbitrator's decision is limited in scope and is neither a true appeal process nor is it a fully-fledged right of appeal. (See *Balaban and BCNU and Yaletown Housing Society,* BCLRB 15/2007). *Balaban* was a review by the Labour Relations Board of an arbitrator's decision confirming a termination of employment. In that case, the Board noted its process was limited in scope but remarked that "absent an issue concerning the law of the statute" or "unless a palpable overriding error has been demonstrated", "the Board will not allow a dissatisfied party to re-argue its position in an attempt to achieve a more desirable result". The language used by the Board reflects the grounds of appeal set out in the *Code*.

45. We point out that all appeals, from a court or tribunal, are restricted or circumscribed in some manner depending on the level of court or tribunal, the legislation permitting the appeal, the type of case and a myriad of other circumstances. As we understand it, the thrust of the registrant's argument is not that the arbitrator's decision was not final, but that he should not be faulted for failing to pursue his avenues of appeal under the *Code* as an appeal from the arbitrator's decision would not have been a 'true appeal'.

46. The point is that this was a final decision and, although he had a right to do so, the registrant did not seek review or appeal. In *Danyluk,* the Court noted that where a party does not pursue an appeal or 'adequate alternative remedy', that failure must count against the person. (See paragraph 74).

47. Third, the registrant concedes that the parties before us are <u>not</u> the same as those before the arbitrator. The difference is that in the first proceeding the employer was a party and the College was not and in this matter, *vice versa*. The union is not a party in this proceeding.

48. As all three preconditions for the application of issue estoppel have not been met, we could conclude that the doctrine of issue estoppel does not apply in this case, which would leave us to decide whether to bar the registrant from relitigating the issue under the doctrine of abuse of process, as the College would have us do.

49. However, counsel for the registrant urges us to bear in mind that we should not apply the issue estoppel rules in an overly mechanical fashion. He argues that we should continue to examine the desirability or otherwise of relitigation by deploying the safety net of the exercise of discretion. We are asked to conclude that it would be unfair to the registrant to accept the arbitrator's findings, that in fairness we should permit him to relitigate the

matters addressed in the arbitration and after hearing the evidence afresh and we should reach our own conclusions based on that evidence.

50. The registrant did not argue that the process governing the prior proceeding was not fair or that the proceeding was conducted in an unfair manner. Nor did the registrant suggest that the prior proceeding was not judicial in nature. We note the College's submissions that the arbitrator is a very senior lawyer with many years of experience in arbitration and labour relations matters.

51. The main thrust of the registrant's argument in support of our exercising discretion not to apply either doctrine, is that the respective legislative purposes and scope of the two proceedings and the effects and possible results of those proceedings are different. He says that we must consider his reasonable expectations as he entered the arbitration and compare those expectations with what might be the consequences at any likely future proceeding. We are asked to consider the stakes in issue. If these matters are taken into account and given proper weight, the registrant says that it would be unfair and unjust to apply either issue estoppel or abuse of process and deny him another opportunity to clear his name.

**The *Penner* Approach**

Legislative Purposes of the Two Proceedings

52. The registrant points out that the *Labour Relations Code* is designed to maintain industrial peace and harmony and says it is essentially a forum for deciding private matters in dispute between employers, workers and unions. By contrast, he argues, the *Health Professions Act* sets up a procedure which is primarily intended to protect the public interest and to impose punitive consequences on College registrants who breach regulations, bylaws, ethical codes or standards of practice.

53. Of course, there is a public interest element embedded in the general notion of workplace and industrial peace and harmony, even if some disputes such as the one before the arbitrator are in essence private matters with private consequences. The arbitration provisions set out in the *Code* may be directed at resolving disputes between workers and their agents and employers, but the effects of those disputes can obviously affect the public at large. Section 2(g) of the *Code* provides that one of the duties of the Board and persons who exercise powers and perform duties under the *Code* "is to ensure that the public interest is protected during labour disputes".

54. Section 82 of the *Code* provides that in order to further the purposes of the arbitration procedures under Part 8, an arbitrator "must have regard to the

real substance of the matters in dispute and the respective merits of the positions of the parties".

55. The facts alleged in the case before the arbitrator did not however simply engage the interests of the employee and the employer, such as for example where and employee is terminated for theft. The *real substance* of the allegations raised broader considerations of public interest, including public confidence in ensuring high standards of health care delivery and patient safety issues. The employer and the employee were facing off with what could reasonably be characterized as one of the more serious sets of allegations that can arise in a clinical psychiatric setting. Both sides would have been on high alert, the registrant for personal financial and reputation reasons and the employer, having obligations under its enabling legislation, the *Health Authorities Act*, R.S.B.C. 1966, c. 180. Members of the public had a very real interest in seeing the matter adjudicated properly and fully.

56. The duties and objects of a college are set out at section 16 of the *Act.* Without enumerating all of the governance objects set out in the section, it is safe to say that the primary object of a college is the protection of the public. The College has an overarching interest in ensuring that its members are properly qualified, that they maintain high ethical standards and that the public is confident that College members will discharge their duties and exercise their skills in accordance with those standards.

57. Membership in a professional, self-regulating organization comes with strings attached. Membership is a privilege, not a right. Professional societies and colleges jealously guard their brands. Membership is a college's guarantee to the public that the practitioner bears the seal of approval. A member of a self-regulating professional organization seeks membership voluntarily and in so doing understands and accepts that the college will oversee his or her conduct and competence as well as the possible consequences of breaches of the Act or bylaws.

58. The considerations which led the employer to terminate the registrant's employment inevitably underlie the arbitrator's decision to uphold the termination. In light of the particular context of the case, those considerations are not, in our view, significantly different from the purpose of the College in meeting its statutory mandate to protect the public interest. Although the objectives and purposes of the *Code* and the *Act* are different for obvious reasons, the application of the two legislative schemes, in the context of this particular case, coincide without significant difference.

59. In cases of this type and in these circumstances the *Code* and the *Act* have a common purpose. Both legislative schemes expect employees and registrants will perform the duties of a psychiatric nurse in accordance with high standards and their level of fitness to do so will be unimpaired.

Possible Results in the Two Proceedings are Different

60. In some respects, the arbitration was an 'all or nothing' battle for the registrant. Under section 89 of the *Code*, the arbitrator could find that termination was excessive and substitute another just and equitable measure or he could confirm the termination. The range of options open to an arbitrator under section 89 is relatively limited.

61. Penalties under the *Act* start with a reprimand, rise to imposing limits or conditions on the registrant's practice, and go on to include suspension or cancellation of a registrant's registration. In addition, the *Act* provides for a fine, which under the College bylaws may be up to $35,000.00. One or more of the penalties authorized may be imposed.

62. Thus the registrant argues that the penalties set out in the *Act* give the Discipline Committee considerably greater powers than those available to the arbitrator, and some of those powers are punitive in nature. The registrant says that the worst possible result for him at the arbitration was the loss of his employment, whereas under the present process he could lose his career and be saddled with a fine as well. The question is whether these results are significantly different and in such degree that it would be unfair and unjust to the registrant to deny him the opportunity to try and achieve a different result.

63. Looking at the effect of the arbitrator's decision on the employment prospects of the registrant, one could conclude that his prospects of employment with the Fraser Health Authority as a psychiatric nurse are slim. On a wider front, within British Columbia, elsewhere in Canada and perhaps beyond, his opportunities for employment as a psychiatric nurse might be slightly less bleak, provided a prospective health authority fails to make basic enquiries and follow up with reference checks. The full text of the arbitration award is published on www.CanLII.org as *Fraser Health Authority v. Health Sciences Association of British Columbia*, 2012 CanLII 97612 (BC LA). In practical terms the findings of the arbitrator comprise a significant impediment to the registrant's hopes of working as a psychiatric nurse anywhere unless, as already noted, an employer does not become aware of his past record, for whatever reason.

64. One cannot look at the range of options available to an arbitrator under the *Code* in isolation from the context of the case. Here, the result of the arbitrator's decision was to confirm the employer's condemnation of the registrant's impugned conduct. The consequence to the registrant was undoubtedly punitive.

65. If this panel adopts the findings of the arbitrator and goes on independently to conclude that those findings meet the evidentiary test that the registrant

has not complied with the Act, a regulation or a bylaw, has not complied with a standard, limit or condition imposed under the Act, has committed professional misconduct or unprofessional conduct, has incompetently practised the designated health profession, or suffers from a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs their ability to practise the designated health profession, then any of the penalties described in the *Act* could apply. The registrant stands to lose his registration. He would no longer be able to rely on his credentials as a member of the College to support any future job application as a psychiatric nurse.

66. In our view, the effects of either scenario are not significantly different either in form or substance. Both have the same effect of curtailing his professional path. Both result in the registrant having, as a matter of practicality, to consider a different career. Both have the same financial repercussions. His continued membership in the College would not overcome the problem. Membership might open some doors and might be a precondition to some types of employment, but membership is not and nor should it be seen to be the answer to a problem or some type of antidote canceling out the severe negative consequences of the registrant's employment history with the Fraser Health Authority. Membership does not guarantee a career or employment. It guarantees fitness.

Reasonable Expectations of the Parties and the Stakes in Issue

67. In April 2011, the registrant was terminated by his employer on the basis that he had engaged in sexual intercourse with one of his patients. In the same month, the College informed the registrant of the complaint to the College by his employer. The registrant then gave an undertaking to the College whereby he agreed not to practice psychiatric nursing until the College investigation was complete. Two weeks before the arbitration commenced and several months before the arbitration got under way in earnest, the registrant's lawyer knew the substance of the College's allegations against him. Those allegations were substantially the same as the case he was to meet at the arbitration. There is no doubt, to use the language of Binnie J. in *Danyluk,* that the registrant was "...well aware, in law and in fact, that (he was) expected to respond to parallel and to some extent overlapping proceedings".

68. As mentioned earlier, the registrant had to have known that the arbitration was going to be a crucial battleground for him. He stood to lose not only his job but any hope of reemployment with the Fraser Health Authority as a psychiatric nurse and quite likely further afield. The stakes were high and this is reflected in the fact that the arbitration took up nine days of hearing. The registrant knew that the College was waiting in the wings and that its interest in the outcome of the arbitration was intense.

69. There is no indication before us, nor was any submission made to the effect that the registrant did not put his best foot forward or that he lacked incentive to defend himself with vigour.

70. We received written submissions from counsel for the registrant on March 3, 2014, in which he referred to a letter dated January 17, 2012 from the College to himself. In that letter, the College indicated its investigation would continue, although the College intended to wait until the arbitration had concluded before taking further action. Counsel pointed out that the College did not say it would be bound by the arbitration decision. He noted that the letter referred to the possibility that the Citation and the arbitration "could result in different decisions".

71. In our view, those remarks by the College cannot reasonably be taken to mean that the College was offering any hope to the registrant or suggesting to him that he did not need to mount his best defence at the arbitration, nor could the College take such a position. The College was under no obligation to advise the registrant whether it would or would not consider itself bound by the arbitration.

72. We are not entirely clear what counsel intended to convey by emphasizing the College's reference to the possibility of different decisions, or for that matter why the College thought to state the obvious. Given the context of the letter, we have no difficulty concluding that the College was simply pointing out that the two processes could result in different decisions as to facts or penalty, if any. We do not understand the comment to mean that the College was signaling to the registrant its agreement that these differences were 'significant' in the sense meant by the court in *Penner,* or that the College was suggesting to the registrant that he should modify his expectations in any way.

73. Counsel for the registrant remarked at the hearing that it was the union and not himself who had control of the conduct of the case. Nevertheless, the case was ultimately one where the arbitrator had to decide between conflicting evidence from two prime witnesses. The union's case was thus firmly grounded in the registrant's evidence and the manner in which he gave that evidence. The registrant had a full opportunity to give his version of what happened with the assistance and support of his union and counsel provided to him for that purpose.

74. The registrant knew, or as a registrant ought to have known, what sanctions the College could bring to bear if the arbitrator found against him and the College later came to the same conclusions. His lawyer at the arbitration was in communication with the College before the arbitration commenced. He therefore cannot reasonably maintain that he was not aware of the

potential legal impact an adverse finding at the arbitration might have on his later dealings with the College.

75. As has already been discussed, proceedings under the *Code* are intended to be final and conclusive. As *Penner* suggests, that is an important consideration when one looks at the reasonable expectations of the parties. (See paragraph 51). If there was any indication that the arbitration was not intended to be conclusive, one might accept that the registrant had a reasonable expectation he would be able to go on and relitigate the same issue elsewhere. But that is not the case. Again, as already noted, the registrant did not appeal the arbitrator's decision and that must count against him. If ever there was a case for taking up every avenue of appeal, this would be the case.

**The *Toronto* Approach**

76. We have felt it useful and necessary to set out an analysis of fairness framed in keeping with *Penner.* We have in mind the statement in *Toronto* that the factors supporting the exercise of discretion in issue estoppel cases apply equally to the doctrine of abuse of process. It is apparent from a reading of the cases that whether one applies issue estoppel or abuse of process, the decision maker must weigh the consequences affecting the losing party and be conscious of the need to avoid injustice and unfairness. As noted earlier, the doctrines are closely interrelated. It is not unrealistic to observe that there are many similarities in their application and the differences in their principles are not irreconcilable.

77. Arbour J. placed great emphasis on the integrity of the adjudicative process. What we understand this to mean, and we note the remarks of Doherty J.A. in the Court of Appeal decision on the same topic, is that courts and tribunals should respect and protect the wholeness and finality of other adjudicative processes unless exceptional circumstances exist. As Arbour J. pointed out "it is improper to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum". (*Toronto,* paragraph 46). That strong statement of legal principle recommends and directs all courts and tribunals to preserve the integrity of the judicial system as a first consideration. In the same paragraph, the court also said, commenting on finality:

> A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned.

78. If this panel were to permit a new hearing, we would have to turn our backs on the principle of finality and in so doing challenge the integrity of the arbitrator's decision. We would also necessarily open up the possibility of reaching a different decision and in so doing acknowledge that inconsistent

results are part of the legal landscape, regardless of how a well informed member of the public might view the problem of conflicting decisions based on the same facts. We would have to conclude that the registrant's rights justify the possible waste of judicial resources and put the parties to the expense of relitigation. We would have to be prepared to embark on a process which could undermine the credibility of the judicial process.

79. A final consideration is the possibility, identified by Arbour J., of hardship for some witnesses. We are aware that the central witness in this case is or was a psychiatric patient. The allegations against the registrant involve elements of breach of trust and power imbalance. The patient testified at the arbitration from a separate room with audio-visual connection to the main hearing room in order to accommodate her. The patient was closely examined and cross-examined. Her psychiatrist wrote in a letter dated April 9, 2013, which was provided to this panel, that her experience at the arbitration was traumatic. We take into consideration possible hardship to the patient if we allow relitigation.

80. These policy considerations are not to be set aside lightly. Under the reasoning in *Toronto* we are not required to focus on the motives or the status of the parties. In the absence of unfairness, the impact on private interests or the intersection of private interests with the legislative schemes, which are much at play in issue estoppel cases, take second place to the broader focus on the administration of justice under the doctrine of abuse of process.

81. For the panel to allow relitigation we must find that the arbitration process was unfair or unjust to the registrant, either in the manner the process was conducted or because the two processes have significantly different purposes and possible outcomes. Unfairness might also have been the result if the registrant's reasonable expectations led him to believe that little was at stake in the arbitration, and he was therefore less engaged in that process than he might otherwise have been. For the reasons already given, we cannot conclude that either form of unfairness exists.

82. There is no suggestion of fraud or dishonesty or other form of taint rendering the arbitration proceeding invalid. There is no suggestion that new evidence, not previously available, has now come to light. There are no other exceptional circumstances which cause us to permit the private interests of the registrant to set aside the policy considerations articulated in *Toronto* which are intended to guard the integrity of the adjudicative process.

## F. Conclusion

83. We are satisfied that the proper approach in this case is to apply the doctrine of abuse of process. We reject the issue estoppel approach as the parties in this proceeding are not the same as those who appeared before the arbitrator and thus the preconditions for issue estoppel have not been met.

84. As is apparent from these reasons however, even if we were to follow the issue estoppel approach we would decline to exercise discretion not to apply the doctrine, since we have concluded that the fairness test is not met.

85. Under the abuse of process analysis we are not persuaded that the importance of recognizing and upholding the integrity of the adjudicative process has in any way been dislodged or lessened based on the facts before us.

86. We have seen nothing that persuades us that relitigation will produce a different result. If in fact we permitted the registrant to relitigate the matter and we reached a different conclusion than the arbitrator, the credibility of the judicial process would be seriously undermined. In that event the College would be obliged to continue to endorse the registrant despite the fact that the arbitrator found his termination was justified on the same facts. The Health Authority might have serious concerns about the continued employment of the many other registrants, whose qualifications and whose fitness to practice psychiatric nursing are regulated by the College.

87. We have already discussed the fairness principles and that discussion applies to our analysis of the application of the doctrine of abuse of process.

88. We find that the doctrine of abuse of process applies in the matter of the Citation against the registrant so that he is barred from relitigating the matter. We adopt and give legal effect the arbitrator's award, his summary of the evidence, and his findings of fact.

89. In light of our decision there is no need to consider the alternative position put forward by the College. The evidence of the patient as summarized by the arbitrator is included as a matter of course.

Tim Holmes, Chair

I agree:

Dave Bhauruth

I agree:

David Axon