

**IN THE MATTER OF A HEARING BY
THE DISCIPLINE COMMITTEE OF THE BRITISH COLUMBIA COLLEGE OF NURSES
AND MIDWIVES CONVENED PURSUANT TO THE PROVISIONS OF
THE *HEALTH PROFESSIONS ACT* RSBC 1996, c.183**

BETWEEN:

The British Columbia College of Nurses and Midwives

(the “College” or “BCCNM”)

AND:

James Christie

(the “Respondent”)

**DETERMINATION OF THE DISCIPLINE COMMITTEE
(Penalty and Costs)**

Hearing Dates:	By written submissions
Discipline Committee Panel:	Edna McLellan, RN(T) (Chair) Roland Mitchell Samantha Love, LPN
Counsel for the College:	Nazio Filice
The Respondent:	Unrepresented by counsel and did not make any submissions
Independent Legal Counsel for the Panel:	Fritz Gaerdes

Introduction

1. On August 11, 2022 a panel of the Discipline Committee (the “Panel”) of the British Columbia College of Nurses and Midwives (the “College” or “BCCNM”) determined that the Respondent James Christie committed professional misconduct under section 39(1)(c) of the Act by conducting himself in the manner described in paragraphs 1, 2 and 3 of the citation dated November 26, 2021 (the “Citation”), and that by conducting himself in the manner described in paragraph 4 of the Citation the Respondent committed unprofessional conduct pursuant to section 39(1)(c) of the Act (hereinafter, the “Conduct Decision”). The particulars of the Respondent’s

misconduct which the Panel found had been proven on a balance of probabilities are set out in the Citation as follows:

...

1. On or about April 1, 2015, you assaulted JV contrary to section 266 of the Criminal Code of Canada. This conduct is conduct unbecoming of a Licenced Practical Nurse and is contrary to one or more of the following Professional Standards and/or Practice Standards: *Responsibility and Accountability* Professional Standard, *Competency-Based Practice* Professional Standard, *Client-Focused Provision of Service* Professional Standard, and *Ethical Practice* Professional Standard.

...

2. On or about May 25, 2015, you assaulted RP contrary to section 266 of the Criminal Code of Canada. This conduct is conduct unbecoming of a Licenced Practical Nurse and is contrary to one or more of the following Professional Standards and/or Practice Standards: *Responsibility and Accountability* Professional Standard, *Competency-Based Practice* Professional Standard, *Client-Focused Provision of Service* Professional Standard, and *Ethical Practice* Professional Standard.

...

3. On or about May 25, 2015, you assaulted JS contrary to section 266 of the Criminal Code of Canada. This conduct is conduct unbecoming of a Licenced Practical Nurse and is contrary to one or more of the following Professional Standards and/or Practice Standards: *Responsibility and Accountability* Professional Standard, *Competency-Based Practice* Professional Standard, *Client-Focused Provision of Service* Professional Standard, and *Ethical Practice* Professional Standard.

...

4. Beginning on or about July 19, 2016, you failed to respond to inquiries and requests for information with respect to the investigation of a complaint against you, contrary to your duty to co-operate and the following Professional Standards and/or Practice Standards: *Responsibility and Accountability* Professional Standard.

....

2. The Panel set a schedule for the parties to provide written submissions on penalty and costs. The College provided the Panel with written submissions and affidavit evidence in support of the penalty and costs orders it seeks. The Respondent did not provide the Panel with any submissions or evidence in response.
3. The College seeks the following orders pursuant to section 39 of the *Health Professions Act* [RSBC 1996] Chapter 183 (the "Act" or the "HPA"):
 - a. That the Respondent's registration is revoked.
 - b. That the Respondent is not eligible to apply for reinstatement of registration for a period of five years from the date the Order is finalized.
 - c. That the Respondent pay costs to BCCNM in the amount of \$2,821.45.

- d. That the penalty decision of the Panel relating to the Respondent be published pursuant to section 39.3 of the Act.

Legal Framework for Assessing Penalty

4. The College submits section 39(2) of the Act authorizes the Panel to cancel the Respondent's registration. It provides:

39 ...

(2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:

- (a) reprimand the respondent;
- (b) impose limits or conditions on the respondent's practice of the designated health profession;
- (c) suspend the respondent's registration;
- (d) subject to the bylaws, impose limits or conditions on the management of the respondent's practice during the suspension;
- (e) cancel the respondent's registration;
- (f) fine the respondent in an amount not exceeding the maximum fine established under section 19 (1) (w).

5. Further, if the Panel cancels the Respondent's registration under subsection 39(2), the Panel may under section 39(8) of the Act:

" ...

- (a) impose conditions on the lifting of the suspension or the eligibility to apply for reinstatement of registration,
- (b) direct that the lifting of the suspension or the eligibility to apply for reinstatement of registration will occur on
 - (i) a date specified in the order, or
 - (ii) the date the discipline committee or the board determines that the respondent has complied with the conditions imposed under paragraph (a), and
- (c) impose conditions on the respondent's practice of the designated health profession that apply after the lifting of the suspension or the reinstatement of registration. ..."

6. The College submits that some of the more common factors to consider in determining the appropriate penalty are:

- a. the nature and gravity of the conduct proven;
- b. the age and experience of the respondent;
- c. the previous character of the respondent, including details of prior discipline;
- d. the impact upon the victim;

- e. the advantage gained, or to be gained, by the respondent;
- f. the number of times the offending conduct occurred;
- g. whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong, and the presence or absence of other mitigating circumstance;
- h. the possibility of remediating or rehabilitating the respondent;
- i. the impact on the respondent of criminal or other sanctions or penalties;
- j. the impact of the proposed penalty on the respondent;
- k. the need for specific and general deterrence;
- l. the need to ensure the public's confidence in the integrity of the profession; and,
- m. the range of penalties imposed in similar cases.

[the "*Ogilvy Factors*"].

7. The College further submits that in *Law Society of BC v. Dent*, 2016 LSBC 05 ("*Dent*") a panel of the Law Society of British Columbia suggested moving away from a rigid application of each of the *Ogilvy Factors* in every case and encouraged a consolidation of these factors into the following broader categories or issues for consideration (hereinafter, the "*Dent Factors*"). In this regard, the panel in *Dent* said:

[18] In addition, it is time to consolidate the *Ogilvie* factors. It is also important to remember that the *Ogilvie* factors are non-exhaustive in nature. Their scope is only limited by the possible frailties that a lawyer may exhibit and the ability of counsel to put an imaginative spin on it.

[19] Therefore, we set out a "consolidated list of *Ogilvie* factors" as indicated below. We have reduced them from 13 to the four general factors outlined below.

Nature, gravity and consequences of conduct

[20] This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

Character and professional conduct record of the respondent

[21] What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

Acknowledgement of the misconduct and remedial action

[22] Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

Public confidence in the legal profession including public confidence in the disciplinary process

[23] Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

8. The College points out that the Dent Factors have been applied by discipline panels of the BCCNM's legacy college, the College of Registered Nurses of British Columbia, in the *Cunningham Penalty Decision, June 22, 2017*, and in the *Hansen Penalty Decision, February 2, 2019*. The Panel notes that more recently discipline panels of the BCCNM have also applied the Ogilvy / Dent Factors in the *Parniak Penalty Decision, December 7, 2020* and the *Perry Penalty Decision, July 13, 2021*¹.

ANALYSIS AND FINDINGS

Jurisdiction to Cancel the Registration of a Former Registrant.

9. As indicated in the Conduct Decision, the Respondent is currently classified as a former registrant within the meaning of the HPA. Section 26 of the HPA, which applies to Part 3 of the Act dealing with inspections, inquiries, and discipline, expressly defines "registrant" for the purposes of that section to include a "former registrant".
10. The Panel notes that the issue whether a discipline panel has jurisdiction under the HPA to cancel the registration of a former registrant was recently addressed by a discipline panel of the College of Massage Therapists of British Columbia (CMTBC). In its Disciplinary Order of October 20, 2022, made in respect of Steven Anderson, Former RMT ("*Anderson*")², the CMTBC discipline panel held the following:

...

¹ Publicly available on this webpage: [Hearings \(bccnm.ca\)](#)

² Publicly available on this webpage: [Disciplinary Actions | College of Massage Therapists of British Columbia \(cmtbc.ca\)](#)

9. The Discipline Committee has the power to suspend or cancel the registration of a former registrant. This issue was recently dealt with in two CMTBC decisions: *College of Massage Therapists of British Columbia v. Gill* 2019 CMTBC 1 and *College of Massage Therapists of British Columbia v. Morgan* (June 8, 2021). The Panel agrees with and adopts the reasoning set out in *Gill*:

25. The Panel agrees with the rationale above. The interpretation of the HPA should likewise be given a purposive approach having regard to the College's duty to protect the public. Interpretations that limit the College's sanctioning powers and encourage members to resign or allow their registration to lapse in order to avoid consequences are contrary to the purpose of the HPA. This is particularly the case, where the College's registration committee is required to process registration applications and grant registration to individuals who meet the conditions and requirements under section 20(2) of the HPA.

26. The Panel finds, having regard to the words of the statute, their context, and the purpose of the HPA, that the HPA's reference to "registrant" and "respondent" in sections 37 to 39 includes a "former registrant". The Panel finds that it may order any of the penalties listed in section 39(2) against a former registrant...

11. The Panel agrees with and adopts the above reasoning in *Anderson*. Accordingly, the Panel finds that it has jurisdiction to order any of the penalties listed in section 39(2) against the Respondent.

Factors in Determining an Appropriate Penalty

12. The Panel finds the Ogilvy / Dent Factors provide the framework for determining the appropriate penalty in this case.
13. The Panel now turns to considering these factors as they pertain to the facts of this matter.

Nature, gravity and consequences of the conduct

14. The College submits the following facts which the Panel accepted and relied on in reaching the Conduct Decision are also relevant to the determination of an appropriate penalty in this matter:
- i. The Respondent worked in a permanent night position as a Licensed Practical Nurse ("LPN") at Selkirk Place Long Term Care Facility ("Selkirk Place").
 - ii. Selkirk Place is a seniors' residential care facility located in Victoria, British Columbia. Throughout his employment at Selkirk place the Respondent worked in the complex care side of the facility, which housed residents that required 24-hour care.

- iii. During night shifts, Selkirk Place was staffed with one Registered Nurse (“RN”), three LPNs and care aides. The RN was responsible for the entire building while each LPN is responsible for 2 units each. LPNs were considered team leads on their assigned units and were expected to oversee the care needs of the residents on their units.
 - iv. On or about April 1, 2015, during the process of changing J.V.’s disposable brief, the Respondent struck J.V. in the groin to make J.V., a resident with advanced dementia, more compliant as J.V. did not like to be changed, causing J.V. to buckle in pain so that his feet and head lifted up and he screamed and moaned.
 - v. On or about May 25, 2015, while assisting a care aid to change R.P., a resident with advanced dementia who resisted being changed, the Respondent placed a blanket over R.P.’s face and pressed down on R.P.’s upper body with his body causing R.P. to moan.
 - vi. Also on or about May 25, 2015, while in J.S.’s room to change his disposable brief, the Respondent flicked the head of J.S.’s penis approximately 15 times causing J.S. to scream and moan.
 - vii. On June 5, 2015, the Respondent was charged with the assault of residents E.K. J.V., R.P., and J.S contrary to section 266 of the *Criminal Code*.
 - viii. The criminal trial took place on July 18 and 19, 2016 before the Honourable Judge L. Mrozinski. On July 22, 2016, Judge Mrozinski found the Respondent guilty of assaulting J.V., R.P., and J.S. contrary to section 266 of the *Criminal Code* in the manner described above. The Respondent was sentenced to 6 months jail and 18 months probation.
 - ix. On November 16, 2016, the Respondent was released on non-surety bail, pending the appeal of his conviction and sentence. Contrary to the conditions of this bail, on November 17, 2016, the Respondent did not attend at Saanich Community Corrections, as required. On October 11, 2017, a warrant was issued for his arrest, and he was declared Away Without Leave (“AWOL”) on November 24, 2017. To date, the Respondent has not served his sentence and remains AWOL. While out on bail the Respondent fled the country and has not returned to Canada.
 - x. On July 19, 2016, and March 9, 2021, a letter was sent to the Respondent requesting his response to the allegations. At the date of the hearing the Respondent had not provided any response to the letters sent.
15. The College submits that the Respondent’s proven conduct of having physically assaulting vulnerable Selkirk residents J.V., R.P., and J.S was not only antithetical to the Respondent’s duty as a nurse, but it was also especially egregious due to his

position of trust and power. It says the Respondent's position of trust and power was not only with respect to the vulnerable elderly dementia residents he assaulted, but also his colleagues – as a team leader.

16. The College also submits that assaulting vulnerable dementia patients who were not only powerless to defend themselves, but also unable to advocate for themselves due to their diminished capacity amounts to very severe misconduct, because the assaults were not a one-off incident born out of frustration or a momentary lapse of judgment, but the Respondent's acts of violence against these residents were intentional and unprovoked. In support of this submission the College points the Panel to the sentencing decision in which the honorable Judge Mrozinski said the following at paragraph 3:

In my reasons for your conviction, Mr. Christie, I outlined the assaults in some detail. They were awful. I noted that you struck at the private parts of two of the victims, causing each of them obvious and great pain. You caused a third victim, R.P., to struggle and moan as you pressed your torso into her face, which you had previously covered with a blanket. These acts were intentional, cruel, and frankly sadistic in their nature.

17. With respect to the victims Judge Mrozinski stated at paragraph 4

I have said that the residents you assaulted were the most vulnerable of an otherwise vulnerable population. Elderly patients suffering from dementia, including Alzheimer's, are sometimes said to be indistinguishable from infants, in the sense that they are so entirely dependent upon their caregivers.

18. The College argue that while the Respondent was sentenced to a 6-month custodial sentence, he appealed the conviction and the sentence and fled the country while on non-surety bail pending his appeal. In fleeing the country, the Respondent has yet to face the consequences of his criminal actions.
19. The Panel accepts the College's submissions. The Panel finds that the Respondent's proven conduct was extremely serious, and this is an aggravating circumstance that favours a significant penalty.

Character and Professional Conduct Record of the Respondent

20. The College submits that a significant consideration in assessing penalty is the protection of the public from other acts of misconduct by the registrant who is the subject of the hearing. This requires consideration of the individual circumstances,

character, and professional conduct record of the Respondent.

21. The College says there is no evidence before the Panel about the Respondent's character or professional conduct record that could mitigate the penalty imposed in this matter. To the contrary, the College argues that the Respondent's demonstrated character is that of an individual who initiates unprovoked acts of violence against vulnerable elderly dementia patients and chooses not to face the criminal or regulatory consequences for his actions by fleeing the country and not engaging in the regulatory process.
22. The Panel accepts the College's submissions. The Panel finds that the evidence regarding the Respondent's post-offence conduct is an aggravating factor in assessing the appropriate penalty.

Acknowledgement of Misconduct and Remedial Action

23. The College further points out that the Respondent did not cooperate with College's investigation, did not attend the hearing, and did not acknowledge his misconduct.
24. The Panel finds that the absence of an admission or demonstrated remorse is not an aggravating factor but is the absence of a mitigating factor.

Public confidence in the legal profession including public confidence in the disciplinary process.

25. With respect to this Dent Factor, the College points the Panel to the objectives outlined in *Cunningham* and submits that the penalty imposed in this case should serve to promote public confidence in the nursing profession, including its ability to self-regulate, and should also address the need for specific and general deterrence.
26. The College argues that the Respondent's proven conduct of physically assaulting elderly dementia patients in his care has a serious impact on the public's confidence in the profession. In support of this submission the College refers the Panel to Judge Mrozinski's sentencing decision in which he wrote:

[12] The daughters of J.D., the resident whose groin you struck with such force it caused him to buckle, gave their impact statements at this sentencing hearing. They expressed deep sadness, anger, and even guilt knowing that their father, in such a vulnerable state, was abused in this way. They feel a

deep sense of betrayal. They thought, acting with the best of intentions that their father was getting the best care they could provide. They felt they had left him in a safe, caring environment, and it is imperative, Mr. Christie, that people feel confident that when they entrust their beloved family members or friends to residential care, that those persons will be treated with the care and dignity and respect their lifetime of contribution to their families and their communities' merits.

[13] It is apparent from these victim impact statements that families are conflicted about their decision to place their loved ones in residential care. When events like these assaults occur, it feeds into that sense of guilt which is unfortunate.

[14] These families should know that they have done nothing wrong by placing their elderly parents in care and that, by and large, these facilities are safe, as are their loved ones.

27. The College also submits that the Respondent's acts of violence against the residents not only had an impact on the residents assaulted and their families, but it also impacts the confidence of the public at large with respect to entrusting the care of their loved ones with health care professionals. In addition to this the Respondent's conduct also tarnishes the reputation of nurses generally.

28. The College says that having regard to the proven conduct of the Respondent, public confidence in the profession will only be preserved by revoking the Respondent's registration. In this regard, the College submits that other cases where a discipline panel made findings that a registrant committed professional misconduct it ordered revocation of licence, including the following:

- a. *College of Nurses of Ontario v Jamieson, 2008 CanLII 89813 ("Jamieson")*: In this case the registrant was found guilty of aggravated assault contrary to section 268(1) of the *Criminal Code* arising out of her conduct towards a client – a 20-month-old child – to whom the registrant was providing care. The assault caused the child to suffer broken limbs on several different occasions. In revoking the registrant's registration, the panel noted that the registrant had no remorse and provided no explanation for her behaviour.
- b. *Ontario College of Teachers v Coccimiglio, 2002 ONOCT 12 ("Coccimiglio")*: In this case, Mr. Coccimiglio's registration was revoked due to his criminal actions against two colleagues. In addition to assaulting a colleague contrary to Criminal Code section 266, Mr. Coccimiglio caused

a second colleague to fear for her safety contrary to section 264 of the Criminal Code.

29. The College argues that while the Respondent's assault of residents J.V., R.P., and J.S. did not involve broken limbs –as was the case in *Jamieson* – the Respondent, similar to Ms. Jamieson, victimized vulnerable defenseless patients who could not speak for themselves. It argues that similar to *Jamieson* the Respondent has shown no remorse and provided no explanation for his actions.
30. The College points out that the conduct in *Coccimiglio*, on which the discipline panel based its licence revocation, was less severe than the proven conduct of the Respondent here.
31. The College further submits that in addition to the above, or in the alternative, the Respondent's licence should be revoked on the basis that he is ungovernable. It relies on *Hall (Re)*, 2007 LSBC 2 ("*Hall*"). In *Hall*, a discipline panel of the law society held that a finding of ungovernability may be based on some or all of the following:
 - i. A consistent and repetitive failure to respond to the governing body;
 - ii. An element of neglect of duties and obligations to the governing body;
 - iii. An element of misleading behaviour directed to a client and or the governing body;
 - iv. A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours;
 - v. A discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances;
 - vi. A history of breaches of undertaking without apparent regard for the consequences of such behaviour; and
 - vii. A record or history of practising while under suspension.
32. The College points the Panel to the following statement in *Hall*, at paragraph 20:

The basis for a finding of ungovernability is that the public interest can only be served if members of the profession respect and respond to the Law Society as a regulating authority. **In order for the Law Society to fulfill its mandate of protecting the public interest in the administration of justice**, (as required by Section 3 of the *Legal Profession Act*), **it is necessary for members of the Law Society to respond to and respect the authority of the Law Society as a regulating body. That respect will be evidenced by lawyers responding promptly to communications**, by lawyers observing directives (for example, dealing

with suspensions and the entitlement to practise) **and by lawyers appearing at discipline hearings when required to do so by the citation process** [emphasis added].

33. The College submits that the proven facts establish that the Respondent is not only incapable of regulating himself, but he has also demonstrated that he cannot be regulated. It says that as a member of a self-regulating profession, registrants are expected to govern themselves in accordance with the Act, Bylaws, and BCCNM Practice and Professional Standards. The College says it is a fundamental requirement that all registrants who wish to have the privilege of practising within a self-regulating profession accept that their conduct will be governed by their regulator and respect the rules and standards put in place by their regulator to govern their conduct. Where a registrant demonstrates an unwillingness to abide by the rules put in place by their regulator – such as the duty to cooperate in an investigation into a serious matter– the registrant cannot be permitted to retain the privilege of being a practising member of that profession.
34. The College argues that in assaulting residents under his care, the Respondent has demonstrated he is incapable of self-regulation. Additionally, following his assault of the residents the Respondent failed to take responsibility for his actions, the Respondent failed to cooperate with BCCNM's (and its legacy College's) investigation by responding to the correspondence sent to him, and failed to attend the disciplinary hearing.
35. The College submits the *Hall* factors to the facts of this case establish that the Respondent has engaged in: (i) a consistent failure to respond to his regulator, (ii) neglect of his duties and obligation to his regulator, (iii) misleading of clients in his care by abusing their trust, and (iv) failing to attend the disciplinary hearing convened to consider his conduct.
36. The College says the Respondent should be found to be ungovernable on the basis that his post assault conduct has shown no respect for the College or its legacy colleges.
37. The Panel has considered the College's submissions and carefully considered the case law on which it relies in support of those submissions. A consideration of

penalties assessed in other cases of professional misconduct, and unprofessional conduct are helpful to establish a range of sanctions by which to judge the current case. Although the Panel is not bound by these cases, they are of assistance in determination of an appropriate penalty in this case. The Panel notes that the penalties imposed in these cases – even where the assaults in question were of a lesser degree or nature – was revocation of licensure.

38. The Panel finds that on the facts of this case cancelling the Respondent's registration would be consistent with the comparable case law cited and would also achieve the objectives of promoting public confidence in the nursing profession, including its ability to self-regulate. It is extremely important that public confidence in the integrity of the nursing profession is maintained and that the public is aware that members are held to account for failing to uphold the applicable standards and failing to conduct themselves professionally and ethically, especially in relation to standards that exist to prevent risk to public well-being.
39. The Panel also considers that there is also a strong need for general deterrence in this case. It is important that other members of the profession understand that they must not assault patients and if they do, cancellation of registration and a long prohibition from re-applying may follow.
40. The Panel further finds there is a need for specific deterrence in this case. While the Respondent is presently not registered, it is possible for him to apply to return to the profession in future. There is currently no evidence before the Panel to suggest that the Respondent would not again conduct himself in the same manner if he were to have his registration reinstated. While the specific deterrence factor may be less significant due the fact that the Respondent is no longer a registrant, it is a factor, nonetheless.
41. With respect to the College's submission that the Respondent is ungovernable, the Panel finds that it is the Respondent's post-conviction conduct, in particular his failure to attend the disciplinary hearing convened to consider his conduct, that is the most compelling ground on which to make such a finding. By failing to co-operate with the investigation, and fleeing the country to avoid any consequences, including professional discipline, for his actions, the Respondent has shown that he has

absolutely no intention of being governed by the College. The Panel accordingly agrees with the College submission that the Respondent is ungovernable.

42. In weighing all the College's submissions and evidence pertaining to the Dent factors, including in respect to the objectives outlined in *Cunningham*, and the case law to which the College referred, the Panel considers a significant penalty is warranted in this case, and that revocation or cancellation of licensure for a period of five years is within a range of reasonable outcomes. Based on the facts and the law present in this case, a strong message must be sent to the Respondent, the profession, and the public that the type of misconduct that occurred in this case will not be tolerated.
43. Accordingly, the Panel finds the following penalty reasonable and appropriate in the circumstances:
- a. That the Respondent's registration is cancelled.
 - b. That the Respondent is not eligible to apply for reinstatement of registration for a period of five years from the date this order is made, at which time he would be required to meet all fitness, competence, and character requirements.

Costs

44. Further, the College submits an award of costs should be made against the Respondent in this case pursuant to sections 39(5) and (7) of the Act, which provide:

(5) If the discipline committee acts under subsection (2), it may award costs to the college against the respondent, based on the tariff of costs established under section 19 (1) (w.1).

...

(7) Costs awarded under subsection (5) must not exceed, in total, 50% of the actual costs to the college for legal representation for the purposes of the hearing.

45. In support of its submission for costs to be awarded, the College relies on *Jaswal v. Newfoundland Medical Board*, 1996 CanLII 11630 (NL SC), where the Court adopted the following principles:

(50) It is necessary, therefore, to determine the factors appropriate to the proper exercise of the judicial discretion to make an order for payment or partial payment of expenses. In my view, based on the submissions of counsel, the following is a non-exhaustive list of factors which ought to be considered in a given case before deciding to impose an order for payment of expenses:

1. the degree of success, if any, of the physician in resisting any or all of the charges
2. the necessity for calling all of the witnesses who gave evidence or for incurring other expenses associated with the hearing
3. whether the persons presenting the case against the doctor could reasonably have anticipated the result based upon what they knew prior to the hearing
4. whether the doctor cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.
5. the financial circumstances of the doctor and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed.

(51) In examining the scope of the inquiry and the manner and focus of the investigation the Court, or the Board, ought to be careful not to apply, with the benefit of hindsight, too high a standard for the imposition of costs. The decision to call witnesses and to take a certain approach is made before the disposition in the case is known. The test is therefore not one of necessity viewed in the light of the resulting decision but one of reasonableness viewed from the perspective of the persons investigating and preparing the case for hearing.

46. Section 39(5) of the Act permits a panel to award costs against a respondent if a tariff has been adopted by the college as allowed by s. 19(1)(w.1) of the Act. Section 212(2) of BCCNM's Bylaws establishes a tariff of costs for discipline hearings as follows:

212 (2) The tariff of costs set out in Schedule J, to partially indemnify parties for their expenses incurred in the preparation for and conduct of hearings under section 38 of the Act, is established under section 19(1)(w.1) of the Act.

47. Schedule J to the College's Bylaws also provides:

Qualifying Expenses

1. For the purpose of assessing costs under this Tariff, qualifying expenses incurred from the time the inquiry committee directs the registrar to issue a citation under section 33(6)(d) of the Act until the time
 - (a) the inquiry committee accepts a written proposal for a consent order under section 37.1(2) or (5) of the Act,
 - (b) the discipline committee dismisses the matter under section 39(1) of the Act, or
 - (c) the discipline committee issues an order under section 39(2) of the Act,

are deemed to be expenses incurred in the preparation for and conduct of the hearing.

Value of Units

2. (1) The value for each unit allowed on an assessment of costs is \$120.
- (2) Where maximum and minimum numbers of units are provided for in an

Item in the Tariff, the discipline committee has the discretion to allow a number within that range of units.

(3) Costs where the Tariff indicates a range of units, the discipline committee must have regard to the following principles:

- (a) one unit is for matters upon which little time should ordinarily have been spent;
- (b) the maximum number of units is for matters upon which a great deal of time should ordinarily have been spent.

Disbursements

3. In addition to the Tariff, actual reasonable disbursements are recoverable.

48. The units claimed by the College according to Schedule J of the Bylaws are the following:

TARIFF			
Item	Description	Units	Claimed
1.	Initiating Process in Respect of Citation All process for which provision is not made elsewhere in this tariff for commencing a proceeding.	Minimum 1 Maximum 5	3
2.	Disclosure All processes associated with obtaining or providing disclosure of evidence, including documents.	Minimum 1 Maximum 10	5
3.	Experts All processes and correspondence associated with retaining and consulting experts for the purposes of obtaining opinions for use in the discipline hearing	Minimum 1 Maximum 5	N/A
4.	Witnesses All process and correspondence associated with contacting, interviewing, and preparing summons to all witnesses	Minimum 1 Maximum 10	3
5.	Pre-Hearing Conferences Preparation for attendance at a pre-hearing conference for each day of attendance	Minimum 1 Maximum 3	1
6.	Attendance at Pre-Hearing Conference for each day.	Minimum 1 Maximum 5	1

8.	Attendance at discipline committee hearing for each day.	10	10
9.	Process for making admission of fact	Minimum 1 Maximum 10	N/A
10.	Preparation of closing submission for the discipline committee	Minimum 1 Maximum 10	5
11.	Attendance at the hearing where party is ready to proceed and when hearing not commenced.	3	N/A
12.	Settlement of Costs	Minimum 1 Maximum 5	N/A
13.	Settlement of Order	Minimum 1 Maximum 3	N/A
Total			36

49. The College claims 36 units at \$120 per unit for a total of \$4,320 in costs. The College points out that under section 39(7) of the Act, costs awarded must not exceed, in total, 50% of the actual costs to BCCNM for legal representation for the purposes of the hearing. Based on that, the claim for costs becomes \$2,160.
50. The College says this sum is reasonable in the circumstances. In support of this submission, it refers to the following statement in *Jaswal*: “*The test [for costs] is therefore not one of necessity viewed in the light of the resulting decision but one of reasonableness viewed from the perspective of the persons investigating and preparing the case for hearing*”. In other words, the perspective for answering the above questions is one of foresight, not hindsight, and the amount sought is gauged on its reasonableness in the circumstances.
51. The College submits that the discipline hearing was diligently and fairly prosecuted. In particular, the College says that the extensive preparation which went into the presentation of its case by way of affidavit evidence facilitated the hearing unfolding in an efficient manner.
52. The College further submits that given the serious nature of the conduct in question, the pursuit of this hearing was in the public interest and in furtherance of the College’s public protection mandate. Applying the test in *Jaswal*, the College submits that it ought to be indemnified to the amount sought in the table above for prosecuting this

matter.

53. The College also argues that the costs sought are not so large as to be punitive to the Respondent. The sum sought is rationally connected to the length and level of difficulty of the hearing. For the same reasons, the costs sought are not so large as to deter another respondent from raising a legitimate defence.
54. The College further submits that the College's Bylaws also permit BCCNM to be indemnified for any disbursements that were reasonably incurred. The disbursements incurred by the College for the hearing were \$661.45 for Court reporter fees and taxes. In total, the College claims 50% of BCCNM's legal fees (\$2,160) and 100% of its disbursements (\$661.45). As such, the total amount of costs sought by BCCNM is \$2,821.45.
55. The College submits that although the disciplinary hearing was not complex, and the College only relied on one witness, substantial time was taken to prepare the affidavit evidence presented by the College at the hearing. Entering the College's evidence by way of affidavit reduced the number of days needed for the hearing, thereby reducing the costs of the hearing. As such the College submits that it ought to be awarded the above claimed cost as it took reasonable actions to ensure that the hearing was conducted in a cost-effective manner.
56. The Panel accepts the College's submissions. The College proved all the allegations in the Citation. The allegations were serious. It was also necessary for the College to pursue the hearing considering the serious nature of the Respondent's misconduct. The costs claimed by the College are also supported by appropriate evidence. The College's witness provided relevant affidavit evidence in relation to the alleged conduct. The fact that the Respondent did not participate in the hearing meant that there was no possibility of admissions or negotiated settlement. The Panel finds the hearing was diligently pursued and prosecuted by the College.
57. The Panel also finds the College's units claimed for legal costs to be fair and reasonable in the circumstances. The Panel is satisfied the total amount of tariff units claimed for each step of the proceeding is rationally connected to the length and level of difficulty to conduct those steps.

58. The Panel further finds the College's disbursements to be reasonable and necessary. Pursuant to the Act, the hearing had to be recorded by a Court reporter.
59. The Respondent has not provided any evidence or submissions regarding his financial circumstances. The Panel is however satisfied that the amount of costs and disbursements the College claims is not so large as to be punitive to the Respondent.
60. The Panel must stipulate a time for payment of costs. The College proposes that costs be payable in full four months from the date of the Panel's order. The Panel accepts this submission.

Order: Penalty and Costs

61. In conclusion, the Panel determines and orders pursuant to ss. 39 and 39.3 of the Act the following:
 - a. That the Respondent's registration is cancelled.
 - b. That the Respondent is not eligible to apply for reinstatement of registration for a period of five years from the date of this order, at which time he would be required to meet all fitness, competence, and character requirements.
 - c. That the Respondent pay costs to BCCNM in the amount of \$2,821.45 within four months from the date of this order.
 - d. That the penalty decision of the Panel relating to the Respondent be published pursuant to section 39.3 of the Act.

Publication

62. The Panel directs the Registrar to notify the public of its decisions pursuant to section 39.3(1)(e) of the Act.

Notice of right to appeal

63. The Respondent is advised that under section 40(1) of the Act, a respondent aggrieved or adversely affected by an order of the Discipline Committee under section 39 of the Act may appeal the decision to the Supreme Court. Under section 40(2), an appeal must be commenced within 30 days after the date on which this Order

is delivered.

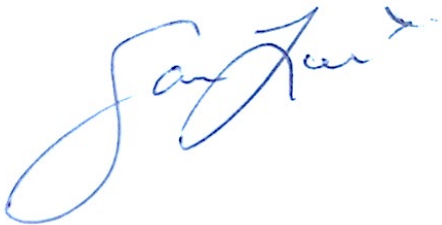
Dated: January 27, 2023



Edna McLellan, RN (T)(Chair)



Roland Mitchell, Public Member



Samantha Love, LPN