

**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:

**Ming Fung**

(the “Respondent”)

**DETERMINATION OF THE DISCIPLINE COMMITTEE**

|   |   |
|---|---|
| <b>Hearing Dates:</b>                           | By written submissions  |
| <b>Discipline Committee Panel:</b>              | Sheila Cessford, Chair<br>Edna McLellan, RN (T)<br>Dr. Catharine Schiller, RN |
| <b>Counsel for the College:</b>                 | Michael Seaborn   |
| <b>Respondent’s Representative:</b>             | Melissa Muir  |
| <b>Independent Legal Counsel for the Panel:</b> | Susan Precious  |

**A. INTRODUCTION**

1. A panel of the Discipline Committee (the “Panel”) of the British Columbia College of Nurses and Midwives (the “College” or “BCCNM”) conducted a hearing to determine, pursuant to section 39 of the *Health Professions Act* RSBC 1996 c.183 (the “Act” or the “HPA”), whether the conduct of Ming Fung (the “Respondent”) constituted unprofessional conduct, a breach of the Act or bylaws.
2. On January 31, 2022, the Panel issued a written determination (the “Conduct Decision”) in which the Panel found that the College had established the sole

allegation set out in the citation dated July 21, 2020 (the “Citation”), namely that beginning in or about July 2018 through to November 2019, the Respondent failed to respond to BCCNP inquiries and requests for information in a full and substantive manner with respect to the investigation of a complaint against him, contrary to BCCNP bylaw 338 and the Responsibility and Accountability Professional Standard. The Panel determined that the Respondent committed unprofessional conduct. As noted in the Conduct Decision, at the time the Citation was issued, the governing body for nursing in British Columbia was the BCCNP. BCCNP is an amalgamation of three pre-existing regulatory bodies. In September 2020, BCCNP and the British Columbia College of Midwives amalgamated to form the BCCNM.

3. The Panel set a schedule for written submissions on penalty and costs. After missing the deadline, the Respondent was granted an extension to provide his submissions. Both parties delivered written submissions, which the Panel considered in reaching this decision.
4. The College seeks the following orders pursuant to section 39 of the Act:
  - a. The Respondent is suspended for a period of four months; and
  - b. The Respondent pay costs to BCCNM in the amount of \$2,652.00 to be paid within three months from the date an Order on penalty and costs is issued by the Panel.
5. In his submissions, the Respondent confirmed that he accepts the Panel’s Conduct Decision and requested that the Panel agree to the above orders requested by the College.
6. For the reasons that follow, the Panel has decided to grant the orders that the College seeks and to which the Respondent consented.

## B. LAW and ANALYSIS

### ***General Approach for Assessing Penalty***

7. Having found that the Respondent committed unprofessional conduct, the Panel must decide what, if any, penalty is appropriate.
8. Section 39 of the Act authorizes the Panel to impose the following penalties:

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).

9. If the Panel orders a suspension or cancellation, the following additional provisions apply:

39 (8) If the registration of the respondent is suspended or cancelled under subsection (2), the discipline committee may

- (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

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.

10. The relevant factors to consider in determining an appropriate penalty are set out in *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17:
  - 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.

11. *Law Society of BC v. Dent*, 2016 LSBC 05 held that it is not necessary to consider each *Ogilvie* factor in every case. In *Dent*, the following consolidated list was suggested:
  - a. Nature, gravity and consequences of conduct;
  - b. Character and professional conduct record of the respondent;
  - c. Acknowledgement of the misconduct and remedial action; and
  - d. Public confidence in the legal profession including public confidence in the disciplinary process.
12. Many professional regulation tribunals, including this College's Discipline Committee, have applied the *Ogilvie / Dent* factors. These authorities have been cited with approval by many health profession regulators in British Columbia, including in the recent BCCNM discipline cases of *Parniak*, *Byelkova* and *Christie*.
13. The Panel considers the *Ogilvie / Dent* factors to be the appropriate framework for assessing penalty and costs in this case.

***Nature, Gravity and Consequences of the Conduct***

14. The College submits that at an immediate and direct level, the consequences of the Respondent's failure to cooperate with the College's investigation were the expenditure of additional limited resources to pursue the investigation, as well as attendant delays in moving the matter forward. In support of this submission, the College points to the Panel's findings at paragraphs 14 (h) and (i) of the Conduct Decision:

h. Considerable staff time and other BCCNP resources were expended in making numerous and repetitious requests for information from the Respondent, and in preparing for an in-person interview, which was then cancelled by the Respondent at short notice.

i. The Respondent's lack of engagement with the process caused significant delays to the investigation of the allegations against him. BCCNP was compelled to repeatedly set deadlines for the Respondent's responses and track his nonresponses or follow up on his partial and inadequate responses.

15. The College further submits that, at a broader and more general level, the consequences of the Respondent's failure to cooperate are profound and risk undermining the public's confidence in the College's ability to regulate its members. The College submits that the true gravity of the Respondent's conduct lies in this potential undermining of the public's confidence in the College's ability to regulate its members. Certain core principles form the foundation of professional self-regulation; cooperation with one's regulator being one of them. Membership in a self-governing profession brings with it privileges but also carries responsibilities (see: *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 paragraph 165).

16. The College points out that the Respondent's failure to cooperate occurred over an extended period, during which his duty to cooperate and the potential consequences of failing to do so were repeatedly brought to his attention.

17. The Panel accepts the College's submissions. The Panel finds that the Respondent's failure to cooperate with the College was serious, particularly because it continued for an extended period, was repeatedly brought to the Respondent's attention, and risked undermining the public's confidence in the College's ability to

regulate its members. As the Panel also stated at paragraph 76 of the Conduct Decision:

Compliance with the duty to cooperate is important not just to ensure that this particular investigation proceeded with dispatch, but also because the College is a self-governing profession, and its primary mandate is to protect the public. The College relies upon the cooperation and compliance of its members during the investigation process in order to effectively regulate the profession in the public interest and for the public's protection. A registrant's failure to cooperate with the College risks undermining the public's confidence in the College's ability to regulate its members.

18. The Panel finds that this factor favours the imposition of a more serious penalty.

### ***Character and Professional Conduct***

19. The College submits that a significant consideration in assessing an appropriate penalty is the protection of the public from other acts of misconduct by the Respondent. This requires consideration of the circumstances of the Respondent. The College points out that the Respondent has been a Licensed Practical Nurse since 2012 and therefore should have known at this stage in his career what his professional responsibilities are to his regulator. The College notes that the Respondent has no prior disciplinary record with BCCNM or its legacy colleges.

20. The Panel finds that the Respondent's absence of any disciplinary record is a mitigating circumstance in this case. The Panel finds that the Respondent's years of experience, however, mean that his conduct cannot be excused by age or inexperience.

21. Overall, this factor has aspects that favour a less serious penalty and aspects that favour a more serious penalty.

### ***Acknowledgement of the Misconduct and Remedial Action***

22. The College submits that the Respondent has not acknowledged the misconduct or taken any remedial action. It submits that during the discipline hearing the Respondent effectively admitted that he did not cooperate with the investigation, going so far as to characterize it as a "witch hunt". The College submits that the Respondent sought to justify his failure to cooperate rather than accept responsibility

for it. In support of these submissions, the College relies upon paragraph 67 of the Conduct Decision:

The Respondent admitted during the hearing that he failed to provide the requested information. He testified that had Mr. Seaborn, rather than Ms. Naylor, handled the matter from the outset, he would have cooperated with the investigation.

23. The College further submits that the Respondent's duty was to the College. He was not in a position to pick and choose who he dealt with at the College or to pick which staff he would cooperate with and those with whom he would not cooperate. The Panel accepts the College's submissions in this regard.
24. The Panel finds that the Respondent's absence of remorse for his misconduct during the discipline hearing is not an aggravating factor but constitutes an absence of a mitigating factor. The Panel finds that the Respondent did not provide any evidence of any remedial action undertaken. The Panel does note that in his penalty submissions, the Respondent confirmed that he accepts the Panel's Conduct Decision and the College's proposal on penalty and costs, which shows some acceptance of responsibility and insight into his misconduct.
25. Overall, the Panel finds this factor to be neutral.

***Public Confidence in the Profession including in the Disciplinary Process***

26. The College submits that the penalty imposed should serve to promote public confidence in the profession, including its ability to self-regulate; address the need for both general and specific deterrence; and serve to educate registrants and the public about professional standards.
27. The College submits that in the circumstances of this case the potential undermining of the public's confidence in the profession is the greatest concern. As such, it argues that it is imperative that the Panel communicate a clear message to the Respondent, other registrants, and the public at large, that failure to cooperate with one's regulator will attract a serious penalty.

28. The Panel accepts the College's submissions. The Panel finds that there is a need for specific deterrence, general deterrence, and the need to maintain public confidence in this case. The very nature of the conduct in this case of failing to cooperate with the College underlines the need for specific deterrence. In terms of general deterrence, it is important that other members of the profession also understand that they are under an obligation to cooperate with the College's investigation of complaints of misconduct and if they do not, suspension from practice may follow.
29. The Panel finds there is a strong need to uphold public confidence in the integrity of the profession and in the College's ability to regulate members of the profession in the public interest. The College has statutory duties to at all times serve and protect the public and to exercise its powers and discharge its responsibilities under the relevant enactments in the public interest. A central feature of a profession's ability to self regulate is to conduct proper investigations of complaints and to impose discipline where appropriate. A registrant's failure to cooperate with the College's investigation undermines the public's confidence in the College's ability to regulate its members. 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, particularly in relation to standards that exist to ensure accountability for misconduct and to protect the public.
30. The Panel finds that this factor favours the imposition of a more serious penalty.
31. The College cited several cases involving non-cooperation with a professional regulator. The College submits that the decision in *College of Physicians and Surgeons of Ontario v. Gill*, 2021 ONPSDT 51 provides useful guidance on the mitigating and aggravating factors to consider in circumstances of a registrant's failure to cooperate with a regulator. The aggravating factors included the length of time over which the failure to cooperate occurred and its persistent and pervasive nature including unanswered emails, failure to be present for in-person



appointments and failure to complete requested documents. In *Gill*, the discipline panel held the following:

[17] Ultimately, given our conclusion Dr. Gill's misconduct was deliberate and prolonged, this impaired the College's ability to govern its members, carry out its public protection responsibilities and maintain public confidence in the profession. This calls for a significant period of suspension. There was no precedent to support a 12-month suspension and we find none. Nor do we find significant mitigating factors that might support a one-month suspension. A suspension of significance is necessary to act both as a specific and general deterrent. As such it is our decision to impose a four-month suspension.

32. *College of Nurses of Ontario v. Bridge*, 2021 ONCNO 120354, involved the failure to cooperate with that college's Quality Assurance Committee. The College submits that mitigating factors present in *Bridge*, but absent in the present case, were that the registrant had cooperated with the discipline process, had accepted responsibility, expressed remorse, and there was a negotiated resolution of the matter. The panel in *Bridge* imposed a two-month suspension.
33. The College also refers to *Re Cunningham* 2017, a discipline case decided by a discipline panel of one of the BCCNM's legacy colleges. In *Cunningham*, the registrant failed to respond to any of the College's correspondence over the course of an investigation and no mitigating factors were advanced. The panel imposed a three-month suspension.
34. Having regard to all of the circumstances, the College submits that the Respondent's only mitigating factor is that he does not have a discipline history. In terms of aggravating factors, the College argues the Respondent's conduct was "persistent and pervasive" due to the significant length of time the failure to cooperate occurred. The College submits that in the absence of any other mitigating factors, and in consideration of the prolonged and intentional nature of the Respondent's conduct, a suspension of four months is warranted.
35. The Panel has considered the cases provided by the College. Although the Panel is not bound by these cases, penalties in other similar cases are helpful to establish a range of sanctions by which to assess the current case. The Panel notes that the penalties in other similar cases involved a period of suspension ranging from two to

four months from practice. The Panel considers that the *Gill* case is most similar to this case in terms of the nature of the failure to cooperate, the persistent and pervasive nature of that non-cooperation, and the absence of significant mitigating circumstances in this case.

36. The Panel finds that on the facts of this case, considering all of the factors set out above, the appropriate penalty is a four-month suspension from practice. This is necessary to achieve specific and general deterrence and to maintain confidence in the profession.

### **Costs**

37. The College submits that an award of costs should be made against the Respondent pursuant to sections 39(5) and (7) of the Act.
38. 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 section 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.

39. 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.

40. The College claims 33 units at \$120 per unit for a total of \$3,960 in legal fees. Pursuant to section 39(7) of the Act, costs awarded must not exceed, in total, 50% of the actual costs to the College for legal representation for the purposes of the hearing. Based on that, the College is seeking legal fees of \$1,980. The College is also seeking the amount of \$672.00, inclusive of taxes, as a disbursement, which represents the cost of a Court reporter for a one-day hearing. Accordingly, the total amount claimed by the College in legal costs and disbursements is \$2,652.00.
41. The College proposes that the costs be payable in full three months from the date an Order on penalty and costs is issued by the Panel. The Respondent consents to payment of the amount claimed within three months.
42. In support of its costs submission, the College relies on *Jaswal v. Newfoundland Medical Board*, 1996 Canlii 11630 (NLSC), which sets out some non-exhaustive factors which may be considered in the assessment of costs.
43. The applicable statutory framework provides the Panel with a broad discretion over the award of costs. The Panel finds that costs are warranted in this case. The College proved all the allegations in the Citation. The allegations were serious. The Respondent failed to cooperate with College and forced the College to expend more

resources than necessary to ascertain the facts related to a complaint. It was also necessary for the College to pursue the hearing considering the prolonged and serious nature of the Respondent's misconduct. The College's witness provided relevant evidence in relation to the alleged conduct. The Respondent did not admit the misconduct. The Panel finds the hearing was diligently pursued and prosecuted by the College.

44. The Panel also finds the College's units claimed for legal costs to be fair and reasonable in the circumstances. The costs claimed by the College are supported by appropriate evidence. The Panel is satisfied that the expenses were reasonably incurred for the preparation and conduct of the hearing. The Panel is satisfied that 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. The Panel further finds the College's disbursements to be reasonable. It was reasonable for the hearing to be recorded by a Court reporter.
45. The Respondent obtained representation and after doing so, consented to payment of the amount claimed on the basis set out by the College.
46. The Panel is satisfied that the final amount of costs and disbursements the College claims is reasonable and not so large as to be punitive to the Respondent. To the contrary, the costs are reasonable in all the circumstances.

**D. ORDER**

47. The Panel orders that:
  - a. The Respondent is suspended for a period of four months; and
  - b. The Respondent pay the College costs in the amount of \$2,652.00, to be paid within three months from the date of this Order.

**Notice of Right to Appeal**

48. The Respondent is advised that under section 40(1) of the Act, that 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.

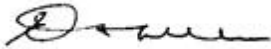
**Delivery and Public Notification**

49. The Panel reminds the College of the requirements in section 39(3)(c) of the HPA.
50. The Panel directs that pursuant to sections 39.3(1)(d) of the Act, the Registrar notify the public of the determination made herein.

Dated: April 18, 2023



Sheila Cessford, Chair



Edna McLellan, RN (T)



Dr. Catharine Schiller, RN