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

BETWEEN:

The British Columbia College of Nurses and Midwives

(the "College" or "BCCNM")

AND:

Sean Taylor

(the "Respondent")

DETERMINATION OF THE DISCIPLINE COMMITTEE

Dates and Place of Hearing:	July 18-20, 2023 October 4-5, 2023 October 20, 2023 December 7, 2023 by Videoconference
Discipline Committee Panel:	Catharine Schiller, RN, Chair Hanna Ridley, RN Joshua Tan, Public Member
Counsel for the College:	Brent Olthuis, KC Jeff Hernaez
Counsel for the Respondent:	Lee C. Turner
Independent Legal Counsel for the Panel:	Fritz C. Gaerdes

A. INTRODUCTION

1. A panel of the Discipline Committee (the "Panel") of the British Columbia College of Nurses and Midwives (the "College" or "BCCNM") has been convened to conduct a discipline hearing pursuant to section 39 of the *Health Professions Act* RSBC 1996 c.183 (the "Act" or the "HPA") in relation to the Respondent's conduct (the "Discipline Hearing" or the "Hearing").

2. The College issued a citation on September 27, 2022, (the "Citation"), naming Sean Taylor as the Respondent. The particulars of the allegations against the Respondent are set out in the Citation as follows:

> "…
> The purpose of the hearing is to inquire into your conduct as follows:
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> 1. Between approximately 31 March 2020 and 2 November 2020, you made the following statements while identifying yourself as a registered nurse:
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>   a. (about COVID-19) "...[Y]ou will get people to wear your masks and put them in your internment camps ... but there is a group of people, myself included, and you, and a bunch of friends, who will not comply. We will meet you in the streets and do this the old fashioned way."
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>   b. (about movements including Black Lives Matter) "The restraint that's being shown on the Right… I watch that shit, I wanna take a road trip and go down and play paint ball."
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>   c. (about COVID-19) "[W]here does influenza come from? It is an avian virus and a porcine virus that usually comes from China because of the interface with Chinese culture".
>
>   d. "There are so many times that I am comforting people in triage, who are terrified to be in the hospital, and I tell them there is no virus here. Don't worry about it. […] We had no cases admitted to the hospital. […] They still buy into this narrative."
>
>   e. "I don't wear a mask […] it's a load of horse shit."
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>   These remarks, made in these contexts, are contrary to BCCNM's Professional Standards and/or Practice Standards, including: the *Professional Responsibility and Accountability* Professional Standard, the *Knowledge-Based Practice* Professional Standard, and the *Ethical Practice* Professional Standard. They also constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.
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> 2. On 22 June 2020, you gave an interview to Global News (the "Segment"). The Segment was titled "*A Kelowna nurse says alleged racism in the emergency rooms having a negative impact on medical staff*". The Segment was filmed outside the Kelowna General Hospital, and you wore your scrubs with a stethoscope around your neck. In the Segment, you discussed allegations of racial discrimination against Indigenous patients and expressed the view that such news resulted in patients making allegations of racism against a nurse when they do not get their way.
>
>   This conduct is contrary to BCCNM's Professional Standards and/or Practice Standards, including: the *Professional Responsibility and*

> *Accountability* Professional Standard, the *Knowledge-Based Practice* Professional Standard, the *Client-Focused Provision of Service* Professional Standard, and the *Ethical Practice* Professional Standard. It also constitutes professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.
>
> …"

3. For the reasons that follow, the Panel finds that the College has proven on a balance of probabilities, with clear and convincing evidence, that Sean Taylor (the "Respondent" or "Mr. Taylor") committed the conduct as set out in paragraphs 1.a, 1.b, and 2 of the Citation, and that the Respondent's proven conduct described in paragraphs 1.a and 1.b of the Citation constitutes professional misconduct, and his proven conduct described in paragraph 2 of the Citation constitutes unprofessional conduct pursuant to section 39(1)(c) of the HPA.

4. The Panel further finds that the allegations set out in paragraphs 1.c, 1.d and 1.e of the Citation have not been proven on a balance of probabilities, and those allegations are dismissed pursuant to section 39(1) of the HPA.

B. LEGAL FRAMEWORK

Service of the Citation

5. The Discipline Hearing was conducted by videoconference. The Respondent attended the Discipline Hearing with legal counsel. No issues were raised with respect to service of the Citation. The Panel is satisfied that the Respondent received the Citation and that he had notice of the date and time of the Discipline Hearing as required by the HPA.

Jurisdiction over Former Registrants

6. The evidence establishes that the Respondent was a registrant at all material times set out in the Citation. Subsequently, during 2022, the Respondent let his registration with the College lapse and became a former registrant. Under the HPA the Panel retains jurisdiction over former registrants. Part 3 of the HPA deals with the College's inquiries, investigations, and discipline proceedings. Section 26 of the HPA defines "registrant" to include "former registrant" for purposes of Part 3 of the HPA. The Panel is accordingly satisfied that under the HPA it has jurisdiction over the Respondent as a former registrant.

Burden and Standard of Proof

7. The College bears the burden of proof. It must prove its case on a balance of probabilities. The law on this point is well established. To satisfy a balance of probabilities, the evidence must be sufficiently clear, convincing, and cogent: *F.H. v. McDougall*, 2008 SCC 53 ("*McDougall")*.

Action by the Panel

8. Pursuant to section 39(1) of the HPA, on completion of a discipline hearing, the Panel may dismiss the matter, or determine that the Respondent:

> 39(1) …
>
> (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
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> (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.

9. The Panel next turns to the legal principles for the relevant concepts identified in section 39(1) of the HPA that are applicable to this proceeding.

Unprofessional Conduct, Professional Misconduct and the *Doré* Framework.

10. The College submits what is squarely at issue in this case is section 39(1)(c) of the HPA. It says this is fundamentally a case about professional misconduct and the question for the Panel is whether the Respondent's statements or comments outlined in the Citation, in context, are such that they amount to professional misconduct or unprofessional conduct. Particularly, are the Respondent's comments unbecoming of a registered nurse and therefore a marked departure from the conduct expected of a regulated nurse. The College submits that because the Panel is considering speech, there is an additional question that it must address in the course of its deliberations. That is, the Panel must balance the right to free speech against the statutory objectives in the regulatory context. Accordingly, the College says this case is about whether the Respondent's comments constitute professional misconduct or unprofessional conduct when

free speech rights and values are balanced against the College's statutory objectives.

11. Section 39(1)(c) of the HPA provides that on completion of the hearing, the discipline committee may determine that the Respondent "has committed professional misconduct or unprofessional conduct."

12. "Professional misconduct" and "unprofessional conduct" are defined in section 26 of the Act as follows:

> "professional misconduct" includes sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession;
>
> "unprofessional conduct" includes professional misconduct.

13. Unprofessional conduct is broader than professional misconduct. It includes professional misconduct. Unprofessional conduct connotes the breach of a standard, rule, or expected behaviour, while professional misconduct is unprofessional conduct that has crossed a more serious threshold.

14. The College relies on *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 ("*Pearlman*"), in which the Supreme Court of Canada held that professional misconduct is a "wide and general term" which encompasses "conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well-respected brethren in the group - persons of integrity and good reputation amongst the membership."

15. The College points out that this standard has been adopted by the College's Discipline Committee, including in the decision of *BCCNM v. Perry* (February 4, 2021) [*Perry*"]. In *Perry,* the discipline panel also referenced *Re McLellan* CRNBC 2018*,* in which a panel of the discipline committee of one of the College's legacy colleges held that:

> 55. An important feature of professional misconduct, or unprofessional conduct, is that a professional standard of practice may arise from different sources: standards may arise from a profession's "culture", such as a common understanding within a profession as to the expected behaviour, or from formal written guidelines published by a regulatory body. One may

> reflect or influence the other.
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> 56. The discipline committee may receive evidence on standards from an expert witness, but it may also rely on a written code of conduct or deduce standards from the fundamental values of the profession. Sometimes finding a standard is easy and straightforward, such as where a rule in written code is directly on point. Sometimes finding a standard involves difficulty, such as where a code expresses a standard as a general principle, and the committee must apply a more fact specific standard. A committee may find a more fact-specific standard by deducing the standard from the fundamental values of the profession, or from the values and principles expressed in a written code, and by interpreting general principles using its own expertise. A committee may also consider the rationales accepted and expressed by other panels of nurses or health professionals, which have applied standards in more or less similar circumstances. Finding a standard may be most difficult where different bodies of responsible professional opinion may differ about the propriety of conduct in a specific situation.

16. The Panel notes that professional misconduct has also been described as a "marked departure" from the expected standards of the competent members of a profession. In *Law Society v. Martin*, 2005 LSBC 16 ("*Martin*") a discipline panel of the law society held that:

> [140] The real question is whether on the facts before us, it can be found that the Respondent, in reviewing and approving the Reyat children's accounts, acted in a manner that was a marked departure from the standard expected of a competent solicitor acting in the course of his profession, and therefore amounted to professional misconduct.

17. Further, as noted, in circumstances such as this case, where the Respondent submits that disciplining him for the off-duty statements he made will violate his freedom of expression protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada's decisions in *Doré v. Barreau du Québec* 2012 SCC 12 (*"Doré")* and *Groia v. Law Society of Upper Canada*, 2018 SCC 27 ("*Groia"*) requires the Panel, in determining whether the Respondent's statements are subject to discipline, to proportionately balance the College's statutory objectives with the rights and values contained in the *Canadian Charter of Rights and Freedoms*. In *Doré* the Supreme Court of Canada held as follows:

> [6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*,

> however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
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> [7] As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the Charter context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant Charter guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with Charter protection, it is a reasonable one.
>
> …
>
> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. ….
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

18. Moreover, in *Salway v. Association of Professional Engineers and Geoscientists of British Columbia*, 2010 BCCA 94 ("*Salway*") the British Columbia Court of Appeal held it is the disciplinary body of the professional organization which sets the professional standards for that organization and there is significant deference to disciplinary tribunals' interpretations of their professional standards, whether those standards are written or unwritten:

> [30] The jurisprudence, therefore, would seem to dictate that courts adopt a **significant degree of deference to disciplinary decisions of professional tribunals concerning the interpretation of their**

> **professional standards, regardless of whether those standards are written or unwritten.** This degree of deference accords with the reasonableness standard of review.
>
> …
>
> [32] The reasonableness standard of review acknowledges that there is "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Reasonableness requires courts to give deference to a professional body's interpretation of its own professional standards so long as it is justified, transparent and intelligible. The pre-Dunsmuir decisions relied on by the respondent, including Reddoch, no longer set the standard for professional misconduct as conduct that is dishonourable, disgraceful, blatant or cavalier. **Rather, it is the disciplinary body of the professional organization that sets the professional standards for that organization**. So long as its decision is within the range of reasonable outcomes—i.e., it is justified, transparent and intelligible—it is not for courts to substitute their view of whether a member's conduct amounts to professional misconduct.
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> (Emphasis added)

19. The Respondent argues that the facts, and particularly the nature of the misconduct alleged in the *Pearlman*, *Perry, Martin,* and *Peterson* cases on which the College relies, are distinguishable from the facts of this case and therefore those cases are inapplicable to this case. The Respondent further submits that the *Salway* decision is about the standard of review on a judicial review application, so it is also not applicable to this case.

20. The Panel disagrees. While the Panel accepts the Respondent's submission that the facts of those cases are not the same as the facts of this case, the Panel associates itself with and adopts the legal principles in *Pearlman, Re McLellan, Perry, Salway, Martin,* and *Peterson v. College of Psychologists of Ontario* 2023 ONSC 4685 ("*Peterson*"), referenced above and below in these reasons. Many of those legal principles have already been accepted by other panels of the College's Discipline Committee to be applicable to discipline proceedings conducted by the College under the HPA. The Panel finds that those legal principles, and section 26 of the HPA, are equally applicable to this case and that they will assist the Panel in determining whether the Respondent's alleged conduct constitutes unprofessional conduct or professional misconduct under section 39(1)(c) of the HPA.

21. The Panel also finds the following statements of the British Columbia Court of

Appeal's decision in *Law Society of British Columbia v. Harding,* 2022 BCCA 229 ("*Harding*") persuasive and applicable to the facts of this matter:

> [140] … the test for professional misconduct in relation to statements made by a lawyer is no longer simply whether the facts disclose a marked departure from the conduct the Law Society expects of its members. Rather, the test is broader:
>
> > [80] In light of *Doré*, in discipline proceedings in which a *Charter* value is raised, the [*Martin*] test for professional misconduct must now be broadened to read:
> >
> > > The test is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members, *having properly balanced the relevant Charter value with the Law Society's public mandate and objectives*; if so, it is professional misconduct. [Emphasis in original]

22. Lastly, and importantly, in assessing whether the Respondent's conduct constitutes unprofessional conduct or professional misconduct, the Panel may draw on its own judgment, experience, and expertise. The Panel is guided by the standards of the profession and what is expected of a professional person in the circumstances or context of a case. While written professional nursing standards may be considered, those standards are not solely determinative. Also, not all standards of the profession need to be in writing. As the British Columbia Court of Appeal recognized in *Salway*, above, ultimately, it is for the disciplinary body of the professional regulator to decide what the appropriate standards for members of the profession are and whether there has been a departure from those standards that constitute either unprofessional conduct or professional misconduct in the circumstances of the case. The Panel has a wide discretion to decide whether the Respondent's behaviour amounts to professional misconduct or unprofessional conduct: *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 ("*Strom*"), at paragraphs 78 to 80.

C. ISSUES

23. The College submits this proceeding is about words. Words the Respondent chose to speak, while identifying as a nurse, to patients and to the public. It says

the Respondent's statements at issue are generally of three types:

a. statements advocating violence (against persons favouring COVID-19 restrictions, or against groups perceived to be on the political left wing) [Citation - Allegations 1.a and 1.b];

b. racially offensive statements about Chinese and Indigenous cultures [Citation - Allegations 1.c and 2]; and

c. inappropriate and inaccurate statements to patients [Citation - Allegations 1.d and 1.e].

24. During closing oral submissions, the College submitted that the Respondent made:

a. statements advocating for violence against persons favouring COVID-19 restrictions or against groups, particularly Antifa and Black Lives Matter, perceived to be on the political left wing (Citation - Allegations 1.a and 1.b);

b. racially offensive statements about Chinese culture, and an insensitive denial of the experience of Indigenous persons (Citation - Allegations 1.c and 2); and/or

c. inappropriate and inaccurate statements to patients about the presence of COVID-19 in hospitals, and the perceived or alleged exaggeration of the pandemic by the media (Citation - Allegations 1.d and 1.e).

25. As noted, the College says what is squarely at issue in this case is section 39(1)(c) of the HPA. It says this is a case about professional misconduct and the question for the Panel is whether the Respondent's statements or comments outlined in the Citation, in context, are such that they amount to professional misconduct or unprofessional conduct. Particularly, are the Respondent's comments unbecoming of a registered nurse and therefore a marked departure from the conduct expected of a regulated nurse. The College submits that because the Panel is considering speech, there is an additional question that it must address in the course of its deliberations. That is, the Panel must balance the right to free speech against the statutory objectives in the regulatory context. Accordingly, the College says this case is about whether the Respondent's comments constitute professional misconduct or unprofessional conduct when

free speech rights and values are balanced against the College's statutory objectives.

26. The College says the Respondent's statements, in their full context, are dishonourable and unbecoming of a registered nurse because they send a message to the public that members of the nursing profession are prepared to engage in violence – or at least to advocate the exercise of violence – against persons of opposing viewpoints. They also have a pernicious effect on the ethnic groups targeted by the statements – specifically, persons of Chinese ancestry (or who might be mistaken to be of Chinese ancestry), and Indigenous persons – by sending the message that persons operating within the public health system harbour harmful stereotypes about them or are willing to casually dismiss their complaints on the basis that those complaints are improperly motivated.

27. The College submits that nurses, like other regulated professionals, hold positions of trust and influence in the community. The College says that the Respondent's statements, while made outside his workplace, conflict with fundamental values of the health care system: a key one of which is that the health care system should be – and should also be perceived to be – consistent and non-discriminatory.

28. The College argues that there is a sufficient nexus between the Respondent's off-duty statements and the nursing profession to engage the College's regulator's duty to intervene for the purpose of protecting public confidence in both the nursing profession and the public health care system.

29. The College relies on the Court's findings in *Kempling v. The British Columbia College of Teachers*, 2004 BCSC 133 ("*Kempling BCSC")* at paragraphs 38-39, and 50:

> [38] I do not accept the appellant's submissions that speech cannot constitute discrimination as a matter of law, and that conduct must be directed against a particular individual in order to constitute discrimination….
>
> [39] … The question before the Panel was whether the making and

> publication of those statements in the circumstances and context in which it was done fell below acceptable standards of professional conduct. Because non-discrimination is a core value of the educational system, a finding that those writings were of a discriminatory and derogatory nature can properly form part of the basis of a determination of conduct unbecoming.
>
> [50] The harm, whether per se or inferred, to the school system, the teaching profession, and student and public confidence in them resulting from the appellant's writings published off-duty warrant a finding that his conduct was unbecoming a BCCT member

30. As noted, the College relies on *Pearlman*, in which the Supreme Court of Canada held that professional misconduct is a "wide and general term" which encompasses "conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well-respected brethren in the group - persons of integrity and good reputation amongst the membership." The College submits the Respondent's conduct meets the description in *Pearlman* and constitutes unprofessional conduct or professional misconduct as defined in the HPA. The College argues that the Respondent made discriminatory and derogatory statements, while identifying himself as a nurse. In doing so, he undermined the public's confidence in the nursing profession and the health care system. The College says that, as a member of a regulated profession, the Respondent is held to a higher standard. It also relies on *Kempling BCSC* where the Court held, at paragraph 93:

> … As the statutory body empowered to regulate the teaching profession in the public interest, the BCCT has a duty to ensure that the fulfilment of public school teaching functions is undertaken in a manner that does not undermine public trust and confidence. The standard of behaviour required of a teacher is greater than the minimum standard otherwise tolerated of individual members of the lay public, given the responsibilities which a teacher must fulfil and the expectations which the community holds for the educational system (Ross, supra, at ¶84).

31. The College submits the Court's above comments in *Kempling,* which addressed the situation of a teacher in the education system, can be applied to the present case involving a nurse and the health care system. It says that those statements of the Respondent which form the basis for this Discipline Hearing fail to fulfil his responsibilities as a nurse and fail to meet the expectations held by the community

for the health care system, and that the result has been harm to the nursing profession and to the health care system.

32. The College also relies on *Pitter v. College of Nurses of Ontario* and *Alviano v. College of Nurses of Ontario* 2022 ONSC 5513 [*Pitter/Alviano*], where the Court held that nurses who identified themselves as nurses when they made off-duty statements that were contrary to public health guidelines and contained what could be harmful misinformation "… not only put the public at risk of being guided by false information, but also risked impacting the reputation of the profession".

33. The College says all nursing registrants must, when identifying themselves as a nurse, engage in public discourse in a respectful and professional manner that is not harmful, derogatory or discriminatory towards any member of the public, particularly marginalized groups, who may be users of the healthcare system and thus interact with nurses. It argues this responsibility flows from nurses holding a position of trust and influence in the community and is part of them collectively upholding the College's public interest mandate by ensuring that their members do not engage in conduct that is inconsistent with the core values of the nursing profession.

34. As noted, the College says the Respondent's off-duty statements amount to professional misconduct or unprofessional conduct as defined in the *HPA* and *Pearlman* because they may reasonably be regarded as disgraceful, dishonourable, or unbecoming of a member of the nursing or midwifery professions.

35. The Respondent disputes these allegations. He argues that the evidence shows that he is a person who has advocated against violence, for his patients and his colleagues, and who has advocated for better healthcare for those that he served. He also was a supportive colleague to those medical health professionals with whom he worked.

36. The Respondent argues that the College has failed to meet the burden of proof on it to show that it had jurisdiction to engage its regulatory power to issue a

citation against him for his off-duty speech and, even if it did have such jurisdiction, the College has failed to meet the burden of proof that his statements, when put in the proper context and when accurately quoted, did not violate any professional nursing standard, and therefore do not warrant any discipline.

37. The Respondent submits that the College investigator tasked with investigating the complaint (the "College Investigator") did not investigate beyond simply reading the complaint, inaccurately summarizing the information contained within the complaint, and then providing that inaccurate executive summary to the Inquiry Committee. He says the College's investigation was truly a non-investigation because the College Investigation report, and the summary provided by the College's Investigator to the Inquiry Committee, was both misleading and inaccurate. Important aspects of the Respondent's statements and their context were omitted or misrepresented by the College Investigator, thereby drastically changing their meaning.

38. He argues that if the College is entitled to engage its regulatory power and intervene and discipline a registrant in these circumstances, this will set a dangerous precedent, and will be a complete disregard of the fundamental rights held by nurses as private citizens under the *Charter of Rights and Freedoms* to hold and express their own personal and political views, even if those views do not align with those in leadership at the College or government.

39. The Respondent submits the College's behaviour in its investigation, the issuance of the Citation and prosecution of it, and the characterization of the Respondent's statements as pernicious, is conduct unbecoming and dishonourable to the profession, and undermines public confidence in the College, the nursing profession, and the health care system more broadly,

40. The Respondent says if the Panel condones the College's conduct, it will embolden the College to prosecute and censor any registrant who holds an opposing viewpoint, even if the registrant expresses that viewpoint outside of work. It will silence those with differing views, which is not in the public interest and which does not advance the provision of effective health care in this province.

41. The Respondent submits that the statements referenced in the Citation do not negatively impact the public health system or negatively impact his ability to carry out his professional obligations in such a way as to attract discipline by the nursing regulatory body. The Respondent says the College has failed to make its case against him and the Citation should therefore be dismissed in its entirety.

42. Both the College Investigator and the Respondent provided testimony during the Discipline Hearing. The College also introduced several videos in support of the allegations in the Citation, and the Respondent introduced video evidence in his defense against these allegations. Both parties introduced documentary evidence. Both parties also tendered expert evidence. The College tendered Dr. Colleen Varcoe's evidence as expert evidence and the Respondent tendered Dr. Steven Pelech's evidence as expert evidence. Both experts testified during the Discipline Hearing. The witnesses' testimony and the video evidence introduced into evidence during the Discipline Hearing were transcribed. The College and the Respondent each object to the other's expert evidence being admitted into evidence. The Respondent also objects to some of the College's video evidence being admitted into evidence.

43. Further, the Respondent submits the Panel ordered the College to provide detailed disclosure on April 24, 2023 (the "Disclosure Decision" or the "Disclosure Order"). The Respondent submits paragraph 122(c) of the Disclosure Order included the College having to provide written particulars of how each paragraph of the Citation and the conduct referred to therein, violates any statute, bylaw or practice standard (page 40 of the order, paragraph 122(c). The Respondent says the College's only response to this provision of the Disclosure Order was to identify 19 professional nursing standards that the College claims the Respondent violated by the statements attributed to him in paragraphs 1 a. to 1 e. of the Citation, and 22 professional nursing standards that the College claims the Respondent violated by the statements attributed to him in paragraph 2 of the Citation.

44. He says the College has not, contrary to the requirements of the Disclosure Order,

identified how the statements referred to in the Citation violate these practice standards.

45. The Respondent argues that as a result of the College's failure to provide the particulars ordered in paragraph 122(c) of the Disclosure Order the Respondent has had to look for clues for these particulars in the opening statement of the College, and in the questions asked by counsel for College of the witnesses who testified at the Discipline Hearing. The Respondent has been left to guess how the statements concerning masks referenced in paragraphs 1 a. and 1 e. of the Citation violated the 19 professional nursing standards. This resulted in the Respondent having to obtain expert opinion evidence from Dr. Steven Pelech concerning the issues of safety and efficacy of masks in preventing infection and transmission of SARS CoV-2 and other similar respiratory viruses.

46. The Respondent submits that the College has failed to provide full and proper disclosure of the investigation materials provided by the College Investigator to the Inquiry Committee, contrary to the rules of procedural fairness and natural justice, and contrary to a specific order of the Panel in the Disclosure Order.

47. In the circumstances, the Panel finds the issues for consideration are:

    a. The College's investigation of the complaint and the College's compliance with Panel's Disclosure Order.
    b. The admissibility of the expert evidence tendered by the parties.
    c. The admissibility of the video evidence tendered by the parties.
    d. Whether any of the Respondent's off-duty statements advocated violence, were discriminatory or inappropriate and inaccurate, and if so, whether he identified himself as a nurse while making those statements?
    e. Whether there is a sufficient nexus between the Respondent's off-duty statements and the profession of nursing?
    f. If so, whether a finding that the Respondent's off-duty statements constitute professional misconduct and/or unprofessional conduct would unjustifiably infringe the Respondent's rights to freedom of expression under section 2(b) of the *Charter of Rights and Freedoms?* Included in this last issue is

the Panel's obligation pursuant to *Doré* to consider *Charter* rights and values and exercise its discretion in a manner that proportionately balances the Respondent's section 2(b) *Charter* rights with the public purpose and objectives of the HPA.

a. The College's Investigation of the Complaint against the Respondent and Compliance with the Panel's Disclosure Order.

48. The College Investigator provided testimony in the Discipline Hearing. The Respondent says the College submitted in its opening statement that the College Investigator's evidence would primarily be to introduce videos and statistics to illustrate "what the actual facts on the ground were at the time the Respondent was making these comments.".

49. The Respondent says that during her testimony, the College Investigator agreed that when providing sworn testimony of any kind, whether through oral testimony or through an affidavit, it is important to provide truthful and accurate information.

50. The College Investigator testified that she began working for the College in February 2020 as legal counsel. She was assigned as the investigator to investigate the complaint against the Respondent sometime after the Inquiry Committee authorized the investigation on January 14, 2021. She had only been responsible for approximately 3 to 5 investigations into alleged professional misconduct of registrants before undertaking the investigation pertaining to the Respondent. She could not recall the specific date when she began her investigation.

51. The College Investigator stated in the opening paragraph of her affidavit that she made her affidavit to describe and present the fruits of her investigation.

52. The College Investigator admitted that although her investigation report says on its face that it was prepared on April 21, 2021, that this was not the date that it was prepared, but rather it was the date when she started drafting her report. She was unable to provide the precise date when she completed the report.

53. The College Investigator confirmed that she deposed in her sworn affidavit that the Inquiry Committee relied on her investigation report in directing the Registrar on March 17, 2022 to issue a citation against the Respondent and that the Inquiry Committee was relying on her to conduct a fair, thorough and unbiased investigation. She agreed that her role was not to seek to have a citation issued against the Respondent but rather to investigate the allegations made and provide her report to the Inquiry Committee.

54. The Citation was issued by the Registrar on September 27, 2022.

55. The Respondent submits that this case is about a lack of thoroughness on the part of the College in conducting their investigation, which affects the presentation of their evidence. He says it is about a lack of accuracy in presenting the evidence, both in its investigation and of its presentation of the evidence, in opening and in closing submissions. It is about a misrepresentation of what the Respondent said and the context in which he said it in. He submits the College on several occasion left out key portions of the statements he is being cited for or taking his statements out of context and mischaracterizing what they were.

56. The Respondent submits it is accordingly essential that the Panel carefully reviews the College's characterization of the evidence. He says the change of a single word or the juxtaposition of words in a way that they were not stated can entirely change the meaning of a statement. It can be that subtle, one word, or positioning parts of statements against each other when there's intervening comments in between that provide proper context. Accordingly, a careful and critical review of the evidence is required. In his written submissions, the Respondent provides several examples where he says the College has done this, which he says results in leaving the audience with a false view of what the Respondent was saying.

57. The Respondent submits the College Investigator confirmed in evidence that what she did during her investigation was to review the complaint, the video links that were contained in the complaint, gathered the videos and prepared an investigation report which she provided to the College’s Inquiry Committee. The

Respondent says this does not constitute an investigation, but rather a review of a complaint that resulted in an inaccurate executive summary of the complaint that was provided to the Inquiry Committee.

58. The Respondent says the College's Investigator's evidence also exposed numerous concerns or shortcomings with the College's investigation of the complaint. In this regard, the Respondent submits the College Investigator testified that:

    (a) She did not think it was an important component of her investigation to understand the background of the complainant or his relationship to the respondent.

    (b) She did not investigate the background relationship between the complainant and the Respondent when preparing her investigation report.

    (c) She knew from the complaint that the complainant said that he had been made aware of a video involving the Respondent that was shared with the complainant and that the complainant and the Respondent belonged to an organization that the complainant felt the Respondent's statements would contravene the policies of.

    (d) She never spoke to the complainant about his complaint.

    (e) She did not inquire as to how the complainant became aware of the video.

    (f) She was not aware of how the Respondent and the complainant knew each other or the depth of their relationship and made no inquiries about this.

    (g) She did not make any inquiries of the complainant.

    (h) She did not ask the complainant what organization that he and the Respondent were both a part of.

(i) The Respondent made her aware of the fact that the complainant was the platoon commander and direct supervisor of the Respondent in the Canadian Armed Forces but that this was not part of her investigation, and she did not advise the Inquiry Committee of her knowledge of this fact.

(j) She was aware of the fact that the complainant stated in his complaint that although he was an employee of Interior Health, he was providing this complaint as an RN and not as an IH representative, but yet deposed in her sworn affidavit that although the complainant was a registered nurse, he submitted his complaint as a member of the public. The College Investigator said she did not know why she provided this inaccurate information in her affidavit to the Inquiry Committee other than to suggest that perhaps it was a typo.

(k) She was not aware that the complainant was a director with Interior Health and accordingly did not advise the Inquiry Committee of that fact.

(l) She did not interview any witnesses.

(m) There was no other report that she gave to the Inquiry Committee other than her investigation report dated April 21, 2021.

59. The Respondent raises the following additional concerns:

(a) The College Investigator deposed in her affidavit that she was attaching the investigation report and its 11 appendices, and she also deposed that an administrative assistant at the College wrote a letter to the Respondent on her behalf on April 23, 2021 enclosing the investigation report, appendices and video clips. However, the April 23, 2021 letter was not signed by her assistant but instead the final page of the three-page letter contained the College Investigator's name and signature as the author of the letter.

(b) In the April 23, 2021 letter she asked the Respondent to tell her whether or not the Global News footage was incorrectly attributed to him. And provide a response to the allegation that his comments regarding Covid-19, specifically comments that are contrary to recommended BC provincial health officer orders, put the public at risk, without advising the Respondent which provincial health orders he was being alleged to have violated, as the complainant never identified this information either.

(c) Despite the complainant advising the College Investigator in his complaint that it was on November 26, 2020 that he first became aware of the Respondent's comments, and that it was not until December 15, 2020 that he issued his complaint, the College Investigator did not look into whether or not the requirements of the provincial public health orders changed between when the Respondent made his comments between March 31, 2020 and November 2, 2020 and when the complainant made his complaint on December 15, 2020.

(d) The College Investigator's affidavit states that she provided the Inquiry Committee with "a faithful summary" of the Respondent's response to the April 23, 2021 letter but she admitted in cross examination it was not a summary but rather an excerpt of 2 of the 6 paragraphs that the Respondent wrote in his two-page response. The College Investigator claimed that she had sent the Inquiry Committee the Respondent's full written response but could not explain why that response was absent from the disclosure provided by the College, nor why it was not attached as an appendix to her investigation report that was attached as an exhibit to her affidavit that was said to comprise her investigation report with all appendices.

(e) The College Investigator could not explain why she decided to summarize the Respondent's 2-page letter in the content of her affidavit, by quoting 2 of 6 paragraphs, while allegedly also providing the full letter to the Inquiry Committee.

(f) The College Investigator, despite acknowledging that in her sworn affidavit she claims that her investigation report with the appendices were attached to her report and her affidavit, and that the Respondent's full response was not attached to the affidavit, she was unwilling to admit that what she deposed in her affidavit was inaccurate, but instead was only prepared to admit that it was "incomplete".

(g) Despite advising the Respondent in her letter of April 21, 2021 that she was happy to answer any questions he may have about her letter, the College's investigative process or other college related matters, the College Investigator never responded to the Respondent's invitation in his written response to do so. She gave evidence in redirect, that she did not consider it was within her role as the investigator to respond to the Respondent other than to "to retell him subsequently to answer the questions specifically asked by the College".

(h) The College Investigator does not agree that it is important for the panel to have the context about what the Respondent was saying about the statements that he has been cited for when deciding whether the statements constitute a violation of professional nursing standards warranting discipline.

(i) The College Investigator says she provided any context that she deemed relevant to the Inquiry Committee and agrees that the Inquiry Committee would then rely on what she deemed to be relevant for their assessment and analysis.

60. The Respondent says the College Investigator's "faithful summary" of the Respondent's written response to her letter of April 21, 2021, is anything but. He says it is only a partial quote of two paragraphs of six, that leaves out critical information pertaining to the Respondent's response which completely alters the character and content of his response to the complaint.

61. The Respondent also points out that:

    (a) The College Investigator testified that the Inquiry Committee does not send any form of communication or report to the Registrar to help them determine what the citation should say, but rather it is legal counsel, who she could not identify, who determines the wording of the citation.

    (b) She also testified that the only communication that the Registrar receives from the Inquiry Committee is a simple statement to say: “We direct you to issue a citation”. No other information is provided.

    (c) The College Investigator testified that the Inquiry Committee does not instruct legal counsel to draft the wording of the citation or the Registrar to draft the wording of the citation, but rather legal counsel drafts the citation without specific direction from the Inquiry Committee.

62. The Respondent submits that the College has not disclosed any information providing communications from the Inquiry Committee to legal counsel, or from the Inquiry Committee to the Registrar, or from legal counsel to the Registrar, with respect to the direction to issue the Citation, or what the contents of the Citation should contain. The Respondent says this lack of disclosure is in breach of paragraph 122 of the Disclosure Order.

63. The Respondent argues that counsel for the College reluctantly agreed that the College was not in perfect compliance with the Disclosure Order.

64. The College says this case is not about the identity of the person who made the complaint to the College in the first instance. It is not about the motivation of that person making the complaint. It is not about the College’s investigation that was conducted into the various videos and comments. It is not about the process of issuing the Citation. It is not about the timing of the College's disclosure. It is not about the efficacy of masking. And it is not about the positions that public health

officials took over time regarding responses to the COVID-19 pandemic. The College says these are all non-issues.

65. The College submits that any concerns that call into question the investigation and the process by which the Inquiry Committee issued the Citation are irrelevant to these proceedings. The College submits that if the Respondent took issue with the investigation or the Inquiry Committee's decision, the proper avenue to challenge those decisions is through the Health Professions Review Board or to seek judicial review of that decision from the Court (see section 33 of the HPA, and Part 4.2, and section 50.6 of the HPA).

66. The Respondent disputes the College's position that these are non-issues. He says the case law does not support the College's position in his regard but instead make it clear that these are entirely relevant and important considerations for the Panel in determining whether the evidence supports the College's assertion that the Respondent's conduct amounts to professional misconduct.

67. With respect to the notion that the Panel should not review how the College conducted their investigation or issued the Citation or how they have presented the evidence, the Respondent points the Panel to section 16(1)(a) of the Health Professions Act, "to serve and protect the public". He says the College, however, did not reference the next subsection, which also is a duty of the College and that is, "to exercise its powers and discharge its responsibilities under all enactments in the public interest." The Respondent says this is the section that makes all these non-issues important issues, something that the College is statutorily obligated to fulfill.

68. In this regard, the Respondent referred the Panel to Strom in which the Saskatchewan Court of Appeal referenced the textbook, the Regulation of Professions in Canada and held that: "…three groups have an interest in fair and effective professional self-governance…that is, the public, the profession, and the members of the profession who are subject to regulation and potential discipline".

69. The Respondent refers to the Court holding that "…[T]he correct view is that the

primary purpose of legislation regulating professions is…" to protect the public. He says it is however, critical to appreciate that the public interest is also served by the protection and promotion of properly functioning, self-governing professions. The Respondent says this speaks to a conclusion that, when an investigation is done, there should be interviews conducted. The information that is alleged should be backchecked, and in this case the College Investigator admitted she did not do that. The Respondent says that, when a complainant provides a response to an investigator and the investigator specifically invites the Respondent to engage her in conversation about any questions he had about the investigation, the process requires her to respond. The Investigator did not do so in this case. The Respondent says he provided a two-page letter containing six paragraphs, explaining himself and requesting her help to understand, with this context, how he could be guilty of this professional misconduct. In that letter, the Respondent had also advised that, if he had been in the wrong, he would publicly apologize. The Respondent submits the College Investigator specifically told him in her letter of April 23, 2021, which she admitted on cross-examination, that she had invited him to engage with her and when he did, she did not respond to him other than to restate that he needed to answer her original questions.

70. The Respondent says this was the only opportunity given to him to tell either the College Investigator or the Inquiry Committee the context of the situation. When the College disclosed the information that they were ordered to provide by the Panel, his letter to the Investigator was missing from that package. His letter was not attached to the College Investigator's affidavit, which she admitted on cross-examination, even though her sworn affidavit says, "I am attaching all of the appendices to my -- my investigation report with all of the appendices to my affidavit." The Respondent submits those appendices were all listed and numbered, and they did not include his letter. He says the College Investigator claims she did provide his letter to the College but could not explain why it was not attached to her affidavit and why it was not in the disclosure package. He says it is important that the investigation be conducted properly and thoroughly, including that witnesses be interviewed and information be checked. The Respondent also stated that, when only highlights are provided to the decision

maker, and that important information is not included in those highlights, statements must not be taken out of context or misquoted.

71. The Respondent says the College Investigator also advised the Inquiry Committee that the complaint had come from a member of the public, when in fact the complainant had stated in his complaint that he was making the complaint as a registered nurse. Further, when the College Investigator learned that the complainant knew the Respondent through him being the Respondent's commander in the military, she did not feel it was necessary to inquire further into that relationship. The Respondent submits the Court in Strom held at paragraph 80 that: "The grant of authority to discipline for professional misconduct must be interpreted in light of this overriding purpose", i.e. protection of the public. He submits that this also requires the self-governing body to be functioning properly so that the investigation can be properly carried out. The investigation must be thorough, it must be accurate, and it must be honest in its presentation.

72. The Respondent further argues that a central question is whether the Discipline Committee, and the College investigation and the Inquiry Committee, gave sufficient weight to freedom of expression and autonomy, which is of particular importance to members of a profession that is regulated. He submits the Court's statement in Strom that: "There are also issues as to whether any or sufficient weight was given to the public interest connected to Ms. Strom's freedom of expression", and the Respondent argues that the College's conduct in carrying out its duty and objects under section 16(1)(b) of the HPA is akin to what the Court is referring to here. That is, whether the College has given proper weight to a registrant's Charter rights, whether they have given proper weight to the public interest in allowing registrants to speak their mind about political issues, even when it comes to speaking about nursing or issues in the healthcare field.

73. The Respondent says the Court in *Strom* made it clear that the ability of people to question, and even harshly criticize, their health authority or the healthcare system should be encouraged because it advances debate that can result in positive change. Further, regulated healthcare professionals should not be fearful of being

censored and disciplined if they have harsh criticisms of their health profession.

74. The Respondent submits that he actually did not even criticize the nursing profession or his nursing colleagues. He says the only two statements in the Citation that pertain in any shape or form to the profession were where he was being critical of the media for exaggerating or misrepresenting the true state of affairs related to Covid. He says he is entitled, as a citizen, to criticize the media. Accordingly, the Respondent says these are critical issues, not non-issues, which inform the Panel's decision as to whether the College has met its burden of proof to show that his off-duty statements constitute professional misconduct.

75. The Respondent submits he also made it clear to the College Investigator when she first wrote to him in April of 2021 that he felt the complaint that had been lodged against him was politically motivated bullying. His letter to the College Investigator in which he explains why he believes that was the case was tendered into evidence during the Hearing. The Respondent says he also explained in his evidence that the complainant had been his platoon commander in the Canadian Armed Forces and that was how they knew each other. They did not have a relationship in the healthcare field; instead, he only knew the complainant as his military commander. He also indicated that they each held political views on the opposite ends of the spectrum. The Respondent says he made it clear to the College Investigator that he felt the complainant “had it out for him” and that the complainant would do everything he could to try and get him fired from his job with Interior Health. The Respondent indicated that the complainant had succeeded in this mission since the Respondent had been suspended and ultimately fired in October 2021 for statements the Respondent made while campaigning as a federal MP in the federal election. The Respondent also lost his license to practice as a Registered Nurse at the end of March 2022.

76. The Respondent submits that the investigation conducted by the College Investigator was lacking in many respects. He says her investigation is more accurately characterized as a non-investigation. He argues that the entirety of the College Investigator’s investigation consisted of reviewing the information

package that had been assembled and provided to her by the complainant. The Investigator admitted in her evidence that she did not interview the complainant; she did not speak to the complainant at all about his complaint despite the Respondent's correspondence bringing other facts to her attention. During cross-examination, the Investigator stated that she did not think it was part of her role to undertake those steps.

77. The Respondent says the Panel has already declared that there is a higher level of procedural fairness required for a hearing of this nature, and that the public interest requires these hearings to be conducted fairly and expeditiously. The Respondent submits that the College Investigator did not investigate what the complainant was claiming, nor did she enquire into his motivation for lodging the complaint, nor did she examine whether there was any truth to the Respondent's statements about that motivation.

78. During oral submissions, the Respondent re-iterated that there had been a lack of disclosure by the College during this proceeding. As noted, he says paragraph 122(c) of the Disclosure Order ordered the College to provide written particulars of how each paragraph of the Citation and the conduct referred to therein violates any practice standards; however, the College's response to the order was simply to provide a list of 19 professional nursing standards that the College claimed had been violated by the statements in paragraphs items 1.a through to 1.e , and a list of 22 professional nursing standards that the College claimed had been violated by the Respondent's comments referenced in paragraph 2 of the Citation. The Respondent submits the College did not state how each professional nursing standard had been violated by the specific statements for which the Respondent was cited. The Respondent submits that this lack of transparency left him in a position where he had to wait and see what the College would say in their opening statement, how they would ask questions of the witnesses, and listen to their closing submissions, to learn the basis for the College's allegations that he had breached each of these 19 and 22 professional nursing standards.

79. The Respondent submits that the College's written submissions did not actually

deal with the professional nursing standards cited, and neither did the College's oral closing submissions. Instead, more vague and general comments were made by the College that the Respondent's statements constituted unprofessional conduct or professional misconduct, conduct unbecoming, dishonourable conduct, and disgraceful conduct. However, no specific reference was made to tie the Respondent's statements back to the professional nursing standards that the College alleges had been violated by the Respondent.

80. Further, the Respondent says that paragraph 122(a)(i) of the Disclosure Order required the College to produce copies of all emails, meeting minutes, correspondence, and notes, of any and all individuals at Interior Health, the College, and the Ministry of Health, concerning the Respondent and his employment with the Interior Health Authority and standing with the College, and the issues raised in the Citation. The College Investigator testified that she was given the assignment of investigating this complaint. However, the Respondent states that no information was disclosed about the nature of that assignment or the instructions she received. He says there was no documentation provided regarding communications between the Inquiry Committee and the Registrar, nor the direction from the unidentified lawyer who the College Investigator had said was charged with the duty of deciding what the Citation would contain. The Respondent says paragraph 122(a)(ii) of the Disclosure Order required the College to disclose to the Respondent, among other things, copies of all emails, letters, faxes, and correspondence between the complainant and the College. The Respondent submits the College Investigator testified that she wrote to the complainant, but that letter was not provided to him. The Respondent submits that paragraph 122(b) of the Disclosure Order required the College to disclose any documents containing the Inquiry Committee's provisional assessments and findings but no documentation in this regard was provided. The Respondent says the Panel's order was clear on what was required to be disclosed, and it is clear what was missing from the disclosure he received.

81. The Respondent further submits the College spent a great deal of time, in both the evidence they presented and in their submissions, talking about extraneous

information in comments made by the Respondent that did not deal with the items listed in the Citation. The Respondent submits he is required to respond to the statements in the Citation which the College claims to be violations of the professional nursing standards, and not to defend himself against other statements. The Respondent says the College's idea of providing context seems to involve the raising of information that could be used to disparage the Respondent's character; however, when it comes to presenting the information directly attributable to the statements in question, information is left out, juxtapositioned out of order, and mischaracterized.

82. The Respondent submits that paragraph 26 of the College's written submissions is an example of this extraneous information that does not pertain to the content of the Citation.

83. The Respondent submits that paragraph 32 of the College's written submission is an example of mischaracterization of his statements. In that paragraph, the College alleges that the Respondent's comments about internment camps suggest that he was expressing or advocating resistance to people who self-isolated due to having acquired Covid infection. The Respondent submits that his evidence was actually very clear that he was against what he saw happening in Saskatchewan, where the Saskatchewan government had changed a women's penitentiary into a COVID internment camp. He says he in no way ever suggested that people who were infected with COVID should not self-isolate. Rather, he was expressing his disagreement with the Saskatchewan government's decision to turn a penitentiary into a COVID isolation camp.

84. The Respondent says the College has focused extensively on the fact that he had identified himself as a nurse when making the statements at issue. For example, in paragraph 33 of the College's written submissions, they quote a statement that the Respondent had made on the November 2, 2020 podcast *Monks and Mavericks*. The Respondent noted that the College started the quote with his answer rather than starting the quote with what he had been asked, which would have put his answer into the appropriate context. The Respondent submits that he had been asked by the podcast host to provide his background and, in doing

so, the Respondent listed all the things that he has done, including his nursing practice. The Respondent submits that including his profession in a description of his background did not mean that he was holding himself out as an expert because he was a registered nurse.

85. The Respondent says the College's investigation started the process incorrectly because the College Investigator did not perform a thorough investigation of the information received and did not provide an accurate executive summary of what the information provided. The Respondent submits that, despite this issue being pointed out to the College, the College continued to double down on that approach. There was a written transcript of podcasts, videos, and other evidence that the Respondent suggests is clear as to his intentions. However, the College continues to mischaracterize and misrepresent the evidence and the Respondent submits that it is only by doing so that the College can hope to reach the standard required.

86. The Respondent submits *Strom* provides the Panel with guidance on how to look at the facts and what will and will not constitute professional misconduct in this context. He says *Strom* confirms that rights under the *Charter* are essential. They are critical. They cannot be brushed aside casually. Yet, the College has admitted that they have infringed these *Charter* rights, and they are not justified in pursuing this matter for discipline when the Respondent's statements are placed in proper context.

87. In reply, the College submits that targeting the College's investigation involves targeting something that is irrelevant. It submits that the Respondent has not shown what material difference would have arisen from a broader investigation or what prejudice might have befallen the Respondent, given that he was able to present his case in full in the Discipline Hearing. The College says the Respondent has not shown what a more thorough investigation would have uncovered other than the potential motivation of the complainant. The College says the Respondent's complaints about the thoroughness of the investigation also has no substance. He has not tied the complainant's alleged motivation to the charges in

the Citation. He also did not explain what steps the College Investigator might or should have done differently and how doing so might have changed the Respondent's defense of his statements in the Discipline Hearing. The College further submits the Respondent's complaints about the way in which the College presented its evidence and submissions show that the Respondent knew the case he had to meet and that he had the opportunity to meet it.

88. The College disputes that the College's investigation and Inquiry Committee proceedings remain relevant at the discipline stage. It also submits that *Strom* is not authority for the proposition that such alleged relevancy continues to be present. It says the Court in *Strom* considered the narrow question of whether the discipline committee gave sufficient weight to freedom of expression and autonomy. It was counsel for the Respondent who claimed that the investigation and the Inquiry Committee also had to consider this same issue. This was an editorial comment by the Respondent's counsel. The Court in *Strom* did not make that finding.

89. The College submits the HPA and British Columbia case law provides guidance on the issue of whether the Inquiry Committee proceedings remain relevant at the discipline stage. It refers the Panel to section 32 of the HPA which provides as follows:

> 32 (1) A person who wishes to make a complaint against a registrant must deliver the complaint in writing to the registrar.
>
> (2) As soon as practicable after receiving a complaint, the registrar must deliver to the inquiry committee a copy of the complaint, an assessment of the complaint and any recommendations of the registrar for the disposition of the complaint.
>
> (3) Despite subsection (2), the registrar, if authorized by the board, may dismiss a complaint, or request that the registrant act as described in section 36 (1), without reference to the inquiry committee if the registrar determines that the complaint
>
> (a) is trivial, frivolous, vexatious, or made in bad faith,
> (b) does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under section 33 (4), or
> (c) contains allegations that, if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33 (4).

(4) If a complaint is disposed of under subsection (3), the registrar must deliver a written report to the inquiry committee about the circumstances of the disposition.

(5) A disposition under subsection (3) is considered to be a disposition by the inquiry committee unless the inquiry committee gives the registrar written direction to proceed under subsection (2).

90. The College says section 32(1) of the HPA is the genesis of the entire discipline procedure. Unless the complaint is dismissed pursuant to section 32(3), the Registrar must deliver a copy of the complaint to the Inquiry Committee. The Inquiry Committee and its duties and obligations are dealt with in section 33 of the HPA, which provides:

33 (1) If a complaint is delivered to the inquiry committee by the registrar under section 32 (2), the inquiry committee must investigate the matter raised by the complainant as soon as possible.

(2) If

(a) a registrant fails to authorize a criminal record check or a criminal record check verification, as applicable, under the *Criminal Records Review Act*,

(b) the registrar under that Act has determined that the registrant does not have a portable criminal record check, or

(c) the deputy registrar under that Act has determined that the registrant presents a risk of physical or sexual abuse to children or a risk of physical, sexual or financial abuse to vulnerable adults and that determination has not been overturned by the registrar under that Act,

the inquiry committee must take the failure or the determination into account, investigate the matter and decide whether to impose limits or conditions on the practice of the designated health profession by the registrant or whether to suspend or cancel the registration of the registrant.

(3) A registrant against whom action has been taken under subsection (2) may appeal the decision to the Supreme Court and, for those purposes, the provisions of section 40 respecting an appeal from a decision of the discipline committee apply to an appeal under this section.

(4) The inquiry committee may, on its own motion, investigate a registrant regarding any of the following matters:

(a) a contravention of this Act, the regulations or the bylaws;
(a.1) a conviction for an indictable offence;
(b) a failure to comply with a standard, limit or condition imposed under this Act;
(c) professional misconduct or unprofessional conduct;

(c.1) [Repealed 2008-29-34.]
(d) competence to practise the designated health profession;
(e) a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs his or her ability to practise the designated health profession.

(4.1)The inquiry committee must not act under subsection (6) (b), (c) or (d) on the basis of subsection (4) (a.1) if the inquiry committee is satisfied that the nature of the offence or the circumstances under which it was committed do not give rise to concerns about the registrant's competence or fitness to practise the designated health profession.

(5) The inquiry committee must request the registrant who is the subject of an investigation under this section to provide it with any information regarding the matter that the registrant believes should be considered by the inquiry committee.

(6) After considering any information provided by the registrant, the inquiry committee may

(a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,

(b)in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,

(c) act under section 36, or

(d) direct the registrar to issue a citation under section 37.

(7) If the inquiry committee acts under subsection (6) (b) to (d), it may award costs to the college against the registrant, based on the tariff of costs established under section 19 (1) (v.1).

91. The College points out that under section 33(1) of the HPA, if a written complaint is delivered to the Inquiry Committee by the Registrar, the Inquiry Committee is mandated to investigate. Under section 33(5), the Inquiry Committee is also mandated to request that the registrant provide it with any information regarding the matter that the registrant believes it should consider. Pursuant to section 33(6) the Inquiry Committee may do the following: (a) take no further action if it believes that the complaint is trivial, vexatious, frivolous, or made in bad faith, or if the conduct or competence is satisfactory; (b) take any action to resolve the matter; or (c) act under section 36, which allows for reprimands or remedial action by consent of the registrant. Under section 33(6)(d) of the HPA, the Inquiry

Committee may also direct the Registrar to issue a citation under section 37 of the HPA.

92. Section 38(1) of the HPA provides that: “The discipline committee must hear and determine a matter set for hearing by citation issued under section 37.” The College says the discipline hearing takes place after the Citation is issued pursuant to section 37. It submits that the discipline hearing panel does not review the investigation. The discipline panel hears and determines the matter set for hearing by the citation. The College says the citation is the document that advises what is relevant for the discipline hearing and governs the discipline proceeding.

93. The College also refers the Panel to section 50.53 of Part 4.2 of the HPA, which deals with the Health Professions Review Board (the “HPRB” or the “Review Board”). It submits that under section 50.53(1)(b) the HPRB can, on application by a registrant or a complainant, review the failure to dispose of a complaint or the failure to dispose of an investigation in the time required. Pursuant to section 50.53(1)(c), the HPRB may, on application by a complainant, review a disposition under 33(6)(a) to (c) of the HPA; that is, the Inquiry Committee’s determination of what to do with a complaint at the end of its investigation.

94. The College further refers the Panel to *College of Dental Surgeons of British Columbia v. Health Professions Review Board*, 2014 BCSC 1841 (“*College of Dental Surgeons 2014”)* in which the Inquiry Committee decided under section 33(6)(a) to take no further action with respect to a complaint made against a dentist. The complainant then applied to the Review Board for a review of that decision. The Review Board found the investigation was inadequate and referred the matter back to the Inquiry Committee, which decision was judicially reviewed by the BC Supreme Court.

95. The College relies on paragraphs 49, 55 and 57 of this BC Supreme Court decision. It points to paragraph 57 in particular, where the Court held that generally speaking the HPA creates three stages for processing complaints, and the first two stages are often collectively referred to as the 'front end' or 'screening' process, which involves the Registrar of the College and the Inquiry Committee,

each of which have certain defined authority, including the authority to dispose of a complaint short of issuing a citation. The Court held that the issuance of a citation puts in motion the second process, that which involves the disciplinary committee panel.

96. The College submits the importance of this decision is that it shows the demarcation between the first two processes, the screening or front end, and the back end, which is the second process involving the discipline committee panel. The College says once a registrant against whom a complaint has been made is past the screening stage, they are into the discipline phase. It says these are different phases.

97. The College also relies on *Ridsdale v. Anderson*, 2016 BCSC 942 [“*Ridsdale”*] (including paragraphs 2, 36, 39, 47, 48, 49, 73), in which a nurse had complained that the finding of the Inquiry Committee that she had breached standards was unreasonable. In this case, a complaint was made against the nurse, and the registrar of the College of Registered Nurses of BC (CRNBC) reviewed the complaint, chose not to dismiss it, and referred it to the Inquiry Committee pursuant to section 33(2) of the HPA. The Inquiry Committee subsequently determined to resolve the matter between the complainant and registrant under section 33(6)(b). The College investigator on behalf of the Inquiry Committee wrote a letter to the nurse registrant. The registrant applied to the BC Supreme Court for judicial review for orders quashing the letter to her from the Inquiry Committee and directing the CRNBC to take no further action in this matter pursuant to section 33(6)(a) of the HPA. She argued that the Inquiry Committee’s letter unreasonably found that she breached professional standards. She argued that the letter was a reprimand, and a reprimand can only be issued by the Inquiry Committee with the consent of a registrant, or by CRNBC’s discipline committee after a full adjudicative hearing.

98. The College submits the CRNBC’s argument set out in *Ridsdale* as follows is similar to the College’s argument in this case:

> [47] Under the HPA, the inquiry committee and the discipline committee

> serve two distinct and separate roles. The inquiry committee has an administrative function. It conducts investigations and makes preliminary or provisional assessments as to what further action may be required, if any, to address concerns about a registrant's conduct or competence that arise from an investigation. The inquiry committee has a front end or screening function and an investigative role. The second stage concerns the discipline committee, which performs a quasi-judicial adjudicative function. Only the discipline committee has authority to conduct a hearing, compel testimony, make any final determination of credibility or fact or any final determination as to whether a registrant has breached professional standards, and to impose a formal disciplinary order under s. 39(2).

99. It also refers the Panel to paragraph 48 of the *Ridsdale* where the Court held that:

> [48] The two distinct roles and stages of the inquiry committee and the discipline committee were explained by Justice Holmes in *Farbeh v. College of Pharmacists of B.C.*, 2009 BCSC 1120. She stated at paras. 10-13:
>
> > [10] In broad overview, the Act contemplates a process in which complaints are reviewed first by the college's inquiry committee, which may appoint inspectors with broad powers to investigate under s. 28. After considering the fruits of its investigation and any information about the matter that the registrant provides, the inquiry committee may follow any of the courses of action listed in s. 33(6) namely:
> >
> > > (a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,
> > > (b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,
> > > (c) act under section 36 [which provides for a reprimand or remedial action by the registrant's consent], or
> > > (d) direct the registrar to issue a citation under section 37.
> >
> > [11] A citation under s. 37, that an inquiry committee may under s. 33(6)(d) direct a college registrar to issue, initiates a second main stage in the process, and must lead to a hearing before the college discipline committee.
> >
> > [12] After a hearing, a discipline committee has a broad range of responses to address any non-compliance, misconduct, unprofessional conduct, incompetence, or other impairment of the registrant's ability to practice, including by cancelling the registrant's registration.
> >
> > [13] Here, the Inquiry Committee followed the course of action described in s. 33(6)(d), and directed the registrar to issue a citation under s. 37 and thus to invoke the second-stage process before the College discipline committee.

100. The College points out that in *Farbeh v. College of Pharmacists of B.C.*, 2009 BCSC 1120 ("*Farbeh*"), an argument about a breach of procedural fairness was also made, and Justice Holmes made the following findings at paragraphs 19 to 20 of her decision with respect to that argument (quoted at paragraph 49 of *Ridsdale*):

> [49] She further stated at paras. 19-20:
>
> [19] The main difficulty with Ms. Farbeh's position on this matter is that it brings to the first of the two stages in the disciplinary process I have described, the full range of procedural protections which will apply at the second stage before the discipline committee. Under the *Act,* the Inquiry Committee served largely in an investigative and screening role to determine whether or not the matter should proceed to a hearing before the discipline committee. A governing body's investigative role is to be distinguished from its adjudicative role, as Mr. Justice Hollinrake for the B.C. Court of Appeal explained in *Strauts v. College of Physicians and Surgeons* (1997), 1997 CanLII 3188 (BC CA), 36 B.C.L.R. (3d) 106 at 108, 94 B.C.A.C. 254 (C.A.), and the requirements of procedural fairness of the former will be less demanding than of the latter:
>
> > The approach of the Courts with respect to the College [of Physicians and Surgeons, acting under the *Medical Practitioners Act*] has been to recognize its purpose and functions as being to serve and protect the public. That is clear from the statute itself. That end is not accomplished by imposing on the College in its investigative function the panoplies of administrative law that protect the members at the adjudicative stage of the College's proceedings.
>
> [20] The distinction is apparent from the *Act* itself, which plainly contemplates a larger role for the registrant at the second stage than at the first. Sections 37 and 38 set out detailed procedural and evidentiary requirements for the discipline committee hearing (concerning the form and timing of notice to the registrant, certain requirements for disclosure, the types of evidence that may be received, and the right of the registrant to participate with or without counsel in the hearing). By contrast, the *Act* says relatively little about the Inquiry Committee's process as it may involve or affect the registrant.

101. The College submits these findings are equally applicable to this case and confirms its argument that the rights a registrant has during the investigation stage are different than the rights he or she has during the adjudicated discipline hearing stage, where there are two sides adversarial to each other and there is a neutral decisionmaker, the College's discipline committee panel.

102. The College further points the Panel to the analysis portion of the Court's decision

in *Ridsdale,* where the Court considered, at paragraph 73 onwards, whether the Inquiry Committee decision to dispose of the complaint under section 33(6)(b) of the HPA was amenable to judicial review, and then concluded that it is not a statutory power that falls under the *Judicial Review Procedure Act* and accordingly is not amenable to judicial review.

103. The College points out that this finding has since been overturned by the British Columbia Court of Appeal in *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board,* 2022 BCCA 10 ("*College of Physicians 2022")*.

104. The College submits that what the Court of Appeal held in *College of Physicians 2022* is, in summary, that: "… the statutory scheme is such that there are certain things that go to the HPRB….and those are funneled in that direction. But that does not mean that a registrant or a complainant cannot seek judicial review for those things that do not go to the HPRB." The Court of Appeal held that a judicial review can still occur based on what occurred at the Inquiry Committee stage.

105. The College submits the Court of Appeal's finding supports its position. The College argues that if the Respondent had issues with the way the investigation was conducted, he could have requested a judicial review of that process, and the Court would consider it. The College says it does not make that first phase consideration now as part of the discipline proceeding. It says the HPA states clearly that after a citation is issued, the discipline committee considers that citation.

106. The College submits that a person cannot bypass the structure of the HPA by failing to request a judicial review. It says if the Respondent had wanted to make complaints about the way the investigation was conducted, he had the right to seek judicial review and he did not do so. The College argues that the Respondent cannot rely on his failure to judicially review as a way of importing something into this discipline process that does not belong there, that the Legislature has said does not belong there, and that the Courts have said does not belong there. Such a question belongs in the Courts in the form of judicial review if there is a legitimate

claim for it.

107. The College argues that the point is, if one reviews the HPA and the cases that have interpreted the HPA, there are two phases. There is the investigative phase, and there is the discipline hearing phase, and there is a clear demarcation between the two. The discipline hearing is not the venue to make complaints about the investigation. And, even if it were, the Respondent has failed to show how his defense was impacted in any way, given that this is a case in which the evidence is all about words uttered from his mouth, and in which he has had every opportunity to make full answer and defense to the College's allegations. The College says the bulk of the Respondent's submissions, which concerned the process of investigation, are of no moment, they do not land, and they do not assist the Panel.

108. In sur-reply, the Respondent submits the College's position that this case is not about how the investigation was conducted or whether anyone involved at the College (i.e. the Registrar, the Inquiry Committee, the College Investigator) followed their obligations under the HPA is wrong in law. He says the College only wants the Panel to focus on how the College has characterized his statements in the context in which the College has placed them, and how it has tried to juxtaposition different comments made against different questions asked or statements made by an interviewer to try and make them appear as though the Respondent was actually responding to a specific comment, when it is clear to anyone who considers them in full that was not what was happening.

109. The Respondent says the College agreed in argument that making a comment or statement about being opposed to burning cities is not misconduct. The Respondent says that, in paragraph 1.b of the Citation, the College did not include his comment, "But you look, you look at the shit that's going on with Antifa and Black Lives Matter are burning cities in the States…" which was part of the comments he made. The Respondent says the College wants to just discipline him for the balance of his statement i.e. "…The restraint that's being shown on the right – like I got to tell ya, I watched that shit. I want to take a road trip and go down

and play paintball, right?" The Respondent submits it was not appropriate for the College to omit his reference to Antifa and Black Lives Matter "burning cities in the States" from paragraph 1.b of the Citation because doing so completely changes the meaning of his statement.

110. The Respondent argues that the College's oral submissions in reply drives home the point that he has been trying to make since the beginning. His comments have been taken out of context, which is important. It is not just the context the College chooses to include that should be considered. The Respondent submits one does not need to review all the videos to understand what he was saying, one only needs to review the comments made around each statement at issue, and if one puts them in proper context, his statements do not amount to professional misconduct or unprofessional conduct.

111. The Respondent says his written submissions outline in more than 50 paragraphs his complaints about the way in which the College's investigation was conducted. He has accordingly provided the College with clear notice about the ways he claims the investigation was not done properly. The College suggests that it has received no notice as to how anything would have been changed had the investigation been conducted differently. The Respondent says he hopes that this is obvious to the Panel from the example he referenced.

112. The Respondent further submits that he does not know exactly what was done by the Inquiry Committee because he has no evidence or disclosure from the College as to what was given to the Registrar, even though that is a requirement under the legislation the College referenced in its reply submissions. Once the investigation has been completed, then, under section 33 of the HPA, the Inquiry Committee is required to give a direction to the Registrar to issue the Citation. The Respondent says he does not have any disclosure of that. There is no evidence before the Panel of what was said to the Inquiry Committee.

113. The Respondent further submits that section 31(2) of the HPA is important. It provides that, "As soon as practicable after receiving a complaint, the registrar must deliver to the inquiry committee a copy of the complaint, an assessment of

the complaint and any recommendations of the registrar for the disposition of the complaint."

114. The Respondent says this is not optional; it is a requirement under the HPA and there is no evidence before the Panel that the Registrar did this. The Respondent says he does not have any disclosure of what the Registrar's assessment was or what recommendations the Registrar made. This is absent from the evidence, which the Respondent says is a violation of the requirement of section 32(2) of the HPA.

115. The Respondent further says the College argued that, in a podcast interview, the Respondent had made a comment about COVID being a scam. In paragraph 34 of its written submissions, the College took the comment by the interviewer where he said "So let's go down to the nitty gritty. Why, why is it that you think the COVID thing is a giant sham?" and juxtaposed it against what the Respondent said minutes later in their conversation. The Respondent reiterates that this is one of his concerns with the College's submissions. He says this demonstrates the approach that has been taken through the investigation, from how the Citation was worded through to the College's arguments. The Respondent submits this is only one of many examples of where the College has taken evidence and juxtapositioned it to try to, or inadvertently, change the meaning of the conversation or the Respondent's statement.

116. The Respondent says that, if the College Investigator had properly provided the Inquiry Committee with a summary that showed this reality of the statements for which he is being cited, that would have made a difference. He says that the proper context makes a significant difference to what these statements meant and to demonstrate what was intended by them. The Respondent argues that, if you remove words from a sentence or take a comment from five pages up in the transcript, and juxtapose it against an answer five pages later and try to suggest that this accurately represents what was being said, it is misleading. In addition, because there is no evidence from the Inquiry Committee about what it did, the Respondent says he does not know if they reviewed the full videos. He does not

know if they relied on the College Investigator's summary and representation of the evidence. However, the Respondent asserts that, if it was done in a way that the College is still asserting at present, it was misleading.

117. The Respondent says the College argued that he has not made it clear how these issues he has raised would make any material difference. He submits that each of the points in the Citation did not provide context and the summary the College Investigator provided to the Inquiry Committee also did not provide the context. He encourages the Panel to carefully review the evidence and not take the College's submissions as being the evidence. It is his position that the College did not entirely accurately represent the words he spoke and that changing even a word or two makes a significant difference.

118. For example, the Respondent submits that on the issue of hospitalizations the College claims his statement was specifically and only about whether there was a virus in the hospital. However, if one looks at the evidence, the Respondent is clear in his interview when he is discussing that point that he is talking about hospital admissions. The Respondent asserts that again, if that statement was put in proper context, it would have been clear he was talking about hospital admissions. He said patients were afraid to come into the hospital because they thought they were full of COVID patients, so they were not coming in for the care that they needed and he was trying to calm them down and encourage them and say, "It's okay, we don't have anyone in the hospital. Come in and get the care you need." The Respondent submits that his true meaning is very clear from the evidence, from the video, and from the transcript of the video. Further, once the College provided disclosure pursuant to the Panel's order, the statistics from Interior Health showed he was correct. However, despite the Respondent pointing out to the College that this disclosure of statistics shows he was accurate in his statements, now the College is trying to argue that the Respondent was only talking about whether the virus was in the hospital.

119. The Respondent says the Citation misquotes him because it takes this statement out of context. If the College Investigator had looked further into that, she ought

to have shared those findings with the Inquiry Committee or the Registrar, but there is nothing disclosed from the Registrar to show what his or her assessment and recommendations were. If the College had looked at the statement in its context (i.e. alongside the statistics), then it would have shown that what the Respondent was saying there was correct. If the College had done so, then the Respondent would not be here addressing that allegation in the Citation. The Respondent indicates that this is one example of how the context could have made a difference. The Respondent submits he has shown in his submissions in respect of each one of the elements in the Citation, how it makes a difference if the entire statement is considered in its appropriate context. The Respondent submits that in paragraph 40 of his written submissions he provides several examples of how he says the College investigator did not complete a proper investigation.

120. The Respondent argues that how the College investigated this matter is entirely relevant. He says section 16 of the HPA sets out the duties and objects of the College and prescribes that the College must do its job properly. He says it does not matter that it is a screening process, the College cannot mischaracterize his statements, take them out of context, and not interview the complainant when it is brought to its attention that there were issues in the relationship between him and the complainant.

121. The Respondent further submits the College was ordered to provide all relevant documents to him. He says the response to the complaint that he had provided to the College Investigator was obviously highly relevant; however, it was not included in the College's disclosure package. His response was also not attached to the College Investigator's affidavit despite her deposing that she had attached her investigation report and all of its attachments to her affidavit. The Respondent asserts that, when the College Investigator was pressed on this fact in cross-examination, she said she was sure she had given his response to the Inquiry Committee but could not explain why it was not attached to her affidavit and why it was not contained in the disclosure provided by the College.

122. The Respondent also submits that, if one reads the Respondent's response to the

complaint, and not only the College Investigator's summary in which she cut and pasted two paragraphs out of the six in his response, it would have been evident what the issues and background were and that it would have led to an investigation of those comments. Instead, there was no such investigation. The College Investigator said the only thing she did after receiving the Respondent's response was to write to him again to state that he needed to answer her questions.

123. With respect to *Strom,* the Respondent submits that it is clear from that case that it dealt with a discipline panel's decision and a lower court decision affirming the disciplinary panel's decision. His comment was simply that the Panel can take much from the decision because the Court had reviewed another discipline panel's decision affirming similar conduct to what he is alleging in this case. In *Strom* the panel found that how the discipline panel had conducted their investigation, and the evidence presented, had indeed warranted the misconduct allegations; however, the Court was critical of how the process was handled.

124. The Respondent says the College is correct that the Court in *Strom* did not look specifically at the Inquiry Committee's conduct. However, it examined exactly what this Panel is being asked to do and how the panel handled what the Inquiry Committee did in that case. In *Strom,* the Court held that the discipline panel had cherry-picked certain evidence from certain statements and mischaracterized other statements.

125. The Respondent says in *Strom* the nurse made the same arguments that he is making here. He submits it is overall a good roadmap for the Panel to say what is and is not acceptable in terms of how the College presents its evidence and how the Panel should deal with that evidence when it comes to the free speech of a nurse who is making off-duty comments. The Respondent submits that there are many parallels.

126. With respect to *College of Dental Surgeons 2014,* the Respondent says he does not dispute that there are different phases to the process, an initial screening phase or front-end evaluation, and then a disciplinary phase before the College's discipline panel. However, he disputes the College's suggestion that because the

first phase is often referred to as a screening phase, the Discipline Panel should not concern itself with how the College conducted itself at that level of the investigation. He says the case law does not support the College's position. In this regard, the Respondent refers the Panel to paragraph 71 of the *College of Dental Surgeons 2014* decision where the Court considered the difference between the screening phase and the disciplinary phase and held:

> "Despite the differences between the two processes, one should not underestimate the significance of the front end process. As Review Board decisions have recognized, this screening role is significant and meaningful. The vast majority of complaints are resolved at this stage..."

127. The Respondent submits this is what could have happened in this case if there had been a proper characterization of his statements.

128. The Respondent points out that the Court also said: "While not formally disciplinary, the powers the Inquiry Committee may exercise may have remedial consequences and their exercise may require critical evaluation of conflicting evidence: *Review Board Decision 2011-HPA-0036(b)(2012 BCHPRB 53)*".

129. The Respondent submits this is an important point. While there are two different processes, the first one is significant and meaningful, and the Inquiry Committee is often required to critically evaluate conflicting evidence.

130. The Respondent further submits that paragraphs 47 to 62 of the *Ridsdale* decision are also important for the Panel to consider. He refers to paragraph 48 of that decision where the Court quotes paragraph 10 of *Farbeh*:

> "In broad overview, the *Act* contemplates a process in which complaints are reviewed first by the college's inquiry committee, which may appoint inspectors with broad powers to investigate under s. 28. After considering the fruits of its investigation and any information about the matter that the registrant provides, the inquiry committee may follow any [one] of the courses of action listed in s. 33(6)…"

131. The Respondent says it is clear from the *Ridsdale* decision that the Inquiry Committee may take no action or take any action it feels is appropriate on a complaint, including the action described in subsection 33(6)(d), which is to direct the registrar to issue a citation as was done in this case although the College has not disclosed any documentation to show that direction.

132. The Respondent also refers to paragraph 49, where the Court quotes paragraph 19 of *Farbeh*:

> "…Under the *Act*, the Inquiry Committee served largely in an investigative and screening role to determine whether or not the matter should proceed to a hearing before the discipline committee. A governing body's investigative role is to be distinguished from its adjudicative role…"
>
> "…and the requirements of procedural fairness of the former will be less demanding than of the latter…"

133. The Respondent agrees that there is a different standard during the investigative phase; however, he says there is still a standard. He argues that the Court provides the Panel with guidance on what the standard is of review of the efforts of the registrar, the investigator, and the Inquiry Committee.

134. The Respondent submits says although the HPA does not provide much guidance about the Inquiry Committee's process as it may involve or affect registrants, the case law does. In this regard, the Respondent refers to the following statements in *Ridsdale*:

> [53] In Decision No. 2010-HPA-0003(a) (2010 BCHPRB 33) (November 18, 2010), the Review Board stated:
>
> > [23] The question as to what an Inquiry Committee might do in the face of conflicting evidence is an important one, as it speaks to the Review Board's role when complainants point to such conflicts on review.
> >
> > [24] On one hand, it is true that the Inquiry Committee is not the Discipline Committee. The Inquiry Committee is not tasked with the type of ultimate fact finding that would happen after a Citation was issued and a hearing held before the Discipline Committee. At the same time, it may not be fully accurate to describe the Inquiry Committee as being solely a "screening" body that has no mandate to critically examine conflicting evidence. For one thing, in the Act, the Inquiry Committee does have its own independent power to take or suggest action adverse to the member without issuing a Citation. It cannot do that without some provisional assessment of the facts. For another, it is difficult to see how the Inquiry Committee can decide meaningfully whether to issue a Citation without forming some provisional assessment of what took place, including whether the evidence needs to be more fully fleshed via the Citation and discipline process. In this latter regard, an analogy might be drawn to the role of Crown Counsel. While the Crown does not find facts – that is the ultimate role of the Court – it must critically examine the evidence to determine whether there is a substantial likelihood of conviction. To merely say "we cannot lay charges because there is conflicting evidence"

> would be wholly inadequate in many cases. While not being a final conclusion, a meaningful, albeit provisional, assessment of the evidence is required.
>
> [25] It follows that there may be cases where an adequate investigation requires a College investigation to look into evidentiary conflicts in more detail given the nature of the complaint and all the circumstances of the investigation. There may also be cases where it would not be a reasonable outcome for an Inquiry Committee to dismiss certain complaints merely by stating "it is one person's word against another's". The Review Board must apply the statutory tests carefully and sensitively, based on the record in each case.
>
> [Emphasis added.]

135. The Respondent also refers to the following underlined portions of paragraph 54 of *Ridsdale*:

> [54] In *Decision No. 2011-HPA-0036(b)*(2012 BCHPBR 53) (July 5, 2012), the Review Board detailed the role of the inquiry committee when an investigation discloses a conflict in the evidence:
>
> > [45] This dispute between the parties raises a very important question regarding the proper role of the Inquiry Committee where an investigation discloses a conflict in the evidence received during an investigation - oftentimes a conflict between the version of events given by a complainant and a registrant. The Review Board cannot properly exercise its role in reviewing the adequacy of the investigation and the reasonableness of the disposition unless there is clarity regarding the Inquiry Committee's proper role in situations where "credibility" is in issue.
> >
> > [46] We can state by way of overview that we do understand why the lay public would find the College's response regarding an inquiry committee's inability to address credibility issues to be confusing and troubling. The College's explanation could appear to be highly technical and difficult to understand. If the Inquiry Committee can do nothing when faced with conflicting evidence, does this mean it must withdraw in the face of a conflict in the evidence?
> >
> > [47] As we will point out in more detail below, it is true that an inquiry committee has no power to convene any proceeding to try the facts, compel and cross-examine witnesses. However, an inquiry committee has the means to engage in some evaluation of credibility other than through a formal hearing process. In fact, in exercising its discretion and judgment on how best to stream the complaint and which sanction is the most appropriate under the circumstances, it must necessarily make some determinations of fact and credibility, even if provisionally. We concur with our fellow Member David Hobbs that "the Inquiry Committee does have its own independent power to take or suggest action adverse to the member without issuance a Citation. It cannot do that without some provisional assessment of the facts".
> >
> > (Underlining added)

136. The Respondent submits these statements in *Ridsdale* speak about the different standards of procedural fairness. The Respondent acknowledges that the Inquiry Committee stage is not the same as the discipline hearing stage before the discipline panel, where witnesses are called to provide evidence; however, he says the Inquiry Committee can, and should in many cases, interview witnesses. The Respondent says that this is the distinction that is made. It is not that there is no evaluation of the evidence, it is not that there is not any investigation being carried out in the nature that the Respondent complained about in his written submissions. The Respondent further submits that the Court in *Ridsdale* accepted, as outlined above, that "in exercising its discretion and judgment on how best to stream the complaint and which sanction is the most appropriate under the circumstances" the Inquiry Committee "must necessarily make some determinations of fact and credibility, even if provisionally…." and that "the Inquiry Committee does have its own independent power to take or suggest action adverse to the member without issuance of a citation. It cannot do that without some provisional assessment of the facts".

137. The Respondent further refers to the following underlined statements in paragraph 55 of *Ridsdale*:

> [55] The Review Board went on to comment specifically on the inquiry committee's "evaluative function" when considering the exercise of its authority to take no further action on a complaint under s. 33(6)(a):
>
> > [78] The Inquiry Committee has the express mandate to take no action where it is of the view that … the conduct or competence to which the matter relates is satisfactory: s. 33(6)(a). … This is a statutory standard requiring a positive conclusion. <u>The Inquiry Committee cannot meaningfully come to the conclusion that the conduct or competence *was satisfactory* if it is unable to draw a conclusion, based on the investigation, about what happened. In some cases, it would be difficult to see how the Inquiry Committee could properly exercise this role without evaluating conflicting evidence.</u>
> >
> > (Underlining added)

138. The Respondent says the Court in *Ridsdale* emphasized his point as follows:

[56] In *Dental Surgeons* at para.71:

> [71] Despite the differences between the two processes, one should not underestimate the significance of the front end process. As Review Board decisions have recognized, this screening role is significant and meaningful. The vast majority of complaints are resolved at this stage. While not formally disciplinary, the powers the Inquiry Committee may exercise may have remedial consequences and their exercise may require critical evaluation of conflicting evidence: Review Board Decision 2011-HPA-0036(b) (2012 BCHPRB 53).

139. The Respondent argues that this is where the error has occurred in his case. The College has relied on the *Ridsdale* case when the parties made submissions about document disclosure and it is still relying on this case. In *Ridsdale* the Court held that the decision of the Inquiry Committee is not amenable to judicial review. The Respondent submits that this finding would be more akin to supporting the College's argument; that is, that the Panel cannot look at what the College is doing. That is what the College relied on during February 2023 in its submissions regarding the *Ridsdale* decision. They argued: " -- it's just a screening phase. … you don't really have any oversight over this."

140. However, the British Columbia Court of Appeal has held in *College of Physicians 2022* that this element of the *Ridsdale* decision is wrong. The Respondent submits it is not just subject to review by the Review Board. When this Panel is looking at the evidence and how the investigation was conducted, it only makes sense that the Panel would also be required to critically evaluate. He says if the Review Board is required to critically evaluate the evidence and consider conflicting evidence at a screening phase that has a lower procedural fairness threshold, certainly this Panel would also be looking at that when it is considering all of the evidence.

141. The Respondent also relies on the Court of Appeal's decision in *College of Physicians 2022*, particularly paragraph 198. He argues that this decision supports his position that it does matter whether the Registrar did an assessment and made recommendations as required. It also does matter whether the College Investigator properly characterized his statements. The Respondent submits that this must be part of the Panel's overall review of the evidence and, had his

statements been properly put in context, as he is doing through these proceedings, there was a reasonable chance that the Inquiry Committee would have concluded that there was no reason to move this matter forward. Instead, the Respondent has been a part of this process now for two years.

142. The Respondent also refers to the Panel's Disclosure Decision of April 24, 2023, in which the Panel had said:

> 37. The College argues that the hearing will involve proof by the College that the Respondent made these comments, and argument about whether they were contrary to the listed provisions, standards, and rules. It says that to the extent the Respondent's disclosure request is underpinned by a wish to turn the proceedings on their head, and "investigate the investigators", he ought not to succeed. The College says these proceedings are about (i) what the Respondent said, (ii) in context, whether the statements are properly subject to discipline. It argues that the process leading to the registrar's issuance of the Citation – and the process leading to the Inquiry Committee's direction to do the same – is irrelevant to the discipline hearing. In this regard, it points to *College of Dental Surgeons of British Columbia v Health Professions Review Board,* 2014 BCSC 1841 at para 57, where Donegan J explained the HPA creates three stages for processing complaints:
>
> > The first two stages are often collectively referred to as the "front end" or "screening" process. The front end process involves the Registrar of the College and the Inquiry Committee. Each has certain defined authority, including the authority to dispose of a complaint short of issuing a citation. The issuance of a citation puts in motion the second process – that involving the Discipline Committee.
>
> 38. The College submits the inquiry committee and the discipline committee have "two distinct roles and stages": *Ridsdale v Anderson*, 2016 BCSC 942 ("Ridsdale") at para 48. It says what happened at the tail end of the front-end stage has no continued relevance at the discipline committee stage, where the result will be determined by whatever evidence the parties choose to lead.
>
> 39. For the above reasons, the College submits the Respondent's arguments regarding transparency, intelligibility and justification and procedural fairness should be rejected. The College says the Panel will be weighing the evidence and arguments presented to it – not the decision to issue a citation. Stated another way, the College agrees that procedural fairness requires timely disclosure. But, as per section 38(4) of the Act, this is timely disclosure of the evidence on which the College will rely in making proof of its case. Neither the Act nor the principles of procedural fairness demand anything broader than that.

143. The Respondent submits that paragraph 37 to 39 shows the College was making the same argument during the Respondent's Application for Disclosure in February 2023 that it is making now; that is, that the process leading to the Registrar's issuance of the Citation and the process leading to the Inquiry Committee's direction to do the same is irrelevant to the Discipline Hearing. At that time, the College had also relied on the *College of Dental Surgeons 2014* and the *Ridsdale* cases, the latter which has been overturned.

144. The Respondent further says the Panel confirmed in the Disclosure Decision that it has a broad discretion to make any direction it considers appropriate in the conduct of a disciplinary hearing and it may exercise that discretion at any time after a citation is issued. In this regard, the Respondent refers to paragraph 96 of the Disclosure Decision:

> 96. The Panel finds that when reading the words of section 38(4.2)(c) in their grammatical and ordinary meaning harmoniously in the context of section 38 as a whole, it is clear that this section grants the Panel a broad discretionary power to make any direction it considers appropriate in the conduct of a discipline hearing. The Panel may exercise this discretion at any time after a citation is issued. The Panel finds it has the statutory power to make orders pursuant to section 38(4.2)(c) of the Act before the hearing commences and during the hearing. This includes making orders with respect to document disclosure as sought in the Disclosure Application.

145. The Respondent says the Panel exercised this discretion when the College argued that it was not required to make more timely disclosure than what he was seeking, and the Panel rejected those arguments.

146. The Respondent also refers to paragraphs 105 to 109 of the Disclosure Decision, in which the Panel wrote:

> 105. The Court confirmed that a duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges, or interests of an individual.
>
> 106. In *Milner* the British Columbia Supreme Court also quoted with approval the following statements of the author James T. Casey in The Regulation of Professions in Canada, at pp. 8-24 and 8.24.1:
>
> > [12] …. The standard of disclosure for a disciplinary tribunal has been described by one Court as follows:

> The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters (see *Biscotti et al. v. Ontario Securities Commission*, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of investigators…. The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearances of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure. *Markandey v. Board of Ophthalmic Dispensers (Ontario),* supra.

107. The Panel associates itself with and adopts these statements.

108. Accordingly, the Panel finds there is a duty on the College and the Panel to ensure that the principles of procedural fairness are complied with during the conduct of disciplinary proceedings pursuant to the Act.

109. The Panel accepts the Respondent submission that the Panel's decision in the discipline hearing may adversely impact on his right to continue his profession or employment. The Panel finds that based on the nature and importance of the potential decision in the discipline hearing a high standard of procedural fairness is required.

147. The Respondent says the Panel already accepted in paragraph 105 of the Disclosure Decision that a duty of procedural fairness rests on every public authority making administrative decisions affecting the rights, privileges, or interests of an individual. He says the Court's comments in *College of Dental Surgeons 2014* and *Ridsdale* also make it clear that the Inquiry Committee is making such decisions, and does have the ability to make decisions regarding credibility and the weighing of conflicting evidence. The Respondent argues that the standard the Panel has already recognized also applies to those types of decisions.

148. The Respondent argues the Panel emphasized fairness in paragraph 106 of the Disclosure Decision, and that the Board has a positive obligation to ensure the

fairness of its own processes. The Panel also at paragraph 107 of the Disclosure Decision said that it associates itself with and adopts those statements. The Respondent says the Panel's findings in paragraph 108 of the Disclosure Decision support his argument. He submits the Panel already found there was a duty on the College and the Panel to ensure that the principles of procedural fairness are complied with during the conduct of the disciplinary proceedings pursuant to the HPA. He submits it is not clear whether that occurred in this case, but when the complaint was received by the Registrar, the HPA required the Registrar to provide an assessment and recommendations. The Respondent submits that that is part of the disciplinary process, and the Panel found that procedural fairness applies to that.

149. The Respondent says the Panel also recognized in paragraph 109 of the Disclosure Decision that this hearing may adversely affect his right to continue in his profession or employment and, based on the nature and importance of the potential decision, a high standard of procedural fairness is required. The Respondent says that, although that statement was with respect to Discipline Hearing, it is clear from paragraph 108 that the Panel found that procedural fairness still applies to conduct throughout the discipline proceedings. He submits that is also what the Court held in *College of Dental Surgeons* 2014 at paragraph 71 and in *Ridsdale*.

150. The College's submission that there is an avenue that he could have pursued with the Review Board, and this Panel then should not look at it, is not appropriate. He says procedural fairness is required at each stage of the disciplinary process, whether it is before the Review Board or before this Panel.

151. The Respondent refers the Panel to the following underlined statements in *Complainant v. College of Dental Surgeons of British Columbia* 2012 BCHPRB 53 ("*College of Dental Surgeons of British Columbia 2012*"), at paragraphs 71 to 79 which case he says gives this Panel some guidance as to the screening function that is in issue here and the investigation:

P. Understanding the screening function in British Columbia

[71] As Review Board decisions have already made clear, the labels "screening" and "streaming" can obscure the evaluative function the Inquiry Committee is sometimes required to undertake in the exercise of its mandate. As noted above, understanding that is important because it speaks directly to the Review Board's jurisdiction to review the adequacy of the investigation and the reasonableness of the disposition. As noted by Member Hobbs in Decision 2010-HPA-0003(a) (2010 BCHPRB 33) (November 18, 2010, College of Dental Surgeons of BC) at paras. [23]-[25]:

> The question as to what an Inquiry Committee might do in the face of conflicting evidence is an important one, as it speaks to the Review Board's role when complainants point to such conflicts on reviews.
>
> On one hand, it is true that the Inquiry Committee is not the Discipline Committee. The Inquiry Committee is not tasked with the type of ultimate fact-finding that would happen after a Citation was issued at hearing held before the Discipline Committee. At the same time, it may not be fully accurate to describe the Inquiry Committee as being solely a "screening" body that has no mandate to critically examine conflicting evidence. For one thing, in the Act, the Inquiry Committee does have its own independent power to take or suggest action adverse to the member without issuing a Citation. It cannot do that without some provisional assessment of the facts. For another, it is difficult to see how the Inquiry Committee can decide meaningfully whether to issue a Citation without forming some provisional assessment of what took place, including whether evidence needs to be more fully fleshed via the Citation and discipline process. In this latter regard, an analogy might be drawn to the role of Crown Counsel. While the Crown does not find facts – that is the ultimate role of the Court – it must critically examine the evidence to determine whether there is a substantial likelihood of conviction. To merely say "we cannot lay charges because there is conflicting evidence" would be wholly inadequate in many cases. While not being a final conclusion, a meaningful, albeit provisional, assessment of the evidence is required.
>
> It follows that there may be cases where an adequate investigation requires a College investigation to look into evidentiary conflicts in more detail given the nature of the complaint and all the circumstances of the investigation. There may also be cases where it would not be a reasonable outcome for an Inquiry Committee to dismiss certain complaints merely by stating "it is one person's word against another's". The Review Board must apply the statutory tests carefully and sensitively, based on the record in each case.

152. The Respondent also refers the Panel to the following underlined statements in

paragraph 72 of *College of Dental Surgeons of British Columbia 2012* where the Review Board references two other decisions that emphasize the power that is shared by the Inquiry Committee and the Registrar to recommend a consent or undertaking, or to dismiss or take no action, which he argues necessarily involves some evaluation of the evidence:

> [72] The Review Board's January 6, 2012 decisions in 2011-HPA-0018(a)(2012 BCHRRB 2) (English, Silversides, Bennett, Hobbs, Clark) and 2010-HPA-G02(b) (2012 BCHPRB 1) (Chair English) reinforce the same point. They emphasize that the power shared by the Inquiry Committee and Registrar to (a) recommend a consent or undertaking under s. 36(1), or (b) dismiss or take no action in respect of a complaint if the Inquiry Committee is of the view that the "conduct or competence is satisfactory", necessarily involves some evaluation of the evidence.

153. The Respondent accepts, as the College also pointed out, that section 33(6)(d) of the HPA further provides authority for the Inquiry Committee to direct the issuance of a citation. He refers to paragraph 73 of *College of Dental Surgeons of British Columbia 2012* where the Review Board refers to the two phases as streams and explained that:

> [73] …. "Stream 1" arises in a complaint where the Registrar evaluates the evidence in a report to the Inquiry Committee under s. 32(2) (para. [40]):
>
> > … section 32(2) of the Act requires the Registrar to deliver to the inquiry committee, as soon as practicable after receiving the complaint, "a copy of the complaint, an assessment of the complaint and any recommendations of the registrar for the disposition of the complaint". To exercise this function, the Registrar needs to be able to do the things that are necessary to meaningfully exercise it. The plain meaning of "assess" is to "evaluate or estimate the nature, ability, or quantity of…" (Oxford English Dictionary second edition, revised). The need for critical evaluation is reinforced by the power to make recommendations regarding the disposition of the complaint. To do all this, one would expect the Registrar to be able to put a package together for the Inquiry Committee in which he or she has examined the allegations contained in the complaint, gathered and evaluated the evidence and made any recommendation for the disposition of the complaint. This, by any other name, involves investigating the complaint. [*footnote deleted*]

154. The Respondent says what is stated in paragraph 73 of *College of Dental Surgeons of British Columbia 2012* makes his point. He also directs the Panel's

attention to paragraph 74 where the Review Board held that:

> [74] Stream 2 arises where the Registrar evaluates the evidence as part of deciding, under s. 32(3)(c), that a complaint which is not a "serious matter" can properly be dismissed by the Registrar without reference to the Inquiry Committee …

155. The Respondent submits that one of the other options is that the Registrar believes that an investigation is warranted. He points to paragraphs 75 to 77 of *College of Dental Surgeons of British Columbia 2012* where the Review Board held that:

> [75] The simple statement in *McKee* that the Inquiry Committee's role "is to screen complaints and to stream them" (para. 13) does not adequately capture the evaluation that is inherent in the proper exercise of the Inquiry Committee's numerous functions.
>
> [76] This requires us to further examine the statement in *McKee* (para. 36) that: "the Inquiry Committee cannot arrive at findings of fact. It is not the role of the Complaints Committee to determine credibility".
>
> [77] While the Inquiry Committee is not the Discipline Committee, it is wrong to suggest that the Inquiry Committee cannot consider credibility to any extent or for any purpose. This can be shown by a careful consideration of the specific statutory powers the Inquiry Committee is required to exercise in s. 33(6) of the Act.

156. The Respondent also refers to the following underlined statements of the Review Board in *College of Dental Surgeons of British Columbia 2012*:

> [78] The Inquiry Committee has the express mandate to take no action where it is of the view that … the conduct or competence to which the matter relates is satisfactory: s. 33(6)(a). As noted in 2010-HPA-0018 [NEUTRAL CITATION], the Registrar has the same power (necessarily implied) for non-serious complaints. This is a statutory standard requiring a positive conclusion. The Inquiry Committee cannot meaningfully come to the conclusion that the conduct or competence *was satisfactory* if it is unable to draw a conclusion, based on the investigation, about what happened. In some cases, it would be difficult to see how the Inquiry Committee could properly exercise this role without evaluating conflicting evidence.

157. The Respondent submits that paragraph 86 of the decision is also important because it provides specific examples in context to guide the Panel as to what types of things the Registrar, the investigator and the Inquiry Committee are expected to do:

> [86] These points having been made, the Review Board must resist the temptation to receive evidence going to the merits of the complaint as if it was the first instance decision-maker. Where the Review Board considers "credibility" in the context of the merits of the complaint it can only be for the purpose of determining whether the Inquiry Committee adequately and reasonably exercised its role – whether the Inquiry Committee too easily dismissed a complaint because of "conflicting stories", or whether it failed to attempt to resolve conflicts in the evidence by pursuing key and important lines of inquiry, which might well have changed the disposition from dismissal to one of the other options in s. 33(6)…
>
> (underlining added)

158. The Respondent says it could also mean that, after doing those steps, the disposition could be changed to one that does not proceed with an investigation. The Respondent refers to paragraph 87 of *College of Dental Surgeons of British Columbia 2012*:

> [87] In examining the adequacy of the investigation in this particular case, we need to ask the question of whether the investigation was adequate taking into account the Complaint's serious attacks on the Registrant's credibility, integrity or trustworthiness. Did the College adequately look into the Complainant's allegations that the Registrant fabricated evidence, was untruthful or made contradictory statements?

159. The Respondent argues that the corollary must also apply; that is, when the Respondent wrote to the College Investigator and said, "You need to know the background here of my relationship with this person and you need to understand what I was conveying." However, the Respondent says there is no evidence that the College Investigator shared with the Inquiry Committee the letter from the Respondent written in response to the complaint that his former military commander had made to the College, other than the College Investigator saying, "Well, I'm sure I gave it to them but it's not in the disclosure and it's not in my affidavit." The Respondent submits that it would have made a big difference if the letter or its contents had been provided to the Inquiry Committee. He says it is important that the College Investigator conduct an investigation based on the information the Respondent had raised to her.

160. The Respondent submits that paragraph 90 of the Review Board's decision in *College of Dental Surgeons of British Columbia 2012* is an example of what the investigator in that case did, and how that investigation was done, which he says

is more appropriate than what occurred in this case:

> [90] Over the course of the long investigation, the College gathered a substantial record containing 2 to 3 inches of documents which included many letters, emails, and telephone and meeting logs evidencing the communications between the investigator and the parties and other witnesses.

161. The Respondent argues that if the complaints he outlined in paragraph 40 of his written submissions had been addressed, the investigation in his case would not have moved forward. He says there would not have been an issuance of a citation in his case if his comments had been put in proper context. However, the College Investigator stated that she did not feel it was her job to interview the complainant or even to respond to the Respondent's letter, other than asking him to answer her questions. The Respondent directs the Panel's attention to paragraphs 91 to 93 of *College of Dental Surgeons of British Columbia 2012*:

> [91] The Registrant provided a chronology of events addressing each of the Complainant's issues, his dental chart with all x-rays as well as other documentation. At the request of the College's investigator, he subsequently added a transcript of the Complainant's treatment records and a further letter outlining the reasons for referring the Complainant to a denturist.
>
> [92] The College's investigator also obtained a written statement from the dental assistant who worked with the Registrant in the matter. Her statement corroborated the Registrant's evidence.
>
> [93] The College's investigator interviewed the Registrant in person and the Complainant by teleconference to obtain their respective versions of the events. At the start of his interview the Complainant told him that "he may not be as forthcoming as he would like as this matter is before the courts" referring to the civil suit he had launched against the Registrant.

162. The Respondent submits this investigative process is what he would have expected and that this should be the minimum expectation in a situation such as this case.

163. The Respondent further refers to paragraph 94 of *College of Dental Surgeons of British Columbia 2012*:

> [94] The investigator reviewed the report prepared by the Complainant's expert which report was critical of the Registrant's work. On review, the investigator found that the expert report referred to a different tooth than

> that which the Registrant treated. The investigator contacted that expert seeking to obtain more information and clarification. The expert's response was that he reviewed what records the Complainant provided, carried out a "quick examination to certify that he in fact was now edentulous on his upper arch . . . (but made no records of his past dental experience)." The investigator concluded that the expert's opinion was not supported by the evidence and that the report was "factually flawed."

164. He submits this shows again that the investigator in that case was looking very carefully at what was being alleged, and as a result, the investigator had noticed in the records that the wrong tooth was being referenced. The Respondent says this is akin to the College's suggestion that he was talking about the virus in the hospital when it was clear that he was talking about hospital admissions. He says a little bit of effort in looking into that comment would have made that clear.

165. The Respondent submits that, in the *College of Dental Surgeons of British Columbia 2012*, the Review Board panel decided that the investigator did a proper job because their investigation had been complete. They interviewed the complainant. They interviewed the registrant in person. They investigated further information. They critically analyzed the evidence that they were given, and the Review Board exonerated the registrant.

166. The Respondent argues that, when an investigation is performed in that manner, the situation is much less likely to find its way to a discipline hearing. He argues that a number of decisions show that, when a proper investigation is carried out, many of these complaints never proceed past the Registrar or the initial investigation and he argues that a thorough investigation should have also been performed in his case. The Respondent says that, if one critically examines what he said in the proper context, then it would have led to a different outcome and that is how he has been harmed. A proper investigation was not done and, as a result, he is two years into a discipline hearing that was supposed to have lasted three days and became seven days. He argues that he has been prejudiced in that he has lost his job and his nursing license has lapsed. The Respondent argues that the cases reviewed above make it clear that it is unfair to categorize this as just a screening process in which there could be no resulting prejudice from an incomplete investigation. The Respondent says the Panel is entitled to look at

whether the Registrar provided an assessment, what recommendations the Registrar made, to look at what the College Investigator did, whether the Respondent's statements were presented properly in context or not, and whether they warrant the Citation and the charges of unprofessional conduct or misconduct.

Findings and Analysis

167. The Panel agrees with the College that the cases on which the Respondent relies, particularly *College of Dental Surgeons of British Columbia 2012,* which deal with the Health Professions Review Board, are distinguishable from this case because they concern matters in which the Review Board had specific jurisdiction under the HPA to review the Inquiry Committee's decision and the investigative phases of the proceeding. The Panel also agrees with the College that the Respondent has not placed any case law before the Panel that supports the proposition that the Panel, at this disciplinary hearing stage, has a similar right to determine that the College Investigator, the Registrar or the Inquiry Committee breached procedural fairness and/or the requirements of the HPA, or to set aside decisions made at those earlier investigative or screening stages of the proceeding on the basis that there were breaches of procedural fairness or the requirements of the HPA by the College Investigator, Inquiry Committee or the Registrar. Under the HPA, the Discipline Hearing is not the place for a review or appeal by the Panel of those earlier stages of the proceeding or the decisions that were made during them.

168. The Panel's statements about procedural fairness in the Disclosure Decision on which the Respondent relies, were made in reference to the discipline hearing stage of the proceeding conducted before the Panel after issuance of the Citation. Those statements by the Panel were not intended to imbue the Panel with and were never intended to suggest that the Panel has jurisdiction to judicially consider, review and/or set aside steps taken or decisions made during those earlier investigative and Inquiry Committee phases of this matter.

169. The Panel agrees with the College's submission that the question the Panel

should focus on is “when” and “by whom” the College’s investigation and Inquiry Committee's conduct and decisions are reviewable. The "when" is at the time the Inquiry Committee makes the decision to direct the Registrar to issue the Citation. The Respondent could at that time have sought judicial review of the Inquiry Committee’s decision to direct the Registrar to issue the Citation. The where or “by whom” is that the matter goes to the BC Supreme Court for judicial review, not to the Panel.

170. The Panel agrees with the College that the Respondent has not placed any case law before the Panel that answers these questions in his favour. Importantly, the BC Court of Appeal’s decision in *College of Physicians* 2022 makes it clear that an application for judicial review to the BC Supreme Court is the appropriate course of action in a case like this, where the registrant is dissatisfied with the College’s investigation and the Inquiry Committee’s disposition of a complaint made against the registrant, and a review by the Health Professions Review Board of that investigation and disposition is not available under the HPA. In this regard, the Court of Appeal held that:

> [197] …. For those matters that are beyond the exclusive authority of the Review Board, judicial review is available.
>
> [198] In saying this, I recognize that in *Ridsdale v. Anderson*, 2016 BCSC 942, the Supreme Court indicated that dispositions by the inquiry committee were not subject to judicial review. The case was followed, as a matter of comity, in *Maroofi v. College of Physicians and Surgeons of B.C.*, 2017 BCSC 1558. In my view, the analysis in *Ridsdale* is in error, and it ought no longer to be followed. An investigation and disposition by the inquiry committee is an exercise of a statutory power amenable to review under the *Judicial Review Procedure Act*.

171. Further, the Panel also does not accept the Respondent’s suggestion that the College’s alleged failures to properly conduct the investigation and/or to comply with the Disclosure Order breached his right to natural justice and/or a procedurally fair Discipline Hearing.

172. The College denies that it has not complied with the Disclosure Order. In this regard, the Panel notes the following exchange between the Panel Chair and College counsel regarding the College’s compliance with the Disclosure Order:

….

THE CHAIRPERSON: Okay, so I think we have everybody here, so we'll come back together.

The panel has some questions for Mr. Olthuis. Can you -- has the College complied fully with the Panel's order of April 24th, 2023 and in particular I'm looking at paragraph 122 of that order and I'll just read it out.

"For all of the above reasons, the Panel directs pursuant to section 38(4.2) of the Act and section 208(6) of the College's bylaws, that the College will, as soon as practicable, but not later than 10 days after the date of this order, provide the respondent with

(a) all documentation not already disclosed that were reviewed and considered by the Inquiry Committee that resulted in the direction to the registrar to issue the citation, including the following documents in the possession or control of the College considered by the Inquiry Committee;

(i) all emails, meeting minutes, correspondence, notes of any and all individuals at Interior Health, the College, the Ministry of Health concerning Mr. Taylor and his employment with Interior Health Authority, his standing with the College and the issues raised in the citation issues September 22nd, 2022.

And then subjection (ii).

"All audio or video or transcripts of the instance referenced in the citation that formed the basis of the citation, including a copy of the complaint and all materials supplied by the complainant in support of the complaint, as well as copies of any and all emails, letters, fax, or correspondence between the complainant and the College or Interior Health Authority, including any notes of any conversations between the College or the Interior Health Authority and the complainant that is in the possession or control of the College…"

And then sub (b):

"…any documents contained in the Inquiry Committee's provisional assessments and findings…"

So the Panel wants to confirm that the College has complied fully with that order and if you would like to take the lunch break to confirm and give the response after that, I think that might be a wise decision for us to have that break now.

MR. OLTHUIS: I'm -- well I'm happy to answer it first and then we can take the break.

THE CHAIRPERSON: Sure.

MR. OLTHUIS: The College believes that it has. My friend has asked questions this morning about -- and the witness has given her response about an additional document that she believes she had provided to the Inquiry Committee. Whether that is a document that was not already disclosed I think is -- I think we would have to address in argument.

But I will say that what caused me to object in my friend's last line of questioning was the expansion of his questions beyond documents reviewed and considered by the Inquiry Committee. My friend was going,

"after the Inquiry Committee process" and was asking the witness about what went to the registrar and what materials counsel had considered in drafting the citation. Those were not the subject of any order, and that was my objection, was the implication or insinuation that those matters were covered by order and were not complied with. That there was a breach.

So to the extent -- the one document my friend referred to is a document in his client's possession, so to the extent that the College was not in perfect compliance with the order, as was directed -- we believe we were -- if we missed a document we can address any prejudice that may flow from that given that it was a document in the respondent's own hand and a document the respondent had.

So we can talk about that prejudice issue and whether this amounts to anything in the course of argument. But the College believes it has complied with the order.

THE CHAIRPERSON: Sorry, Mr. Turner, just before -- I will let you speak, I promise. I just wanted to mention to Mr. Olthuis that we understand what you're actual -- what the objections were. We're not ruling on that at this time. I'm asking a different question about this order of the panel and whether it was fully complied with by the College. So if we could leave that objection to the side for a moment.

MR. OLTHUIS: I've address that, Madam Chair. I've address that.

THE CHAIRPERSON: Thank you.

MR. OLTHUIS: I said that we believe we have.

THE CHAIRPERSON: Yes.

MR. OLTHUIS: And to the extent that there was one document missing, then we'll address that in terms of prejudice in the course of argument.

…..

THE CHAIRPERSON: Thank you. So I think I would like to take a lunch break. Mr. Olthuis, I think I will ask you to have another look at that order and confirm that everything that the panel had ordered in that section was complied with and then we will return in an hour and we will continue…

…

THE CHAIRPERSON: Okay, so I think that everybody's back from lunch. It is 1:18 right now.

Mr. Olthuis, I'd like to ask you first if you could please provide us with an update on your -- the compliance with that order.

MR. OLTHUIS: Certainly, Madam Chair. So, I will begin by saying that at the time the order came in, obviously I reviewed. I spoke with then counsel, internal counsel at the College, we both reviewed the order and the records that we understood were provided to the Inquiry Committee diligently, and I'm confident in the advice I gave the panel earlier, that we diligently followed the order and to the best of our knowledge we had complied with it.

173. The Panel accepts the College's assurance that it has complied with the

Disclosure Order. Be that as it may, the more fundamental question is whether the Respondent was provided with the necessary information to know the case he had to meet in the Discipline Hearing and with a full and fair opportunity to meet it. The Panel is satisfied that the Respondent was provided with that information and opportunity. In a discipline proceeding, the focus is on whether a registrant is aware of the case they are to meet, rather than the wording of the charge itself. The purpose of a citation is to advise the registrant with reasonable precision of the allegations he is facing. Discipline panels are not bound by the technical rules involved in the drafting of a criminal indictment. The essence of a discipline hearing is to determine whether there has been professional misconduct or incompetence. In professional discipline proceedings, factual particulars should be described in the notice of hearing, citation or supplementary document. Both the client and the specific misconduct should be identified. However, a notice should not read like an Information in a criminal proceeding. How detailed it should be depends on the complexity and seriousness of the case. A failure to provide details in the notice of hearing or citation can be cured by full disclosure of the evidence to be filed at the hearing. The discipline tribunal is not restricted to considering only the facts alleged in the notice of hearing but should make its decision in light of all of the facts adduced at the hearing. The notice of hearing or citation is merely an outline of the alleged facts.

174. Reasonable notice is accomplished in a variety of ways: disclosure by a regulator of the available evidence and documents; pre-hearing conferences and other discussions that identify the issues between the parties; the exchange of pleadings such as further particulars; and the notice of application (or citation) that particularizes factual allegations the regulator is making; and often, the rule or rules relied upon to support the allegation of a contravention. Written and oral submissions and the evidence presented during a discipline hearing provide further notice of the case to be met.

175. The HPA also prescribes several procedural fairness safeguards to ensure a respondent knows the case to be met, including that the citation must describe the

nature of the complaint or other matter that is to be the subject of the discipline hearing [section 37(1)(b)]; all witness testimony during the discipline hearing must be taken under oath or affirmation (section 38(4)(a); that the College and the respondent have the right to cross-examine witnesses and call reply evidence (section 38(4)(b)); and that the parties have common law and legislative notice and disclosure requirements in advance of the Hearing (section 38(4.1)). The Panel notes that in this case:

a. The Respondent was properly served with the Citation setting out the nature of the complaint or other matter that is to be the subject of the discipline hearing i.e. the College's allegations against him. The Citation indicates that the College alleges that the Respondent's comments outlined in paragraphs 1.a to 1.e and 2 were "…contrary to BCCNM's Professional Standards and/or Practice Standards…" and also "constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act."
b. The Respondent was also provided with timely disclosure of all the evidence on which the College intended to rely during the Hearing.
c. On May 4, 2023, the College further provided the Respondent with a 4-page schedule (the "Schedule" or the "College's Schedule of Further Particulars") that provides 19 professional standards the College alleges were violated by the Respondent's statements referenced in paragraph 1 of the Citation, and 22 professional standards the College alleges the Respondent's statements referenced in paragraph 2 of the Citation violate. The College's Schedule of Further Particulars indicates that the College alleges that the Respondent's statements outlined in paragraphs 1 and 2 of the Citation

> …also constitute professional misconduct and unprofessional conduct, as defined in section 26 of the *Health Professions Act,* RSBC 1996, c 183 (the "Act"), and are a breach of section 39(1) of the Act. The statements made by Mr Taylor are dishonorable, unbecoming of a Registered Nurse, and therefore constitute a

marked departure from the conduct expected of a Registered Nurse.

d. Further, on July 5, 2023 counsel for the parties attended a pre-hearing conference (the "PHC") for purposes of an application by the Respondent for an order for dismissal of the Citation or adjournment of the Discipline Hearing. As the PHC Panel noted in its reasons for decision refusing the relief sought in the PHC, College counsel advised the Respondent during the PHC that the College is specifically relying on sections 39(1)(b) and 39(1)(c) of the HPA in support of the allegations in the Citation. Accordingly, that the College is alleging that the conduct outlined in the Citation constitutes professional misconduct or unprofessional conduct under section 39(1)(c) of the HPA and, pursuant to section 39(1)(b) of the HPA, that the conduct outlined in the Citation also does not comply with a standard, limit or condition imposed under the HPA. The College further advised the Respondent during the PHC that the College is no longer alleging that the conduct outlined in the Citation breaches any Bylaw. That has fallen away.
e. Both parties were allowed to and did tender documentary and video evidence during the Discipline Hearing.
f. Both parties were allowed to and did call witnesses during the Discipline Hearing, including expert witnesses, and they tendered witness oral evidence.
g. Counsel for both parties were allowed to and did examine and cross-examine each other's witnesses during the Discipline Hearing.
h. The Discipline Hearing, including all witness testimony and video evidence tendered during the Hearing were transcribed and both parties had access to the hearing transcripts for purposes of preparing their closing written and oral submissions.
i. Prior to the conclusion of the Discipline Hearing, the College provided the Respondent with its written closing submissions which set out its case against him in detail, including reference to case law

and legislative provisions.

j. The Respondent was also given and used the opportunity to provide written closing submissions.

k. Prior to the conclusion of the Discipline Hearing, both parties were also given and used the opportunity to provide oral submissions, including the opportunity to fully respond and reply to each other's written and oral submissions.

l. The Respondent was represented by competent legal counsel for the duration of the Discipline Hearing.

176. While the College initially indicated it was alleging that the Respondent's conduct outlined in paragraphs 1 and 2 of the Citation constitutes professional misconduct or unprofessional conduct under section 39(1)(c) of the HPA and, pursuant to section 39(1)(b) of the HPA, that the conduct also does not comply with a standard, limit or condition imposed under the HPA, it clarified during oral submissions that what is squarely at issue in this case is section 39(1)(c) of the HPA. The College submitted that this is a case about professional misconduct and the question for the Panel is whether the Respondent's statements or comments outlined in the Citation, in context, are such that they amount to professional misconduct or unprofessional conduct. Particularly, are the Respondent's comments unbecoming of a registered nurse and therefore a marked departure from the conduct expected of a regulated nurse. The College further submitted that because the Panel is considering speech, the Panel must balance the right to free speech against the statutory objectives in the regulatory context. Accordingly, the College argued that this case is about whether the Respondent's comments constitute professional misconduct or unprofessional conduct when free speech rights and values are balanced against the College's statutory objectives.

177. It was clear from the College's submissions, including the case law and legislative provisions that it cited, that the College was no longer alleging that the Respondent's conduct outlined in the Citation violated the written Professional Standards and/or Practice Standards outlined in the College's Schedule of Further Particulars and, that pursuant to section 39(1)(b) of the HPA, the Respondent's

conduct accordingly does not comply with a standard, limit or condition imposed by the HPA. Instead, the College was only alleging that the Respondent's statements constituted professional misconduct or unprofessional conduct under section 39(1)(c) of the HPA.

178. It is also clear from the Respondent's closing submissions that he understood this. During his closing submissions, the Respondent acknowledged that the College's submissions did not deal with the College's Professional Nursing Standards cited in the College's Schedule of Further Particulars but that the College was making "more vague and general comments" that the Respondent's statements were "unprofessional conduct or professional misconduct, conduct unbecoming, dishonourable, disgraceful".

179. During a discipline proceeding, issues may expand and further sections or statutory provisions may be referenced as the proceedings unfold. Likewise, issues or legal provisions or standards initially relied upon may fall away or become narrower as a matter unfolds, as has already happened in this matter.

180. The Panel has already held that the Citation as presently worded is not deficient as a matter of procedural fairness. It complies with section 37(1) of the HPA. The Panel is satisfied that the Citation, the College's evidence disclosed to the Respondent, the College's Schedule of Further Particulars, the information the College provided to the Respondent during the PHC, and the College's oral and written submissions advised the Respondent with reasonable precision of the allegations he faced and the case he must meet in the Discipline Hearing. The documents and information the College provided to the Respondent indicated to him the nature of the complaint or other matter that was going to be subject of the Discipline Hearing i.e. the key factual allegations being made against him and contained all the evidence the College would be relying on. It also advised the Respondent that the College alleges that his statements outlined in the Citation constitute professional misconduct, as defined in section 26 of the *Health Professions Act*, and for purposes of section 39(1)(c) of the HPA because those statements are

dishonourable, unbecoming of a registered nurse and therefore constitute a marked departure from the conduct expected of a registered nurse.

181. Considering the circumstances as a whole, the Panel is satisfied the Discipline Hearing was conducted in a procedurally fair manner, that the Respondent knew, or ought to have known, the College's case he had to meet during the Discipline Hearing, and that he had full and fair opportunity to make full answer and defense to the College's allegations against him, including by providing the Panel with the context of each of the impugned statements, which the Panel also carefully considered in reaching its determinations.

b. The Admissibility of Expert Evidence Tendered by the parties.

182. As noted, both parties tendered expert evidence. The College and the Respondent objected to each other's expert evidence being admitted into evidence.

183. The parties agree that the modern framework for the admissibility of expert opinion evidence was set out by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co*. 2015 SCC 23 ("*White Burgess")* which provides a two-stage test for admissibility.

184. First, the party seeking to adduce the expert evidence must establish the threshold requirements of admissibility: relevance, necessity, absence of an exclusionary rule, and a properly qualified expert. In the case of opinion evidence based on novel or contested science, the reliability of the underlying science must also be established.

185. If the expert evidence does satisfy the threshold criteria, the court retains the discretion to nonetheless exclude the evidence if the risks in admitting the evidence outweighs its benefits. The second stage of the admissibility test is referred to as the gatekeeping stage.

Dr. Varcoe

186. Dr. Varcoe was qualified by the Panel as an expert qualified to give evidence

concerning: (a) structural forms of inequality and violence (such as racism), (b) racism and inequality in health care, and (c) ethical nursing practices.

187. Dr. Varcoe is a Professor Emeritus in the University of British Columbia's School of Nursing. She holds a diploma in nursing, a Bachelor of Science in Nursing, a Master of Education, a Master of Science in Nursing, and a Doctor of Philosophy in Nursing. She has been a Registered Nurse with a practicing license since 1973.

188. Dr. Varcoe taught nursing for 40 years in practice settings and educational institutions. She has also been in leadership positions in practice settings and educational institutions, including being the Director of the UBC School of Nursing.

189. For the past 25 years she has conducted research with a focus on inequities in health care, with an emphasis on ethical nursing practice and on racism. She is the author of over 200 peer reviewed journal articles and chapters, and books on women's health, relational nursing practice and trauma- and violence-informed care.

(i) Nurses and Contact with the Public

190. Dr. Varcoe outlined the deficiencies in treatment and outcomes for racialized peoples in the healthcare system, drawing on an extensive body of research correlating racism and wide-ranging health effects. Dr. Varcoe noted that nurses are the most numerous health professionals and work in most health care settings. As a result, racialized persons will have more contact with nurses than any other provider in healthcare and nurses are often the first point of contact for individuals. Nurses, therefore, have a profound impact throughout the healthcare experience.

(ii) Harms from the Expression of Discriminatory Views

191. Dr. Varcoe opined that nurses expressing or publishing views that deny the experience and identity, or threaten the safety, of racialized persons are harmful in at least four ways: (1) racism's profound negative physiological and health effects; (2) racism deterring racialized persons from access health care; (3) racism expressed by individuals contributing to collective discrimination; and (4) the harm posed by racism to the health care workforce.

192. Dr. Varcoe identified a significant correlation between experiences of discrimination and lower ratings of care received. She pointed to research in this regard that found that “sizeable and statistically significant relative risks for poor health exist for those identifying as Aboriginal, Aboriginal/white, Black, Chinese or South Asian”. More importantly, Dr. Varcoe suggested in both her report and oral testimony that health care provider practices contribute to such negative impacts and inequitable outcomes. Specifically, Dr. Varcoe stated during oral testimony that drawing on racial stereotypes can lead to misdiagnoses and overlooked health issues.

193. In Dr. Varcoe’s findings, these effects, which are not drawn from individual but widespread racist practices, translate into community-wide fear of seeking care. Moreover, Dr. Varcoe established in her testimony that these types of practices and discriminatory views contribute to collective practices. For example, as a result of racist views of an individual or small group of nurses, it may become common practice among the whole department to treat certain groups of people with less respect and less urgency. Accordingly, nurses can significantly influence each other in terms of quality of care that is provided and how patients are treated.

194. Dr. Varcoe opined that such racism also has profound effects on the wellbeing of health care providers and their careers. Specifically, Dr. Varcoe stated in her report that observing racism and other firms of discrimination can elicit moral distress in healthcare practitioners of all ethnic identities.

195. Dr. Varcoe also testified that when health care professionals, and in particular nurses, express views that threaten the safety of racialized people, trust and public confidence in the healthcare system is eroded

196. The College argues that this is the type of expert evidence that deals with issues that are not within the realm of a layperson to draw as inferences, and accordingly it is both necessary and relevant for the Panel on the facts of this citation.

197. The Respondent says that the issues on which Dr. Varcoe provides an opinion

are not relevant to the Citation, and he does not dispute that there are individuals in society and in healthcare who hold racist views.

198. The Respondent says the College's position that introducing Dr. Varcoe's evidence to provide yet further context is not the purpose of expert opinion evidence. Opinion evidence is not admissible because it is hearsay. The exception to this evidentiary rule is that expert evidence that meets specific criteria may be admissible.

199. The Respondent did not dispute Dr. Varcoe's qualifications as an expert in the areas of structural forms of inequality and violence, racism and inequality in healthcare and ethical nursing practice.

200. The Respondent objects to Dr. Varcoe's expert opinion being admitted into evidence on the basis that her expert opinion is not relevant to the issues in the proceedings, nor is her opinion necessary. He says the Supreme Court of Canada has made it clear that at the first step of the analysis, there are four threshold requirements that the proponent of the expert opinion evidence must establish for the proposed opinion to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule, (4) a properly qualified expert (*White Burgess*, above at paragraph 19).

201. The Respondent says that mere relevance or helpfulness of the expert opinion is not enough. (*White Burgess*, supra at paragraph 21). Evidence that does not meet the threshold requirements should be excluded. (*White Burgess*, above at paragraph 23)

202. The Respondent says the admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed easy entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility (*White Burgess*, above at paragraph 45)

203. The Respondent says at the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence to decide

whether the potential benefits justify the risks. (*White Burgess*, above at paragraph 24)

204. The Respondent also does not dispute the fact that there are individuals in society and in healthcare who hold racist views, and that there is harm to those who are targeted by those with such views.

205. The Respondent says Dr. Varcoe admitted in cross-examination that she has never met the Respondent, nor has she ever been present when he has been working in one of the emergency departments in British Columbia; she has not supervised his work or job shadowed him, and she does not know of the Respondent at all. It is another example of why her opinion is not necessary.

206. The Respondent says Dr. Varcoe's report, and her opinion evidence, do not meet the first step of the analysis, by failing to be relevant or necessary to assist the trier of fact in determining if the statements made by the Respondent as referenced in the Citation are deserving of discipline. Accordingly, her report and opinion should not be admitted into evidence. He says Dr. Varcoe's report is not admissible, not because Dr. Varcoe is not an expert on the issues that she was qualified for, but because her opinion is not necessary, which he says is the test in the first stage 1 of the criteria that must be met. He says it must be necessary for the Panel to make its decision that it needs Dr. Varcoe's opinion.

207. The Respondent says that Dr. Varcoe opined that nurses expressing or publishing views that deny the experience and identity or threaten the safety of racialized persons are harmful in at least four ways, which she lists in her report. The Respondent denies that he did any of those things. The Respondent points out that one of the main areas of harm is racism deterring racialized persons from accessing healthcare.

208. The Respondent says he agrees wholeheartedly; he is a friend of the Indigenous community. He has worked in Indigenous communities for years since he was an EMT.

209. The Respondent further argues that if the Panel concludes that Dr. Varcoe's opinion is necessary to make its findings, it should also consider his testimony that what the media was doing would also deter racialized people from accessing healthcare, and through his statements he was encouraging the media to be more responsible in their reporting.

210. The Respondent says he was not denying that racism exists. He submits that the College asked him during cross-examination whether this ever occurs. He testified “yes sometimes”, sometimes there are false statements made. In other words, he agreed that sometimes those statements have merit, and someone is acting on their racialized views in healthcare. The Respondent submits that if he had asserted that racism never exists in healthcare, then that would be a denial of the experience of racialized people. In contrast, the Respondent acknowledges that racism can and does occur in healthcare. The Respondent submits that accuracy is important, and the College should not be misrepresenting or taking his statements out of context, as the context is essential to evaluating whether they constitute professional misconduct.

211. In reply, the College argues that the Respondent misinterprets Dr. Varcoe’s evidence. The College says that her evidence goes beyond simply pointing out that racism is prevalent in healthcare. The College says her evidence is that disparaging racialized groups may have the compounding effect of creating distrust in the healthcare system and its providers, negatively impacting quality of care, and increasing harmful outcomes. It says this evidence is necessary and relevant because it provides the Panel with clarity as to why the Respondent’s conduct is so harmful.

212. With respect to the Respondent’s submission that the Panel should give less weight to Dr. Varcoe’s evidence because she had never met the Respondent, the College says it does not matter. The College submits there is no relevance to the fact that Dr. Varcoe had never met the Respondent. It argues that the gravamen of her evidence does not turn on her assessment of, or even knowledge of, the Respondent.

Dr. Steven Pelech

213. Dr. Pelech was qualified by the Panel as an expert to give opinion evidence on the safety and effectiveness of wearing a mask to prevent the infection or transmission of the SARS- CoV-2 virus or similar respiratory viruses.

214. Dr. Pelech is a faculty member at the University of British Columbia; he has been a Professor in the Department of Medicine for 35 years. His post-doctoral training is in the area of biochemistry.

215. The Respondent sought Dr. Pelech's opinion as to the effectiveness of masks in preventing the spread of SARS-CoV-2 or similar respiratory viruses, and whether there are any negative health concerns that can arise as a result of being required to wear a mask for this purpose. The Respondent submitted that he was not sure why his comments about wearing masks in paragraph 1.a and 1.e of the Citation were in the Citation. He assumed the College was alleging that he was spreading false information about masks, because from the way his statements have been paraphrased and characterized in paragraph 1.e. of the Citation it appears that he is disagreeing with wearing a mask. He submits he secured the expert opinion of Dr. Pelech because he was not given the particulars of how that comment about wearing a mask violated the professional nursing standards and believed the Panel would be assisted by having an expert on this issue provide evidence about the effectiveness of wearing a mask to prevent the infection or spread of COVID-19.

216. Dr. Pelech's evidence included that masks are ineffective at preventing the spread of COVID- 19. Dr. Pelech's evidence was also that he agreed with Dr. Tam and Dr. Henry when they were of that same view in 2020, but he disagreed with them when they changed their position after that. In Dr. Pelech's opinion, wearing masks in an attempt to reduce the spread of COVID-19 is also harmful for numerous reasons, such as the reduced intake of oxygen, potential skin disorders, the psychological impacts on children, and it also causes individuals to be less careful in group interactions.

217. The Respondent submits Dr. Pelech's evidence should be admitted. He says Dr. Pelech's qualifications were admitted, he provided evidence directly on the efficacy of masks, which is relevant based on the statements in the Citation at least and provides helpful expert evidence that certainly a layperson would not be able to discern on their own. The Respondent argues that having Dr. Pelech's expertise and research will assist the Panel in evaluating the statements in paragraphs 1.a and 1.e of the Citation.

218. The College argues that Dr. Pelech's evidence ought not to be admitted because it is not relevant.

Findings and Analysis

219. As noted below, generally, administrative tribunals like this Panel are not bound by the strict rules of evidence. The Panel, however, accepts the parties' submission that *White Burgess* is the guiding case authority on the admissibility of expert witnesses that should be applied in this case. *White Burgess* describes the appropriate approach to the admissibility of expert evidence as follows:

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the

> preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

220. The Panel accepts the College's submission that a principal question for the Panel's determination is whether the Respondent's comments referenced in paragraph 2 of the Citation so negatively impact on the public health system, or the profession, that it attracts discipline.

221. The Panel further accepts the College's submission that Dr. Varcoe's evidence goes further than simply pointing out that racism is prevalent in healthcare. Her evidence indicates that disparaging racialized groups may have the compounding effect of creating distrust in the healthcare system and its providers, negatively impacting quality of care, and increasing harmful outcomes. The Panel also accepts the College's submission that this evidence is necessary and relevant to the principal question to be decided because it provides the Panel with a ready-made inference as to why the Respondent's alleged conduct is harmful. The Panel is further satisfied that Dr. Varcoe is properly qualified and is able and willing to carry out her primary duty to the Panel. The Panel finds that there is not an exclusionary rule prohibiting her expert opinion from being admitted and finds that her evidence is relevant, necessary, reliable, and unbiased.

222. Further, in the second step of the *White Burgess* analysis, the Panel must determine whether the benefits of admitting Dr. Varcoe's evidence outweigh any potential harm, including potential harm to the hearing process. If the probative value of her evidence is outweighed by its prejudicial effect, it should be excluded. The Respondent has not shown potential harm or risk to the hearing process that outweighs the benefits of admitting Dr. Varcoe's evidence and the Panel finds that there is none. Accordingly, the Panel admits Dr. Varcoe's expert opinion evidence in this Discipline Hearing.

223. The Respondent says he was not sure why his comments about wearing masks in paragraph 1.a and 1.e of the Citation had been included. He assumed that the College was alleging that he was spreading false information about masks

because, from the way his statements had been paraphrased and characterized in paragraph 1.e. of the Citation, it appears that he is disagreeing with wearing a mask. However, as previously noted, the Respondent claims that his actual statements made it clear that he was talking about people wearing masks outside at a time when that was a violation of public health guidance. The Respondent says he secured the expert opinion of Dr. Pelech because the College had not given him the particulars of how his comment about wearing a mask violated the professional nursing standards. The Respondent therefore believed the Panel would be assisted by having an expert on this issue address the effectiveness of wearing a mask to prevent the infection or spread of COVID-19.

224. With respect to Dr. Pelech's expert evidence, the Panel agrees with the College's submission that his evidence is not admissible because it is not relevant to or necessary for determination of the principal issue in dispute. As noted, the ultimate question for the Panel to decide is whether the Respondent's statements that are outlined in the Citation so negatively impact the public health system, or the nursing profession, that it attracts discipline. As part of this inquiry, the Panel must determine whether the Respondent's comments in paragraph 1.b of the Citation are discriminatory and if his comments in paragraph 1.e are inaccurate or inappropriate. The question of whether masks are effective in preventing the spread of COVID-19 and other respiratory illnesses is not relevant to or necessary for the Panel to make these determinations. Accordingly, since Dr. Pelech's evidence has not met the threshold requirement for admission, the Panel declines to admit his evidence as expert evidence in this Discipline Hearing.

c. The Admissibility of Video Evidence Tendered by the College.

The Parties' Submissions

225. The video and documentary evidence tendered by the parties were marked as exhibits. The Respondent objected to the admissibility of some of the videos that the College sought to use as evidence.

226. The Respondent submits the only evidence that should be admitted regarding statements made by him on the podcasts are those that were entered as exhibits

by him, along with the Global News segment, as these provide the context of the statements referenced in the Citation and for which the Respondent is before the Panel.

227. The Respondent says the extraneous video evidence tendered by the College is an attempt to assassinate his character, rather than evaluate the statements referenced in the Citation.

228. The Respondent argues that the only exhibits that should be admitted are 1, 7, and 20 to 39. He says Exhibits 2 to 6 and 8 to 17 tendered by the College should not be admitted because they contain several minutes of extraneous information that do not pertain to the items for which the Respondent is cited. The Respondent says the only reason that these other exhibits have been introduced by the College is to try and assassinate his character and paint him as a particular type of person, rather than looking at the context of the statements that are at issue in the Discipline Hearing.

229. The Respondent further submits that when he was given an opportunity to explain himself during his testimony regarding this extraneous information, it was clear that he had not said anything that would constitute a breach of any professional nursing standard.

230. The College submits that all of its video evidence is admissible. Section 37(1)(b) of the HPA states that:

> 37(1) If directed by the inquiry committee or the board, the registrar must issue a citation that […]
>
> (a) describes the nature of the complaint or other matter that is to be the subject of the hearing, […]

231. The College says the Respondent's assertion that any video that does not pertain to the impugned statements referenced in the Citation should be ruled inadmissible, is an unduly narrow reading of the purpose of the Citation. The College relies on *Bell ExpressVu v. Limited Partnership v. Rex* 2002 SCC 42 where the Supreme Court of Canada noted, at paragraph 27, that "[W]ords, like people, take their

colour from their surroundings." The College submits that, while this comment was made in the statutory interpretation context, it is of general relevance to this case.

232. The College says the Respondent had identified himself as a nurse in the various videos. This was the setting in which he was making comments. The Panel can no doubt take notice of the fact that the intention of persons who broadcast (or webcast) their views is for other persons to be exposed to their message – that is, the entire message. To the extent that some viewers may watch only a portion of a vlog, it is impossible to identify which portions those would be. Anyone charged with interpreting the impugned comments requires a broader context. In the phrasing from the Supreme Court of Canada, those persons require the broader surroundings to give colour to the specific words under scrutiny.

233. The College says that it is telling, although far from determinative, that the Respondent himself took the position at various times in the Discipline Hearing that fuller context was required in order to understand the comments that the College expressly referenced in the Citation. The College says it lies ill in the Respondent's mouth to take a completely different position at this stage.

234. The College submits the Respondent had his opportunity to proffer the evidence that he says would provide necessary context to the statements at issue. The College is now doing the same. The Panel should be considering all of the evidence to make the necessary findings of fact and determinations of law.

235. The College denies the Respondent's allegation that this is an attempt by the College to assassinate his character. It says the Respondent cannot say how his own words are, or possibly could be, harmful to him in this way. Instead, the Panel is left only with the Respondent's accusation that the College is hurting him by playing his own words as part of the Hearing. In any case, the College says the Respondent at another stage of Discipline Hearing had said exactly the opposite. He had argued that watchers and listeners would only be able to put his comments into proper context if they listened to the comments in their entirety.

236. The College submits that watchers or listeners would be able to put the

Respondent's statements in full context if they listened to those comments in their entirety. The College argues that the Respondent had every opportunity during the Hearing to provide the context that he had argued was critical to include, and he elected not to do so. The Panel is accordingly left with the evidence that it has heard. The College says it has provided all of the context, and the Respondent has had the same opportunity to provide context. The Panel is left with the words that the Respondent used in order to determine if they are disciplinable. The College says this is not about attempts at character assassination; instead, it is about whether words used by the Respondent amount to disciplinable conduct. The College has only led evidence about specific things that have been said by the Respondent himself.

Findings and Analysis

237. As the College pointed out, the Panel does not have its own rules of procedure, and the HPA is silent on how the Panel must decide to admit or reject evidence. In its preliminary decision of December 5, 2022, the Panel held:

> 8. It is a well-established principle of administrative law that administrative tribunals, including this Panel, are the "masters in their own house", and they have the authority to determine their own procedures, subject to specific statutory requirements and the rules of procedural fairness and natural justice (*Prassad v. Canada (Minister of Employment and Immigration*, 1989 CanLII 131 (SCC), [1989] 1 S.C.R. 560 at 568-69; *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55).

238. Administrative tribunals such as the Panel are generally not bound by the ordinary rules of evidence. The Panel may however, draw from principles flowing from the law of regulatory proceedings.

239. The principal task for a discipline panel in a discipline hearing is to determine, based on the facts or evidence placed before it, whether a registrant has committed unprofessional conduct or professional misconduct.

240. The Panel does not accept the Respondent's submission that the College is attempting to assassinate his character through the introduction of the video evidence. The Panel accepts the College's submission that the purpose of the

video evidence is to provide the Panel with the broader context to give colour to the specific words under scrutiny in this Discipline Hearing.

241. Accordingly, for the reasons advanced by the College, the Panel admits into evidence all of the video evidence tendered by the College during the Discipline Hearing in order to determine whether the Respondent has committed unprofessional conduct or professional misconduct.

d. Whether the Respondent made public statements that advocated violence, were discriminatory and/or were inaccurate or inappropriate, and if so, whether he identified himself as a nurse while making those statements.

242. The Panel will next consider whether the evidence placed before it establishes that the Respondent made public statements that advocated violence, were discriminatory and/or were inaccurate or inappropriate, and if so, whether he identified himself as a nurse while making those statements. In determining these issues, the Panel will consider the evidence and submissions introduced by the parties to provide context for each of the specific allegations outlined in the Citation.

The College's evidence in support of the allegations contained in paragraphs 1.a-e and 2 of the Citation.

243. The College tendered video evidence in support of the allegations in the Citation which shows that during March 31, 2020 and November 2, 2020, the Respondent appeared several times on the publicly available "Grizzly Patriot" video log ("Vlog") and the "Monks & Mavericks podcast".

(1) <u>31 March 2020 - Grizzly Patriot YouTube Vlog</u>

244. During the Respondent's appearance on the Grizzly Patriot vlog on 31 March 2020, the host and the Respondent had the following interaction:

> MR. FRIESEN: All right, so, last time, who are you, where'd you come from, what's your experience?
>
> MR. TAYLOR: All right, so I'm an emergency room nurse, have been since 2005. I currently work in Kelowna, Vernon and Penticton in the Okanagan Valley for Interior Health. I'm also a military veteran of 18 years with most of those being in the infantry, but recently I switched over to

being a nursing officer, and I'm now a platoon commander with 12 Field Ambulance out of Vancouver.

(2) 22 April 2020 - Grizzly Patriot YouTube Vlog

245. On the 22 April 2020 episode of the Grizzly Patriot YouTube vlog, the host introduced the Respondent as "a nurse in BC". The host indicated that he had spoken with the Respondent earlier that day, and described the purpose of that discussion and the context for the Respondent's appearance on the vlog: "*I wanted to see what things were happening in Kelowna and Interior BC, because he [the Respondent] does float around to a bunch of different hospitals there. And I thought I should touch base with. So I'm glad I did, because he had some interesting information to share with me.*"

246. During this appearance the Respondent's comments included the following:

(a) "I was out shopping the other day for my folks and I'm seeing guys in their 20s walking around wearing N95 marks and work gloves in, in, in the grocery store. And it's just, it's completely ridiculous, right?"

(b) "[I]f you step off (inaudible), get out of Facebook, get out of YouTube and start heading over to (inaudible). Like the litany of doctors that are on, they're talking about, 'Hey, I've got patients dying of congestive heart failure, of influenza, of, of pancreatic cancer and they're being marked down as COVID deaths' ".

(c) "…I had a little girl come in yesterday that I triaged. She, she fell down, hit her head. She was fine, everything was good. Yeah. And she was in [a] mask, mom was in a mask, they're both N95s. Mom was completely (inaudible) she didn't want her kid to sit down, she didn't want her kid to – and I, and I just – yeah, I just told mom, I'm like, 'You know what? It's all good.' Like, the thing has been so overblown and exaggerated that everyone's terrified".

(d) "So they look at the data, they crunch the numbers. Like, all right, we get this effect with this kind of messaging. And they have honed their message in. So with that, we're under martial law, and they haven't had to use the police of the army, [they've] used the CDC".

(e) "Well, and that's (inaudible) to the people watching tonight, it's what I just encourage you to do. You're gonna piss people off. I've done that quite a bit at work. Yeah, 'cause a lot of people they don't want to hear it. Yeah, people need to hear it and we just – we need to start speaking truth to power, right? It's insane, it's insane. And the apprehension I have about where this leads to, if we don't, if we don't start speaking up and it's when you – when people hear that, it's funny, like and it's everywhere I go. It's like, 'Hey, how's it going? How's the big fake virus treating you? Or the fake pandemic treating

you?' And people are just completely shocked at anyone saying that.[31] … And then when they give you the gears on it, it's like 'oh, okay, well this is what my experience has been working as a front-line healthcare worker. I tell them I'm an emergency nurse[.]"

(f) "[T]he discrepancy between what people think's going on and what's actually going on is so stark. And you tell people that and they're just like, 'Oh, what do you mean?' It's like, "All bullshit, man".

(g) "This is what they're doing, so if it was really bad, they [wouldn't] have to lie about it. … Right? They wouldn't have to fabricate … all this media to justify the fear."

(3) 30 October 2020 - Grizzly Patriot YouTube Vlog

247. On October 30, 2020, the Respondent appeared on the *Grizzly Patriot* vlog and stated the following:

> MR. TAYLOR: Where I worked in health care and I'm, I'm in the military and it's – it puts you in a weird spot, right? Because, okay, well I'm supposed to tow the company line but at the same time, as a nurse, it's my professional responsibility to advocate for my patients and for doing the best job I possibly can, that's my professional responsibility, right? Like the docs have the [Hippocratic] Oath and stuff like that, and you see – this is, this is the thing that's been so weird, like, psychologically just watching this stuff go down where you see some doctors rebelling against it saying, 'We've got to do a better job.' And then you see some doctors towing the company line, and it doesn't matter how smart you are or if you're a good person or not, right?"

248. On this appearance on the *Grizzly Patriot* vlog, the Respondent also made the following comments:

(a) "Like the racism thing in, in BC here where they were calling ER docs and nurses racist because of guessing numbers and stuff like that and we, we got thrown under the bus by our unions, by our health authority CEOs, by our Health Minister, everything, right? And it just took one, one news story to say this is all bullshit, and it all went away, right?"

(b) "[T]his is the thing, Mark, it it isn't about getting people to believe, it's getting them to be complicit in a lie [A]nd it's a demoralization thing. Every time you put that mask on your face, and you know it doesn't do shit, they tell you it doesn't do shit. But every time you put that mask on your face, you're complicit in a lie. Right? … And the more you become complicit the more, the more the demoralization occurs, and that's how all this stuff goes."

(c) "I'm not going to lie, I'm in health care, so I've got a, I've got to – I've got to play the game at times, and I feel like a bitch every time I do it, and it's silliness, but I'm vocal about it".

(d) "Like if you're my patient, like I said, you come in for a broken heart – or a

broken arm, or a heart attack or whatever, you get inoculated for communism, right, because I'm campaigning. I'm campaigning everywhere. Like, people need to wake the hell up".

(e) "Like you go to the bigger cities and it's just the amount of masks, and I've seen it here, even in Grand Forks, like I don't wear a mask. Like it's been mandatory masks, I think since August at some of the stores here".

249. The Respondent also made the following statements, portions of which the College included in paragraphs 1a. and 1.b of the Citation:

> "But you look, you look at the shit that's going on with Antifa and Black Lives Matter are burning cities in the States. The restraint that's being shown on the right – like I got to tell ya, I watched that shit. I want to take a road trip and go down and play paintball, right? Like it just – the restraint that's being shown right now, that isn't going to last forever[.]"
>
> and
>
> "Yeah, and you know, it's like, well what is it going to take, what is it going to take, what is it going to take? I'll tell [you] what it's going to take, it's going to take a fucking push back, right? And we need to start letting these people know. It's like, okay you know what this, all this stuff it may go down – yeah, you'll get people to wear your masks, and you can put them in, in, in your internment camps and stuff like that, la-la-la-la-la, but there is a group of people, myself included, and you and a bunch of friends, who will not comply. We will meet you in the streets and do this the old fashioned way. Right? And until you fucking hoist that aboard your frontal lobe there people, right, like this is going to start happening, right, and I don't see – yeah, I don't see them stopping until, until, until that does, right?"

250. With respect to the first of these two comments, the Respondent testified during cross-examination that persons would perceive him as being "on the right" of the political spectrum, and that his intention was to express that those on the right had shown too much restraint in reaction to the actions of groups he considers Marxist. With respect to the remaining content of that statement, the Respondent testified as follows in response to questions by counsel for the College:

> Q I'm going to suggest, sir, that in fact your comments were to the effect that an appropriate way to deal with the destruction was to meet it through violence, an eye for an eye.
>
> A You would be incorrect.
>
> Q Well, sir, you said, "I want to take a road trip and go down and play paintball." Do you remember that comment?
>
> A If I'm correct, "It makes me want to." It's a turn of phrase.

Q Okay. Okay, it's a turn of phrase, but the road trip portion of that comment, sir, suggests that you're going to be travelling to the areas of the protest, the areas of destruction.

A Say that again?

Q When you refer to road trip, you're talking about travelling down to these cities that are under siege by Antifa and Black Lives Matter supporters.

A Yes.

Q So "I want to take a road trip" means travelling to those cities. Agree? Sorry, you have to yes [sic]. You can't just nod your head.

A Yes.

Q And the paintball portion of it, "and to play paintball", suggests shooting, does it not?

A You understand that an expression, a turn of phrase, right? I'm not going to go down and play paintball. I just – I don't – well, what are you trying to say, sir?

Q Well, I'm trying to get you to answer the question, that when you say, "I want to go down and play paintball," you're using a euphemism for shooting someone, aren't you?

A It's an expression.

Q Yes, it's an expression with meaning.

A I felt that there should have been a bigger bulwark against the violence that the American cities were experiencing while that podcast was made.

Q And that bulwark, in your view -- in the comment you made, that bulwark was an eye for an eye.

A I never said an eye for eye.

Q You didn't say –

A And I never –

Q But you said you want to go down there, you want to take a road trip and play paintball. Isn't it the same thing in different words?

A There was never -- I was expressing my frustration with the violence that I was seeing on TV. I'm a law-and-order guy. I believe in law and order. The fact that I temper what I see through my experience as a psychological operator and I see that these leftist groups who

are filled with a diverse group of people were being misled and being used to perpetrate violence in our closest neighbour. Right? Using an expression where, you know, I don't think anyone would listen to that and thinking that I'm going to go down and play paintball, and I would never advocate for violence but protecting the cities that you live in is I thought something I'd see more of. And I was expressing my frustration that I wasn't.

Q This might, sir, have been another one of those occasions in which the context and the person you were speaking with caused you to be a little looser in your language than maybe you ought to have been. Do you accept that?

A Possibly.

Q Do you accept that a listener might have perceived those comments as advocating for violence?

A Again, I'm not going to speak what other people – to what other people perceive.

Q Well, did you give any thought, sir, before you said it, to whether a listener might perceive it as having advocated for violence?

A Can you ask that question again?

Q Did you at least give any thought before you uttered the words as to whether someone might take it as advocating violence?

A It happened in the flow of conversation. I don't know how much – we were expressing our frustration with what was going on. I don't know how much thought I gave, it was quite a while ago.

251. With respect to the second comment, the Respondent testified as follows in response to questions from counsel for the College:

Q I'm going to suggest sir, that you also advocated violence when you said, "we will meet you in the streets and do this the old-fashioned way."

A There – there's a lot of people that took to the streets during this. It didn't happen much in Canada, but resistance to abuse of power, is not – yeah, is not uncommon throughout history, right? I've never – you've picked certain videos. There's a lot more videos out there where I am strongly advocating against violence, and you can, as we see in the citation, on how you've removed certain words and the way you've cut things apart that I've said, to make it look like I'm advocating for violence. I've never advocated for violence, and if you search the internet, there's a lot of people out there advocating for violence, and very few of them are people who've experienced violence. I fought in a counter-insurgency war, and I

don't want to see that come to Canada, but with the things that I'm seeing happen, I think at some point people are going to have to resist.

Q Well sir, I appreciate that, and you did give further context when your counsel was interviewing you, but you'll appreciate when you're giving an interview like this, listeners might come in and go out at various times. And much of the context you provided now you didn't provide in the course of your interview with Mark, and we're focusing on the statement that we've isolated. And I'm just asking you, just on that statement alone, "we will meet you in the streets and do this the old-fashioned way," you'll understand that someone might take that to be advocating violence.

A Again, that's, that's out of my control how people take it, right? You Canadians love hockey, right? Is that racist? Is someone's offended by that? It doesn't -- you know? Like the intent – I can't control how people shape what I say with their world view, okay? I haven't said anything – well, I've given the College opportunity to point out where I've said anything that's inaccurate, and they haven't. And I am – yeah.

Q Well, sir, you say that you have no control over how people perceive what you've said. But you'll agree with me you have full control over what you do say. You have full control over what words you use to express what you want to say.

A That's true.

Q And you'll agree with me that sometimes we express ourselves in a way that we wish we had it back. We think, you know what, I didn't phrase that well, that's not the greatest way of putting it, let me try again. You've had experiences like that?

A Yes I have.

Q And I'm giving you an opportunity here to agree with me that by saying, "We will meet you in the streets," immediately after having referring to internment camps and "we will not comply," when you say, "we will meet you in the streets and do this the old-fashioned way," do you not think for a moment that maybe you could have phrased it differently, because it sounds like you're advocating for violence?

A I could have phrased it differently, yes, but I – I fail to see – I think we've watched a few of my videos now, and I think the spirit of what I'm saying is able to be perceived, that I'm advocating for better patient care, I'm advocating for better health policy, and I'm advocating for actions that will avoid harm. And what they were doing was bringing us towards – because, in the application of violence, there's a thing called the escalation of force. Right? And before you start advocating open violence, you know, going out into the streets and saying no to policies that are restricting the

freedoms of people, is just the next step, right? So, if someone misconstrues that, I'm sorry, but I don't – I didn't say anything that was advocating violence.

Q Do you –

A Throughout this entire thing, I've advocated for don't comply with things that don't make sense.

Q And you also said, "We will go out in the streets and do this the old-fashioned way," and I'm asking you sir, do you have any regret with how you expressed yourself in that clip?

A I wouldn't say regret, but I could have worded it differently.

Q Did you give any thoughts before you uttered that phrase as to whether a listener might perceive it as advocating violence?

A When conducting interviews in a podcast, Mark Friesen is a very dear close friend, and sometimes, sometimes the way those interviews go, it ends up being more like a conversation with a friend than something that's in a public forum. Sometimes things are said that you normally wouldn't say in public. I wasn't there as a nurse, I wasn't there – yeah, representing nursing. I was in a political podcast talking about political things, right? And sometimes, you know, colloquial language and jocularity is used. Would I use those terms and that type of language in a nursing forum? No I would not. Would I use it in a business forum? No I would not. But in that podcast, and in that milieu, jocularity and colloquial language is just a norm. So, I can't think it strayed out of the norm for that podcast.

Q. Well, I won't comment on that, sir, but I'm going to ask you to admit that in the course of those podcasts, you were identified as a nurse, you self- identified as a nurse on several occasions throughout. Did you not?

A When asked my background? I – yeah, it's not a secret that I'm a nurse, it's not a secret that I was in the Canadian Armed Forces. It's not a secret that I was a firefighter. Yeah, when people asked, I stated it.

Q But it is not just when you were asked sir, you sometimes referred to the fact that you were a nurse when you were buttressing the knowledge you had about certain aspects of public health.

A If I was talking about my experiences in healthcare, yes, that would identify me as a nurse.

Q Right, and then you sort of – I don't mean this in a pejorative way, but you traded on the fact that you were a nurse to explain how you had obtained certain knowledge.

A Yes.

Q You didn't – you've explained, sir, and I think quite fairly about how the conversations go, or how they went, at least in this case in the podcast, so you'll agree with me that you didn't for instance – the comment about going to the streets and doing this the old-fashioned way, you didn't vet that comment through anyone?

A I didn't vet that comment through anyone? No.

Q Correct. You didn't seek advice from the College as to whether that was an appropriate comment to make while identifying as a nurse?

A No.

(4) 2 November 2020 – *Monks & Mavericks* YouTube Vlog

252. The College's evidence shows that on November 2, 2020, the Respondent appeared in a separate vlog called the "Monks & Mavericks Podcast" and when he was asked to introduce himself, the Respondent stated the following:

> So, I'm a registered nurse, an emergency nurse. I've been doing that since 2005. Before that, I worked advance life support air ambulance, supporting Western Canada with interfacility transfers and ground, ground ambulance as well.

253. During this vlog, the host asked the Respondent: "*So, let's just get down to the nitty gritty. Why, why is it that you think the COVID thing is a giant sham?"* In the course of a lengthy response, the Respondent said:

> Right, but where does influenza come from? It's, it's an avian, it's an avian virus and it's a, a (inaudible) virus and they usually come from China, right, because of the interface with Chinese culture. But this one started in Mexico City.

254. The College says that, although the Respondent was not speaking specifically about COVID-19 in that quotation, he did testify during cross-examination that at the time of his appearance on the vlog in November 2020 the prevailing wisdom was that COVID-19 had originated in a wet market in Wuhan, China. The Respondent also testified that he was aware of news reports detailing anti-Asian racism in Canada, and that he was aware of incidents of violence that had taken place in New York State.

255. The Respondent further testified that he misspoke in referencing "Chinese culture".

He said when he made this comment he had in mind "the Chinese culture's interface with animal husbandry" and he provided the following further testimony in response to questions from the College:

> Q You're not an expert in Chinese culture at all?
>
> A No.
>
> Q In fact, you'd agree with me that neither you nor I can speak to whether there is a single Chinese culture?
>
> A No, it's very diverse. There's several cultures that exist within China, but the amount of agrarian regions and the way they practice animal husbandry there is the -- is how the CDC and the WHO come up with their vaccine choices for the next round of vaccines.
>
> Q Okay, and I think you quite fairly stated that you didn't misspeak, you didn't say anything about animal husbandry in that (inaudible), did you?
>
> A No, I didn't.
>
> Q And you'll, I think, concede then in that circumstance that somebody who did hear what you had to say, the interface with Chinese culture might take that discussion in the context of the larger COVID discussion as being a comment that China was responsible for the pandemic.
>
> A If they didn't listen to what we were saying and were ignorant about where vaccines come from and how the decisions are made, possibly, but I can't speak to that.

(i) <u>The Respondent's Comments made to Patients</u>

256. In the November 2, 2020 Monks & Mavericks Podcast, the Respondent also said that in the course of his work as a nurse he had told concerned patients in hospital triage that "*there's no virus here don't worry about it*".

257. The Respondent provided the following further explanation in his examination-in-chief, testifying:

> And, like I said in the video, the amount of fear in the population when they come in and they're crying. And that's – and I don't know if any of the panel have worked in emergency and worked triage, like that's the first contact with people in crisis. And your job, other than, you know, just

> healthcare, but just the psychological support of people in crisis. And when they come in and they're bawling and they've been locked in their – they've locked themselves in their basement for a month or two and they're so sick that they feel that they've come in and that they're – that we're angry at them for coming in. And I just – you know, and I tell them, like, "Don't worry, this has all been exaggerated, this isn't" – right? "Let's take care of your issue."

258. In the November 2, 2020 Monks & Mavericks Podcast, the Respondent also stated that he does not wear a mask because "this is a load of horse shit". He further stated:

> (a) "my initial response was 'this looks like a load of horse shit to me […] because it usually is man, it usually is. Right? You look at the fake pandemic that they had in 2009/2010 with H1N1, right? It was one of the best influenza years we've had in decades, right?"
>
> (b) "And in Kelowna, I don't know if you saw on the news there but we have … like 'we're having a massive outbreak' […] on the news, Bonnie Henry, 'we're on the edge, there's hundreds of new cases, healthcare workers are going down'. I'm down here in the Kootenays and we're swabbing people at the hospital and we're swabbing all these young health people that are coming in and they're afraid that they've got the virus. So we've got to swab them and I ask then like 'why are you here? You're healthy. Why are you getting swabbed here? And it's like 'I was in Kelowna, there's a massive outbreak there. So I go out and go up to work, and we didn't have a single case in the hospital. And the health care workers that went down … the majority of them went down through contact tracing through Cactus Club. So someone tested positive, they were at the Cactus Club, so they went through the list of people that were dumb enough to write their names down".
>
> (c) When asked about whether severe outbreaks in Italy and Iran were propaganda: "a lot of it was. So lets look at Italy. Italy … it's a different population. It's an elderly population, lot of smokers … yeah they've been leaning towards a socialist … I heard that there's been a degrading of their healthcare system over the last decade and they weren't prepared for it. I had a friend who was there on the frontlines with Samaritan's Purse right in the centre of it when it was really bad. She said they did have a couple bad weeks and then it kind of burned itself out".
>
> (d) "And from what I saw like … during the first lockdown when this stuff was going on… we were sitting on our asses. I was casual, I couldn't get shifts, right? 'Cause no one was phoning in sick, there was no patients, we outnumbered the patients in the hospital, right? And you saw that massive onslaught of nursing TikTok videos, right? Where they're doing all the dance routines and stuff like that … cause there's no one in the hospital, right?".

(e) "I'm a fucking white nationalist … right? I'm white and I believe in Canada first".

(ii) Comments Made as a Nurse - 22 June 2020 - Global News

259. The Respondent testified that he was aware that, in 2020, reports were circulating in the media alleging racism in the healthcare sector. Specifically, the allegations were about doctors and nurses in emergency rooms playing a blood-alcohol guessing game, primarily when Indigenous patients were involved and they angered him. He said he felt had had a responsibility to "set the record straight because the narrative they were pushing was just obviously untrue." The Respondent testified that he called Global News, identified himself as an "experienced emergency nurse" and offered to speak with Global News reporters about the issue.

260. During the Discipline Hearing, the College also tendered into evidence a video (the "Global News Piece" or the "Segment") showing that, during his lunch break on June 22, 2020, the Respondent met with a Global News reporter outside Kelowna General Hospital. During the interview, the Respondent was dressed in scrubs and had a stethoscope around his neck. In testimony, the Respondent agreed that the setting and his appearance during the interview had underscored to viewers of the Global News Piece that he was a health professional and, specifically, a nurse.

261. In the Global News Piece, the Respondent says, among other things, the following:

a. "We do this all day, every day in every ER that I've ever worked in, right? We have people coming in and – with various conditions and we're trying to figure out what's going on. We're guessing numbers all the time for all our patients. But to say that it's specifically happening against Indigenous people? I have not witnessed that.

b. "It's disheartening to the staff. It's had a negative impact on us with patient interactions and it's – yeah, it's been a hard pill to swallow."

c. "Me and the people I work with are quite distraught over this."

d. "[W]hen you start slandering people, just saying that there's racism in emergencies across British Columbia, I think it paints us with an unfair brush."

e. "When someone doesn't get what they want and they, they just call you a racist."

262. In cross-examination, the Respondent agreed that, even if he did not see an event taking place, this does not mean it was not happening elsewhere. The Respondent also agreed that his comment "When someone doesn't get what they want and … they just call you a racist" could suggest that the allegations of racism were being made for an improper purpose.

263. The Respondent further testified as follows in response to questions by counsel:

Q Do you agree with me that saying "someone doesn't get what they want" might be taken or might be understood by a listener as meaning that someone is seeking treatment when they don't require it?

A That's out of my control, sir.

Q Did you give any thought at all, sir, as to how your message might be perceived by Indigenous persons?

A I gave very much thought to what I said and how it might be perceived.

Q Did you get authorization from anyone before giving the interview?

A No, I did not.

Q. Did you seek advice from the College as to the propriety of giving the interview?

A No, I did not.

The Parties' submissions on the allegations in paragraphs 1.a-e and 2 of the Citation.

264. Both parties made submissions on each of the specific allegations in the Citation. The Panel will first consider the submissions with respect to the allegations in paragraphs 1.a and 1.e of the Citation before turning to the submissions made with respect to the allegations in paragraph 1.b, 1.c, 1.d and 2 of the Citation.

Citation – Allegations 1.a and 1.e.

Allegation 1.a

265. Paragraph 1.a of the Citation contains the following allegations against the Respondent:

1. Between approximately 31 March 2020 and 2 November 2020, you *made the following statements while identifying yourself as a registered nurse:*

   a. *(about COVID-19) "...[Y]ou will get people to wear your masks and put them in your internment camps ... but there is a group of people, myself included, and you, and a bunch of friends, who will not comply. We will meet you in the streets and do this the old fashioned way."*

   ….

These remarks, made in these contexts, are contrary to BCCNM's Professional Standards and/or Practice Standards, including: the Professional Responsibility and Accountability Professional Standard, the Knowledge-Based Practice Professional Standard, and the Ethical Practice Professional Standard. They also constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.

Evidence and Submissions

266. In closing submissions on October 20, 2023, the College argued that the Respondent's statement "We will meet you in the streets and do this the old-fashioned way" is about resistance to COVID measures and advocating violence.

267. The Respondent does not deny that he made the statements outlined in paragraph 1.a of the Citation. However, he submits that, in the Citation, the College has misquoted his statement. He says his entire statement was the following:

> *"… All this stuff, it may go down -- yeah, you'll get people to wear your masks, and you can put them in, in, in your internment camps and stuff like that, lalalalalala, but there is a group of people, myself included, and you and a bunch of friends, who will not comply. We will meet you in the streets and do this the old fashion way."*

268. The Respondent denies the College's allegation that he was advocating violence against people who favoured COVID-19 restrictions, or at all. He submits that people who were wearing masks outside were, at the time that he made those statements, not following the recommended COVID-19 restrictions and public health guidance.

269. The Respondent says that his comments meant he was not in support of people wearing masks outside, that he would not be forced to wear masks outside himself, and that he would take to the streets in peaceful protest if anyone tried to

force him to wear masks outside.

270. The Respondent says the evidence he tendered shows that, when he made the comments about the wearing of masks outside, they were in line with the public health guidance as stated by the Chief Public Health Officer for British Columbia, Dr. Bonnie Henry, and the Chief Public Health Officer for Canada, Dr. Teresa Tam (Exhibits 38 and 39). The Respondent testified that it was his understanding that, at the time he made these statements, they were also aligned with Dr. Henry's public health guidance about wearing masks outside.

271. The Respondent also testified that he had always worn a mask when working as a registered nurse in the hospital. The Respondent says that the College Investigator admitted during cross-examination that she had also understood his comments to be in reference to people wearing masks outside. The Respondent submits the College Investigator also admitted during cross-examination that she did not recall what the public health guidance from the Chief Public Health Officer for British Columbia had been with respect to wearing masks outside at the time the comments were made. The College Investigator testified that she had fully investigated anything that she had thought would be important to investigate. She further admitted that she did not present any information to the Inquiry Committee about the public health orders in place at the time the Respondent made the statements.

272. The Respondent argues that, in addition to being unaware of the provincial and national public health guidance on mask-wearing that were in place at the time of the Respondent's comments, the College had misquoted and misrepresented his statements in the Citation, leaving out a clear reference to the fact that his comments related to people wearing masks outside. He says that omitting this part of his statement completely changes the meaning and context of it. The Respondent argues that it is clear the College also did not consider whether his comments were aligned with either the prevailing public health guidance at the time or the peer-reviewed literature. He submits that, despite having brought this information to the attention of the College months before the disciplinary hearing

began, the College retained this allegation in the Citation.

273. The Respondent says that, when placed in proper context without being spliced as it is in the Citation, the evidence shows that he was speaking out against the changeover of a woman's penitentiary into an internment camp in Saskatchewan, suggesting that he did not agree with that. The Respondent further argues that it had been made clear that he was not advocating violence when he said, "We'll meet you in the streets and do this the old-fashioned way", but was instead talking about protesting peacefully in the streets. In this regard, the Respondent testified:

> Q *All right. And when you mentioned in the first clip, on the same topic and you said, you know, "We will meet you in the streets and do this the old fashion way", what were you referencing?*
>
> *A Well, I had gotten involved in the protest movement here and there wasn't really any big movements, but we saw in Quebec they were out in the streets by the hundreds of thousands. Like they were resisting and that's what I was talking about, right? We were seeing this protest movements around the world, like Brazil, Germany, London. Hundreds of thousands of people in the streets saying no, we're not going to do this. That's what I was talking about.*

274. His counsel argues the Respondent is here referring to public protests in Canada and around the world, and when he said, "We're going to take to the streets," he was not advocating for violence, he was talking about the protests that were seen in Quebec, in Brazil and Germany and London, that is, that "We're going to protest when we don't agree with what is being said".

275. The Respondent submits his comment was specifically about wearing masks outside; however, the College wants to ignore the context that he also made a specific comment saying, "You see people outside wearing masks. I'm not going to do that. I'm not going to wear them. I'm not going to go to an internment camp." The Respondent says B.C. was not advocating for internment camps, there were no penitentiaries in British Columbia being set up as internment camps. This was something that the Respondent saw in Saskatchewan that he specifically mentioned. The Respondent says he was talking about two things here, not wearing a mask outside in the summer of 2020, up to November 2, 2020, and that he was not going to go to an internment camp. And before he would do those

things he would take to the streets in protests like he had seen in many other places around the world. However, the College wants the Panel to believe the was advocating for violence.

276. The Respondent further disputes the College's assertion that it is irrelevant what the public health guidance was at the time he made his comments, and that the Panel should not concern itself with that because it is a non-issue. The Respondent argues that it is a relevant issue because, if he was advocating for something that is consistent with British Columbia's chief health officer's directions at the time and the directions of the Canada's chief health officer, then that is important context. The Respondent says he was advocating for something that was in alignment with the public health guidance in the province in which he worked and lived. The Respondent argues that his statements, when put in proper context, did not violate any nursing standards, that he was expressing a political opinion about what was happening in Saskatchewan with an internment camp being put into a prison, that he was not advocating for people to wear masks outside, and that he was not going to go along with that. However, when he was working, he wore his mask as he was required to do. The Respondent argues there is nothing about those statements that are professional misconduct.

277. The Respondent further submits that, as a citizen, he is entitled to have an opinion about policies, and an opinion about when people should abide by public health guidance, and that the College should not want to punish a registrant for doing so. The Respondent submits that all of this would have been evident if the College had placed his statements in their full context, rather than presenting those statements to the Panel out of context.

278. Further, as noted above, the Respondent says the College Investigator admitted in cross examination that she had understood the Respondent to be referring to wearing a mask outside when she read his comments. The College Investigator further admitted in cross-examination that she was not aware of, or could not recall, what the public health guidance had been at the time his statements were made and that she did not investigate it.

279. The Respondent says the College Investigator accordingly provided information to the Inquiry Committee that suggested the Respondent had made negative statements about wearing masks generally, and this had resulted in the allegations contained in paragraphs 1.a and 1.e of the Citation.

280. The Respondent says he did not understand why his comments about wearing masks, outlined in paragraph 1.a and 1.e of the Citation, had been included in the Citation. It was his assumption that the College was alleging that he was spreading false information about masks because, from the way the College had paraphrased and characterized his statements in paragraph 1.e. of the Citation, it appears that he was disagreeing with wearing a mask. However, the Respondent submits that, when his actual statements are reviewed, it is clear that he was talking about people wearing masks outside at a time when doing so was not in accordance with public health guidance. The Respondent says he secured the expert opinion of Dr. Pelech for this Discipline Hearing because the College had not shared the particulars of how his comments violated the BCCNM professional nursing standards, and he believed it would assist the Panel to hear from an expert about the effectiveness of wearing a mask to prevent the infection or spread of COVID-19.

281. Moreover, the Respondent argues that the College appears to be equating resistance with violence. He submits he was advocating for protesting; it is equivalent to no means no. That does not mean violence. He submits there is a big difference between resisting something and being violent. The Respondent says the College conflates those two concepts and tries to say they mean the same thing. He submits there is also freedom of association in Canada, people are allowed to protest. It is a *Charter* right as well. He says resisting something is not the equivalent of condoning or advocating violence.

282. In reply, the College says the Respondent's counsel misspoke when he said the Respondent's comment was about taking to the streets. The College points out that the Respondent's actual comment was, "*We will meet you in the streets and we will do this the old-fashioned way."* The College submits there is a distinction

between resistance and violence, and the Panel must focus on the actual words the Respondent used, not on counsel's submissions or more anodyne paraphrase. The College argues that in this case, when one focuses on the actual words that the Respondent used, "We will meet you in the streets", not on counsel's submissions, not counsel's more anodyne paraphrase "We will take to the streets," which in some context may sound more like a protest with banners and marches, then one is on the violent side of the spectrum, of that distinction between resistance and violence. The College says the actual words the Respondent used, advocate for or suggest a favourable disposition towards violence, which is disciplinable.

Findings and Analysis

283. The Panel finds the evidence establishes, on a balance of probabilities, that on October 30, 2020 the Respondent made the following comments on the publicly available *Grizzly Patriot* YouTube vlog:

> *"… All this stuff, it may go down -- yeah, you'll get people to wear your masks, and you can put them in, in, in your internment camps and stuff like that, lalalalalala, but there is a group of people, myself included, and you and a bunch of friends, who will not comply. We will meet you in the streets and do this the old fashion way."*

284. The Panel accepts the Respondent's submission that when he made these comments he was expressing opposition to wearing a mask outside and that he was speaking out against the changeover of a woman's penitentiary into an internment camp in Saskatchewan, suggesting that he was not going to go along with that, and that he was not going to go to an internment camp.

285. As detailed previously, the Panel has already found that Dr. Pelech's evidence is neither necessary nor relevant to the decisions before the Panel in this case. The Panel accepts the Respondent's submission that his comments at the time he made them were in line with public health guidance at the time as stated by the Chief Public Health Officer for British Columbia and the Chief Public Health Officer for Canada. The Panel also accepts his evidence that that was his understanding when he made these comments.

286. However, the Panel does not accept the Respondent's submission that when he said, "*We'll meet you in the streets and do this the old-fashioned way*," that he had meant peacefully protesting in the streets, such as in the protests that were seen in Quebec, Brazil, Germany, and London. Further, the Panel does not accept the Respondent's submission that his comment should be interpreted as meaning "We're going to protest when we don't agree with what is being said".

287. The Panel agrees with the College's submission that there is a distinction between resistance and violence and that, in determining whether the Respondent's comment advocated violence, the Panel must focus on the actual words that he used, not on his submission that he had meant his words to be interpreted in a more anodyne manner. The Respondent's actual comment was, "*We will meet you in the streets and do this the old-fashioned way".* The Panel agrees with the College that the Panel should focus on the actual words used by the Respondent, "*We will meet you in the streets*", and not on the more anodyne paraphrase "We will take to the streets" that was offered in the Respondent's submissions and that could, in some contexts, appear to suggest a more peaceful approach to protesting. The Panel also agrees with the College that the actual words used by the Respondent are more on the violent side of the spectrum between resistance and violence.

288. The Panel further agrees with the College that the actual words the Respondent used do advocate for or suggest a favourable disposition towards violence. The Panel finds that, at the time the comment was made, a reasonable person who heard the Respondent say "*We will meet you in the streets and do this the old-fashioned way"* would also have perceived that comment as advocating for or suggesting a favourable disposition towards violence (i.e. to physically fight their opposition in the streets), rather than as advocacy for peaceful protest in the streets.

Allegation 1.e

289. Paragraph 1.e of the Citation contains the following allegation against the Respondent:

> *1. Between approximately 31 March 2020 and 2 November 2020, you made the following statements while identifying yourself as a registered nurse:*
>
> *e.* "*I don't wear a mask […] it's a load of horse shit.*"
>
> *These remarks, made in these contexts, are contrary to BCCNM's Professional Standards and/or Practice Standards, including: the Professional Responsibility and Accountability Professional Standard, the Knowledge-Based Practice Professional Standard, and the Ethical Practice Professional Standard. They also constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.*

Evidence and Submissions

290. With respect to paragraph 1.e of the Citation, the Respondent submits that the College has so significantly taken his statement out of context in the Citation that it is no longer even talking about the same thing. The Respondent says his complete comment on the relevant podcast was as follows:

> *"You can see it right now. You go outside and you look at all the people wearing masks, right? The CDC says masks don't work, the WHO has said masks don't work; oh, no, you need to wear a mask; masks don't work; you need to wear a mask. Right? Back and forth, back and forth, back and forth.…But you see, you go out there and you see these people and they're wearing masks.*
>
> *And you see all these spikes, the testing, who's getting tested? The people that wear masks, they're the ones getting tested because people like me and people like you that don't wear a mask, and, like, this is a load of horseshit…"*

291. The Respondent says it is clear from his statement, when it is placed in context, that he was expressing opposition to the ever-changing and contradictory advice being provided by the CDC and the WHO as to whether or not masks were effective. He submits that the College Investigator also agreed during cross-examination that this is how she would interpret what he said in this instance.

292. The Respondent explained that the frustration he was expressing in this statement was in regard to the conflicting and ever-changing guidance from the CDC and the WHO about masks. He says he was also not criticizing British Columbia healthcare officials. He was instead referring to organizations and how frustrating

and confusing it was to the public to receive conflicting messages. He also explained that his comment was referring to the conflicting messages that the public was receiving about wearing a mask outside when he said that it was “a load of horseshit”; he was not referring to wearing a mask. He submits that he had made this context clear in the actual comments. He says he believed in masks, and he always wore them in the hospital. However, being required to wear masks outside, and the conflicting messaging that was being shared with the public in this regard, was the focus of his comments. In this regard, the Respondent testified as follows:

> *Q All right. In -- with respect to citation 1(e) and the citation quotes a small portion of what you said there in the video and so what were you referencing when you said, "I don't, I don't wear a mask, it's a load of horseshit." What were you talking about?*
>
> *A So yeah, you missed the beginning of the clip there, but what I was talking about is the fact that -- and in there I mention the CDC and the WHO are saying masks don't work and at the time Theresa Tam and Bonnie Henry were saying masks don't work and we shouldn't be wearing them when we're outdoors. But you're going around and you're seeing all these people wearing masks outdoors and the flipflopping back and forth in the media telling us we need to do this or we need to do that and it's just the inconsistency. But the people that are wearing the masks are the ones that are following, right, what they're saying, even with all those inconsistencies. And the people that aren't, like myself and like my friend Mark there, we see these inconsistencies and we know it's a load of horseshit. That's what I would say.*
>
> *Q So was the reference to your, your thoughts about the -- your use of the language, "it's a load of horseshit", what were you specifically referencing? Wearing masks or the inconsistency?*
>
> *A The -- yeah, the inconsistency back and forth. That's what I said, right? And, and wearing masks was just part of that. But I didn't say masks themselves.*
>
> *Q All right. And when you mentioned in the first clip, on the same topic and you said, you know, "We will meet you in the streets and do this the old fashion way", what were you referencing?*
>
> *A Well, I had gotten involved in the protest movement here and there wasn't really any big movements, but we saw in Quebec they were out in the streets by the hundreds of thousands. Like they were resisting and that's what I was talking about, right? We were seeing this protest movements around the world, like Brazil, Germany, London. Hundreds of thousands of people in the streets saying no, we're not going to do*

this. That's what I was talking about.

Q Did you wear a mask in 2020 when you were working as a registered nurse in the hospital?

A All the time.

Q Did you follow --

A When it was compliant. The rules changed quite often, but when I was supposed to wear a mask or my PPE I wore a mask. But that was a moving, right? They were changing it all the time.

Q So when you were working as a registered nurse you complied –

All the time.

Q -- with the PPE protocols?

A And before COVID too, right? Like masks is just part of your personal protective equipment.

293. The Respondent says the College has argued that one of the key values of the healthcare system is that it should be, and should be perceived to be, consistent. He says it is evident from his statement, when accurately quoted and placed in context, that his position was that the CDC and the WHO should be clear and consistent in their advice to the public and not keep issuing contradictory advice. The Respondent says that, since his statements were in keeping with this key value of the healthcare system, as identified by the College, those comments could not be a violation of any professional nursing standards or worthy of any form of discipline.

294. The Respondent questions how a registrant, who is speaking outside of work on a podcast and who says, "I'm frustrated by this conflicting messaging from the CDC and the WHO as to whether masks work or don't work and that that's…confusing people" could constitute a breach of professional nursing standards or could adversely affect the public's view of the profession of nursing. The Respondent says that messages about wearing masks that were issued by the CDC and the WHO had changed multiple times over the prior three years, and that was the issue he was raising and that had led to his public declaration that he would not wear a mask outside. He says there is nothing unprofessional about expressing frustration regarding conflicting public health guidance by the WHO

and the CDC.

Findings and Analysis

295. With respect to paragraph 1.e of the Citation, the Panel finds the Respondent's evidence to be clear and convincing that his complete statement was the following:

> *"You can see it right now. You go outside and you look at all the people wearing masks, right? The CDC says masks don't work, the WHO has said masks don't work; oh, no, you need to wear a mask; masks don't work; you need to wear a mask. Right? Back and forth, back and forth, back and forth.…But you see, you go out there and you see these people and they're wearing masks.*
>
> *And you see all these spikes, the testing, who's getting tested? The people that wear masks, they're the ones getting tested because people like me and people like you that don't wear a mask, and, like, this is a load of horseshit…"*

296. The Panel also accepts the Respondent's submission that the evidence establishes that his comment was that it is the inconsistent messaging from the CDC and WHO about wearing masks which was a "load of horseshit", not mask-wearing itself.

297. The Panel is not satisfied that the College has shown, on a balance of probabilities with clear and convincing evidence, that a nurse publicly expressing frustration about this situation is acting inappropriately or that it is conduct that is unbecoming of a nurse that may constitute unprofessional conduct or professional misconduct as defined in the HPA and the case law outlined above.

298. Accordingly, pursuant to section 39(1) of the HPA, the allegations in paragraph 1.e of the Citation are dismissed.

<u>Citation – Allegation 1.b</u>

299. Paragraph 1.b of the Citation contains the following allegation against the Respondent:

> 1. *Between approximately 31 March 2020 and 2 November 2020, you made the following statements while identifying yourself as a registered*

nurse:

b. (about movements including Black Lives Matter) "The restraint that's being shown on the Right… I watch that shit, I wanna take a road trip and go down and play paint ball."

….

These remarks, made in these contexts, are contrary to BCCNM's Professional Standards and/or Practice Standards, including: the Professional Responsibility and Accountability Professional Standard, the Knowledge-Based Practice Professional Standard, and the Ethical Practice Professional Standard. They also constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.

Evidence and Submissions

300. The College argues that the Respondent's comment "I wanna take a road trip and go down and play paintball" outlined in paragraph 1.b of the Citation suggests or advocates for violence against groups perceived to be on the political left wing, or groups of opposing political or cultural views.

301. The Respondent says that the College's allegation that he was advocating violence against these groups is false. He argues that this is not a fair characterization of his comment, and that the College has taken this statement out of context.

302. The Respondent says that the wording of paragraph 1.b of the Citation indicates that he was alleged to have made comments about movements, including Black Lives Matter.

303. He submits that his October 30, 2020 comment referenced in paragraph 1.b of the Citation was actually a denunciation of the violent rioting in the United States that was resulting in the burning of cities in that country, not an endorsement of it. He says that the following segment is the only portion of the video played by the College that is relevant to the allegations in paragraph 1.b of the Citation:

MR. TAYLOR: But you look, you look at the shit that's going on with Antifa and Black Lives Matter are burning cities in the States. The restraint that's being shown on the right -- like I got to tell ya, I watched that shit. I want to take a road trip and go down and play paintball right?

304. The Respondent says the College Investigator testified that these were the statements from the podcast that pertain to paragraph 1. b of the Citation.

305. The Respondent says that paragraph 1.b of the Citation simply indicates that he had made comments about movements, including Black Lives Matter. The Respondent says the comment for which he is being cited in paragraph 1.b is incomplete, because it does not include the following comment which he also made:

> *"But you look, you look at the shit that's going on with Antifa and Black Lives Matter are burning cities in the States…."*

306. The Respondent says this comment places the comment for which he is being cited in paragraph 1.b of the Citation in context and makes it clear that he was not necessarily speaking out against Antifa or Black Lives Matter; he was speaking out against the burning of cities in the United States. He was speaking out against violence and destruction.

307. The Respondent tendered a video into evidence as an example of the rioting in the United States that was in the news during 2020, which he says demonstrates the type of violent behaviour that he was denouncing. The Respondent submits this video evidence shows that law enforcement officers were also making it clear that the violent behaviour of people who were holding themselves out as being part of Antifa or Black Lives Matter would not be tolerated and that they would be brought to justice. The Respondent says he is a “law and order guy”, and he was not advocating for violence through his comments; he was advocating for having those people who were burning cities in the Unites Sates brought to justice. The Respondent submits he also made it clear during cross-examination that there were people who were part of the Antifa or Black Lives Matter movements who had good intentions, but who were being misled to carry out the violence. The Respondent says he was not against these movements or even the people in them, but he was against destruction and “burning cities”, as he said when he made the comments.

308. The Respondent argues that by leaving out the phrase, “are burning cities in the States” from the wording of paragraph 1.b of the Citation, the College was attempting to characterize his statement as speaking out against left wing or political left-wing groups, which he denies doing. The Respondent says the College Investigator admitted that she did not include this context in her quotation of the Respondent’s statements in the investigation report that she provided to the Inquiry Committee. The Respondent says that the Investigator’s decision to leave out the reference to the burning of cities in the United States completely changed the meaning of this statement.

309. The Respondent says that the College wants to discipline him for being against the burning of cities; however, he did not violate any professional nursing standards when he advocated against the burning of cities and advocated for bringing the perpetrators to justice.

310. The Respondent says that, during cross-examination, his counsel had confronted the College Investigator about her omission of his contextual comment that “Antifa and Black Lives are burning cities in the States” from her investigation report. Respondent’s counsel had suggested to the College Investigator that it would have been important for her to also include in the written summaries of the Respondent’s statements in her investigation report, that the Respondent had been speaking against the burning of cities. He says the College Investigator explained why she did not include that information in her report, including that:

    (a) she found it difficult to ascertain what he was saying on the podcast,

    (b) she did not have a certified transcription of the podcast, and

    (c) it was up to her discretion to decide what to bring to the attention of the Inquiry Committee.

311. The Respondent submits that the decision of the College Investigator to omit such a critical part of these sentences completely changed the meaning. The Respondent says that, if the Panel allows his statement to be misrepresented in this way, it will result in the incorrect interpretation that he is against left wing political groups, which he says is not the reality. The Respondent says that a

College Investigator should be held to a high standard of accuracy when quoting someone, and it is the Investigator's responsibility to bring to the Inquiry Committee's attention those elements of the complaint that the Investigator thinks are important for the Committee to consider.

312. The Respondent further argues that, when he said it makes him want to "take a road trip and go down and play paintball", he had been employing a turn of phrase or an expression to advocate for stopping the violence. The Respondent said the following in testimony:

> *Q Mr. Taylor, just carrying on with the item 1(c) -- or 1(b) pardon me, 1(b) of the citation about the Black Lives Matter/Antifa rioting and violence. At the end of the citation, the quote -- the partial quote taken in the citation of what your actual statement was, it mentions that you want to take a road trip and go down and play paintball. So what did you mean by that statement?*
>
> *A It's turn of phrase, right? It got me fired up.*
>
> *Q So were you advocating for violence?*
>
> *A No. I was advocating to stop the violence.*

313. The Respondent says he also explained in cross-examination that he was not actually going to go down to the United States and play paintball. The Respondent says it was his way of expressing, "I don't agree with the fact that these violent riots are going on and that people aren't doing more to stop them." He says that he had been frustrated that there was not more of a response to stop the violence. The Respondent explained his comments during cross-examination as follows:

> *Q Well, sir, you said, "I want to take a road trip and go down and play paintball." Do you remember that comment?*
>
> *A If I'm correct, "It makes me want to." It's a turn of phrase.*
>
> *Q Okay. Okay, it's a turn of phrase, but the road trip portion of that comment, sir, suggests that you're going to be travelling to the areas of the protest, the areas of destruction.*
>
> *A Say that again?*
>
> *Q When you refer to road trip, you're talking about travelling down to these cities that are under siege by Antifa and Black Lives Matter supporters.*

A Yes.

Q So "I want to take a road trip" means travelling to those cities. Agree?

Sorry, you have to say yes. You can't just nod your head.

A Yes.

Q And the paintball portion of it, "and to play paintball", suggests shooting, does it not?

A You understand that an expression, a turn of phrase, right? I'm not going to go down and play paintball. I just -- I don't -- well, what are you trying to say, sir?

Q Well, I'm trying to get you to answer the question, that when you say, "I want to go down and play paintball," you're using a euphemism for shooting someone, aren't you?

A It's an expression.

Q Yes, it's an expression with meaning.

A I felt that there should have been a bigger bulwark against the violence that the American cities were experiencing while that podcast was made.

Q And that bulwark, in you view -- in the comment you made, that bulwark was an eye for an eye.

A I never said an eye for eye.

Q You didn't say --

A And I never --

Q But you said you want to go down there, you want to take a road trip and play paintball. Isn't it the same thing in different words?

A There was never -- I was expressing my frustration with the violence that I was seeing on TV. I'm a law-and-order guy. I believe in law and order. The fact that I temper what I see through my experience as a psychological operator and I see that these leftist groups who are filled with a diverse group of people were being misled and being used to perpetrate violence in our closest neighbour. Right? Using an expression where, you know, I don't think anyone would listen to that and thinking that I'm going to go down and play paintball, and I would never advocate for violence but protecting the cities that you live in is I thought something I'd see more of. And I was expressing my frustration that I wasn't.

….

Q Did you at least give any thought before you uttered the words as to whether someone might take it as advocating violence?

> *A It happened in the flow of conversation. I don't know how much -- we were expressing our frustration with what was going on. I don't know how much thought I gave, it was quite a while ago.*
>
> *Q And you were expressing your frustration as well, sir, with the restraint that was being shown on the right.*
>
> *A Yes. And I could have --*
>
> *Q And the right is the side that you identify with.*
>
> *A I'd say that would be more -- the whole right-left paradigm is a construct that's no longer really that effective in describing what's going on. I would say that -- yeah, the way most things are perceived now, I would be interpreted as being more on the right. I'm a law-and-order guy and the fact that you have all these conservative cities that were experiencing these things, I thought there would have been more of an effort to stop it. At no time -- at no time did I call for violence. You can -- you can look through my videos. You'll see me denouncing violence quite often, and if I turn a phrase now and then that maybe sounds a little spicy -- right? Again, colloquial language and jocularity in that milieu is not -- is not something that I deem as unprofessional.*

314. The Respondent also argued that the College was trying to suggest he was advocating for violence by tendering irrelevant evidence about the Proud Boys and the Three Percenters, which are not the subject of the Citation. He submits it was clear from the irrelevant video evidence played by the College, and his testimony in response thereto, that when he had met someone from those organizations, he advocated for them to use political channels to express their views and to avoid violence.

315. In reply, the College acknowledged that it did not include the Respondent's comments about Antifa and Black Lives burning cities in the States in paragraph 1.b of the Citation. The College says this information was omitted because the College is not alleging that the Respondent's comment about burning cities constitutes misconduct.

316. The College says that the fact that the Respondent's complete comment also included the reference to "burning cities in the States" does not help his case or mean that the portion of his comment that is referenced in paragraph 1.b of the Citation is not misconduct. The College argues that the Respondent's comment for which he should be disciplined was about going down to the US and playing

paintball. The Respondent did not, in his evidence, deny that this comment to "*play paintball"* refers to shooting someone and the College says the only conclusion the Panel can draw from the evidence is that this comment i.e. "*play paintball"* was a euphemism for shooting. The College says the Respondent may or may not have meant this comment in a farcical or jocular manner, but it still remains a euphemism for shooting. The College argues that it does not matter if the people to which the Respondent was referring are on the left, on the right, or in the centre of the political spectrum, they do not deserve to be shot. The College submits that a nurse publicly referencing, or even joking about, shooting people amounts to misconduct.

317. The College says that the Respondent's submission that the College wants to discipline him for being against the burning of cities is confusing, given that he also correctly noted that the College did not include or reference that part of his full comment in the Citation.

318. The College submits that it is not seeking to discipline the Respondent for being against the burning or destruction of cities. It is seeking to discipline him for suggesting that there has been too much restraint shown by the political right and that this restraint should be remedied by going to the location and "play paintball" (a euphemism for shooting) people he deemed to be perpetrators. The College says that is what is disciplinable.

Findings and Analysis

319. The Panel finds the evidence establishes, on a balance of probabilities, that on October 30, 2020, the Respondent made the following comments on the publicly available Grizzly Patriot YouTube vlog:

> *… But you look, you look at the shit that's going on with Antifa and Black Lives Matter are burning cities in the States. The restraint that's being shown on the right -- like I got to tell ya, I watched that shit. I want to take a road trip and go down and play paintball right?*

320. The Panel agrees with the Respondent that the College had omitted to include the

Respondent's reference to "burning cities in the States" in paragraph 1.b of the Citation. The Panel accepts the Respondent's evidence and submission that he was not opposed to Antifa or the Black Lives Matter movements, or even the people who were part of those movements, but that he was opposed to the destruction and burning of cities in the United States as shown in the video that he tendered into evidence. The Panel also accepts the Respondent's evidence and submission that his comments had been an argument for bringing those people to justice. The Panel further accepts the Respondent's evidence and submission that the Respondent's comment "*I want to take a road trip and go down and play paintball*" is a turn of phrase.

321. However, what the Panel does not accept is that the Respondent's comment was not advocating violence.

322. The Panel finds that the evidence has established that the Respondent's comments, in their totality, were expressing frustration with the violent protests in the United States and the restraint the groups on the right side of the political spectrum had been showing to those violent protests. As noted, the Respondent testified during cross-examination:

> …I was expressing my frustration with the violence that I was seeing on TV. I'm a law-and-order guy. I believe in law and order. The fact that I temper what I see through my experience as a psychological operator and I see that these leftist groups who are filled with a diverse group of people were being misled and being used to perpetrate violence in our closest neighbour. Right? Using an expression where, you know, I don't think anyone would listen to that and thinking that I'm going to go down and play paintball, and I would never advocate for violence but protecting the cities that you live in is I thought something I'd see more of. And I was expressing my frustration that I wasn't.

323. The Panel agrees with the College that the Respondent's comment about wanting to go down and "play paintball" is a euphemism for shooting. During cross-examination, the Respondent did not deny that the phrase "play paintball" is a euphemism for shooting someone.

324. The Panel also agrees with the College that it does not matter if the Respondent was simply joking when he made that comment. What matters is how a reasonable

listener might perceive the comment. The Panel has no hesitation in finding that a reasonable person who heard the Respondent's comment at the time that he made it would also understand that the Respondent was referring to shooting those people who were burning cities in the United States. The Respondent's comment, whether made in jest or not, suggests that an appropriate way to deal with violent protests or the burning of cities in the United States is through violence, that is, to shoot people.

325. Accordingly, the Panel finds that the Respondent's comment is a statement that advocates violence, even if it was made in a farcical or jocular manner.

Citation - Allegation 1.c

326. Paragraph 1.c of the Citation contains the following allegation against the Respondent:

> *1. Between approximately 31 March 2020 and 2 November 2020, you made the following statements while identifying yourself as a registered nurse:*
>
> *c. (about COVID-19) "[W]here does influenza come from? It is an avian virus and a porcine virus that usually comes from China because of the interface with Chinese culture".*
>
> *These remarks, made in these contexts, are contrary to BCCNM's Professional Standards and/or Practice Standards, including: the Professional Responsibility and Accountability Professional Standard, the Knowledge-Based Practice Professional Standard, and the Ethical Practice Professional Standard. They also constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.*

Evidence and Submissions

327. The Respondent submits that his comments, as quoted in paragraph 1.c of the Citation, were also taken out of context. He says his actual comments were the following:

> *"MR. TAYLOR: …that they had in 2009, 2010, with H1N1, right? It was one of the best influenza years we've had in decades, right? But -- and it was funny, right? I was over in Afghanistan, I wasn't actually working in the hospitals at that time, and I was talking with friends in the hospitals, and I'm watching the narrative on international news on the CBC being over in Afghanistan, and they're pushing the vaccine for us over there, and I remember the big, the big hoopla about the Calgary Flames having access*

> *to the vaccine before Average Joe Canadian. And I remember our POWs getting vaccines and I was helping administer vaccines to my team, right? And it was just this (inaudible) thing, but I remember sitting there as, you know, whatever, call me a tin-foil-hatter, whatever, I'm watching it on the CBC and I'm like, none of this really makes any sense, okay? Influenza comes (inaudible)*
>
> *VOICE: (Inaudible) giving it to the Calgary Flames, you know what I mean? Like --*
>
> *MR. TAYLOR: That's one of, that's one of the things that I remember about it happening, right? But where does influenza come from? It's an avian, it's an avian virus, and it's a porcine virus, and they usually come from China, right? Because of the interface with Chinese culture. But this one started in Mexico City…"*
>
> **Exhibit 21**

328. The Respondent says that, contrary to the College's suggestion, he was not making disparaging comments about China or people of Asian descent nor was he making racist comments. The Respondent also disputes the College's oral submission that the College knew his comments were actually about H1N1, and that the College was not alleging in the Citation that these comments were about COVID-19. The Respondent submits that that is exactly what the College has claimed in the wording of paragraph 1.c of Citation; that is, that he was making statements about COVID-19 and suggesting that it had originated in China.

329. The Respondent says that his comments were referring to the H1N1 virus in 2009/2010, and that he had been explaining that influenza is an avian virus that usually comes from China because of the interface with Chinese culture and animal husbandry. However, the Respondent also noted that H1N1 had originated in Mexico City.

330. In cross-examination, the Respondent asked the College Investigator why she had chosen not to highlight to the Inquiry Committee the portion of the Respondent's comments that would place his statement about H1N1 in context. Her explanation was that she had not included this additional context because she had provided the entire video to the Inquiry Committee. The College Investigator admitted that she had not considered whether this context was important enough to be provided to the Inquiry Committee, and she stated that she had highlighted the material that she wanted to highlight for their review.

331. In testimony, the Respondent explained that when he had made these comments, he had based them on his knowledge of the public health guidance on this issue from the WHO. The Respondent tendered into evidence an example of the type of public health guidance he had heard from the WHO previously, that supported the veracity of his statements.

332. The Respondent submits that the College Investigator admitted on cross examination that she did not review what the WHO had to say regarding the origins of the avian flu and SARS virus. Despite not reviewing the WHO's public health guidance, the College Investigator testified that if she had thought the Respondent's statement was in accordance with the WHO's public health guidance on this topic, she would have reviewed that public health guidance. However, because she did not consider the Respondent's statement to be in accordance with the WHO's public health guidance, the College Investigator did not review that guidance to confirm.

333. The Respondent says the College Investigator also admitted in cross-examination that she did not review every comment that the Respondent had made, or fact check them, as she did not think that this was what the complaint required. The College Investigator took the position that it was not her role to fact-check his comments. The Respondent argues that the College Investigator's admission that she did not consider it to be her role to determine if the Respondent's statements were either true or in line with public health guidance, shows a clear misunderstanding of the requirement that she conduct her investigation in accordance with the rules of natural justice and procedural fairness.

334. The Respondent submits that it is clear from a review of the WHO public health guidance that he tendered into evidence that his statements about the origin of the avian flu virus are entirely consistent with that guidance on this issue, and that he should not be disciplined by the College for expressing opinions consistent with the WHO's position on the issue.

335. The Respondent says that, despite the College being made aware of the WHO's public health guidance on this issue many months before his Discipline Hearing began, the College refused to abandon this allegation in the Citation.

336. The Respondent submits that the full transcription of his podcast conversation is six pages long, but the College only included two pages of quotations in its written submissions. The Respondent further submits he also made it clear during his testimony on cross-examination that he had been referring to the interface with Chinese culture and animal husbandry during this podcast conversation. He says there is no evidence to suggest that he was making racist comments about Chinese people, or people from China, or people who are of Asian descent.

337. The Respondent submits that the podcast conversation focused on where influenza comes from, and the comments he made about this issue during the podcast were fully aligned with the WHO public health guidance. The WHO public health guidance says that these respiratory viruses, such as influenza and the avian flu, often result from the interface between Chinese society, the Chinese culture, and these wet markets where such viruses can proliferate. The Respondent says that his comments were fully aligned with the WHO's public health guidance, and that the relevant sections of WHO health guidance that he tendered into evidence explain that this connection has been well known for many years, and that, while the WHO and others have taken steps to remediate this issue it remained a problem, and more effort needed to be made. He submits that this issue, in conjunction with the origination of H1N1 from Mexico, were the subject of the podcast conversation. The Respondent says that he was not making a comment about anyone's race or their home country or their ethnicity.

338. The Respondent says that, even after the College were made aware of the WHO's position on this issue, the College did not withdraw this allegation against him but instead doubled down on it. Despite the evidence heard by the Panel, the College continued to suggest that the Respondent had targeted people of Chinese ancestry or of Asian descent.

339. The Respondent submits that, under cross-examination, he had agreed that there

were suggestions in early 2020 that COVID-19 had originated in a wet market in Wuhan. He submits that the Panel can take judicial notice that this was common belief at the beginning of the pandemic. He says, however, that he had not even been talking about COVID-19 during that portion of the podcast; he had been talking about influenza. The Respondent submits that, despite the College stating in its opening and closing submissions that it is not alleging that these comments of the Respondent were about COVID-19, the Citation indicates that this is, in fact, exactly what the College is alleging.

340. The Respondent submits that this allegation is another example of the College taking his comments out of context. For example, in paragraph 34 of the College's written submission, the College identified someone else's statement and attributed it to the Respondent. At paragraph 34 of its submissions, the College quoted the host of the podcast as asking: "So, let's just get down to the nitty gritty. Why, why is it that you think the COVID thing is a giant sham?" The Respondent submits that he did not say that COVID was a giant sham; rather, it was the podcaster who said that. The Respondent submits that, after that comment, there are three pages of transcribed conversation before the Respondent's comment that the College has quoted in paragraph 1.c of the Citation. There are many different things discussed between the comment that the podcaster had made and the Respondent's statement that is noted in the Citation. The Respondent submits there is no way the College can reasonably suggest there is a direct relationship between the podcaster's statement about the "giant sham" and Respondent's statement three pages later that is referenced in paragraph 1.c of the Citation.

341. The Respondent submits it is also clear that he did not agree with the podcaster's statement that COVID is a giant sham. He says that any allegation to the contrary is a misrepresentation of his evidence. The Respondent says that there are numerous other examples of the College trying to insinuate that he was saying something that he was not.

342. In reply, the College says the Respondent's submission that this case is about whether or not he was targeting people of Chinese ancestry or Asian descent, and

whether he was or was not targeting Indigenous people, is a mischaracterization of the College's case.

343. The College says it is not arguing that the Respondent is a racist. It submits that it does not have to say that, nor does the Respondent have to be one, nor does the College need to prove that the Respondent is a racist, to allege that the statements made by the Respondent were derogatory and discriminatory and amount to professional misconduct. The College says that its position that the Respondent's statements were derogatory and discriminatory form the basis for alleging professional misconduct. The College argues that the Respondent did not have to target someone specific to amount to a derogatory or a discriminatory comment.

344. The College says the Respondent has also made submissions about the College's presentation of its case, rather than about the College's investigation. The Respondent complained about what had been left in and left out of the College's case. With respect to the final video where the Respondent had been interviewed by a person named Ace, the Respondent complained that the College left out Ace's question from its submission. The College says that its intention had been to show the capacity in which the Respondent presented himself. The College says it shows the Respondent was speaking as a nurse. The College points out that the question from Ace referred to the "nitty gritty", "Let's get down to the nitty gritty"; in other words, Ace was asking the Respondent to focus on the reason for doing the interview, which, as Ace presented it, was about why COVID is a "giant scam". Accordingly, the College says the Respondent's attempts to say that he was speaking only in a personal capacity, and that he was speaking about politics, cannot land because the discussion was all about his role as a nurse. That is the reason why he had been asked to do the interview.

345. The College argues that, during that discussion, the Respondent made comments about the H1N1 flu, and he referenced its "interface with Chinese culture." The Respondent did not mention animal husbandry in the interview. The College argues that, to assess the statements the Respondent made in public, the Panel

must consider the Respondent's statements made at that time in that interview as the public would have heard them. It says the Respondent admitted during testimony that he had erred in failing to mention "husbandry". The College therefore says that the question for the Panel is, "*would his statement be perceived as derogatory or discriminatory by the persons who heard them at that time?"*.

Findings and Analysis

346. The Panel finds that the evidence establishes, on a balance of probabilities, that on November 2, 2020, the Respondent made the comments outlined in Exhibit 21 (and quoted above) on the publicly available *Monks and Mavericks* podcast.

347. In *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 ("*Kempling BCCA")* the British Columbia Court of Appeal provided the following guidance with respect to the meaning of discriminatory statements:

> [33] …. A central tenet of democratic society is the belief that all people are equally deserving of respect, concern and consideration, and this belief flows from a recognition that each individual is inherently valuable. Statements critical of a person's way of life or which denounce a particular lifestyle are not in themselves discriminatory. In my view, it is only when these statements are made in disregard of an individual's inherent dignity that they become so. To hold an individual in contempt or to judge them, in the words of Abella J.A., as she then was, in *R. v. Carmen* M. (1995), 1995 CanLII 8924 (ON CA), 23 O.R. (3d) 629 at 633, "based not on their actual individual capacities, but on stereotypical characteristics ascribed to them because they are attributed to the group of which the individuals are a member", is to treat that individual in a manner which is not consonant with their inherent dignity. Statements and actions based on such judgments are the hallmark of discrimination.
>
> [34] Viewed in this light, it is clear that many of Mr. Kempling's published statements were discriminatory. ….
>
> [35] Mr. Kempling's statements about homosexuals are based on stereotypical notions about homosexuality and demonstrate a willingness to judge individuals on the basis of those stereotypes….

348. Accordingly, a discriminatory statement is a statement that holds a person in contempt or judges them, based not on their actual individual capacities, but on stereotypical characteristics ascribed to the group of which the person is a member.

349. The College submits that the Respondent's statement that influenza typically comes from China "because of the interface with Chinese culture" play upon stereotypes that are harmful.

350. The Panel does not accept this submission.

351. The Panel accepts the Respondent's submission that the phrase "about COVID-19" that the College included in paragraph 1.c of the Citation allegations made against him suggests that he was making statements about COVID-19 and that it came from China. The Panel also accepts the Respondent's evidence and submission that his comments, when viewed in context, were not about COVID-19 but about the H1N1 virus in 2009/2010 and that he was explaining his belief that influenza was an avian virus that usually comes from China because of the interface with Chinese culture and animal husbandry, but that H1N1 started in Mexico City, which he thought was unusual.

352. The WHO interim guidance document "Reducing public health risks associated with the sale of live wild animals of mammalian species in traditional food markets" dated 12 April 2021, which the Respondent tendered into evidence states, amongst other things:

> …It is likely that the virus that causes COVID-19 originated in wild animals as it belonged to a group of coronaviruses normally found in bats. One hypothesis is that the virus was initially transmitted to humans through the intermediary animal host that is as yet unknown. Another possibility is the virus was transmitted directly from a host species of animals to humans. Some of the earliest known cases of COVID-19 has a link to wholesale traditional food market in Wuhan City, Peoples Republic of China, and some did not. Many of the initial COVID-19 reports -- patients were stall owners, market employees, or regular visitors to this market. Environmental samples taken from the market in December 2019 tested positive for SARS-CoV-2 further suggesting that the market in Wuhan City might be the source of the outbreak or that it played a role in the initial applications of outbreak. Determining whether or not, which wildlife species contributed to an initial animal to human transmission of the virus remains a critical research question. The answer may help us to prevent the virus from reappearing once the current pandemic is under control.
>
> …During the SARS epidemic in 2003, SARS-CoV-1–like viruses were isolated from live wild animals sold in traditional food markets in China. This suggested that traditional food markets provided an environment

> conducive for animal coronaviruses to amplify and transmit to new hosts, including humans. Evidence of infection with SARS-CoV-1 was found in humans working at a live animal market, and several of the known initial cases were chefs or restaurant workers handling wild captured animals prepared for food suggesting a link between the marketing and preparation of wild animals and the transmission of SARS-CoV-1…
>
> …. During the avian influenza and SARS outbreaks in China, high-risk practices in market settings were identified, and interventions were implemented. Communication and training programmes aimed at reducing the risk of disease transmission in traditional food markets in a low-cost and sustainable manner and adapted to local contexts were also developed. However such interventions need to be scaled up. [Footnotes omitted]

353. The Respondent testified that this was the kind of information from the WHO that he had previously read and on which he based his comments referenced in paragraph 1.d of the Citation. He acknowledged that the WHO guidance document he tendered into evidence appeared to be an updated version, and that in the WHO documents he had read previously there was less focus on wet markets, and more of a focus on animal husbandry itself, and the interface between human and domesticated animals.

354. Even if the Respondent was suggesting that COVID-19 originated in China, that in and of itself would not be a discriminatory statement, particularly considering that the WHO guidance shows that the World Health Organization itself had hypothesized that the market in Wuhan City might be the source of the outbreak or that it may have played a role in the initial outbreak.

355. The Panel is not satisfied that the College has proven on a balance of probabilities that a registrant who publicly mentions or discusses information that is also discussed in a WHO health guidance document is making a discriminatory statement.

356. While the Panel recognizes that the Respondent did not specifically reference animal husbandry in his comments, the Panel is not satisfied that the College has shown on a balance of probabilities with clear and convincing evidence that the Respondent's comment was discriminatory, as defined in *Kempling BCCA*. In particular, the College has not adequately shown or explained how the

Respondent's comments hold persons of Chinese ancestry or Chinese culture in contempt or judges them, based on stereotypical characteristics.

357. Accordingly, pursuant to section 39(1) of the HPA, the allegations in paragraph 1.c of the Citation are dismissed.

Citation – Allegation 1.d

358. Paragraph 1.d of the Citation contains the following allegation against the Respondent:

> *1. Between approximately 31 March 2020 and 2 November 2020, you made the following statements while identifying yourself as a registered nurse:*
>
> > *d. "There are so many times that I am comforting people in triage, who are terrified to be in the hospital, and I tell them there is no virus here. Don't worry about it. […] We had no cases admitted to the hospital. […] They still buy into this narrative."*
>
> *These remarks, made in these contexts, are contrary to BCCNM's Professional Standards and/or Practice Standards, including: the Professional Responsibility and Accountability Professional Standard, the Knowledge-Based Practice Professional Standard, and the Ethical Practice Professional Standard. They also constitute professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.*

Evidence and Submissions

359. The College submitted in its opening statement that the Respondent stated on several occasions that the hospitals he was working in were empty, suggesting that this was contrary to the message coming out from public health. The College submitted that the Respondent had admitted that he told patients and triage that there was no COVID-19 virus in the hospital.

360. The College argued in closing submissions on October 20, 2023, that the Respondent's comments in paragraph 1.d of the Citation is an admission by him that, to comfort people in triage who were terrified to be in the hospital because of their worry about COVID-19, he told them there was no virus there, and "don't worry about it, we had no cases admitted to the hospital". The College says the

Respondent's comment that "They still buy into this narrative" refers to the narrative that the public ought to be concerned about COVID-19. The College says these comments to patients were inappropriate or inaccurate.

361. The Respondent says what he actually said was the following:

> *"MR. TAYLOR: You know, it's so weird man, like you, you work in these facilities and you see what's happening, yet you go home and you watch the news and the narrative paints something completely different. And it -- I gotta say, it's been, it's been really frustrating, and it breaks my heart to see what was done, or what we haven't done for the population that we're mandated to protect and serve, right? Like the amount of fear, the amount of people coming in that are just completely, completely terrified…"*
>
> …
>
> **Exhibit 23**

> *"MR. TAYLOR: I -- there's so many times, you know, I'm, I'm comforting people in triage and they're absolutely terrified to be in the hospital. I was like, 'hey man, there's no virus here, don't worry about it, don't worry about it.' Right? And like in, in Kelowna, I don't know if you, you saw on the news they were pushing, like we have -- we're having a massive outbreak, there is -- yeah, the whatchamacallit, on the news, like Bonnie Henry, 'we're on the edge, there's hundreds, there's hundreds of new cases, healthcare workers are going down,' I'm down here in the Kootenays and we're swabbing people in the hospital, I'm swabbing all these young, healthy people that are coming in afraid that they've got the virus. So we swab them, and I ask them, like 'why are you -- you're healthy, like why are you getting swabbed here?' And it's like, 'Oh, I was in Kelowna, there's a massive outbreak there,' so I go up, I go up to work, and we didn't have a single case in the hospital."*
>
> **Exhibit 24**

> **…**
>
> **"***MR. TAYLOR: …yeah, we had, we had, we had no, we had no cases admitted to the hospital, right? And I'm, the disparity is just, it boggles the mind. And I gotta say, man, like you see these healthcare workers, like a lot of people buy into it. Even, even though they work in these facilities and they see what's going on, they still buy into the narrative."*
>
> **Exhibit 25**
>
> **…**
>
> *"MR. TAYLOR: …you work in the same hospital that I do, and you see that we have no cases, right? And there might be now, I haven't, I haven't been there, I haven't been there in a bit, so, right? That's the thing. These, these things they're always moving targets."*
>
> **Exhibit 26**

362. The Respondent says the College Investigator admitted in cross-examination that she did not know that the Respondent was primarily working in the hospital in Grand Forks and that he only picked up occasional shifts at other hospitals.

363. The Respondent submits it is clear what he was saying when he made the impugned statements, which was that when he was working in the hospital, which was primarily in Grand Forks, there were no COVID-19 cases admitted to the hospital between March 2020 and November 2, 2020, when he made his statements. The Respondent also mentioned that he picked up the occasional shift in Kelowna General Hospital and when he was there in the summer of 2020 there were no COVID-19 cases admitted to hospital there; the Respondent indicated that he had confirmed the accuracy of this information with the physicians and patient care coordinator.

364. The Respondent admitted to telling patients this fact with the goal of reassuring those patients who were terrified of coming to the emergency department for care because of their impression that the hospital was full of COVID-19 patients.

365. The Respondent says he also made it clear when he made his comments that this reality could have changed as he had not been there in a while, and that these things were always moving targets. He submits the College Investigator admitted in cross-examination that was also her understanding of what the Respondent was saying.

366. The Respondent says the allegation in paragraph 1.d of the Citation leaves out most of the above important contextual information and, in doing so, misrepresents his comments and results in a misleading presentation of what he was saying. He submits the College Investigator admitted that Exhibit 27 represents the COVID-19 cases and hospitalizations reported between March 1, 2020 and December 31, 2020 for certain hospitals in Interior Health.

367. The College Investigator admitted that where Exhibit 27 does not show any reported cases of hospitalizations in column 4, that means there were no COVID-

19 hospitalizations for those months in those specific hospitals.

368. The Respondent submits the combination of Exhibit 27 and the Respondent and the College Investigator's evidence makes it clear that when he was saying that there were no COVID-19 hospitalizations in Grand Forks hospital between March 1, 2020 and November 2, 2020, and in the few shifts that he picked up in Kelowna General Hospital on June 22, 2020 and in August 2020, this was accurate. The Respondent submits that despite this fact being brought to the College's attention many months before the Discipline Hearing began, the College had refused to abandon allegation 1.d of the Citation.

369. The College says that statements to patients that the hospitals were empty, telling patients in triage that there was no COVID-19 virus in the hospital, were inappropriate. It says there was no authority given to the Respondent to make those comments to patients. The College says the issue of whether there were any people in the hospital being treated for COVID-19 is a different matter because COVID-19 could be circulating in a hospital even if there was no one hospitalized for it at the time. Therefore, the Respondent's statements to patients that there was no COVID-19 in the hospital, and that everything had been exaggerated, were inappropriate in the circumstances, even if the motivation for saying them was honourable. Even if the Respondent was making these statements to calm people down, the appropriate way to do so is not by telling them that there was no COVID-19 in the hospital and that public messaging had been exaggerated. The College says that the Respondent's statements in this regard amount to conduct unbecoming and this is not protected by the Respondent's section 2(b) protection of free expression.

370. The Respondent says the evidence produced by the College confirms that his statements referenced in paragraph 1.d of the Citation, when not misquoted and put in proper context, were true and accurate statements, and were made to calm patients so that they would not refrain from seeking the care they needed from the hospital emergency department because of fear that the hospital was full of patients admitted for COVID-19. He says that telling the truth to patients to calm

them down so they can receive necessary medical treatment is neither inappropriate nor inaccurate.

371. The Respondent says that, in the interview referenced in paragraph 1.d of the Citation, he was referring to the politics of what the media was reporting on regarding several different topics that did not accord with his own experience. He says to the extent that he spoke in terms of his experience as a nurse in the interview referenced in paragraph 1.d of the Citation, he had been talking about the media claiming that the hospitals were overrun with COVID patients, and that he felt that this was detrimental to the wellbeing of patients as it negatively impacted their willingness to come in and receive treatment. Accordingly, in that respect he was speaking about his experience when he said that the media was telling people not to go into hospital because they are overrun with COVID-19 patients when there were no COVID patients admitted to the hospitals where he worked. In that respect, he did speak about his experience as a nurse.

372. The Respondent says the College is critical of him for saying making these statements and that the College is arguing that he should have obtained permission from the College to comfort patients and tell them that they should come in because the hospital did not have admissions for COVID-19 patients at the time. Accordingly, the Respondent argues, the College is advocating that the Respondent should not have told patients the truth that there were no Covid patients in the hospital where he worked at the time, and that he should have obtained permission from the College before telling patients the truth.

373. Under cross-examination, the Respondent argued that, “I'm an experienced nurse, I don't need to ask the College or my supervisor if I should be calming a patient down and telling them the truth about the state of the hospital at the moment”. The College tendered one page of the College Investigator’s 111-page affidavit as Exhibit 27, which shows statistics from Interior Health Authority. The College Investigator indicated this document shows the number of people hospitalized for COVID-19 in specific hospitals over specific months between March and December 2020. The evidence is clear that the Respondent’s primary

hospital workplace, at the time that he made statements about the lack of hospital admissions for COVID-19 patients, was Boundary Hospital in Grand Forks. The College Investigator agreed during her testimony in cross-examination that she did not know that Boundary Hospital was the Respondent's primary hospital workplace when she filed her investigation report. She was not aware of the fact that Boundary Hospital is where the Respondent spent almost all his work time. The Respondent did pick up the occasional shift in Kelowna, Vernon, and Penticton, and he testified that he was in Kelowna on June 22, which is also evidenced by the June 22 Global News video tendered into evidence. The Respondent was also in Kelowna for a shift in August of 2020, a fact to which he testified when speaking about the outbreak at the Cactus Club.

374. The College Investigator agreed that, when the Internal Health Statistics document (Exhibit 27**)** does not show any number for a month for a particular hospital, it means there were no hospitalizations admitted during that month. In Exhibit 27, Grand Forks does not appear for many of the months because there either was not a case of COVID-19 reported or there was no hospitalization for COVID-19 in the region. For the few months that do show Grand Forks, which are March, April, and May 2020, there were no COVID hospitalizations in that timeframe. The College Investigator agreed in testimony that the way to interpret this would be that when no number is shown in the fourth column of the Internal Health Statistics document, it means there were no hospitalizations for COVID at that time. Central Okanagan is the Kelowna Hospital and, when the Respondent was in Kelowna in August 2020, the Internal Health Statistics document shows there was only one hospitalization at that time (it does not show the particular day of that hospitalization). The Respondent testified that, when he was in Kelowna, he had asked the physicians and the nurse in charge on the COVID ward whether there were any admitted COVID patients because he had not seen any, and they had confirmed there were none.

375. The Respondent says the Internal Health Statistics document confirms that he was telling the truth to these patients in triage when he was trying to comfort them and had said, "Don't worry about it. There's no COVID hospitalizations here.

Come in and get the care that you need. You don't need to be afraid." He submits it was a misrepresentation by the media to suggest the status was otherwise, and that misrepresentation is what he had been expressing frustration about. The Respondent submits that he would have thought that the College would appreciate him telling the truth to patients to calm them down so they will come to the hospital to get the care they need, rather than suggesting he needs permission from the College before he can do that.

376. The Respondent submits that Exhibit 27 and his testimony confirm that paragraph 1.d of the Citation should not have been pursued by the College, because the College had known those statistics, presumably from the beginning on May 4, 2023 when they disclosed Exhibit 27 to his counsel. However, the College had continued to pursue an argument that the Respondent should be disciplined for breaching 19 professional nursing standards for telling patients the truth about the number of COVID-19 admissions at the hospital where he had worked at that time.

377. The Respondent says the College suggested in its opening statement that his comments about COVID-19 admissions had referred to COVID-19 hospital admissions generally. He says that the College's suggestion is neither true nor supported by the evidence. He says the evidence shows his statement was specifically directed at the media's reporting of the number of people hospitalized for COVID-19 at the time, and he was telling people that where he worked there were no cases, which the Interior Health Statistics document confirmed was true.

378. With respect to the Respondent's statement quoted in paragraph 1.d of the Citation, the Respondent submits the Interior Health Statistics document confirms the veracity of his statement. However, in its written submissions on the issue, the College provides only parts of the relevant information from the evidence. For example, at paragraph 37 of its submissions the College references footnote 57, page 200, lines 9 to 14. However, the Respondent's comments continue for another page and a half of this document, and those additional comments are necessary for context. The Respondent says that only quoting those five lines, as the College has done in their written submissions, paints a completely different

picture than if they had quoted or referenced the entire conversation. The College also identifies page 343, lines 15 to 20 of the transcript, in its submissions but they leave out the remainder of the paragraph at page 344, lines 12 to 13 and page 345, lines 7 to 9. Similarly, the College lists page 491, lines 10 to 15, but leaves out page 492, lines 6 to 8, which show that he is talking about COVID admissions. He submits that the picture painted by the College is completely inaccurate as a result. The Respondent submits that his statement is clearly focused on hospital admissions but, in the College's written submissions, this important context has been omitted.

379. In reply, the College disputes the Respondent's submission that the Respondent's comments to patients in the hospital were "telling the truth". The College says the gravamen of the Respondent's submission presented the comments as being all about the hospitals, and that the hospitals are not overrun with COVID-19 cases. The College submits that this is not what the Respondent actually said. The College says that anybody who was in the emergency room at the time speaking with the Respondent could have seen for themselves how the hospitals looked. Instead, the allegation in the Citation is focused on his comment: "There is no virus here." The College says the Respondent admitted that he was, in his words, inoculating or campaigning all the time. It argues that the Respondent said that COVID was not a big deal for most people, and what he said to patients was "There is no virus here." The College argues that this is what is misleading and disciplinable.

Findings and Analysis

380. The Panel finds that the evidence establishes, on a balance of probabilities, that the Respondent publicly made the comments in Exhibits 23 to 26 outlined above, portions of which are referenced in paragraph 1.d of the Citation.

381. The Panel accepts the Respondent's submission and evidence that, in the conversation during which he made the comments referenced in paragraph 1.d of the Citation, he was speaking about COVID-19 hospital admissions and expressing frustration about the media's reporting regarding this issue.

382. The Panel also accepts the Respondent's submission that the combination of the Internal Health Statistics document (Exhibit 27), and the Respondent and the College Investigator's evidence, shows that there were no COVID-19 admissions (or hospitalizations) in the Grand Forks hospital (where the Respondent primarily worked) between March 1, 2020 and November 2, 2020, and also in the shifts that the Respondent worked at the Kelowna General Hospital on June 22, 2020 and in August 2020.

383. The Panel is not satisfied that the College has proven on a balance of probabilities with clear and convincing evidence that the Respondent's comments referenced in paragraph 1.d of the Citation can reasonably be regarded as inaccurate or misleading and therefore unbecoming a member of the profession of nursing.

384. Accordingly, pursuant to section 39(1) of the HPA, the allegations in paragraph 1.d of the Citation are dismissed.

Citation – Allegation 2:

385. Paragraph 2 of the Citation contains the following allegations against the Respondent:

> *2. On 22 June 2020, you gave an interview to Global News (the "Segment"). The Segment was titled "A Kelowna nurse says alleged racism in the emergency rooms having a negative impact on medical staff". The Segment was filmed outside the Kelowna General Hospital, and you wore your scrubs with a stethoscope around your neck. In the Segment, you discussed allegations of racial discrimination against Indigenous patients and expressed the view that such news resulted in patients making allegations of racism against a nurse when they do not get their way.*
>
> *This conduct is contrary to BCCNM's Professional Standards and/or Practice Standards, including: the Professional Responsibility and Accountability Professional Standard, the Knowledge-Based Practice Professional Standard, the Client-Focused Provision of Service Professional Standard, and the Ethical Practice Professional Standard. It also constitutes professional misconduct, unprofessional conduct, and/or a breach of the Act or by-laws, under s. 39(1) of the Act.*

Evidence and Submissions

386. The College submitted in its opening statement that the Respondent's comments were defensive of nurses, and that the Respondent had "suggested that patients were making allegations of racism because they did not get what they want and referred to the allegations as slandering people."

387. The College says the Respondent's defense of nurses, and the suggestion that Indigenous patients were making allegations because they did not get what they want can only be interpreted as a racially insensitive remark. The College says one should not only look at the subjective intent of the Respondent. The Respondent may consider himself to have had good intentions, but that does not start the inquiry, and it certainly does not finish it. The College says the question is, "What would an objective listener think of that statement? A strong defense of nurses, a statement that calling a nurse or perceiving the nursing profession as having elements of racism in it was hurtful. And then to cap it off with a suggestion that persons making allegations of racism were doing so for an improper purpose and denying the lived experience of persons making suggestions of racism." The College says it can only be interpreted as a racially insensitive remark and a discriminatory remark, and it is a remark that has no place in the nursing profession and is therefore conduct unbecoming a member of the College.

388. The Respondent says the evidence of what the June 22, 2020 Global News Segment contained is transcribed, although with some typographical errors. For example, in one instance, the statement of the Respondent in the news clip was erroneously attributed to his counsel. The Respondent says he had made it clear to the Global News reporter that it is common practice for healthcare workers in emergency to take educated guesses about a patient's test result before the result comes back, that it is not a game, and it is certainly not racially-motivated or at least this is not something he has personally experienced or witnessed. The Respondent said that all of the medical staff with whom he has worked are caring and dedicated. He also stated that he had personally witnessed in the couple of days prior to the news interview, since all the media hype had started, several

incidents where someone did not get what they wanted from the ER staff member and had called the medical professional a racist.

389. The Respondent submits that he had made it clear that, in his observation, the allegations made in those couple of incidents were not true and that to suggest that all healthcare workers in emergency are racist was painting emergency room personnel with an unfair brush.

390. The Respondent says that contrary to the College's submission, he did not make any racially offensive statements about indigenous persons or cultures. He did not deny that racism exists in society or in healthcare, nor did the College present any evidence that he had done so. He had simply stated that he had not personally witnessed anyone playing the types of games that the media was describing, and that he had witnessed a couple of incidents since the media reports about these stories surfaced, where people had unfairly called an emergency room healthcare worker a racist when they were unable to obtain what they wanted.

391. The Respondent submits that the College did not present any evidence to challenge his personal experience and observations in this regard, and the College Investigator admitted in cross-examination that she did not interview any witnesses concerning this issue.

392. The Respondent says the College is not entitled to discipline a registrant for describing their own personal experience.

393. During oral submissions, the Respondent argued that the College was suggesting that, by his statements in the Global News Segment, he was rejecting the notion that racism exists in healthcare and he was targeting Indigenous people and denouncing their experience. The Respondent says that, if the Panel carefully reviews the Segment, it will see that that is not what he was saying in it. In this regard, the Respondent referred the Panel to the transcript of the Segment which provides:

> *"MR. TAYLOR: It's disheartening to the staff. It's had a negative impact on us with patient interactions and it's --yeah, it's been a hard pill to swallow.*

MS. VAN EMMERIK: Sean Taylor says it's been a hard few days in the ER ward at Kelowna General Hospital.

MR. TAYLOR: Me and the people that I work with are quite distraught over this.

MS. VAN EMMERIK: The ER nurse is referring to disturbing allegations involving medical staff in emergency rooms playing racially motivated games, namely health staff betting on the blood-alcohol level of primarily Indigenous patients. Taylor, who's worked in emergency rooms all over the Okanagan says while it's common practice to take educated guesses before patients' test results come back, he says it's not a game and certainly not racial. At least not something he has ever experienced.

MR. TAYLOR: We do this all day, every day in every ER that I've ever worked in, right? We have people coming in and with various conditions and we're trying to figure out what's going on. We're guessing numbers all the time for all our patients. But to say that it's specifically happening against Indigenous people? I have not witnessed that.

MS. VAN EMMERIK: The shocking allegations of the racially motivated games being played in B.C.'s emergency rooms first surfaced last week, prompting the Province's Health Minister to launch an immediate investigation.

MR. DIX: If true, it is intolerable, unacceptable and racist.

MS. VAN EMMERIK: It's not clear which hospitals these alleged games were played at or how long it's been going on. And that's something B.C.'s former children's watchdog and prominent Indigenous lawyer, Mary Ellen Turpel-Lafond, has been tasked to find out.

MS. TURPEL-LAFOND: Any workplace in British Columbia where people are playing games at the expense of the health or safety of indigenous people, one can only expect someone in those roles to face severe consequences.

MS. VAN EMMERIK: And while that happens, Taylor was compelled to come forward to say all the medical staff he's ever worked with are caring and dedicated. That the allegations have resulted in some unpleasant situations at KGH in the last few days.

MR. TAYLOR: When someone doesn't get what they want and they, they just call you a racist. I've just noticed an increase in the last couple days since all this started, right? We've had a couple incidences recently.

MS. VAN EMMERIK: Something he says is hurtful.

MR. TAYLOR: And when you start slandering people, just saying that there's racism in emergencies across British Columbia, I think it paints us with an unfair brush.

MS. VAN EMMERIK: Klaudia Van Emmerik, Global News Kelowna."

394. The Respondent says that he did not decide which parts of the conversation he had with the Global News reporter were included in the Segment that ultimately aired publicly. That decision was entirely up to Global News. The Respondent submits the Global News reporter did, however, provide some context where she paraphrased other things that he said and that put what was included in the Segment into context.

395. The Respondent says the College, when it quoted information about the Segment in its submissions, left out those comments by the Global News reporter where she provided explanations of things that the Respondent obviously told her but which were not aired as part of the Segment. For example, the Respondent says the College omitted from its written and oral submissions the following statement by the Global News reporter that provides context: "… Taylor, who's worked in emergency rooms all over the Okanagan says while it's common practice to take educated guesses before patients' test results come back, he says it's not a game and certainly not racial."

396. The Respondent argues that by including this statement in the Segment, before playing the rest of their interview, the Global News reporter was obviously sharing with the Segment viewers that the Respondent had told her that what the media was reporting about ER healthcare workers guessing the results of patient's x-ray or blood reading that they were waiting for, was not a game and not racially-motivated. The Respondent says he had also made it clear to the Global News reporter during their interview that in his experience it was not a game, and that it was not racially-motivated. The Respondent submits that what he was saying was that in his personal experience, he and the colleagues that he worked with, did not play these kinds of games, and that it was not a game to them when they were trying to make educated guesses as to what was going on with a patient. It was simply part of their expertise, like any healthcare professional would do. They are trying to figure out what the correct path of care was for the circumstances. It was not racial.

397. The Respondent says the College omitted the Globe News reporter's abovementioned comment from its submissions, and omitting that comment leaves a significantly different perception of what the Respondent must have meant. The Respondent says he explained in the Segment that "We have people coming in with various conditions and we're trying to figure out what's going on." The Respondent says that these are the "educated guesses" made by him and his colleagues but that it was not a game and it had nothing to do with race. The Respondent says he also explained in the Segment that, "We're guessing numbers all the time for all of our patients". He submits there was no discrimination. That it is how it is done, regardless of who you are.

398. The Respondent says his next comment in the Segment, "But to say that it's specifically happening against Indigenous people? I have not witnessed that", is important. He says that what he was saying here was that in "his personal experience" he had not witnessed the guessing games that the media were reporting as being specifically directed against Indigenous people.

399. The Respondent says the College also omitted the following comments by the Global News reporter from its submissions: "And while that happens Taylor was compelled to come forward to say the medical staff he's ever worked with are caring and dedicated." The Respondent says this comment by the Global News reporter makes it clear that she is reporting that the Respondent told her that "he works with good people".

400. The Respondent says the Global News reporter's next comment in the Segment, i.e. "That the allegations have resulted in some unpleasant situations at KGH in the last few days." places his comment: "When someone doesn't get what they want and they, they just call you a racist" in context. However, the College also omitted that comment from its submissions. The Respondent says his comment, "I've just noticed an increase in the last couple days since all this started, right?" is further important for context; however, the College also omitted to include that comment in its submissions. The Respondent submits that, when he said "all this", he was referring to the media talking about emergency departments across British

Columbia playing racially motivated games in which staff were guessing the blood alcohol levels of Indigenous patients. The Respondent submits that the way in which the media was reporting was giving the public the impression that these games were widespread in emergency departments across British Columbia. The Respondent submits with his comment, "We've had a couple of incidences recently" that he was not accusing Indigenous people or any other race or ethnicity of making false allegations. He says what he was saying is that he had witnessed a couple of incidents recently where someone had called one of his colleagues a racist because they did not get what they want. The Respondent says that he had witnessed that happening. The Respondent further submits that he was not asserting there was never any merit to an allegation of racism, and that he never stated anything that would suggest that this was his view.

401. The Respondent submits that it was in this context that he said the following in the Segment, "*I've just noticed an increase in the last couple days since all this started, right*." The Respondent says that, when he stated “And when you start slandering people, just saying…", the word “you” referred to the media. Therefore, the Respondent was telling the media that when they are “...slandering people, just saying there is racism in emergencies across British Columbia, I think it paints us with an unfair brush”.

402. The Respondent submits that this is why he wanted to take part in the media interview with Global News. He wanted to counter the media’s suggestion that all healthcare workers were racist. He also wanted to make it clear that the media was making it sound like all ER healthcare workers were racist, and because of what the media was reporting it had created an uncomfortable environment the last few days, and that he had actually witnessed a couple instances where people had accused colleagues of racism because they did not get what they wanted. The Respondent submits he also did not say that those incidents that he witnessed involved Indigenous persons. Instead, the Respondent submits that he was making a more general statement, and telling the media that he had witnessed people during the last couple days of making these allegations and that the media needed to be more fair in their reporting.

403. The Respondent further submits that when he was questioned about these comments in direct examination during the Hearing, he did not dispute the fact there are individuals in society who hold racist views nor did he dispute that there are individuals who work in healthcare who hold racist views. Instead, he testified as follows:

> *Q Can you explain what you meant by -- when you said that -- when you referenced in the video about the slander? When you slander people by making this accusation. What were you saying?*
>
> *A In the previous four days the media was saying that there's racist doctors and nurses in emergency departments across the province.*
>
> *Q So when you reference -- who were you referencing when you said, "when you slander people?"*
>
> *A The media.*
>
> *Q And when you said that you haven't witnessed it, what were you referencing?*
>
> *A This -- the narrative they were saying, pushing at that time was that doctors and nurses were betting on patient blood-alcohol levels based on their -- them being Indigenous, right? And while yeah, late at night I didn't witness any of that.*

404. The Respondent says the College also cross-examined him about what he had said in the Segment and that he testified that:

> *A…."I didn't say anything against Indigenous people and I just said that that was not my experience, right? I didn't say anything that was factually inaccurate. I talked about the reality … in the emergency department that we had experienced over the last few days. I was quite upset about the backlash that we were getting over the media reporting that British Columbia emergency doctors and nurses were racist with no grounds and the fact that no one was coming to our defence."*

405. The Respondent submits another important piece of evidence the College omits from its submissions is his testimony that: "… we have a professional responsibility to ensure a safe workspace, and it wasn't a safe workspace. And misleading Indigenous people into believing that there's bias existing against them in emergency departments is dangerous to the Indigenous population because it

may inhibit them from seeking care that they need."

406. The Respondent says he made it clear in his testimony that he cares about Indigenous people and that he wants them to feel safe coming to the hospital to seek care, and not to be scared away because the media is making it appear as though it is unsafe for them to be in emergency departments across British Columbia. The Respondent says that he did not deny that racism exists and he was not making pejorative statements about Indigenous people. The Respondent says he did not even say that the incidents he witnessed involved Indigenous people. Instead, he was advocating for the wellbeing of Indigenous people, and saying that the media was making it tough on them, and that the media needs to be more careful in their reporting of such situations.

407. The Respondent says he testified under cross-examination "I have worked with Indigenous populations since I was an EMT. I worked on reserves. Like I've got a very, very good relationship with people in the Indigenous community. My efforts and goals have always been to advocate for safe patient care and providing safe workspaces." The Respondent also testified that, when he had the opportunity to return to northern communities and work on the reserves in Northern Alberta, he had chosen to do that, and he had expressed how grateful he was to return to the community. The Respondent testified that he is not a person who holds racist views against Indigenous people, and his statements were not pejorative against them. The Respondent argues that the College has misrepresented what he said in the Segment in an attempt to support the allegation that he made racially discriminatory comments.

408. In reply, the College denies the Respondent's submission that this allegation is about whether or not he was targeting Indigenous people. The College says that this is not the case, and it is not alleging that the Respondent is racist. It submits that it does not have to say that, nor does the Respondent have to be one, nor does the College need to prove that the Respondent is a racist, to allege that the statements made by the Respondent were derogatory and discriminatory and amount to professional misconduct. The College says that its position that the Respondent's statements were derogatory and discriminatory form the basis for

alleging professional misconduct. The College argues that the Respondent did not have to target someone specific to amount to a derogatory or a discriminatory comment.

409. With respect to the Respondent's submission that he was actually encouraging Indigenous persons to come to the hospital to access medical care, and that he was advocating for Indigenous rights, the College says that this was not his evidence. The College submits that the Respondent did not testify about any specific statements made in the Segment in which he had encouraged Indigenous persons to seek medical care, nor did the Respondent testify about any specific statements made in the Segment in which he had advocated for Indigenous rights, nor did the Respondent testify that Global News had excised any such statements from the Segment. Rather, what the Respondent had said was, "People don't get what they want and they accuse you of racism." The College submits that this comment, and the insinuation arising from it, is what is disciplinable. The College says the insinuation arising from this comment made by the Respondent is that the experience of persons who are complaining about racism in healthcare is being falsely presented, and that these false allegations against healthcare providers are being made only because the complainants are not getting what they want from those providers, which the College says is code for drug seeking.

410. Lastly, as noted, the College also denies the Respondent's allegation that this disciplinary process is an attempt by the College to assassinate the Respondent's character. The College says the Respondent has not been able to explain how his own words are, or possibly could be, harmful to him in this way. Instead, the Panel is left only with the Respondent's empty accusation that the College is hurting him by playing his own words back to him. In any case, the College submits that the Respondent, at one point during the Discipline Hearing, claimed exactly the opposite – the Respondent had said that watchers and listeners of the entire videos would only be able to put the comments in context if they listened to the full exchange in its entirety. The College agrees that watchers or listeners would indeed be able to put those statements of the Respondent that are at issue into context if they listen to those comments in their entirety. The College says it has

provided all of the context, and the Respondent has had every opportunity to provide additional context, and he elected not to do so. The Panel is accordingly left with the evidence that it has heard.

411. The College says this disciplinary process is not about character assassination. This is about whether words used by the Respondent amount to disciplinable conduct. The College submits that it has made no attempt whatsoever to bring other witnesses into the Hearing to report any bad things that the Respondent has said in other contexts or to report any bad conduct in other areas. The College submits that it has simply led evidence about specific things said by the Respondent that are the subject of the Citation, and these are comments made by the Respondent when he was being voluntarily and purposefully recorded, and when he had identified himself as a nurse.

Analysis and Findings

412. The evidence establishes, on a balance of probabilities, that on June 22, 2020, Global News aired the Segment on which the Respondent appeared in front of the Kelowna General Hospital in his nursing scrubs and with a stethoscope around his neck. In the Segment, the Respondent, the Globe News reporter, Ms. Van Emmerik, and others make the following statements:

> *"MR. TAYLOR: It's disheartening to the staff. It's had a negative impact on us with patient interactions and it's --yeah, it's been a hard pill to swallow.*
>
> *MS. VAN EMMERIK: Sean Taylor says it's been a hard few days in the ER ward at Kelowna General Hospital.*
>
> *MR. TAYLOR: Me and the people that I work with are quite distraught over this.*
>
> *MS. VAN EMMERIK: The ER nurse is referring to disturbing allegations involving medical staff in emergency rooms playing racially motivated games, namely health staff betting on the blood-alcohol level of primarily Indigenous patients. Taylor, who's worked in emergency rooms all over the Okanagan says while it's common practice to take educated guesses before patients' test results come back, he says it's not a game and certainly not racial. At least not something he has ever experienced.*
>
> *MR. TAYLOR: We do this all day, every day in every ER that I've ever*

worked in, right? We have people coming in and with various conditions and we're trying to figure out what's going on. We're guessing numbers all the time for all our patients. But to say that it's specifically happening against Indigenous people? I have not witnessed that.

MS. VAN EMMERIK: The shocking allegations of the racially motivated games being played in B.C.'s emergency rooms first surfaced last week, prompting the Province's Health Minister to launch an immediate investigation.

MR. DIX: If true, it is intolerable, unacceptable and racist.

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MS. TURPEL-LAFOND: Any workplace in British Columbia where people are playing games at the expense of the health or safety of indigenous people, one can only expect someone in those roles to face severe consequences.

MS. VAN EMMERIK: And while that happens, Taylor was compelled to come forward to say all the medical staff he's ever worked with are caring and dedicated. That the allegations have resulted in some unpleasant situations at KGH in the last few days.

MR. TAYLOR: When someone doesn't get what they want and they, they just call you a racist. I've just noticed an increase in the last couple days since all this started, right? We've had a couple incidences recently.

MS. VAN EMMERIK: Something he says is hurtful.

MR. TAYLOR: And when you start slandering people, just saying that there's racism in emergencies across British Columbia, I think it paints us with an unfair brush.

MS. VAN EMMERIK: Klaudia Van Emmerik, Global News Kelowna."

413. The Panel accepts the Respondent's above-mentioned submissions about the context that the Globe News Reporter's statements provide for his own statements in the Segment.

414. However, the Panel does not accept the Respondent's submission that a registrant cannot be disciplined for making public statements about personal observations.

415. The Panel also does not accept the Respondent's submission that his statements

were not discriminatory or pejorative about Indigenous people.

416. As noted previously, a discriminatory statement is a statement that holds a person in contempt or judges them, based not on their actual individual capacities, but on stereotypical characteristics ascribed to the group of which the person is a member.

417. The Panel agrees with the College that the Respondent's statement "*When someone doesn't get what they want and they, they just call you a racist"* is a discriminatory statement.

418. The Respondent was asked during cross examination if his comment suggested that the allegations of racism were being made for an improper purpose. The Respondent's answer to this question was "sometimes".

419. The Respondent's defense of nurses in relation to the allegation that hospital staff had played a "game" of guessing the blood-alcohol level of Indigenous persons attending the Emergency Room, while suggesting that patients were making such allegations of racism because they did not "get what they want", and that it is slandering people (i.e. healthcare providers) to say there is racism in ERs across British Columbia, is a racially insensitive remark in response to the concerns of Indigenous persons. The insinuation or suggestion arising from the Respondent's comment is that the experience of those Indigenous persons who are complaining about racism in healthcare was being falsely presented, and that these false allegations against healthcare providers were being made only because the complainants were not getting what they wanted from those providers. The Respondent's comment sends a message to the public that healthcare professionals, including nurses who operate within the public health apparatus, harbour harmful stereotypes about Indigenous persons. As such, the Respondent's statement is a discriminatory statement, as defined in *Kempling BCCA* above.

e. Whether the Respondent had identified himself as a Nurse when he made the statements or comments outlined in paragraphs 1.a, 1.b and 2 of the Citation.

420. The Panel will next consider whether the Respondent had identified himself as a nurse while making his discriminatory statements and his statements that had advocated violence.

421. The College says the Respondent made the statements or comments outlined in paragraphs 1.a and 1.b of the Citation while identifying himself as a nurse. The Respondent denies this. He submits the *Grizzly Patriot* vlog was a political podcast on which he appeared and made statements as a private citizen, not as a registered nurse. The Respondent testified that he already knew the presenter of the *Grizzly Patriot* vlog because they had both previously campaigned as candidates for the PPC party. They had met each other at a PPC campaign event. The Respondent submits that he was physically located in his rented basement suite in Grand Forks at the time he made these statements.

422. The Respondent submits the evidence also shows that he made the comments in the Global News piece on the basis of his own personal experience, and what he had personally witnessed, and that his statements contain no commentary on the proposition that there are individuals in society and in healthcare who hold racist views, and that those targeted by such views suffer harm as a result. The Respondent says the impugned statements made during the Segment were not made in the workplace while he was working as a registered nurse.

423. In testimony, the Respondent acknowledged that he made the statements included in the Segment while he was standing outside the hospital during his work break, while he was wearing his nursing scrubs and had a stethoscope around his neck.

424. As indicated above, the evidence confirms that the Respondent appeared on the *Grizzly Patriot* vlog on 30 October 2020 and said the following:

> MR. TAYLOR: Where I worked in health care and I'm, I'm in the military and it's – it puts you in a weird spot, right? Because, okay, well I'm

> supposed to tow the company line but at the same time, as a nurse, it's my professional responsibility to advocate for my patients and for doing the best job I possibly can, that's my professional responsibility, right? Like the docs have the [Hippocratic] Oath and stuff like that, and you see – this is, this is the thing that's been so weird, like, psychologically just watching this stuff go down where you see some doctors rebelling against it saying, 'We've got to do a better job.' And then you see some doctors towing the company line, and it doesn't matter how smart you are or if you're a good person or not, right?"

425. On this appearance on the *Grizzly Patriot* vlog, the Respondent also made the following comments:

> (a) "Like the racism thing in, in BC here where they were calling ER docs and nurses racist because of guessing numbers and stuff like that and we, we got thrown under the bus by our unions, by our health authority CEOs, by our Health Minister, everything, right? And it just took one, one news story to say this is all bullshit, and it all went away, right?"
>
> (b) "[T]his is the thing, Mark, it it isn't about getting people to believe, it's getting them to be complicit in a lie [A]nd it's a demoralization thing. Every time you put that mask on your face, and you know it doesn't do shit, they tell you it doesn't do shit. But every time you put that mask on your face, you're complicit in a lie. Right? … And the more you become complicit the more, the more the demoralization occurs, and that's how all this stuff goes."
>
> (c) "I'm not going to lie, I'm in health care, so I've got a, I've got to – I've got to play the game at times, and I feel like a bitch every time I do it, and it's silliness, but I'm vocal about it".
>
> (d) "Like if you're my patient, like I said, you come in for a broken heart – or a broken arm, or a heart attack or whatever, you get inoculated for communism, right, because I'm campaigning. I'm campaigning everywhere. Like, people need to wake the hell up".
>
> (e) "Like you go to the bigger cities and it's just the amount of masks, and I've seen it here, even in Grand Forks, like I don't wear a mask. Like it's been mandatory masks, I think since August at some of the stores here".

426. The Respondent further testified the following in response to questions from counsel for the College:

> Q I'm going to suggest sir, that you also advocated violence when you said, "we will meet you in the streets and do this the old-fashioned way."
>
> A There – there's a lot of people that took to the streets during this. It didn't happen much in Canada, but resistance to abuse of power, is not – yeah, is not uncommon throughout history, right? I've never – you've picked certain videos. There's a lot more videos out there

where I am strongly advocating against violence, and you can, as we see in the citation, on how you've removed certain words and the way you've cut things apart that I've said, to make it look like I'm advocating for violence. I've never advocated for violence, and if you search the internet, there's a lot of people out there advocating for violence, and very few of them are people who've experienced violence. I fought in a counter-insurgency war, and I don't want to see that come to Canada, but with the things that I'm seeing happen, I think at some point people are going to have to resist.

Q Well sir, I appreciate that, and you did give further context when your counsel was interviewing you, but you'll appreciate when you're giving an interview like this, listeners might come in and go out at various times. And much of the context you provided now you didn't provide in the course of your interview with Mark, and we're focusing on the statement that we've isolated. And I'm just asking you, just on that statement alone, "we will meet you in the streets and do this the old-fashioned way," you'll understand that someone might take that to be advocating violence.

A Again, that's, that's out of my control how people take it, right? You Canadians love hockey, right? Is that racist? Is someone's offended by that? It doesn't -- you know? Like the intent – I can't control how people shape what I say with their world view, okay? I haven't said anything – well, I've given the College opportunity to point out where I've said anything that's inaccurate, and they haven't. And I am – yeah.

Q Well, sir, you say that you have no control over how people perceive what you've said. But you'll agree with me you have full control over what you do say. You have full control over what words you use to express what you want to say.

A That's true.

Q And you'll agree with me that sometimes we express ourselves in a way that we wish we had it back. We think, you know what, I didn't phrase that well, that's not the greatest way of putting it, let me try again. You've had experiences like that?

A Yes I have.

Q And I'm giving you an opportunity here to agree with me that by saying, "We will meet you in the streets," immediately after having referring to internment camps and "we will not comply," when you say, "we will meet you in the streets and do this the old-fashioned way," do you not think for a moment that maybe you could have phrased it differently, because it sounds like you're advocating for violence?

A I could have phrased it differently, yes, but I – I fail to see – I think we've watched a few of my videos now, and I think the spirit of what I'm saying is able to be perceived, that I'm advocating for better

patient care, I'm advocating for better health policy, and I'm advocating for actions that will avoid harm. And what they were doing was bringing us towards – because, in the application of violence, there's a thing called the escalation of force. Right? And before you start advocating open violence, you know, going out into the streets and saying no to policies that are restricting the freedoms of people, is just the next step, right? So, if someone misconstrues that, I'm sorry, but I don't – I didn't say anything that was advocating violence.

Q Do you –

A Throughout this entire thing, I've advocated for don't comply with things that don't make sense.

Q And you also said, "We will go out in the streets and do this the old-fashioned way," and I'm asking you sir, do you have any regret with how you expressed yourself in that clip?

A I wouldn't say regret, but I could have worded it differently.

Q Did you give any thoughts before you uttered that phrase as to whether a listener might perceive it as advocating violence?

A When conducting interviews in a podcast, Mark Friesen is a very dear close friend, and sometimes, sometimes the way those interviews go, it ends up being more like a conversation with a friend than something that's in a public forum. Sometimes things are said that you normally wouldn't say in public. I wasn't there as a nurse, I wasn't there – yeah, representing nursing. I was in a political podcast talking about political things, right? And sometimes, you know, colloquial language and jocularity is used. Would I use those terms and that type of language in a nursing forum? No I would not. Would I use it in a business forum? No I would not. But in that podcast, and in that milieu, jocularity and colloquial language is just a norm. So, I can't think it strayed out of the norm for that podcast.

Q. Well, I won't comment on that, sir, but I'm going to ask you to admit that in the course of those podcasts, you were identified as a nurse, you self-identified as a nurse on several occasions throughout. Did you not?

A When asked my background? I – yeah, it's not a secret that I'm a nurse, it's not a secret that I was in the Canadian Armed Forces. It's not a secret that I was a firefighter. Yeah, when people asked, I stated it.

Q But it is not just when you were asked sir, you sometimes referred to the fact that you were a nurse when you were buttressing the knowledge you had about certain aspects of public health.

A If I was talking about my experiences in healthcare, yes, that would identify me as a nurse.

Q Right, and then you sort of – I don't mean this in a pejorative way, but you traded on the fact that you were a nurse to explain how you had obtained certain knowledge.

A Yes.

Q You didn't – you've explained, sir, and I think quite fairly about how the conversations go, or how they went, at least in this case in the podcast, so you'll agree with me that you didn't for instance – the comment about going to the streets and doing this the old-fashioned way, you didn't vet that comment through anyone?

A I didn't vet that comment through anyone? No.

Q Correct. You didn't seek advice from the College as to whether that was an appropriate comment to make while identifying as a nurse?

A No.

427. The Panel finds that this evidence establishes, on a balance of probabilities, that the Respondent did identify himself as a nurse during the public conversation in which he made the statements outlined in paragraphs 1.a and 1.b of the Citation.

428. The Panel further finds that the evidence establishes, on a balance of probabilities, that the Respondent held himself out as a nurse during the Segment, and that it would have been clear to the public watching the Segment that the Respondent was a nurse by the fact that he had been identified by the reporter during the Segment as an emergency room nurse and also by the fact that he was wearing nursing scrubs and had a stethoscope around his neck. It was therefore made clear to the public watching the Segment that it was a nurse (i.e. the Respondent) who was making the discriminatory statement outlined in paragraph 2 of the Citation.

f. Whether there is a sufficient nexus between the Respondent's off-duty statements and the profession of nursing.

429. The parties agree that the allegations in the Citation do not pertain to concerns with the Respondent's nursing clinical practice; rather, the allegations pertain to off-duty statements made by the Respondent. Off-duty conduct that does not have the necessary nexus with the profession cannot be regulated by that profession's regulatory body, the College (*Strom,* at paragraph 89 and 105).

430. The Panel will next consider whether there is a sufficient nexus between the Respondent's comments advocating violence, his discriminatory comments, and the profession of nursing.

431. The Respondent points out that the College has argued that it is critical to their ability to intervene, and to engage their duty as a regulator, that the Respondent made the impugned statements while "identifying as a nurse". The Respondent submits that, if the College's argument is accepted, all that will be required for the College to regulate and discipline registrants for their off-duty speech is for an individual to be a registrant, and to disclose that fact or admit that fact when asked. He submits that this means that an individual, who just so happens to also be a registrant, could never disclose or admit the fact that they are a registrant when making a statement or offering an opinion that differs from those in leadership at the College, without fear of being disciplined by the College when their personal views do not align with those in leadership at the College.

432. The Respondent further argues that, at an absolute minimum, to engage the jurisdiction of the College to regulate and investigate its members, a member must claim that they are making a statement as a registrant, or on behalf of the College. It cannot be sufficient simply to be a nurse and admit that you are a nurse for the College to engage its regulatory powers to investigate and discipline its registrants for off-duty statements. The Respondent also argues that, for the College to even have the jurisdiction to investigate his off-duty comments, they must prove on a balance of probabilities that the Respondent had been speaking as a representative of, or on behalf of, registered nurses in British Columbia, on behalf of the College, or on behalf of the Health Authority for whom he worked. He says the evidence shows that this was not the case, and accordingly the College did not have jurisdiction to initiate the investigation or issue the Citation. The Respondent has not provided any case law to support these arguments.

433. The Panel does not accept the Respondent's arguments in this regard. The Courts

have held that professional regulators may discipline their members for conduct that occurs outside the practice of their profession. This is a well-established legal principle supported by the Court's decision in *Strom* and other Court decisions, such as *Pitter/Alviano*, *Peterson,* and the cases cited in *Peterson* outlined below. These decisions show that a registrant's off-duty conduct may give rise to professional discipline if that conduct is not consistent with the core values of the profession and/or where there is a need for a regulated profession to maintain the confidence of the public in the profession and not be seen to condone certain types of conduct by its members. Similarly, off-duty conduct may give rise to discipline if it conflicts with the fundamental values of the healthcare system.

434. *Pitter/Alviano* involved two healthcare professionals who had made public statements that were contrary to public health guidelines and contained what could be harmful misinformation. Both professionals had identified themselves as healthcare professionals when making the public statements. Ms. Pitter publicly identified herself as a nurse practitioner. Ms. Alviano publicly identified herself as a registered nurse. Ms. Pitter made public posts on Facebook about the COVID-19 virus and public health measures. On the Facebook profile she used to make those posts, Ms. Pitter was identified as a "Nurse Practitioner". Similarly, Ms. Alviano was a registered nurse who worked in hospital critical care units. Approximately five months into the COVID-19 pandemic, Ms. Alviano made a speech at a public gathering. Ms. Alviano introduced herself at the outset of that speech as an "RN". She was wearing scrubs and a stethoscope. As a result of their statements, the College of Nurses of Ontario ("CNO") commenced investigations into their conduct. At the conclusion of its investigations, CNO's screening committee, the Inquiries, Complaints and Reports Committee (ICRC), was concerned that both had made statements that were contrary to public health guidelines and contained what could be harmful misinformation. The ICRC directed that Ms. Pitter and Ms. Alviano appear in order to be cautioned with respect to CNO practice standards and that they each attend remedial education programs. They sought judicial review of that decision. At paragraph 7, the Court described the crux of the nurses' submissions as an entitlement to express unpopular views. The Court upheld the ICRC's decision. In doing so, the Court

noted that, by making public statements in which they identified themselves as nurses, they: "… not only put the public at risk of being guided by false information but also risked impacting the reputation of the profession. Like the HPA, the Ontario *Regulated Health Professions Act* provides that the College's overriding duty is to serve and protect the public interest.

435. *Peterson* involved the judicial review of a decision of the College of Psychologists of Ontario to require Dr. Peterson to take a remedial course in professional communication following its finding that some of Dr. Peterson's off-duty public statements, made while self-identifying as a clinical psychologist, could be taken as degrading and demeaning. The discipline panel in *Peterson* also focused on the harm from the language used, noting that: "undermining public trust in the profession of psychology, and trust in the College's ability to regulate the profession in the public interest." It expressed concern that "public statements of this nature may also raise questions about Dr. Peterson's ability to appropriately carry out his responsibilities as a registered psychologist" and that "public statements that are demeaning, degrading, and unprofessional may cause harm, both to the people they are directed at, and to the impacted and other communities more broadly."

436. The Ontario Divisional Court rejected Dr. Peterson's appeal and stated in the opening paragraph:

> When individuals join a regulated profession, they do not lose their *Charter* right to freedom of expression. At the same time, however, they take on obligations and must abide by the rules of their regulatory body that may limit their freedom of expression. This case raises the clash between a regulated clinical psychologist's right to speak in a certain manner and the regulator's power to require the member to moderate that speech.

437. The Divisional Court in *Peterson* went on to hold:

> [49] In short, while his counsel may argue that Dr. Peterson's comments are "off duty" and outside his role as a psychologist, Dr. Peterson doesn't see it that way. To the contrary, representing himself as a clinical psychologist when expressing his views is important to him. **It also adds credibility to his statements since, as a regulated health professional he holds a position of "trust, confidence and responsibility" in society: *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825, at paras. 44-45.** But Dr. Peterson cannot have it both ways: he cannot speak as a member of a regulated profession

> without taking responsibility for the risk of harm that flows from him speaking in that trusted capacity.
>
> [50] High standards are imposed on members of the College of Psychologists who, like members of other regulated professions, take on responsibilities to their profession and to the public. As the Supreme Court observed in *Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 SCR 513, at para. 36, "[t]he importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them."
>
> [51] **Even when "off duty", courts have recognized that members of regulated professions can still harm public trust and confidence in their profession by their statements and conduct.** As the British Columbia Court of Appeal put it in *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327, 255 DLR (4th) 169, at para. 43, citing the Supreme Court in *Ross*: "**When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result."**
>
> […]
>
> [54] Many other professional discipline cases have involved situations in which a member's misconduct in their personal life, or outside the immediate context of practising their profession, has nevertheless resulted in regulatory action. As observed by Copeland J. (as she then was) in *Dr. Jha* at para. 119:
>
> > It is well-established that actions of members of a profession in their private lives may in some cases be relevant to and have an impact on their professional lives – **including where the conduct is not consistent with the core values of a profession and/or where there is a need for a regulated profession to maintain confidence of the public in the profession and not be seen to condone certain types of conduct by its members**: *Wigglesworth* at pp. 562-563; *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 O.R. (3d) 420 at paras 97-98; *Re Cwinn and Law Society of Upper Canada* (1980), 1980 CanLII 1694 (ON SC), 1980 CanLII 1964, 28 O.R. (2d)(Div. Ct.), leave to appeal refused 28 O.R. (2d) 61n (C.A.); *Adams v. Law Society of Alberta*, 2000 ABCA 240, 82 Alta. L.R. (3d) 21.
> >
> > (Emphasis added)

438. The Panel finds the above case law persuasive and equally applicable to the resolution of this case. The Panel agrees with the College that it flows from this case law that all College registrants must, when identifying themselves as a nurse, engage in public discourse in a respectful and professional manner that is not harmful or discriminatory to any members of the public, particularly members of

marginalized groups.

439. The Panel accepts the College's submission that this responsibility flows from nurses holding a position of "trust and influence" in society and is part of collectively upholding the public interest mandate by not engaging in conduct that is not consistent with the core values of the profession or the healthcare system. In this regard, the Supreme Court of Canada held the following in *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 ("*Ross*") with respect to teachers and the school system, which statements the Panel finds equally applicable to nurses and the health care system:

> 44 By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion" (see *Re Cromer and British Columbia Teachers' Federation* (1986), 1986 CanLII 143 (BC CA), 29 D.L.R. (4th) 641 (B.C.C.A.), at p. 660); teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. Reyes affirms this point in her article, *supra*, at p. 37:
>
> > The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with the values which the education system perpetuates. [Emphasis in original.]
>
> I find the following passage from the British Columbia Court of Appeal's decision in *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 1987 CanLII 159 (BC CA), 21 B.C.L.R. (2d) 93, at p. 97, equally relevant in this regard:
>
> > The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system.

> 45 It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. …..

440. The Respondent as a private citizen is entitled to publicly express his views and opinions. However, as a member of a regulated profession, he also has duties and obligations to ensure that the expression of those views accords with the College's professional standards, whether he is on or off duty. The Respondent does not lose his *Charter* rights merely by being a member of a regulated profession, nor does he breach his professional or practice standards simply by engaging in debate in the public sphere on controversial subjects or by expressing views that some may consider unpalatable. However, engaging in public debate while identifying or holding himself out as a member of the nursing profession engages regulatory oversight. As a member of a regulated profession, the Respondent cannot identify or hold himself out as a nurse while conducting himself in a manner that brings the profession or the healthcare system into disrepute.

441. Both parties agree that the Court's decision in *Strom* is also applicable to the resolution of the issues raised in the Discipline Hearing. *Strom* involved a registered nurse who was disciplined by the Saskatchewan Registered Nurses' Association for off-duty comments she made on social media that were critical of the healthcare services her father received. As the Court explained in *Strom*, off-duty conduct may be professional misconduct if there is a sufficient nexus or relationship of the appropriate kind between personal conduct and the profession to engage the regulator's obligation to promote and protect the public interest. In particular, the Court found that off-duty conduct may give rise to discipline if the impugned conduct were such that it would have a sufficiently negative impact on the ability of the professional to carry out their professional duties, or on the profession, to constitute misconduct": *Strom*, at paragraphs 89 and 105.

442. The Respondent argues that the only connection that his comments outlined in the Citation have with healthcare, is him suggesting that it was not appropriate to wear a mask outside before November 2, 2020, and that the hospitals were not overrun with COVID admitted patients. He submits the former comment was in

line with the public health guidance at the time and the latter statement was true and was made to comfort patients so they would not hesitate to seek necessary medical care. He says these statements do not have a sufficiently negative impact on his ability to carry out his professional duties. He says that telling a patient the truth and saying that he was not going to wear a mask outside, when that position was aligned with the public health guidance at the time, also do not sufficiently negatively impact the profession.

443. The Respondent further argues that to say that he disagrees with violent riots and the burning of cities, and to express his frustration by using a turn of phrase and saying that he wishes to meet you in the streets and protest, are not sufficiently connected to the profession or his professional duties to be subjected to discipline and does not harm the profession, particularly as he gave examples of other peaceful protests around the world in illustration of what he was referring to.

444. The Respondent also submits that, to say the media is conveying inaccurate messages to the public when they report that nurses and doctors in emergency rooms across British Columbia are all racist, is connected to the profession; however, it does not negatively impact on the profession for him to say "I am advocating for the Indigenous [peoples] so that you [the media] don't create a barrier for them coming in to see us, by the media making this seem like there is no safety for them in emergency departments in British Columbia, they are not safe to come there." He says that his statements in this regard are actually helping the profession to say, "we care about these patients, we treat all patients the same, we take educated guesses for all patients, it's not a game, it's not racial, so don't make us out all to be that way because you're creating this unnecessary barrier that Dr. Varcoe spoke of that's going to prevent them from coming into the hospital." The Respondent says that his statements in this regard do not have a negative impact on the nursing profession. The Respondent submits that the only way his statements could have a negative impact on the nursing profession is if those statements are taken out of context and mischaracterized.

445. The Panel disagrees.

446. The Panel accepts the College's submission that a fundamental value of the healthcare system is that it should be – and should be perceived to be - consistent and non-discriminatory. The Panel also has no hesitation in finding that tolerance, an ethos of non-violence, and respect for the inherent dignity of all people are fundamental values of the nursing profession.

447. The Respondent identified himself as a nurse during the October 30, 2020 Grizzly Patriot podcast on which he made comments that advocate violence as outlined in paragraphs 1.a and 1.b of the Citation. The Respondent also held himself out as a nurse when he appeared on Global News and during the Segment made the discriminatory statements described in paragraph 2 of the Citation. Since the Respondent wore scrubs and a stethoscope during the Segment interview, and because the reporter identified the Respondent as a nurse when he appeared on the Segment, members of the public who saw the interview would have been able to identify that he was a nurse. The Respondent conceded as much.

448. The Respondent's statements advocating violence that he made on the Grizzly Patriot podcast on October 30, 2020, and the discriminatory comments that he made during the Segment, conflict with these fundamental values of the healthcare system and the nursing profession. By publicly identifying himself as a nurse while making off-duty statements that conflict with the fundamental values of the healthcare system and the nursing profession, the Respondent created a sufficient nexus to the nursing profession to bring his off-duty conduct within the College's regulatory oversight.

g. Whether a finding that the Respondent's statements constitute professional misconduct and/or unprofessional conduct would unjustifiably infringe the Respondent's rights to freedom of expression under section 2(b) of the *Charter of Rights and Freedoms.*

449. The Respondent argues that any discipline imposed by the Panel for his impugned statements would violate his right to freedom of expression protected by section 2(b) of the Canadian *Charter of Rights and Freedoms*:

> 2. Everyone has the following fundamental freedoms: […]

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; […]

450. The College submits, and the Panel agrees, that an individual's freedom of expression guaranteed by section 2(b) is vitally important. In *Ross,* the Supreme Court of Canada held that:

> 59. Section 2(b) must be given a broad, purposive interpretation; see *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927. The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfilment; see *Zundel*, supra. As Cory J. put it in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336, "[i]t is difficult to imagine a guaranteed right more important to a democratic society"; as such, freedom of expression should only be restricted in the clearest of circumstances.
>
> 60. Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee of freedom of expression; see *Irwin Toy*, supra, at p. 969. The scope of constitutional protection of expression is, therefore, very broad. It is not restricted to views shared or accepted by the majority, nor to truthful opinions. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be; see *Zundel*, supra, at p. 753. The wide ambit of s. 2(b) is underscored by the following passage from McLachlin J.'s reasons in that case, at pp. 752-53:
>
> > The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfillment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy*, *supra*, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55.

451. A finding that the Respondent's off-duty statements constitute unprofessional conduct or professional misconduct would adversely impact on his freedom of expression under section 2(b) of the *Charter.* An administrative decision which limits *Charter* protections "will only be reasonable if it reflects a proportionate

balancing of the *Charter* protections at play with the decision-maker's statutory mandate": *Groia*, at paragraph 111.

452. The question then becomes whether such infringement can be justified under the law, which entails balancing the Respondent's expressive rights with the College's statutory objectives, including the broader question of ensuring equal access for all to the healthcare system.

453. As noted, *Doré* sets out the general legal framework that must be applied by an administrative decision-maker when exercising a statutory discretion that engages Charter rights or values. The Panel must first consider the statutory objectives the College is seeking to uphold, and then, secondly, ask how the Charter right or values at issue will best be protected in view of the statutory objectives. This requires conducting a proportionality exercise, balancing the severity of the interference of the *Charter* protection with the statutory objectives sought to be achieved: see also *Peterson*, at paragraph 13, *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 ("*Loyola*"), and *Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32 ("*Trinity Western*").

454. The Panel will accordingly consider the statutory objectives at issue in this case before turning to the proportionality analysis.

Statutory Objectives

455. The College's duties are listed in section 16(1) of the HPA. Subsection (a) provides that it is the duty of the College at all times to serve and protect the public.

456. The College's objects are enumerated in section 16(2) of the HPA. The College submits the statutory objects applicable to this case are:

(a) to establish, monitor and enforce standards of professional ethics amongst registrants (section 16(2)(g)); and

(b) to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair (section 16(2)(i.1)).

457. In *Strom*, the Court outlined the following helpful approach to identifying the

statutory objective of a disciplinary process such as this one:

> [148] I must first identify the statutory objective of the disciplinary process against Ms. Strom. That statutory objective must be pressing and substantial to justify the infringing measure: *RJR-MacDonald Inc. v Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199 at para 143 [*RJR-MacDonald*]. In doing so, it is necessary to take account of the facts, rather than simply restating the purpose of the *Act* as a whole or, for that matter, of the disciplinary process as a whole. As Lamer C.J.C. said in *RJR-MacDonald*:
>
> > 144 Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is *the objective of the infringing measure*, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. … (Emphasis in original)
>
> [149] Put differently, the objective should be defined in a fashion that is narrow enough to test the decision at issue and broad enough to enable the court to identify and assess other options that may have been available to the administrative body. In his majority judgment in *Groia,* for example, Moldaver J. described the statutory objective as "advancing the cause of justice and the rule of law by setting and enforcing standards of civility" (at para 140).
>
> [150] On this appeal, the SRNA identified various possible statutory objectives. In its factum, the SRNA submitted that the objective was to ensure that nurses publicly advocate in a professional manner. In its supplementary factum, it argued – echoing the language of s. 26(1) – that the Discipline Committee's objective was to protect the best interests of the public, nurses and standing of the profession of nursing from unjustified harm by another registered nurse. That objective is so broad as to serve no useful analytical purpose. The SRNA also suggested that the pressing and substantial objective could be expressed as ensuring the protection of the standing of the profession of nursing by requiring a minimum standard of professionalism from nurses in the way they seek to advocate for change or address health issues.
>
> [151] I have described the purpose of the Act as being to provide for a professional regulatory body to license and regulate registered nurses, with an overriding objective of safeguarding the public interest. Professional discipline serves the public interest by protecting the standing of the profession. The speech at issue is public speech relating to healthcare, including registered nurses. I would characterize the statutory objective as protecting the public interest and the standing of the profession by setting and enforcing standards as to public speech by registered nurses relating to healthcare. I am satisfied that is a pressing and substantial objective.

458. The College refers the Panel to *Kempling* BCSC where the Court found several "pressing and substantial" objectives for the British Columbia College of Teachers

("BCCT") disciplining discriminatory speech by a teacher:

> 100. The BCCT had several pressing and substantial objectives that would justify overriding the appellant's exercise of his *Charter* rights in this case. These were: 1. to ensure an equal, tolerant, discrimination-free school environment; 2. To protect students, in particular gay and lesbian students, from the appellant's anti-homosexual discrimination; and 3. To restore and uphold the integrity of, and student and public confidence in, the public school system and the teaching profession as non-discriminatory entities.

459. The College argues that, although the context and the governing body in *Kempling* BCSC are different than in this case, the core of the pressing and substantial objectives outlined in that case remains true and applicable to this case. The College submits that disciplinary action in this case would serve the pressing and substantial objectives of restoring and upholding public confidence in the health care system and the nursing profession as non-discriminatory entities, and ensure an equal, tolerant, discrimination-free healthcare environment for all.

460. During its oral submissions, the College argued that the pressing and substantial objectives of the College are to ensure an equal, tolerant, and discrimination-free healthcare environment, to protect the users of the healthcare system, in particular marginalized communities or those supporting marginalized communities, from discrimination against them, and to restore and uphold the integrity of, and public confidence in, a discrimination-free nature of the healthcare profession. The College also argued that exhortations to violence, whether or not that exhortation was intended to be jocular, while identifying as a nurse, amount to conduct unbecoming. Free speech does not tilt the *Doré* balance in favour of the Respondent. The College says it has a legitimate pressing and substantial objective in ensuring that the public is not exposed to its members making the kind of comments as those outlined in the Citation, without those members facing discipline. The College argues that another way to look at the balancing of the *Doré* factors is to ask what would happen if the College could not discipline its members for saying such things. What impact would it have on the public and its perception of the nursing and midwifery professions if nurses were permitted, while identifying as a nurse, to suggest, in a jocular manner or not, that violence is an appropriate response to COVID-19 measures.

461. The College says the comments made by the Respondent on Global News, as referenced in paragraph 2 of the Citation, undermine public confidence in the healthcare system and the nursing profession because of how those comments belie attitudes toward members of marginalized groups, particularly Indigenous individuals. The College argues that, rather than restoring and upholding the integrity of the healthcare system, the Respondent chose of his own volition to volunteer to speak to Global News to defend nurses and to state that nurses are not racist, that it is hurtful to nurses to say that nurses may be racist, and to suggest that the allegations of racism were the result of Indigenous individuals not getting “what they want” from the healthcare system. The College says that this is disciplinable speech.

462. The Panel finds that the pressing and substantial objectives in this discipline case are to restore and uphold public confidence in the healthcare system and the nursing profession, and to ensure an equal, tolerant, and discrimination-free healthcare environment for all.

Proportionality Analysis

463. The fundamental nature of the right, and its underlying values, must be recognized when considering whether a limitation on speech is justifiable. The "core" values of freedom of expression include, "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, the promotion of public participation in the democratic process" (*Kempling BCCA* at paragraph 75 and *Ross*, at paragraph 89), and “the search for truth and the common good (*Groia*, at paragraph 117).

464. In *Strom* the Court relied on *Groia* and held that a Discipline Committee must consider the “full panoply of contextual factors” particular to the registrant’s before deciding whether they should be disciplined, despite the infringement of their right of free expression. The Court provided the following guidance with respect to the contextual factors to be considered during the proportionality analysis stage of the *Doré* framework:

155. …. The correct approach to assessing whether speech … constitutes professional misconduct would account for the unique circumstances of each case — such as what the registered nurse said, the context in which they said it and the reason it was said — thereby enabling the Discipline Committee to accurately gauge the value of the impugned speech. The relevant contextual factors might include, without limitation:

(a) whether the speech was made while the nurse charged was on duty or was otherwise acting as a nurse;

(b) whether the nurse charged identified themself as a registered nurse;

(c) the extent of the professional connection between the nurse charged and the nurses or institution the nurse charged has criticized;

(d) whether the speech related to services provided to the nurse charged or their family or friends;

(e) whether the speech was the result of emotional distress or mental health issues;

(f) the truth or fairness of any criticism levied by the nurse charged;

(g) the extent of the publication and the size and nature of the audience;

(h) whether the public expression by the nurse was intended to contribute to social or political discourse about an important issue; and

(i) the nature and scope of the damage to the profession and the public interest.

[156] I have characterized the statutory objective against which the DC Decision must be assessed as "protecting the public interest and the standing of the profession by setting and enforcing standards as to public speech by registered nurses relating to healthcare". A fact-specific approach that takes account of all contextual factors would enable the Discipline Committee to proportionately balance the Charter right of registered nurses to free expression and the SRNA's legitimate concern with off-duty speech by registered nurses with a sufficient nexus to the profession. This approach would enhance respect for the SRNA and the disciplinary process and, by doing so, would more effectively advance this statutory objective.

[157] What, then, of the severity of the impact of the *DC Decision* on Ms. Strom's freedom of expression? The SRNA argues that the Discipline Committee took account of that issue. It emphasizes that Ms. Strom could have simply reposted the newspaper article and explained that she shared the concerns identified by the author, without targeting St. Joseph's or its staff. It says she could have privately raised her concerns about the care

> given to her grandfather with St. Joseph's and, if by doing so she obtained evidence confirming her suspicions, she could have filed a complaint.

465. In *Kempling BCCA,* the Court also identified several contextual factors that may be considered, including the nature of the impugned activity, the vulnerability of the group affected by the off-duty statements, and the nature of the harm.

466. The College submits that *Strom* factors (b), (h) and (i) are relevant in this case. The College says the Respondent's public statements were made while he identified as a nurse. Further, these public statements negatively impacted on the nursing profession and the healthcare system. The College says the nexus and impact are such that they rise to the level of unprofessional conduct and engage the regulator's duty to restore and protect the public interest.

467. The Respondent agrees that *Strom* applies to this case. He also relies on *Harding* (at paras 54, 62, 64, 74, 85) and submits that, in the context of considering disciplinary proceedings taken against a lawyer who was alleged to have violated professional standards for statements he had made both inside and outside the courtroom, the BC Court of Appeal held that when a professional body is assessing whether or not a member has violated a professional standard, the tribunal must proportionately balance the *Charter* rights and values with the statutory objectives when considering whether the impugned conduct warrants discipline. The Respondent says the Panel is required to consider a broad range of contextual factors, including whether the impugned conduct was in good faith and on a reasonable basis, and the stakes and burdens of the situation.

468. The Panel finds the contextual factors that are relevant to this case are: (i) whether the nurse identified himself as a registered nurse when making the off-duty statements (ii) whether the nurse's public statements was intended to contribute to social or political discourse / the stakes and burdens (iii) the nature of the impugned activity; (iv) the truth and/or fairness of the statements, including whether they were made in good faith; (v) whether the off-duty statements were directed at a marginalized and vulnerable group; (vii) the nature and scope of the damage to the profession and public interest; and (viii) the impact of finding that the comments constitute unprofessional conduct or professional misconduct. The

Panel will address each of these factors below.

(i) The Respondent identified himself as a nurse.

469. The Panel agrees with the College's submission and the case law on which the College relies that what a person says as a regulated professional carries more weight than what a person says as a private citizen.

470. As previously noted, the evidence confirms that the Respondent's statements were made off-duty and that he identified and/or that he held himself out as a nurse in public conversations during which he made the comments included in paragraphs 1.a, 1.b and 2 of the Citation. By doing so, the Respondent linked his views to the nursing profession and the healthcare system because his publicly-made comments may influence the public's perception of members of the nursing profession, the healthcare system, and the likely care that Indigenous people may receive when they access that healthcare system.

(ii) Whether the statements were intended to contribute to social or political discourse / the stakes and burdens.

471. The Respondent says the Court in *Strom* recognized at paragraph 115 that the right to participate in social and political discourse is an important aspect of personal autonomy and free speech and is at the heart of a liberal democracy. He argues that the few people who listened to the podcasts he was on would be able to put matters in context if they listened to the entire exchange. He submits that, when his comments are placed in context, they do not constitute professional misconduct.

472. The Respondent says that, in *Strom,* the Court held that those unfairly criticized may suffer hurt feelings and deserve sympathy, a negative impact on the public interest nurses or the profession is a horse of a different colour. In other words, it takes much more than that to negatively impact on the public interest or the profession to bring it into the category of professional misconduct.

473. The Respondent also refers to paragraph 117 of *Strom* where the Court held that the tone, the content, and the purpose were important contextual factors when

answering the question of how a nurse's public comments would be understood by members of the public, and thus whether there would be an impact of the kind necessary to establish a sufficient nexus to the purpose of the HPA.

474. The Respondent says that the comments that are the subject of the Citation were made by him in good faith to convey that he was not going to comply with the mask mandate as it was at the time, he was not going to submit to going into an internment camp, and he was going to protest if he was required to do so. He says the Court in *Strom* had highlighted in paragraph 119 how important it is that the discipline committee does not ignore any positive aspects to the context of the statements. He submits the Court in *Strom* also recognized that, although Ms. Strom was very harsh in her criticisms, there had been some things she did that tempered or qualified what she had said. Similarly, the Respondent says that his public statements were not critical of the Health Authority or the Ministry of Health; rather, he was being critical of the media. His public statements also included comments that his healthcare colleagues were caring and dedicated rather than racist. Further, he also testified how much he loved the Indigenous people and that he had a good relationship with them and had worked with them for years. The Respondent argues these comments tempered his impugned statements and they are all comments that the Court in *Strom* says the Panel must also consider in order to put his impugned statements in proper context. The Respondent says the Court in *Strom* was critical of the College and that Saskatchewan's disciplinary committee had "cherry picked" the most critical portions of the posts while neglecting to include the entire post to place those portions in context, and that the Court had said it was an error of law for the Panel to have done so.

475. The Respondent submits that at paragraph 160 of the *Strom* decision the Court further recognized that the right to criticize public services is an essential aspect of the "linchpin" connection between freedom of expression and democracy and that criticism of the healthcare system is manifestly in the public interest. Such criticism, even by those delivering those services, does not necessarily undermine public confidence in healthcare workers or the healthcare system. Indeed, it can enhance confidence by demonstrating that those with the greatest knowledge of

this massive and opaque system, and who have the ability to effect change, are both prepared and permitted to speak and pursue positive change. In any event, the fact that public confidence in aspects of the healthcare system may suffer as a result of fair criticism can itself result in positive change. The Respondent says he was not even making comments about healthcare, other than chastising the media for unfairly representing what the healthcare system stood for and its doctors and nurses. He says the Court in *Strom* recognized that a nurse has the permission, and in fact it is a benefit to the public, to be able to speak freely and even unfairly criticize the system when the tone, the content, and the purpose of the criticism is also considered. The Respondent argues that people can make good faith, inaccurate criticisms that do not rise to a level of professional misconduct.

476. The Respondent also refers to paragraph 162 of the *Strom* decision, where the Court was critical of the discipline panel for failing to recognize that the nurse's comments were self-evidently intended to contribute to public awareness and public discourse, something the Court commended when it held that "Ms. Strom spoke to the need for training and of the right of all residents to quality and compassionate care." The Respondent says that this is something he made clear that he also stands for. He says he has always been an advocate for his patients and better outcomes in healthcare.

477. The Court in *Strom* recognized that the discipline panel's decision not only denied Ms. Strom, and would deny other registered nurses, the right to choose their means of communication and [their] audience. Instead, that decision would effectively preclude nurses from using their unique knowledge and professional credibility to publicly advance important issues relating to long-term care of the sort raised by Ms. Strom.

478. The Respondent submits that the Court further recognized that some of Ms. Strom's statements were matters of common sense. The Respondent says that, through his comments, he had been suggesting that people should not wear masks outside when the public health guidance was aligned with that position,

which he says is also a matter of common sense. He says protesting against being placed in an intern camp in a penitentiary, and suggesting that the way to deal with it would be to take to the streets to protest, is another *Charter* enshrined right in the Canadian Constitution and is a matter of common sense. He argues that peaceful protest is how the public can express their views when they disagree with those authoritative institutions in our society that impose conditions on the public. People are allowed to protest, and in fact it is encouraged. He argues that the Court in *Strom* encouraged it. The Respondent says that protest is how citizens bring about positive public change. Censoring nurses from using their skill, knowledge, experience in public discourse, or similarly censoring the Respondent from using his experience in the military regarding psychological operations, does not benefit the public.

479. The Respondent says the College has admitted that they have infringed his rights, but claim that they were justified in doing so. He says the Court in *Strom* also recognized that censoring nurses when they are using their skill, knowledge, experience in public speaking: " is properly characterized as a serious impact on the type of speech that s. 2(b) of the *Charter* seeks to protect. The significance of that impact is increased by the fact that it related to [this nurse]'s freedom of expression while off duty and in relation to her private life."

480. The Respondent accepts that "becoming a member of a regulated profession comes with benefits but at a cost" and that nurses must still be held to their professional standards. He refers to paragraph 166 of *Strom* where the Court refers to the Supreme Court of Canada decision in *Ross*: "…that does not mean the entire life of a professional should be subject to inordinate scrutiny on the basis of more onerous standards of behaviour, as that would lead to a substantial invasion of the privacy rights and fundamental freedoms of professionals. The word 'inordinate' can be understood as a shorthand expression of the need for proportionality. Nurses, doctors, lawyers and other professionals are also sisters and brothers, and sons and daughters. They are dancers and athletes, coaches and bloggers, and community and political volunteers. They communicate with friends and others on social media. They have voices in all of these roles. The

professional bargain does not require that they fall silent. It does, however, allow the regulator to impose limits. The question as to whether it has imposed excessive limits is the proportionality question."

481. The Respondent argues that disciplining him would achieve nothing except having a salutary effect by perhaps providing some satisfaction to the complainant and those at the College who believe that his statements are worthy of punishment. He says advocating for protests rather than violence is in the public interest.

482. The Respondent submits that it should be viewed as admirable that he stood up against the media when they were unfairly characterizing emergency departments across British Columbia as being racist. He says that he did not deny that racism exists nor did he deny the harm that is suffered by those who experience racism. However, the Respondent criticized the media for their reporting of the incident. The Respondent submits that, in the Segment, he spoke of his personal experience and did not make a general statement. He told the reporter that, "I have not witnessed this [guessing games involving blood alcohol levels of Indigenous patients], but I did witness a couple of instances over the last couple of days [of claims of racism]." He argues that a registrant cannot be disciplined for sharing their personal experience.

483. In *Strom*, the Court recognized at paragraph 161 that political expression and the promotion of participation in the democratic process are at the core of the section 2(b) protection of freedom of expression.

484. The Panel accepts that many of the opinions the Respondent expressed during his appearances on the *Grizzly Patriot* vlog and the *Monks and Maverick* podcast were intended to contribute to political and social discourse, which lie at the core of section 2(b) protected expression. Specifically, the Panel accepts the Respondent's submission that, during his public conversations, he was advocating for compliance with the public health guidance on wearing masks for better patient care, better health policy and outcomes, and for media actions that would avoid harm to Indigenous persons.

485. However, not all the Respondent comments were close to the core of the values underlying section 2(b).

(iii)The nature of the Respondent's public statements

486. As noted, the Panel found the Respondent's comment that he would want to "go down and play paint ball" against persons responsible for burning cities in the United States, and his comment that "We will meet you in the street and do this the old-fashioned way", both advocate violence.

487. The Panel's finds that these statements sent a message to the public that the Respondent, a nurse, was prepared to engage in violent behaviour against those with whom he disagrees. It does not matter whether the Respondent intended the statements in jest, or if they were made in good faith or as a matter of common sense, they remain comments that could be reasonably perceived by members of the public to mean that the Respondent, a nurse, views using violent behaviour, i.e. shooting people who are burning cities, or fighting with them in the streets, as an appropriate way to resolve disagreement.

488. Similarly, the Respondent's defense of nurses in relation to the allegation that hospital staff played a "game" of guessing the blood-alcohol level of Indigenous persons attending the Emergency Room to receive healthcare services, while suggesting that patients were making allegations of racism because they did not "get what they want", was a racially insensitive remark in response to Indigenous persons' concerns. As previously noted, this comment sends the message to the public that people, including nurses, operating within the public health apparatus, harbour harmful stereotypes about Indigenous persons. It is a discriminatory statement as defined by *Kempling BCCA*.

489. In *Groia*, the Supreme Court held that:

> 117. ... speech is not sacrosanct simply because it is uttered by a lawyer. Certain communications will be far removed from the core values s. 2(b) seeks to protect: the search for truth and the common good: *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762 and 765. The protection afforded to expressive freedom diminishes the further the speech lies from the core values of s. 2(b):

> *Keegstra*, at pp. 760-62; *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 72-73. As such, a finding of professional misconduct is more likely to represent a proportionate balance of the Law Society's statutory objective with the lawyer's expressive rights where the impugned speech lies far from the core values of lawyers' expressive freedom.[118]

490. The inherent dignity of the individual is a concept that is essential to a functioning democracy. Political or social discourse that ignores it is not representative of the core values underlying section 2(b) of the *Charter*. In *Kempling BCCA,* the BC Court of Appeal stated the following, which is equally applicable to this case:

> [75] The Supreme Court has made it clear that the nature of the impugned expression will, in part, determine how difficult it will be to justify an infringement of s. 2(b). In *Ross*, La Forest J. made the following comments at paragraph 89:
>
> > In my reasons in *RJR-MacDonald*, *supra*, I stated that the "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process" (p. 280). This Court has subjected state action limiting such values to "a searching degree of scrutiny" (p. 281). This standard of scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s. 1 has been applied.
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> And in *R v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697 at 760, Dickson C.J. made the following observation:
>
> > In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).
>
> [76] There is undoubtedly a political element to Mr. Kempling's expression, and portions of his writings form a reasoned discourse, espousing his views as to detrimental aspects of homosexual relationships. Though his views may be unpopular, he was, in his more restrained writings, engaged in a rational debate of political and social issues; such writing is near the core of the s. 2(b) expression. **However, not all of his writings were of this nature and as I have said, Mr. Kempling's writings at times clearly crossed the line of reasoned debate into discriminatory rhetoric.**

> [77] In a number of Mr. Kempling's published writings he relied upon stereotypical notions of homosexuality, and he expressed a willingness to judge individuals on the basis of these notions. **In doing so, he ignored the inherent dignity of the individual; this concept is essential to a functioning democracy, and, in my view, political discourse which ignores it is not representative of the core values underlying s. 2(b). Accordingly, Mr. Kempling's published writings, taken as a whole, are not deserving of a high level of constitutional protection.** (Bolding added)

491. In the view of the Panel, the Respondent's statements referenced in paragraphs 1.a, 1.b, and 2 of the Citation crossed the line of reasoned political and social debate or discourse into discriminatory rhetoric, including exhortations to violence, which ignored the "inherent dignity of the individual".

492. The Panel is satisfied that these statements lie far from the core values underlying section 2(b): the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, the promotion of public participation in the democratic process", and "the search for truth and the common good". Accordingly, these statements do not enjoy a high level of constitutional protection.

(iv)The truth and/or fairness of the statements.

493. The truth and/or fairness of the Respondent's off-duty statements is another contextual factor for consideration. The Respondent submits that his comments were neither false nor exaggerated. He says that, when the Panel looks at his statements in context, it would be evident that those statements were supported by the public health guidance on masks and by the video of violent rioting in US cities that he introduced into evidence.

494. The Panel accepts that the Respondent's evidence shows that violent rioting occurred in the US and that the Respondent's position on wearing masks outside was supported by and/or aligned with the public statements of Dr. Henry and Dr. Tam regarding wearing masks.

495. However, as the College pointed out, the Respondent is not being disciplined for being opposed to the burning of cities by rioters in the US. Nor is he being

disciplined for speaking out against wearing masks outside. He is being disciplined for publicly making the comments referenced in paragraphs 1.a and 1.b which would reasonably have been perceived by members of the public as advocating violence. It is irrelevant to the determination of whether those statements constitute professional misconduct or unprofessional conduct that it was true that cities in the US were being burnt by rioters, or that the Respondent's position on wearing masks outside was aligned with the provincial and national leadership's guidance on masks at the time he made those comments.

(v) Some of the off-duty statements concerned a marginalized and vulnerable group.

496. Another contextual factor for the Panel to consider is that the Respondent's statements on the Global News Segment were directed at Indigenous people, who are a vulnerable and marginalized group in Canadian society.

497. As noted, with respect to the Respondent's comments about Indigenous people and the media, the Respondent says he was advocating for Indigenous people, and that he was not denying their experience. What he had denied in the Segment was the media's claims that emergency departments across the province were a dangerous place for Indigenous people. He says it is admirable that he stood up against the media when they were unfairly characterizing emergency departments across British Columbia as being racist, but he did not deny the experience that racism exists and the harm that is suffered by those who experience racism.

498. The Panel accepts the Respondent's evidence about his intention when he made his comments on the Global News Segment. However, public commentary can be discriminatory and harmful even if it is not intended to be. As already noted, a discriminatory statement about Indigenous people, who are a historically disadvantaged and vulnerable group in Canada, lies far from the core values underlying section 2(b) of the *Charter* and thus enjoys diminished constitutional protection.

(vi) The nature and scope of the damage to the profession and public interest.

499. The Panel must also consider the nature and scope of the damage to the profession and the public interest from the Respondent's off-duty statements.

500. The Panel has no hesitation in finding that public statements made by nurses which are discriminatory with respect to Indigenous person, and that advocate violence, are harmful to the nursing profession and the healthcare system. In *Kempling BCCA,* the British Columbia Court of Appeal held the following, which is equally applicable to this case:

> [43] Non-discrimination is a core value of the public education system; the integrity of that system is dependent upon teachers upholding that value by ensuring the school environment is accepting of all students. When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result.
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> …
> [45] …. Proof that he had actually discriminated against a particular student, or evidence of a poisoned school environment, was not required to prove that the school system had sustained harm. Mr. Kempling's statements damaged the integrity of the school system as a whole. They undermined the core value of non-discrimination by denying homosexual students an education environment accepting of them.
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> (Underlining added)

501. As a member of a regulated profession, the Respondent is held to a higher standard. In his regard, it refers to *Kempling BCSC* where the Court said at paragraph 93:

> … As the statutory body empowered to regulate the teaching profession in the public interest, the BCCT has a duty to ensure that the fulfilment of public school teaching functions is undertaken in a manner that does not undermine public trust and confidence. The standard of behaviour required of a teacher is greater than the minimum standard otherwise tolerated of individual members of the lay public, given the responsibilities which a teacher must fulfil and the expectations which the community holds for the educational system (Ross, supra, at ¶84).

502. The above comments addressing the situation of a teacher in the education system are equally applicable to the present case involving a nurse and the healthcare system. The Respondent's statements which form the basis for this

hearing fail to fulfil his responsibilities as a nurse and fail to meet the expectations held by the community for the healthcare system, the result of which has been harm to the nursing profession and to the healthcare system.

503. Statements by a nurse advocating violence or violent behavior, whether or not those statements were made as a joke, are inimical to the profession's foundational values of tolerance, non-violence, and respect for the inherent dignity of all people and undoubtedly erode the public's trust in members of the nursing profession.

504. Further, as Dr. Varcoe's evidence shows, a nurse who makes public statements that are discriminatory while trading on the credibility associated with their professional status, erodes the trust the public has in the healthcare system and no doubt fosters a reluctance or unwillingness by Indigenous persons to access healthcare for fear they will face further discrimination. This is harmful, and in opposition to the foundational values of the nursing profession and Canada's healthcare system.

505. The Respondent's comments advocating violence, and his discriminatory comments, are not only contrary to the foundational values of the healthcare system but also to the obligation of the nursing profession to treat individuals with tolerance, respect, and dignity and to facilitate and promote equitable access to health care services without regard to irrelevant personal attributes or characteristics.

506. The Respondent's comments went beyond mere inflammatory speech. His remarks disparaging Indigenous people may have had the compounding effect of creating distrust in the healthcare system and its providers, negatively impacting quality of care, and increasing harmful outcomes. Dr. Varcoe's evidence, considered in conjunction with the Respondent's statements, emphasize the harm caused by the Respondent to the healthcare system, and to Indigenous persons who often engage with nurses at first instance.

507. By identifying himself as a nurse while publicly making statements that advocate

violence and making discriminatory comments about a vulnerable and historically disadvantaged group, the Respondent undermined the reputation and integrity of the nursing profession and caused harm to the healthcare system.

(vii) The Impact of finding that the Respondent's off-duty comments constitute professional misconduct or unprofessional conduct.

508. The Panel recognizes that finding that the Respondent's off-duty statements referenced in paragraph 1.a, 1.b, and 2 of the Citation constitute unprofessional conduct or professional misconduct will adversely impact on his personal autonomy and right to freedom of expression as protected by section 2(b) of the *Charter*.

509. The Panel also accepts that an individual who becomes a regulated professional does not lose their *Charter* rights. However, all registrants must still comply with the professional standards of their regulatory body, which may reasonably limit their right to free speech: *Groia, Kempling BCCA, Peterson, Pitter/ Alviano.*

510. The Panel finds it is reasonable to limit a College registrant's ability to make off-duty statements that advocate violence, or that are discriminatory about a marginalized and vulnerable group, made while self-identifying or holding themselves out as a nurse. As noted, statements of this nature enjoy diminished constitutional protection because they lie far from the core values underlying section 2(b) *Charter* protection.

511. The Panel is satisfied that making a finding that the Respondent's comments referenced in paragraphs 1.a and 1.b of the Citation constitute professional misconduct, and that his discriminatory comments referenced in paragraph 2 of the Citation constitute unprofessional conduct, would not, in the circumstances of this case, impair the Respondent's section 2(b) right to freedom of expression more than is necessary to achieve the objectives of protecting the public interest and maintaining the integrity and reputation of the nursing profession and public confidence in the healthcare system.

512. The deleterious effects of disciplining the Respondent are proportionate when weighed against their salutary effects. The Respondent is free to publicly advocate for better patient and healthcare and any other cause he supports, and to express his views and opinions, without identifying or holding himself out as a nurse. The Respondent can also freely advocate his causes and express his views and opinions while identifying as a nurse, provided they do not advocate violence, are not discriminatory, and do not harm the public's perception of the profession or the healthcare system.

513. The Panel finds there are no other reasonable options to give effect to the Respondent's freedom of expression protected by section 2(b) of the *Charter* while fulfilling the College's mandate to protect the public interest. The Panel would fail to fulfill its duty under section 16(1) of the HPA by not disciplining unprofessional conduct and professional misconduct that has a nexus to the profession of nursing, specifically in these circumstances where the nurse identified or held out their professional status while making public statements or comments that advocates violence, and are discriminatory, and which are diametrically opposed to the foundational values of the nursing profession. The Panel accepts that such statements adversely impact on the public's perception of the nursing profession, the healthcare system, and/or the willingness of members of the Indigenous community to access healthcare.

514. In *Kempling BCSC* the Court held, at paragraphs 39 and 50:

> [39] … The question before the Panel was whether the making and publication of those statements in the circumstances and context in which it was done fell below acceptable standards of professional conduct. Because non-discrimination is a core value of the educational system, a finding that those writings were of a discriminatory and derogatory nature can properly form part of the basis of a determination of conduct unbecoming.
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> [50] The harm, whether per se or inferred, to the school system, the teaching profession, and student and public confidence in them, resulting from the appellant's writings published off-duty warrant a finding that his conduct was unbecoming a BCCT member.

515. The Panel does not accept the Respondent's submission that disciplining him

would do nothing other than have a salutary effect by perhaps providing some satisfaction to the complainant and those at the College who believe that his statements are worthy of punishment. A finding that the Respondent's statements advocating violence constitutes professional misconduct, and that his discriminatory comment constitutes unprofessional conduct, would support and further the pressing and substantial objectives of restoring and upholding public confidence in the healthcare system and the nursing profession, and to ensure an equal, tolerant, and discrimination-free healthcare environment for all. Disciplining the Respondent will make a strong statement to the public that what he did was wrong and that the Panel and the College do not condone advocating either discrimination or violence. This statement will go some way to repair the damage done to, and of restoring and upholding public confidence in the healthcare system and the nursing profession, and to ensure an equal, tolerant, and discrimination-free health care environment for all.

516. Professional misconduct is generally more serious than unprofessional conduct. Professional misconduct generally refers to misconduct that is more egregious than unprofessional conduct. The Panel has considered the definitions in section 26 of the HPA and has decided to characterize conduct that it regards to be of a more serious or egregious nature as professional misconduct rather than unprofessional conduct, since the definition of that phrase includes unethical conduct and infamous conduct.

517. As noted, in *Pearlman* the Supreme Court held that professional misconduct is conduct that would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well-respected brethren in the group - persons of integrity and good reputation amongst the membership. In *Martin,* it is described as conduct that is a "marked departure from the standard expected of a competent" registrant. Pursuant to section 39(1)(c) of the HPA the Panel finds the Respondent's comments referenced in paragraph 1.a and 1.b of the Citation meets the descriptions in *Pearlman* and *Martin* and constitute professional misconduct for purposes of the HPA. Those comments are unbecoming a member of the nursing profession, and in making them while identifying as a nurse, the

Respondent acted in a manner that is a marked departure from the standard expected of a competent registrant.

518. Further, as recognized in *Kempling BCSC* above, discriminatory statements about vulnerable and marginalized persons are unbecoming a teacher. The Panel similarly finds it is also unbecoming a member of the nursing profession. However, on the facts of this case, the Panel is not satisfied that the Respondent's comments during the Segment crosses the serious threshold to constitute professional misconduct. In reaching this conclusion, the Panel accepts and has given the Respondent's evidence that he did not intend to deny the experiences of Indigenous persons, or that racism in the healthcare system exist, considerable weight. However, as noted, public commentary may, as in his case, still be discriminatory and harmful even if they are not intended to be. The Panel finds the Respondent's comments referenced in paragraph 2 of the Citation constitutes unprofessional conduct for purposes of the HPA.

D. Order

519. For the above reasons, the Panel determines pursuant to section 39(1)(c) of the HPA that the College has proven on a balance of probabilities, with clear and convincing evidence, that the Respondent committed the conduct as set out in paragraphs 1.a, 1.b, and 2 of the Citation, and that the Respondent's proven conduct described in paragraphs 1.a and 1.b of the Citation constitutes professional misconduct, and his proven conduct described in paragraph 2 of the Citation constitutes unprofessional conduct pursuant to section 39(1)(c) of the HPA.

520. The Panel further determines that the allegations set out in paragraphs 1.c, 1.d, and 1.e of the Citation have not been proven on a balance of probabilities, and those allegations are dismissed pursuant to section 39(1) of the HPA.

E. Schedule for Submissions on Penalty and Costs

521. The Panel requests that the parties provide written submissions regarding the appropriate penalty and costs in accordance with the following schedule:

a. Submissions must be delivered by the College to the Respondent and the Panel within twenty (21) calendar days from the date of this determination;

b. Submissions must be delivered by the Respondent to counsel for the College and the Panel within twenty (21) calendar days from the date on which the Respondent received the College's submissions; and

c. Reply submissions, if any, may be delivered by the College to the Respondent and the Panel within seven (7) calendar days from the date on which the counsel for the College received the Respondent's submissions.

522. Submissions for the Panel's consideration should be delivered by email to independent legal counsel for the Panel.

F. Notice of right to appeal

523. 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: February 2, 2026

Signed by:

Catharine Schiller, RN, Chair

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Hanna Ridley, RN

Joshua Tan, Public Member