

**IN THE MATTER OF
THE COLLEGE OF REGISTERED NURSES OF BRITISH COLUMBIA
AND CITATION ISSUED UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.B.C. 1996, chapter 183 (the "Act")**

BETWEEN:

THE COLLEGE OF REGISTERED NURSES OF BRITISH COLUMBIA

(the "College" or "CRNBC")

AND:

JEAN MARLYN CUNNINGHAM

(the "Respondent")

Date and Place of Hearing:

Date: Monday, January 9, 2017

Place: 2855 Arbutus Street, Vancouver, BC,

Members of the Hearing Panel of the Discipline Committee:

Tracey Martindale, RN

Bob Johnstone

Sheila Cessford

Counsel for the College:

Jean Whittow, Q.C. and Miriam Isman

Counsel for the Respondent:

No attendance by the Respondent or counsel

Independent Legal Counsel for the Panel:

Lisa C. Fong

Court Reporter:

January 9, 2017: Rose Halendy

**REASONS FOR DECISION AND ORDER
OF THE DISCIPLINE COMMITTEE**

1. A Hearing Panel of the Discipline Committee (the "Panel") convened on January 9th, 2017 to inquire into allegations of unprofessional conduct.
2. The hearing came to order at 10:00 a.m. on January 9th, 2017, at which time the court reporter, Rose Halendy was sworn in.

Proceeding without the Respondent

3. Given the Respondent was not in attendance, the Panel adjourned the hearing while legal counsel for the College attempted to contact the Respondent. When the hearing reconvened,

College counsel advised she had telephoned the Respondent, who answered. The Respondent advised that she had received the Citation, was aware of the date and time of the hearing, and was not intending to attend the hearing or have someone attend on her behalf.

4. The College proposed that the hearing proceed in the absence of the Respondent. The College submitted that the Respondent was given adequate notice of the proceeding and therefore had every opportunity to attend but, as advised on the telephone, has decided not to attend.

5. Ms. Whittow tendered into evidence the citation in this matter dated December 6, 2016 (the "Citation") (Exhibit #1). She pointed out that the Citation set out the hearing date, time, and also advised the Respondent that if she failed to attend, the hearing could proceed in her absence and the Panel might make determinations and orders under s. 39 of the Act.

6. Ms. Whittow also tendered into evidence an affidavit of personal service of Manjinder Singh, who deposed that she personally served the Respondent with a copy of Citation on Friday, December 6, 2016 (Exhibit #2).

7. The Panel noted that under s. 38(5) of the Act, the hearing may proceed in the Respondent's absence on proof of receipt of the Citation by the Respondent. The Panel was satisfied the Respondent had received the Citation, and agreed with the College's submissions.

Discipline Committee Panel

8. As a preliminary matter, member Cessford advised that she was on the College's Inquiry Committee while this matter was proceeding through the inquiry process. The College's Inquiry Committee makes decisions, however, through panels. The panel on which Ms. Cessford sat did not deal with this matter. Ms. Cessford does not know anything about this matter. The panel she was on never learned of this matter and did not see any information about this matter.

9. As Ms. Cessford has no information about this matter, she does not view her participation on this panel of raising any issue of actual or an appearance of bias or conflict of interest.

10. The Chair of the Panel advised that the Panel had discussed Ms. Cessford's involvement with the Inquiry Committee. The Panel shares Ms. Cessford's view that her participation did not raise any issues concerning any actual or any appearance of bias or a conflict of interest. The Chair invited the College whether it had any concerns. Ms. Whittow advised that the College had no concerns regarding Ms. Cessford's past engagement on an Inquiry Committee panel that did not deal with this matter.

Citation

11. The Citation is attached as Schedule A to these Reasons for Decision and Order (the "Reasons"), and forms a part of the Reasons.

The hearing matter

12. The matter before the Panel is whether the Respondent committed unprofessional conduct, within the meaning of s. 39(1)(c) of the Act, by failing to respond to communications from CRNBC concerning a complaint, which communications included letters dated June 16, August 12, September 9, September 23, and November 7, 2016.

Facts and evidence

13. The Respondent is a registrant of the College in the “registered nurse” registration class.
14. The College adduced evidence of a book of documents and called the evidence of one witness, Ms. Tansey Ramanzin (“Ms. Ramanzin”).
15. For simplicity, these Reasons refer to the registrar, the Inquiry Committee, and to personnel acting on their behalf, simply as the “College”, as their legal distinctness is immaterial in this case.

(a) Witness evidence

16. Ms. Ramanzin testified she is a Professional Conduct Review Consultant with the College, and has been in that position since 2014. She testified as to the details of her and the College’s interaction with the Respondent:
 - (a) On April 13, 2016, the College received a complaint from [redacted] against the Respondent (the “Complaint”). He alleged that when he inquired as to his mother’s condition, the Respondent had been rude and dismissive to him. The Respondent had turned her back to him and refused to speak with him.
 - (b) The Complaint was initially directed to the registrar’s stream, as it involved a less serious matter not involving patient or public safety issues.
 - (c) On June 16, 2016, the College sent to the Respondent a copy of the Complaint, together with a letter from the College requesting a response by July 21, 2016 (the “First Request Letter”). Ms. Greer, a co-worker and also a Professional Conduct Review Consultant at the College, contacted the Respondent on June 23, 2016 who confirmed receipt.
 - (d) The College did not receive a response to its First Request Letter. On August 12, 2016, the College sent a second letter to the Respondent requesting a response by August 25, 2016 (the “Second Request Letter”).
 - (e) The College did not receive a response to the Second Request Letter. Due to the non-responsiveness, the matter became more serious, and was referred to the Inquiry Committee. The Inquiry Committee accepted the Complaint on September 8, 2016. and it was assigned to Ms. Ramanzin.
 - (f) On September 9, 2016, the Inquiry Committee sent a letter to the Respondent advising of its investigation into the Complaint. The letter did not request a response from the Respondent.
 - (g) On September 13, 2016, Ms. Ramanzin spoke with the Respondent via telephone. The Respondent acknowledged receipt of the Inquiry Committee’s letter and advised that she would contact Ms. Ramanzin within a week as to whether she would be retaining counsel.
 - (h) The Respondent did not contact Ms. Ramanzin within a week. Ms. Ramanzin telephoned the Respondent and left a message but received no return response.

- (i) On or about September 23, 2016 the Inquiry Committee sent to the Respondent its investigation report on the Complaint. The Inquiry Committee asked for a response by October 21st, 2016 (the "Third Request Letter").
- (j) On October 5, 2016, Ms. Ramanzin sent an email to the Respondent at her work email address, requesting a response to the investigation report, and received no return response.
- (k) On November 3, 2016, the Inquiry Committee met and considered the Respondent's non-responsiveness and directed that a letter be sent to the Respondent.
- (l) On November 7, 2016, the Inquiry Committee sent the Respondent a letter advising that the matter would be returned to the Inquiry Committee on November 17, 2016, with or without her response (the "Fourth Request Letter"). The Fourth Request Letter was delivered by registered mail, and Ms. Ramanzin testified about the tracking document (at tab 11 of the College's Book of Documents).
- (m) The Inquiry Committee did not receive any response to the Third Request Letter, the Fourth Request Letter, or Ms. Ramanzin's requests via telephone and email.

17. The Panel accepts the evidence of Ms. Ramanzin about communications with the Respondent.

(b) Documentary evidence

18. Counsel for the College adduced documentary evidence consisting of a Book of Documents (Exhibit #3) containing the following:

- (a) TAB 1: the Complaint dated April 13, 2016;
- (b) TAB 2: Emails dated May 1-20, 2016 between the College and the complainant;
- (c) TAB 3: Letter dated June 16, 2016 from the College to the Respondent (being the First Request Letter);
- (d) TAB 4: Record dated June 23, 2016 of a telephone call with the Respondent;
- (e) TAB 5: Letter dated August 12, 2016 from the College to the Respondent with enclosures (being the Second Request Letter);
- (f) TAB 6: Letter dated September 9, 2016 from the College to the Respondent with enclosures;
- (g) TAB 7: Record dated September 13, 2016 of a telephone call with the Respondent;
- (h) TAB 8: Letter dated September 23, 2016 from the College to the Respondent (being the Third Request Letter);
- (i) TAB 9: Email dated October 5, 2016 from the College to Ms. Cunningham;
- (j) TAB 10: Letter dated November 7, 2016 from the College to Ms. Cunningham (being the Fourth Request Letter);

(k) TAB 11: Canada Post "Track Results" dated November 12, 2016.

Findings

19. The Panel agrees with the College that the burden of proof is on the College to prove a case on the balance of probabilities. The evidence must be "sufficiently, clear, convincing and cogent" to satisfy that burden (*F.H. v. McDougall*, [2008] 3. S.C.R. 4). The Panel must find that it is more likely than not that the alleged conduct occurred. The burden does not shift to the Respondent.

(a) Findings of Fact

20. The testimony of Ms. Ramanzin and the documentary evidence established that the College sent letters, sent one email, and made telephone calls to Respondent requesting that she respond to the Complaint. The Respondent received these communications and failed to respond to them, and also failed to even acknowledge requests that she confirm she received communications.

21. Specifically, the evidence establishes the Respondent did not respond to the First Request Letter, or the Second Request Letter. Both letters set out precisely the issue on which a response was sought, i.e., the assertion that the Respondent ignored and turned her back on the Complainant. Both of these letters advised that, "Regulated professionals have a positive obligation to engage with the investigation process." Both letters set out exact dates by which the Respondent was to respond.

22. Between the First Request Letter and the Second Request Letter, Ms. Greer spoke with the Respondent on the telephone. The Respondent acknowledged that she had received the First Request Letter and understood that the College requested a response from her by July 21st, 2016. There is no doubt, given this evidence, the Respondent decided not to respond to the First Request Letter and the Second Request Letter.

23. The Inquiry Committee had no issue with the Respondent's lack of response to its letter of September 9, 2016, as that letter expressly advised that no response was requested at that time. But the Inquiry Committee gave notice to the Respondent of its investigation through that letter, which included notice that the Inquiry Committee would be sending its investigation report for her response after its completion. After the Inquiry Committee sent that letter, Ms. Ramanzin spoke with the Respondent. The Respondent acknowledged her receipt of the September 9 letter. Therefore the Respondent was aware the Third Request Letter would be forthcoming.

24. With respect to the Third Request Letter and the Fourth Request Letter, the evidence establishes that the Respondent failed to respond to the Complaint issues raised in the investigation report, and failed to acknowledge receipt of the investigation report. The Fourth Request Letter again advised that, "Regulated professionals have a positive obligation to engage with the investigation process."

25. Ms. Ramanzin testified that she had no knowledge as to any reason why the Respondent would not respond to the Complaint, or to communications from the College.

26. Finally, the Respondent advised at the outset of the hearing that she had received the Citation, was aware the hearing was underway, and did not intend to participate.

27. The Panel finds that the Respondent received, and failed to respond to, the First Request Letter, the Second Request Letter, the Third Request Letter, the Fourth Request Letter, telephone calls from Ms. Ramanzin, and an email from Ms. Ramanzin.

(b) Unprofessional Conduct

28. Section 39(1)(c) of the Act provides that on completion of a hearing, the discipline committee may, by order, determine that the Respondent “(c) has committed professional misconduct or unprofessional conduct....”

29. Section 26 of the *HPA* defines “unprofessional conduct” as including “professional misconduct”. Professional misconduct is defined broadly to include “sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession”.

30. College counsel submitted that case law establishes the principle that members of a regulated profession have a duty to cooperate with their governing body, including a duty to reply to communications from the regulator, and that a failure to do so amounts to unprofessional conduct.

31. The rationale behind this principle is that a governing body must be able to rely on the cooperation of members to effectively regulate the profession. Accordingly, the College may require that registrants respond to correspondence so that the body may address complaints. An inability of a body to require prompt responses to a complaint undermines public confidence in that body’s ability to perform its function.

32. College counsel referred the Panel to the case of *Millar v. College of Physicians and Surgeons of British Columbia*, 1994 CANLII 1010 (B.C.S.C.) (“*Millar*”) which involved a doctor who refused to submit to a review of his practice. This refusal resulted in a finding of “unprofessional conduct” by the College. On appeal, the British Columbia Supreme Court at p. 19, upheld the finding, and approved the definition of “unprofessional conduct” from the *Black’s Law Dictionary* which provides:

[t]hat which violates the ethical code or rules of a profession or such conduct which is unbecoming a member of the profession in good standing.

The court in *Millar* concluded that, “a breach of a professional rule would be unprofessional conduct” (at p. 19).

33. In *Millar* (where in 1994 an “Inquiry Committee” of the College of Physicians performed functions that fall to discipline committees under the Act), the court accepted (at p. 20) that “It is in any given case for the Inquiry Committee to determine whether the conduct of a member is of sufficient seriousness to justify a finding of unprofessional conduct.” The court adopted a principle by an Ontario court that, “Fundamentally, every professional has an obligation to cooperate with his self-governing body”. *Artinian v. College of Physicians and Surgeons of Ontario* (1990), 73 O.R. (2d) 74 (Ont.H.C.) (“*Artinian*”). The College submitted that the *Millar* case supports the principle that every member of a regulated profession has a duty to cooperate with his or her governing body; that failure to do so amounts to unprofessional conduct; and that this duty extends to the requirement to reply promptly to communications from the regulator.

34. The Panel was also referred to a number of cases where a member of a regulated profession was found to have committed misconduct or unprofessional conduct for failing to cooperate with the governing body. These cases rely on the principles set out in *Millar*, supra,

that every member of a regulated profession has a duty to cooperate with his or her governing body, and the failure to do so amounts to unprofessional conduct:

- (a) *Kaburda v. College of Dental Surgeons*, 2001 BCSC 1326 (BCSC) (“Kaburda”);
- (b) *Law Society of British Columbia v. Robert John Cuddeford*, 2010 LSBC 11 (“Cuddeford”) referring with approval to *Artinian*;
- (c) *College of Nurses of Ontario v. Agyekum*, 2012 CanLII 100086 (ON CNO) (“Agyekum”); and
- (d) *College of Physicians and Surgeons of BC re Dr. Jeannine Olszewski*, July 2016 and November 2016 (“Olszewski”), recently decided under the Act.

35. In *Kaburda*, a dentist appealed a finding by a “Panel of Inquiry” that he had committed conduct unbecoming for failing to reply to a complaint. The complaint was that he had been rude during an independent examination of a patient making an ICBC claim. The College imposed a four-week suspension, a \$10,000 fine, costs, and other conditions. The result was upheld.

36. In *Cuddeford*, over a two-month period, a lawyer (Mr. Cuddeford) failed to respond to several telephone calls and letters that the Law Society sent to him regarding a complaint. At the hearing, Cuddeford admitted he had not responded to the communications. The Law Society relied on the principle that responding promptly, candidly, and completely to Law Society communications is the cornerstone of the Law Society’s right to self-govern (at para. 14, citing *Law Society of BC v. Dobbin*, [1999] LSBC 27 at para.25). Mr. Cuddeford was fined \$2,000, required to pay costs of \$1,000 and ordered to provide a response by a specific date.

37. In *Agyekum*, Ms. Agyekum did not respond to requests of the College of Nurses of Ontario (the “CNO”) for a response to a patient complaint. The CNO’s Discipline Committee found that Ms. Agyekum committed professional misconduct by failing to appear before a panel of the Inquiries, Complaints and Reports Committee to be orally cautioned. Subsequently, after a hearing and finding of misconduct, Ms. Agyekum failed to respond to CNO’s attempts to schedule a penalty hearing.

38. The Discipline Committee determined that Ms. Agyekum’s actions “were not those that represented the professionalism of a nurse as expected by the public or that of others of the profession” (at p. 5). Her “repeated failure to respond to communications” represented a “significant failing on her part.” The panel found that her conduct “unprofessional” and suspended her for one month.

39. In *Olszewski*, a registrant was found to have committed unprofessional conduct where she failed to respond to correspondence from the College of Physicians and Surgeons of British Columbia over a five-month period, and for her subsequently refusing to cooperate in a practice review. The Board of that College, which had jurisdiction over penalties, suspended Dr. Olszewski for three months and also ordered that she pay costs and comply with conditions.

40. The Panel agrees with the submissions of College counsel that the Citation is proven on the balance of probabilities, and that the Respondent has committed unprofessional conduct.

Order

41. The Panel unanimously determines, pursuant to s. 39(1)(c) of the Act, that the Respondent committed “unprofessional conduct” by failing to respond to communications from

the College concerning the Complaint, which communications included letters dated June 16, August 12, September 23, and November 7, 2016.

Penalty, publication and costs

42. Submissions regarding penalty, publication and costs will be forthcoming from the College and may be forthcoming from the Respondent. The Panel will arrive at a decision on these issues in due course and its further reasons will form part of these Reasons.

Notice

43. 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.

These are the Panel's Reasons for Decision and Order.

Tracey Vancouver BC Feb 3/17

Name Place Date

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Name	Place	Date
<i>R. J. Stone</i>	<i>Kimberley, BC</i>	<i>FEBRUARY 3, 2016</i>

Name	Place	Date

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<i>A. Lewisford</i>	<i>Delta, B.C.</i>	<i>February 6/17</i>
Name	Place	Date