

**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: Wednesday, May 31, 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:

Miriam Isman

Counsel for the Respondent:

No attendance by the Respondent or counsel

Independent Legal Counsel for the Panel:

Lisa C. Fong

Court Reporter:

May 31, 2017: Rose Halendy

**REASONS FOR DECISION AND ORDER
OF THE DISCIPLINE COMMITTEE
ON PENALTY, COSTS AND PUBLIC NOTICE**

1. The Panel re-convened on May 31, 2017, to hold a penalty hearing so that it could hear evidence and submissions on penalty, costs and public notice. This hearing follows an earlier determination by the panel that the Respondent engaged in unprofessional conduct by failing to respond to communications from the Inquiry Committee. These reasons adopt the terms that the Panel used in its earlier reasons on verdict.

2. The penalty hearing came to order at 10:00 a.m., with Rose Halendy again acting as Court Reporter.

Proceeding without the Respondent

3. As in the case of the verdict hearing, the Respondent did not attend. The Panel asked that College counsel, Ms. Isman, advise of any information she had concerning notice to the Respondent of the penalty portion of the hearing.

4. Ms. Isman tendered an affidavit of Tansey Ramanzin, sworn May 17, 2017 (“Ramanzin #1”), as Exhibit #4:

- (a) Exhibit C of Ramanzin #1 is a letter from the College to the Respondent, dated February 7, 2017, enclosing the verdict decision of the Panel.
- (b) Exhibit D of Ramanzin #1 is a printout from Canada Post’s website showing the history of how Canada Post picked up Exhibit C on February 7, 2017, and that someone signed for the package as “Jean Martyn Cunningham” on February 11, 2017 at 10:53 a.m.

The Panel accepts that the Respondent sent the verdict decision to the Respondent by registered mail, and that the Respondent received it on February 11, 2017. The Respondent is also deemed to receive the documents 7 days after the mailing date, under HPA section 54(1).

5. Ms. Isman also tendered an affidavit of Lucy Fenekoldt, sworn May 25, 2017 (“Fenekoldt #1”), as Exhibit #5:

- (a) Exhibit A of Fenekoldt #1 is a letter from Ms. Isman dated March 9, 2017, advising the Respondent that the penalty portion of the hearing was set for 10:00 a.m. on Wednesday, May 31, 2017, and that if she did not proceed, the hearing could proceed in her absence.
- (b) Exhibit B of Fenekoldt #1 is a printout from Canada Post’s website showing the history of how Canada Post processed Exhibit A, and that someone signed for the package as “Jean Cunningham” on March 22, 2017.
- (c) Exhibit C of Fenekoldt #1 is a letter from Ms. Isman dated May 11, 2017, reminding the Respondent of the date, time and place of the penalty hearing; advising that she might wish to provide mitigating evidence at the hearing; and advising of the College’s position that an appropriate disposition was “a three-month suspension, a direction that you provide a substantive response by a specified date, costs... and a direction that the registrar publish notification of the case....”
- (d) Exhibit D of Fenekoldt #1 is a printout from Canada Post’s website showing the history of how Canada Post processed Exhibit D, and that someone signed for the package as “Jean Cunningham” on May 17, 2017.
- (e) Exhibit E of Fenekoldt #1 is a letter from Ms. Isman dated May 25, 2017, enclosing a draft copy of the College’s written submissions for the penalty hearing, as well as a copy of Ramanzin #1.

The Panel accepted that the Respondent received the materials sent to her, including notice of the date, time and place of the penalty hearing; notice of her opportunity to provide mitigating evidence; and notice of penalty that the College would be proposing. The Panel also accepted that the Respondent received a draft of the College’s written submissions.

6. Additionally, the Panel found as part of its verdict decision that the Respondent had been personally served with the Citation prior to the verdict portion of the hearing.

7. The Panel decided to proceed with the penalty portion of the hearing, without the Respondent attending, as permitted by HPA section 38(5).

Proceedings to date

8. On January 9, 2017, the Panel conducted a hearing to inquire into allegations that the Respondent engaged in unprofessional conduct by failing to respond to communications from the Inquiry Committee.

9. On February 7, 2017, the Panel issued its Reasons for Decision and Order concerning verdict. The Panel determined that the Respondent had engaged in unprofessional conduct, specifically 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.

The penalty jurisdiction of the Discipline Committee

10. Under HPA section 39(2), if a determination is made under subsection 39(1), the Discipline Committee may make orders respecting penalty:

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

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

Submissions of the College

11. Counsel for the College submitted that the Panel could consider a number of factors in deciding on appropriate penalty, including

- (a) the nature and gravity of the proven allegations;
- (b) the age and experience of the professional;
- (c) the number of times the offending conduct occurred;
- (d) its impact upon the victims;
- (e) whether the professional acknowledged what occurred; and
- (f) the purposes of the "sentencing" process, which include
 - i. specific deterrence;

- ii. general deterrence;
 - iii. educating the profession and the public about professional standards; and
 - iv. promoting public confidence in the profession; and
- (g) regard to other decided cases on similar facts.

12. Counsel submitted that this Panel found that the College sent letters, sent one email, and made calls requesting that the Respondent respond to the Complaint; that she failed to respond; and that she also failed to even acknowledge requests that she confirm she received communications. In particular, the Respondent failed to respond to the First Request Letter, the Second Request Letter, the Third Request Letter, the Fourth Request Letter, telephone calls, and an email. As a result, the College could not complete its investigation of the Complaint.

13. Counsel also submitted that the Respondent has been a registrant since March 31, 1982 and had sufficient experience to know that this conduct fell below standards of expected professional conduct. Furthermore, the Panel could consider past action under HPA section 39.2, which past action showed in this case the Respondent's experience with the College's investigation process. The Inquiry Committee had previously sought, and the Respondent agreed to, a meeting with a CRNBC Nursing Practice Consultant in order to resolve a complaint in 2014.

14. Further, Counsel noted the Respondent had not demonstrated that she had insight into her behaviour. To the contrary, she had still not provided any response to the Complaint, and refused to participate in the verdict portion of the hearing.

15. Counsel referred the Panel to a number of cases:

- (a) *College of Nurses of Ontario v. McLaughlin*, 2009 CanLII 92102 (ON CNO) (registrant not participating in or attending discipline hearing; noncompliance demonstrating registrant's ungovernability; no mitigating factors; three-month suspension and conditions on registration, including that she complete remedial activities, such as meeting with various practice consultants);
- (b) *College of Nurses of Ontario v. Greenshields*, 2014 CanLII 97441 (ON CNO) (registrant failing to participate in a practice assessment, not responding to College's correspondence, and not attending hearing; three-month suspension, and a requirement that she participate in the next practice assessment cycle);
- (c) *College of Physicians and Surgeons of British Columbia v. Dr. Jeannine Olszewski*, November 2016 (registrant failing to respond to correspondence, failing to attend meeting and refusing to cooperate in a practice review; three-month suspension, and that she comply with conditions);
- (d) *College of Nurses of Ontario v. Cornelius*, 2014 CanLII 90723 (ON CNO) (registrant failing to complete Specified Continuing Education or Remediation Program; failure constituting professional misconduct; given prior discipline history involving dishonest behaviour, and no mitigating factors, four-month suspension);
- (e) *College of Nurses of Ontario v. Kaastra*, 2011 CanLII 99846 (ON CNO) (registrant failing to comply with requirements for remedial activities directed by

Quality Assurance Committee; professional misconduct resulting in a suspension for at least six months, but in any event until such time she successfully completed a course related to medication administration); and

- (f) *College of Nurses of Ontario v. Agyekum*, 2012 CanLII 100086 (ON CNO) (registrant failing to respond to College's requests for a response to a patient complaint; joint submission of a one-month suspension, with terms requiring that the respondent fulfil extant requests).

16. The College proposed the following measures:

- (a) a three-month suspension;
- (b) as a condition of continued practice, a direction that the Respondent provide a substantive written response to the Complaint by September 1, 2017;
- (c) costs of \$8,027.75 (which the Panel addresses below); and
- (d) public notice pursuant to HPA section 39.3 (which the Panel addresses below).

17. Counsel submitted that the penalty should demonstrate to the profession the seriousness with which the College treats the duty to cooperate.

Submissions of the Respondent

18. The Respondent did not attend, did not provide any mitigating evidence, and did not provide any submissions concerning penalty.

Reasons for decision

19. As submitted by counsel, the Panel may decide on an appropriate measure under HPA s. 39(2) with a view to a number of objectives, including the following:

1. the need for specific deterrence of the Respondent;
2. general deterrence of other registrants who might otherwise offend;
3. educating registrants and the public about professional standards; and
4. promoting public confidence in the profession and its ability to self-regulate.

20. Ultimately, a penalty must fall within a reasonable range of appropriate penalties, having regard to the circumstances of the misconduct and the evidence in mitigation.

21. The Respondent has been practicing for 35 years, has been through the College's investigation process, and has provided no explanation for her failure to respond or cooperate with the Inquiry Committee. She has not provided any evidence concerning mitigating factors. The Panel found a three-month suspension, as recently imposed by the College of Physicians and Surgeons in the *Olszewski* case, appropriate to these circumstances.

22. The Respondent has, however, continued her failure to respond to the Inquiry Committee about the Complaint, and through that failure continues to impede the investigation. The Panel has decided, in lieu of an additional fine, to structure its order to deter the Respondent from continuing her failure. The Panel therefore orders that the Respondent be suspended until the later of the following two events:

- (a) the expiry of a three-month suspension period; and

- (b) the Respondent delivers, to the Inquiry Committee, a substantive written response concerning the Complaint, and the Registrar, as a delegate of the Panel, confirms that this condition has been met.

The Panel thereby imposes a suspension of three months (pursuant to HPA s. 39(2)(c)), with a response from the Respondent being a condition of the suspension lifting (pursuant to HPA s. 39(8)(a)). The Respondent may choose to avert any consequences beyond a three-month suspension by providing her response during the suspension period.

23. The Panel orders that the suspension commence on the fifth calendar day after the earliest date on which the Respondent receives these reasons, whether by personal service, by registered mail, or by deemed receipt via registered mail under HPA s. 54(1).

Costs

24. With respect to costs, the Panel awards costs to the College against the Respondent (pursuant to HPA s. 39(5), Bylaw s. 6.12, and Schedules F and G).

25. The College seeks costs of \$8,027.75, consisting of the following amounts, for a period from when the Inquiry Committee directed the Registrar to issue a citation to present:

- (a) \$6,750, representing one-half of the College's legal fees; and
- (b) \$1,277.75, for one-half of counsel's disbursements, plus full court reporter costs up to the conclusion of the hearing on January 9, 2017.

The College provided evidence of legal fees and disbursements as part of Ramanzin #1, paragraphs 9-10 and Exhibit E (legal fees and disbursements) and Exhibit F (court reporter fees). The Panel recognizes that in seeking only one-half of counsel's disbursements, the College has sought less than its full entitlement under the Bylaws.

26. The College also suggested that costs be paid in full by December 31, 2017.

27. The costs sought by the College are appropriate, and the Panel orders costs against the Respondent in the amount of \$8,027.75, to be paid in full by December 31, 2017.

Order of the Committee on Penalty

28. The Panel orders the following (pursuant to HPA sections 39(2) and (8)):

- 1. the Respondent's registration is suspended, effective the fifth day after the Respondent actually or constructively receives notice of this order, until the later of the following two events:
 - a. the expiry of a three-month suspension period; and
 - b. the Respondent delivers, to the Inquiry Committee, a substantive written response concerning the Complaint, and the Registrar, as a delegate of the Panel, confirms that this condition has been met; and
- 2. the Respondent pay costs to the College in the amount of \$8,027.75 by December 31, 2017.

Publication

The Panel directs that the registrar notify the public of its order (pursuant to HPA s. 39.3(1)). The registrar must also notify all registrants, and the regulatory bodies governing the practice of

registered nursing in every other Canadian jurisdiction (pursuant to Bylaw s. 6.08(1)(a)), and may notify other regulatory or governing bodies of a health profession inside or outside of Canada (pursuant to Bylaw s. 6.08(1)(b)).

Given that the Panel has ordered a suspension, and its order is a matter of public notice (under HPA s. 39.3), the College may generally disclose that information, to whatever extent it is “personal” information, pursuant to section 33.1(1), paragraphs (c.1) and (l), of FIPPA (i.e., the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165). The Panel accordingly directs that the registrar may, as she deems appropriate, provide the public notice to the Respondent’s employer, and to any health authorities, hospitals, or other institutions or facilities where they Respondent may be practicing.

9. Notice

A Respondent aggrieved or adversely affected by an order of the Discipline Committee under HPA s. 39 may appeal the order to the Supreme Court (under HPA s. 40(1)). An appeal must be commenced within 30 days after the date on which this order is delivered to the Respondent (under HPA s. 40(2)).

These are the Panel’s Reasons for Decision and Order concerning penalty.

Dated for reference this 22nd day of June 2017.

Name	Place	Date
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Name	Place	Date
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Name	Place	Date
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These are the Panel's Reasons for Decision and Order concerning penalty.

Dated for reference this ____ day of June 2017.

Sheila Cessford *Delta, BC* *June 21, 2017*
Name (Sheila Cessford) Place Date

Name Place Date

Name Place Date

registered nursing in every other Canadian jurisdiction (pursuant to Bylaw s. 6.08(1)(a)), and may notify other regulatory or governing bodies of a health profession inside or outside of Canada (pursuant to Bylaw s. 6.08(1)(b)).

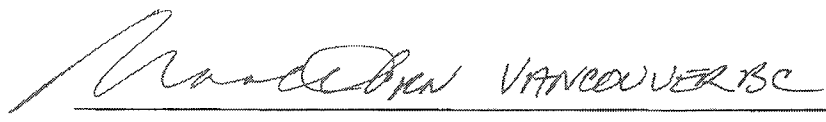
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These are the Panel's Reasons for Decision and Order concerning penalty.

Dated for reference this ____ day of June 2017.

 VANCOUVER BC June 22/17

Name Place Date

Name Place Date

Name Place Date

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

Dated for reference this ____ day of June 2017.

Name	Place	Date
	Kimberley BC	JUNE 22, 2017
Name	Place	Date

Name	Place	Date
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