

THE MATTER OF THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA

AND DR. MICHAL KABURDA, A REGISTRANT

PENALTY DECISION

Dr. Arnold Steinbart
(Chair)

Dr. Myrna Halpenny

Mr. Paul Durose



Panel

Hearing Date: January 9, 2015, Vancouver, B.C.

Counsel for the CDSBC: Thomas M. Lutes and Greg Cavouras

Counsel for the Discipline Panel: Ms. Catharine Herb-Kelly Q.C.

Dr. Kaburda: Did not appear and no counsel

INTRODUCTION

1. The Panel released its decision in this matter on October 15, 2014. The hearing was reconvened in Vancouver on January 9, 2015, for submissions as to an appropriate disposition. The respondent did not attend. Counsel for the College of Dental Surgeons of British Columbia (CDSBC) advised that the CDSBC had provided notice to Dr. Kaburda of the date of this penalty hearing by several means. The Panel was satisfied that he had sufficient notice and this phase of the hearing proceeded in his absence.
2. Section 39 of the *Health Professions Act*, RSBC 1996, c.183 (the “HPA”) sets out the options for 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).
- (8) If the registration of the respondent is suspended or cancelled under subsection (2), the discipline committee may
- (a) impose conditions on the lifting of the suspension or the eligibility to apply for reinstatement of registration,
 - (b) direct that the lifting of the suspension or the eligibility to apply for reinstatement of registration will occur on
 - (i) a date specified in the order, or
 - (ii) the date the discipline committee or the board determines that the respondent has complied with the conditions imposed under paragraph (a), and
 - (c) impose conditions on the respondent's practice of the designated health profession that apply after the lifting of the suspension or the reinstatement of registration.
3. Sections 39(5) and 39(7) authorize the Panel to make an order for costs in accordance with the tariff in Schedule "H" of the CDSBC's bylaws. The CDSBC is entitled to recover up to a maximum of 50% of legal expenses and 100% of disbursements incurred in these proceedings.
4. The CDSBC has asked the Panel to do the following:
- (a) impose a reprimand

- (b) suspend Dr. Kaburda's registration for two to three months, from the date of the Panel's order subject to compliance with the conditions listed in sub-paragraph (c) below;
- (c) require Dr. Kaburda to provide to the CDSBC:
 - (i) a substantive reply to the "First Complaint" (submitted April 2013, College File No. 102620) and the "Second Complaint" (submitted August 2013, College File No. 102620); and
 - (ii) a legible and full copy of all patient records for the complainant in his care, custody control or access;
- (d) impose a fine in an amount of between \$5,000.00 and \$8,000.00, and
- (e) impose a costs order in the amount of \$15,083.13 inclusive of legal fees and disbursements.

DECISION

5. Counsel for the CDSBC submitted several authorities. In reaching its decision, the Panel has found the following extract from *Law Society of B.C. v. Ogilvy* [1999] LSBC 17 to be helpful and has considered and applied several of the factors referred to:

10 The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:

- a) the nature and gravity of the conduct proven;
- b) the age and experience of the respondent;

- c) the previous character of the respondent, including details of prior discipline;
 - d) the impact upon the victim;
 - e) the advantage gained, or to be gained, by the respondent;
 - f) the number of times the offending conduct occurred;
 - g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
 - h) the possibility of remediating or rehabilitating the respondent;
 - i) the impact on the respondent of criminal or other sanctions or penalties;
 - j) the impact of the proposed penalty on the respondent;
 - k) the need for specific and general deterrence;
 - l) the need to ensure the public's confidence in the integrity of the profession; and
 - m) the range of penalties imposed in similar cases.
6. There are no comparable discipline decisions from the CDSBC to use as a guide to an appropriate penalty in this case. While, counsel provided some decisions from other jurisdictions involving professionals who have failed to cooperate with their regulatory bodies, the Panel is of the view that the facts and context of the case before it are quite different.
7. The Panel considered the CDSBC's submissions on an appropriate penalty and has decided it does not sufficiently take into account the ungovernability aspect of Dr. Kaburda's conduct; the seriousness of his offences; the degree of harm he has inflicted on the complainant, the CDSBC and the public; and his past character.
8. Dr. Kaburda is a senior member of the profession. He is 77 years of age and has been practicing in B.C. since 1965. Initially he practiced general dentistry, but in 1968 he was certified in oral and maxillofacial surgery. All aspects of his conduct in this matter were unseemly for such a long term and experienced registrant.

9. The facts found by the Panel reveal that Dr. Kaburda has little or no regard for the authority of the CDSBC, the wellbeing of the complainant (his patient) and the inconvenience and expense his actions caused her. He has little or no respect for his professional colleagues as evidenced by his refusal to provide the complainant's subsequent treating dentists with her records. His treatment of the CDSBC employees was belittling. His failure to provide the records to the CDSBC effectively prevented it from investigating the allegation of substandard practice she made against him so that it has been unable to comply with its statutory mandate to protect the public.
10. His refusal to provide the complainant's records is contrary to the CDSBC's *Dental Record Keeping Guidelines* and the decision of the Supreme Court of Canada – the highest court in the land – in *McInerney v. MacDonald* [1992] 2 S.C.R. 138 which clearly states that patients have the right of access to their medical (dental) records.
11. Dr. Kaburda's attitude that he is beyond the reach of the CDSBC and not required to comply with its requirements is an attitude that has prevailed on other occasions in different but related ways. The Panel has taken this into account in assessing the seriousness of his conduct and how to treat it. Counsel provided the Panel with material revealing that he has refused to comply with orders imposed upon him in other relevant forums.
12. In 2006 the Director of Crime Victim Assistance brought an application to the Supreme Court of B.C. for an order that Dr. Kaburda be found in contempt of court for "wilfully disobeying the summons of the Director of Crime Victim Assistance": *Director of Crime Victim Assistance v. Kaburda* 2006 BCSC 2031.
13. According to the decision, one of his patients had sustained injuries to his mouth and jaw from an assault. He sought compensation under the *Crime Victim Assistance Act*. He gave his consent to the Director to obtain his dental x-rays from Dr. Kaburda who had treated the injuries, so that his claim could

- be processed. Dr. Kaburda repeatedly refused to provide the records for various reasons including his view that the Director did not need them, the assistance program was “Stalinist” and the request was “an affront to his professional association with his patient”.
14. Finally, the Director issued a summons to Dr. Kaburda compelling their production. When Dr. Kaburda ignored the summons, the Director applied for a contempt order.
 15. The Judge rejected Dr. Kaburda’s defenses and imposed a term of incarceration for five days, which was suspended for one week to give him time to purge the contempt. He further ordered Dr. Kaburda to pay the Director special costs of the application. Dr. Kaburda’s appeal of this decision was dismissed: *Director Of Crime Victim Assistance v. Kaburda* 2007 BCCA 278.
 16. Another example of his past behaviour is related to this case. The complainant filed a civil action against Dr. Kaburda in Small Claims Court arising out of the additional expenses she incurred as a consequence of Dr. Kaburda’s work. She obtained default judgment against him in the amount of \$6736.25 on August 22, 2013. Dr. Kaburda did not pay the judgment and did not attend a payment hearing on May 2, 2014. Finally, the complainant obtained a warrant for his arrest. Counsel for the CDSBC provided the Panel with an Application Record/Order from the Small Claims Court dated July 24, 2014. It appears from this document that Dr. Kaburda responded to the warrant for his arrest because he finally attended Court on that date and was ordered to pay the judgment “forthwith”.
 17. The Panel regards the principles of denunciation and deterrence to Dr. Kaburda and others to be particularly relevant in this case. His failure to comply with the CDSBC has had serious consequences for both the complainant and the CDSBC. It is important that the public have confidence

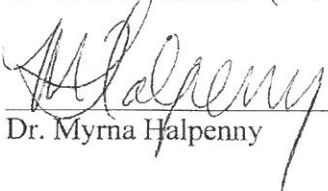
that a regulatory body is in control of its process and registrants so that it may carry out its obligations to protect the public in a prompt and thorough manner.

18. The Panel has no information that enables it to assess the impact of a penalty on Dr. Kaburda's finances. It has examined the evidence to see whether there is any sign of remorse on his part or other mitigating factors that ought to be taken into account, but has found none.
19. The Panel has reviewed the schedule of costs and disbursements claimed by the CDSBC. It seeks \$12,947.20 for legal expenses and \$2135.93 for disbursements. Under its bylaws, the CDSBC is entitled to recover up to 50% of the actual costs of legal representation and 100% of disbursements incurred to conduct the hearing. Instead of calculating the legal fee component at 50% of the actual amount incurred, the CDSBC relies on the Tariff in the BC Supreme Court Civil Rules for party and party costs as a guide with some adjustments because of the different forum. Counsel advised that this method of calculating the legal fee component means that the CDSBC will recover substantially less than 50% of the fees actually incurred. The Panel has concluded that the amount of costs and disbursements sought by the CDSBC is reasonable.
20. The CDSBC asked the Panel to order Dr. Kaburda to produce a "substantive reply" to the first and second complaints. The Panel has decided that such an order would likely be futile and is unnecessary. If Dr. Kaburda provides the records, the CDSBC will be able to commence a meaningful investigation and can seek further information from him if necessary.
21. In conclusion, the Panel has decided to impose the following on Dr. Kaburda:
 1. a reprimand;
 2. a fine of \$10,000.00 payable forthwith;

3. a period of 6 months suspension to begin forthwith;
4. he must produce a complete copy of the complainant's records to the investigator at the CDSBC forthwith;
5. payment to the CDSBC of its costs and disbursements in the amount of \$15,083.13; and
6. If Dr. Kaburda fails to comply with the order to produce the complainant's records, his suspension will continue until he does so.

By the Discipline Committee

Dr. Arnold Steinbart (Chair)



Dr. Myrna Halpenny

Date



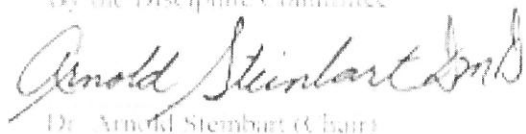
Date

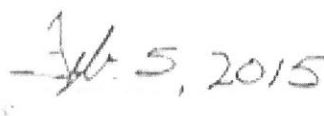
Mr. Paul Durose

Date

3. a period of 6 months suspension to begin forthwith;
4. he must produce a complete copy of the complainant's records to the investigator at the CBSBC forthwith,
5. payment to the CBSBC of its costs and disbursements in the amount of \$15,083.13; and
6. If Dr. Kaburda fails to comply with the order to produce the complainant's records, his suspension will continue until he does so.

By the Discipline Committee


Dr. Arnold Steinbart (Chair)


Date

Dr. Myrna Halpenny

_____ Date

Mr. Paul Durose

_____ Date

3. a period of 6 months suspension to begin forthwith;
he must produce a complete copy of the complainant's records to the investigator at the CDSBC forthwith;
5. payment to the CDSBC of its costs and disbursements in the amount of \$15,083.13; and
6. if Dr. Kaburda fails to comply with the order to produce the complainant's records, his suspension will continue until he does so.

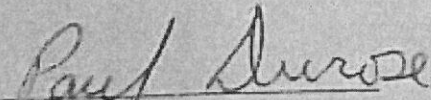
By the Discipline Committee

Dr. Arnold Steinbart (Chair)

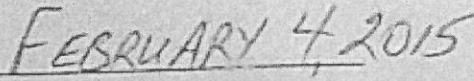
Date

Dr. Myrna Halpenny

Date



Mr. Paul Durose



Date