

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

BETWEEN:

THE COLLEGE OF DENTAL HYGIENISTS OF BRITISH COLUMBIA
(the “College” or “CDHBC”)

AND:

DARREN KLUTHE (a.k.a. CHRISTIAN DALE AERIUS)
(the “Respondent”)

Date and Place of Hearing:

Date: September 13, 2017

Place: Via Teleconference

Members of the Hearing Panel of the Discipline Committee:

Carol Williams (Chair)

Zul Kanji

Jennifer Aarestad

Counsel for the College:

Angela Westmacott, Q.C.

Counsel for the Respondent:

No attendance by the Respondent or counsel

Independent Legal Counsel for the Panel:

Lisa C. Fong

Court Reporter:

Not applicable (hearing in writing)

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

1. The Panel re-convened on September 13, 2017, at 1:00 p.m., to consider evidence and submissions on penalty, costs and public notice. This hearing follows an earlier determination by the panel that the Respondent engaged in professional misconduct by making knowingly false statements to the College relating to his continuing competency credits, and contravening undertakings he had formerly made to the College. These reasons adopt the terms that the Panel used in its earlier reasons on verdict.

Proceeding without the Respondent

2. As in the case of the verdict hearing, the Respondent did not attend. The Panel accepted that on May 5, 2017, the College sent the verdict decision to the Respondent by registered mail, and that the Respondent is deemed to have received the document 7 days after the mailing date, under HPA section 54(1). The Panel also accepted that on June 22, 2017, Ms. Westmacott wrote to counsel for the Panel, Ms. Lisa Fong, advising that she had emailed the Respondent copies of the College's Submission on Penalty, a draft Bill of Costs, the Affidavit of Ms. Jennifer Lawrence, and copies of the 2012 and 2014 consent orders for the Respondent.

3. The Panel further accepted that on July 4, 2017, Ms. Fong wrote to the Respondent advising him of an upcoming penalty hearing. Ms. Fong requested that the Respondent indicate by July 14, 2017, whether he would prefer a written or an oral hearing. Further, she advised that if he wished to proceed with a written hearing, or if he had not replied regarding his preference before July 14, 2017, the hearing would proceed in writing according to the timeline set out in her letter. Ms. Fong invited the Respondent to deliver any responding written submissions and affidavits to her office and to Ms. Westmacott by Friday, July 21, 2017. Ms. Fong advised that once she had received all written submissions from the Respondent and the College, they would be delivered to the hearing panel for their deliberation.

4. The Panel accepted that neither Ms. Fong nor Ms. Westmacott ever received any responding submissions or affidavits from the Respondent.

5. The Panel found that on July 7, 2017, Ms. Westmacott wrote to Ms. Fong advising that the Respondent had requested the previous day that the College cancel his registration, as he had decided to pursue a different career. Ms. Westmacott confirmed that the Registrar cancelled the Respondent's registration effective July 7, 2017, under s. 21(3)(a) of the HPA. The Panel accepted that the Respondent had resigned as a member of the College on July 7, 2017.

6. The Panel accepted that the Respondent had received the materials sent to him, including the College's written submissions and affidavits, and he had received notice of his opportunity to provide submissions in response, as well as notice of the penalty that the College would be proposing.

7. 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.

8. The Panel decided to proceed with the penalty portion of the hearing without the Respondent attending or participating, as permitted by HPA section 38(5). The Panel elected, with the concurrence of the College's counsel, to proceed by way of written materials.

Proceedings to date

9. On April 11, 2017, the Panel conducted a hearing to inquire into allegations that the Respondent engaged in professional misconduct by making untrue and misleading statements to the College, and by breaching undertakings he had made to the College requiring the Respondent to provide accurate information in future communications with the College, and to maintain professional liability insurance while registered with the College.

10. On May 2, 2017, the Panel issued its Reasons for Decision and Order concerning verdict. The Panel determined that the Respondent had engaged in professional misconduct, specifically by making knowingly false statements to the College and its staff relating to his continuing

competency credits; by contravening an undertaking to ensure he is open and forthright and provides accurate information in all future communications with the College; and by contravening an undertaking not to repeat the conduct of failing to have professional negligence insurance in place at all times while holding full registration with the College.

The penalty jurisdiction of the Discipline Committee

11. 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

12. Counsel for the College submitted that the Panel could consider a number of factors in deciding on appropriate penalty, including specific deterrence of the member from engaging in further contraventions, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offender, isolation of the offender, the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of a profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases.

13. Counsel submitted that this Panel found that on October 9, 2012, the Respondent had provided an undertaking "to ensure he is open and forthright and provides accurate information in all future communications with the College" (the "First Undertaking"). The Panel also found that on May 24, 2014, the Respondent had provided an undertaking "not to repeat the conduct of failing to have professional negligence insurance in place at all times while holding full registration with the College of Dental Hygienists of British Columbia" (the "Second Undertaking"). Counsel also submitted that this Panel found that the Respondent had been a full registrant of the College in March 2016, when he made a number of misrepresentations to College staff regarding the status of his continuing competency credits. The Panel found that the Respondent had also provided a false declaration in his CC Credit Form. Further, the Panel found that the Respondent failed to have professional liability insurance in place while he was practising, between January 1, 2016 and January 22, 2016.

14. Counsel submitted that the Respondent's failure to have valid professional liability insurance in place for the three-week period in January 2016 was more egregious in light of the fact that the Respondent had previously provided undertakings to the College to be "open and

forthright in all future communications” and “not to repeat the conduct of failing to have professional liability insurance in place at all times while holding full registration.” Counsel submitted that while the Respondent knew that contravening his undertakings would lead to more severe regulatory sanctions, he chose not to comply with them, and that this conduct represents a deliberate and blatant disregard for the College’s regulatory authority. Counsel submitted that the Respondent had demonstrated a pattern of dishonest, misleading conduct and indifference regarding the breach of his undertakings. Counsel relied on *Francis (Re)*, [2010] O.C.P.S.D. No. 26, as authority for the proposition that breaching a term of an undertaking in a consent order warrants a significant penalty, as it signals that the registrant willfully and contemptuously disobeyed an order of the Inquiry Committee and refused to be properly governed by it. Counsel also submitted that there was a significant risk that he would continue to provide false and misleading information to the College if he is permitted to remain a registrant.

15. Further, counsel for the College noted that the Respondent had not demonstrated any remorse, recognition or understanding of the seriousness of his misconduct. The Respondent had not provided any indication of his willingness to be governed by the College, and he did not even bother to attend his own discipline hearing. Counsel submitted that the Respondent’s dishonesty, lack of insight and lack of contrition were aggravating factors in this case. The College was not aware of any mitigating circumstances that would explain the Respondent’s egregious conduct.

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

- (a) *Francis (Re)*, [2010] O.C.P.S.D. No. 26 (registrant failing to comply with previous written cautions from the College, failing to communicate with other health care professionals involved in patient’s circle of care, and failing to communicate to patients in respectful manner; failures constituting professional misconduct; two-month suspension, conditions imposed on his registration, and order to pay \$3,650 in hearing costs);
- (b) *College of Dental Hygienists of Ontario v. Romana Bompa-MacRae*, January 17, 2014 (registrant failed to comply with Quality Assurance Program; made false statements to College representatives; and practised while suspended for non-payment of fees; reprimand and 12-month suspension, conditions and limitations on registration, hearing costs and \$1,000 fine imposed; suspension rather than revocation because this was registrant’s first hearing, registrant pled guilty and co-operated with the College);
- (c) *College of Dental Hygienists of Ontario v. Norah Thon*, March 10, 2017 (registrant failing to comply with the direction of the Quality Assurance Committee, failing to follow a decision of the Inquiries, Complaints and Reports Committee, failing to complete remediation courses, and failing to communicate with the College; failure to comply with prior committee decisions, respond to messages from the College or the notice of hearing until the day before constituting aggravating factors; revocation of registration certificate and order to pay \$10,000 in hearing costs);
- (d) *College of Dental Hygienists of Ontario v. Karen Allen*, November 27, 2014 (registrant failing to comply with the requirements of the Quality Assurance Program and failing to cooperate with the Inquiry Committee; revocation of registration certificate and order to pay \$10,000 in costs);

- (e) *College of Dental Hygienists of Ontario v. Amanda Gauthier*, March 2014 (registrant making false statements to the College in her application for reinstatement and to a College inspector, practising while suspended, and misrepresenting that she had professional liability insurance when she did not; revocation of registration certificate and order to pay \$26,000 in costs); and
 - (f) *College of Dental Hygienists of Ontario v. Christine Plasaj*, December 2016 (registrant failing to comply with a direction to complete a specific continuing education project or remediation program and failing to cooperate with a college-appointed investigator; did not attend discipline hearing; revocation of registration certificate and order to pay \$9,500 in costs).
17. The College proposed the following measures:
- (a) a reprimand;
 - (b) cancellation of registration without a right to reapply for registration for ten (10) years; and
 - (c) in the event that the Respondent seeks reinstatement at the expiration of ten years, he must first:
 - i. successfully complete the CDHBC Clinical Examination within the preceding six (6) months prior to submitting his application for reinstatement to the College to ensure that his skills are current on re-entry; and
 - ii. provide a reflective essay to the Registration Committee of not less than 1,500 words outlining the professional obligations of registrants of the College, with a specific focus on the obligation to respond promptly and accurately to all College communications and to be forthright with the College on any information that a registrant provides;
 - (d) in the event that the Respondent obtains reinstatement of registration at the expiration of ten (10) years, he must:
 - i. successfully complete any outstanding requirements imposed by the Quality Assurance Committee prior to the cancellation of his registration in 2017 within thirty (30) days of reinstatement;
 - ii. establish a formal mentorship program with a mentor, to be approved in advance by the College, for a period of not less than three (3) years and meet with the mentor at least monthly to discuss issues with respect to his practice and professional conduct; and
 - iii. contact the College on the first day of each month as long as he holds full registration to ensure that he is receiving, reading and responding to communications from the College.
 - (e) Payment of hearing costs in the amount of \$12,423.40 representing 50% of actual legal fees and 100% of disbursements within fourteen (14) days of the date of the penalty decision.

Submissions of the Respondent

18. The Respondent 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; and
3. maintaining 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 of mitigation.

21. The Respondent has provided no acceptable explanation for his egregious behavior. The Panel found it troubling that he had attempted to avert responsibility by shifting blame to College staff. The Respondent claimed that he did not fully appreciate what was expected of him. The Panel accepted the College's submission that this explanation is not tenable in light of his discipline history and his prior undertakings. The Respondent did not attend his own discipline hearing, provide any response to the College submissions, or provide evidence of mitigating factors.

22. In normal circumstances, the serious misconduct engaged in by the Respondent would warrant a revocation of his license, and all of the associated penalties requested by counsel for the College. The Respondent has, however, recently cancelled his registration with the College. The Panel is troubled by the possibility the Respondent cancelled his registration to avoid having his registration revoked. His conduct also raised the issue of whether the Panel could cancel his registration where he had already resigned it.

23. Part 3 of the Act clearly applies to former registrants, given that under section 26 of the Act, the term "registrant" as used in Part 3 includes a former registrant. But the power of the Panel to cancel the Respondent's registration does not clearly include a power to symbolically cancel a registration that the registrar has already cancelled for other reasons. Section 39(2) of the Act simply empowers the discipline committee to "(e) cancel the respondent's registration". Section 39(8) of the Act allows the discipline committee to impose limits and conditions "[i]f the registration of the respondent is suspended or cancelled under subsection (2)...."

24. The Panel considered the recent decision of the Ontario Superior Court of Justice in *College of Nurses of Ontario v. Mark Dumchin*, 2016 ONSC 626. That case addressed the issue of whether a committee could revoke the certificate of registration of someone who had already voluntarily resigned as a member. While this decision suggests that disciplinary bodies are authorized to penalize registrants with revocation even after they have resigned, the decision turns on a specific statutory context, namely the *Health Professions Procedural Code*, which is Schedule 2 of Ontario's *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. In particular, the court relied on section 14(2) of the Code, which said that, "A person whose certificate of registration is suspended continues to be subject to the jurisdiction of the College for incapacity and for professional misconduct or incompetence referable to the time when the person was a member or the period of the suspension and may be investigated under section 75." The Ontario

Court decided that the purpose of section 14 was to ensure that a member cannot “frustrate” the disciplinary process by resigning unilaterally. The court declined an interpretation of the *Code* that would limit “the College’s important sanctioning powers” by limiting the College’s power to revoke a certificate where a member resigns.

25. The Panel was concerned that despite the *Dumchin* case, the wording of the Act in British Columbia may not support the Discipline Committee cancelling a registration already cancelled. Since Part 3 of the Act applying to former registrants has already allowed the Panel to make findings of professional misconduct, a “purposive” view of the Act does not necessarily extend to the Panel having a power to cancel a registration already cancelled. The College did not make submissions on the Panel’s jurisdiction to order a symbolic cancellation, and the Respondent did not appear to provide another view.

26. To avoid inadvertently exceeding its jurisdiction, but without prejudice to any future orders the Discipline Committee may make in other matters about its powers under section 39(8), the Panel orders a reprimand, and in lieu of an order to cancel, the Panel concludes and declares that the Respondent’s conduct warranted the following measures, limits and conditions under sections 39(2) and 39(8):

- (a) cancellation of registration;
- (b) no eligibility to reapply for registration, including reinstatement, for ten (10) years;
- (c) the following additional pre-conditions to registration, including reinstatement:
 - i. successfully completing the CDHBC Clinical Examination within the preceding six (6) months prior to submitting his application for reinstatement to the College to ensure that his skills are current on re-entry; and
 - ii. a reflective essay to the Registration Committee of not less than 1,500 words outlining the professional obligations of registrants of the College, with a specific focus on the obligation to respond promptly and accurately to all College communications and to be forthright with the College on any information that a registrant provides;
- (d) the following conditions on the Respondent’s practice after registration, including reinstatement:
 - i. successfully completing any outstanding requirements imposed by the Quality Assurance Committee prior to the cancellation of his registration in 2017 within thirty (30) days of reinstatement;
 - ii. establishing a formal mentorship program with a mentor, to be approved in advance by the College, for a period of not less than three (3) years and meet with the mentor at least monthly to discuss issues with respect to his practice and professional conduct; and
 - iii. contacting the College on the first day of each month as long as he holds full registration to ensure that he is receiving, reading and responding to communications from the College.

(the "Appropriate Measures").

27. The Panel accordingly orders a reprimand that reflects the College's disapproval of the Respondent's behavior regarding both his professional misconduct, and his resigning his registration during the hearing, which misconduct warranted the Appropriate Measures.

28. The Panel further orders that the Appropriate Measures be entered onto the register, pursuant to section 21(2)(g) and (5) of the Act:

[21] (2) The registrar must maintain a register setting out, for every person granted registration under this Act, the following:

...

(g) any additional information specified under subsection (5) by the registration committee, inquiry committee or discipline committee.

...

(5) Subject to subsection (6),

...

(b) the inquiry committee or discipline committee, in disposing of a matter under Part 3 respecting a person granted registration under this Act,

may specify information regarding the person that must be entered on the register referred to in subsection (2).

(6) Information required to be entered on the register in accordance with subsection (5) may be entered only after the final disposition of a matter when no further review or appeal is available under this Act.

Should the Respondent reapply for registration, the Registration Committee may consider this Panel's conclusions about the Appropriate Measures under section 20(2.1) of the Act, and especially under paragraph (b.1). The entry on the register will also be relevant to any other regulator, inside or outside of British Columbia, to which the Registrant may apply for registration.

Costs

29. With respect to costs, the Panel awards costs to the College against the Respondent (pursuant to HPA s. 39(5), Bylaw s. 59.3, and Schedule H).

30. The College seeks costs of \$12,423.40, consisting of the following amounts, for a period from when the Inquiry Committee directed the Registrar to issue a citation to present:

(a) \$7,679.98, representing one-half of the College's legal fees; and

(b) \$4,743.42, for counsel's disbursements.

The College provided details of legal fees and disbursements in a Bill of Costs which was reviewed by the Panel.

31. The College also suggested that costs be paid within fourteen (14) days of the penalty decision.

32. The costs sought by the College are appropriate, and the Panel orders costs against the Respondent in the amount of \$12,423.40, to be paid in full within fourteen (14) days of the date of this decision.

Order of the Committee on Penalty

33. The Panel orders the following:

- 1. a reprimand;
- 2. that the Appropriate Measures be entered on the register; and
- 3. that the Respondent pay costs to the College in the amount of \$12,423.40, within fourteen (14) days of the date of this decision.

34. The Panel directs the Registrar to attempt to deliver these reasons to the Respondent both by attempting personal service, and by registered mail. The Respondent may accordingly receive these reasons by one or both of personal service and registered mail, and will in any event be deemed to receive these reasons seven days after the date on which it is mailed (pursuant to HPA s. 54(1)).

Publication

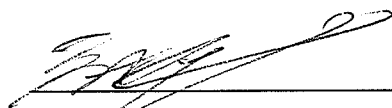
35. The Panel directs that the registrar notify the public of its order (pursuant to HPA s. 39.3(1)). The registrar must also notify all registrants, and the regulatory bodies governing the practice of dental hygiene in every other Canadian jurisdiction (pursuant to Bylaw s. 59(1)), and may notify other regulatory or governing bodies of a health profession inside or outside of Canada (pursuant to Bylaw s. 59(1)).

Notice of right to appeal

36. 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 ____ day of September 2017.

 Vancouver BC Sept 26/17

Name Place Date

Name Place Date

Name Place Date

32. The costs sought by the College are appropriate, and the Panel orders costs against the Respondent in the amount of \$12,423.40, to be paid in full within fourteen (14) days of the date of this decision.

Order of the Committee on Penalty

33. The Panel orders the following:

- 1. a reprimand;
- 2. that the Appropriate Measures be entered on the register; and
- 3. that the Respondent pay costs to the College in the amount of \$12,423.40, within fourteen (14) days of the date of this decision.

34. The Panel directs the Registrar to attempt to deliver these reasons to the Respondent both by attempting personal service, and by registered mail. The Respondent may accordingly receive these reasons by one or both of personal service and registered mail, and will in any event be deemed to receive these reasons seven days after the date on which it is mailed (pursuant to HPA s. 54(1)).

Publication

35. 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 dental hygiene in every other Canadian jurisdiction (pursuant to Bylaw s. 59(1)), and may notify other regulatory or governing bodies of a health profession inside or outside of Canada (pursuant to Bylaw s. 59(1)).

Notice of right to appeal

36. 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 ____ day of September 2017.

<i>C. Williams</i>	<i>Victoria BC</i>	<i>26 Sept 2017</i>
Name	Place	Date

Name	Place	Date

Name	Place	Date

32. The costs sought by the College are appropriate, and the Panel orders costs against the Respondent in the amount of \$12,423.40, to be paid in full within fourteen (14) days of the date of this decision.

Order of the Committee on Penalty

33. The Panel orders the following:

- 1. a reprimand;
- 2. that the Appropriate Measures be entered on the register; and
- 3. that the Respondent pay costs to the College in the amount of \$12,423.40, within fourteen (14) days of the date of this decision.

34. The Panel directs the Registrar to attempt to deliver these reasons to the Respondent both by attempting personal service, and by registered mail. The Respondent may accordingly receive these reasons by one or both of personal service and registered mail, and will in any event be deemed to receive these reasons seven days after the date on which it is mailed (pursuant to HPA s. 54(1)).

Publication


35. 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 dental hygiene in every other Canadian jurisdiction (pursuant to Bylaw s. 59(1)), and may notify other regulatory or governing bodies of a health profession inside or outside of Canada (pursuant to Bylaw s. 59(1)).

Notice of right to appeal

36. 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 ____ day of September 2017.


Vancouver
Oct 11, 2017

Name Place Date

Name Place Date

Name Place Date