

**IN THE MATTER OF
THE HEALTH PROFESSIONS ACT, R.S.B.C. 1996, C. 183**

BETWEEN:

THE COLLEGE OF DENTAL HYGIENISTS OF BRITISH COLUMBIA
(the "College")

AND:

PAVLE DJORDJEVIC, A REGISTRANT
(the "Respondent")

Date and place of hearing:

By written submissions, concluding on June 19, 2020.

Members of the hearing panel of the Discipline Committee:

David MacPherson (Chair)
Jennifer Aarestad
Karen Lange

Counsel for the Panel:

Greg Cavouras

Counsel for the College:

Angela Westmacott, Q.C.
Alandra Harlinton

Counsel for the Respondent:

No submissions provided

Order and Reasons on Penalty and Costs

1. Introduction

1. A hearing panel of the Discipline Committee of the College (the "Panel") convened on February 18, 2020 to hear and determine the allegations made in a citation dated January 10, 2020 (the "Citation").
2. On March 19, 2020, the Panel issued its decision on the allegations in the Citation (the "Findings Decision").

3. In the Findings Decision, the Panel determined that the Respondent had committed professional misconduct. This is the Panel's order and decision with respect to the penalty to be imposed.

2. Preliminary issue: proceeding without the Respondent

4. The Respondent did not attend the hearing of the Citation. The Panel made an order that the hearing could proceed in his absence.
5. At the conclusion of the Findings Decision, the Panel sought written submissions regarding the appropriate penalty from the College and the Respondent. The Findings Decision included a schedule for those written submissions.
6. Having previously made the decision to proceed in the absence of the Respondent, section 38(5)(b) of the *Health Professions Act* (the "HPA") permits the Panel to "without further notice to the respondent, take any action that it is authorized to take". However, to ensure that the Respondent had every reasonable opportunity to respond, even following his non-attendance at the hearing of the Citation, the Panel directed the College to promptly post the Findings Decision (which included the Panel's request and schedule for submissions) on its website and to deliver it to the Respondent by mail and email.
7. The College confirmed, with supporting documentation, that on March 24, 2020 it sent the Findings Decision to the Respondent by mail and email as directed by the Panel. The College also posted the Findings Decision on its website.
8. As requested by the Panel, the College copied its submissions on penalty to the Respondent.
9. The Panel has not received any submissions from the Respondent, either on the schedule established by the Panel, or at all.
10. In these circumstances, the Panel is satisfied that reasonable attempts were made to elicit the Respondent's participation. The Panel is prepared to provide its decision on penalty despite the fact that the Respondent did not provide any submissions.

3. Preliminary issue: jurisdiction of the Panel

11. The Respondent is no longer a registrant of the College. This raises a question as to whether or not the Panel maintains jurisdiction to issue a penalty order in this matter.
12. This issue came up in a previous decision involving a panel of the discipline committee of the College: *College of Dental Hygienists of British Columbia v. Darren Kluthe*, September 13, 2017.
13. In the *Kluthe* decision, the respondent was no longer a registrant. The College was seeking cancellation of the respondent's registration. In support of its submission that the hearing panel could cancel the respondent's registration, notwithstanding that he was at that time no longer a registrant, the College relied on the case of *College of Nurses of Ontario v. Dumchin*, 2016 ONSC 626.

14. In the *Dumchin* case, the Ontario Superior Court held that the College of Nurses of Ontario retained the jurisdiction to discipline its registrants, including the ability to impose a suspension or cancellation of registration, even if the person had already relinquished their registration.
15. The hearing panel of the Discipline Committee in the *Kluthe* case was cautious about applying the decision in *Dumchin*, which was an Ontario case, to BC's legislation, the HPA. The hearing panel stated its approach at paragraphs 24-25, reproduced below:

[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 [the HPA] 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.

16. Instead of cancelling the respondent's registration, the hearing panel in *Kluthe* ordered that cancellation (along with other disciplinary orders) be entered on the College's register. The hearing panel ordered a reprimand to reflect disapproval of the respondent's conduct. The hearing panel also expressly stated that its approach was made "without prejudice to any future orders the Discipline Committee may make in other matters about its powers under section 39(8)..."
17. Although the College is not seeking cancellation in this case (as discussed further below), the fact that the Respondent is no longer a registrant requires the Panel to address the decision in the *Kluthe* case. As noted above, the hearing panel in the *Kluthe* case was not prepared to apply the result from the *Dumchin* case. The Panel sought supplemental submissions on this point.

18. Counsel for the College made three primary submissions in response to the *Kluthe* decision:
- a. The parties in the *Kluthe* case did not make submissions about the hearing panel's jurisdiction to cancel the registration of a former registrant;
 - b. The hearing panel in the *Kluthe* case stated expressly that its view on the issue was made "without prejudice" to future orders in other matters; and
 - c. The decision in the *Kluthe* case is not binding on this Panel in any event, in accordance with the Supreme Court of Canada's decision in *Domtar Inc. v. Quebec (Commission d'appel en matiere des lesions professionnelles)*, [1993].
19. Overall, the College submitted that the Panel should rely on *Dumchin* and depart from the approach in the *Kluthe* case.
20. The Panel agrees. The Panel accepts that in this case, based on the submissions before it, it is appropriate to make a disciplinary order against the Respondent even though the Respondent is no longer a registrant of the College. The Panel reaches this conclusion for the following reasons.
21. First, section 26 of the HPA defines a "registrant" to include a "former registrant" for the purposes of Part 3, which includes the Panel's authority under section 39. The Panel agrees with counsel for the College that if the legislature had intended to restrict the range of penalties that could be imposed on former registrants, it would have done so with express language.
22. Second, in analysing the provisions above, the Panel agrees with counsel for the College that the HPA should be given a "broad and purposive" interpretation that allows the College to carry out its important statutory mandate. In the *Dumchin* case, the Ontario Superior Court of Justice stated as follows:
- [33] The *RHPA* and the Code must be given a broad and purposive interpretation in keeping with the college's duty to act in the public interest. Interpretations that lead to absurd results and/or undermine the college's ability to carry out its duties are inconsistent with the legislative intent and are to be avoided [citations omitted].
- The Panel agrees that this approach is appropriate for the HPA.
23. Finally, and underlying both points above, the Panel comes back to the College's statutory mandate. It is worth repeating section 16(1) of the HPA, which states the College's only two duties:
- 16 (1) It is the duty of a college at all times
- (a) to serve and protect the public, and
 - (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

24. The Panel concludes that the College's role as a public interest regulator would be undermined if the HPA were interpreted as limiting the orders available to the Discipline Committee with respect to a former registrant.
25. The Panel therefore, with the greatest of respect, departs from the approach in the *Kluthé* case and concludes that it has jurisdiction to make the orders the College is seeking in this case, notwithstanding the fact that the Respondent is a former registrant.

4. Panel's authority under the HPA

26. Having determined that the Respondent committed professional misconduct, and having addressed the Panel's jurisdiction to order the full range of penalties available under the HPA with respect to former registrants, the Panel may now impose one or more of the penalties provided for in section 39(2) of the HPA:

(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).

5. Submissions of the parties

27. Counsel for the College referred to the decision of *Jaswal v. Medical Board (Newfoundland)* (1996), 42 Admin L.R. (2d) 233 (Nfld S.C.) where the court described the factors to be considered in determining an appropriate penalty.
28. In her submission, counsel for the College emphasized the following factors identified in the *Jaswal* decision:
 - The nature and gravity of the proven allegations;
 - The absence of any evidence of contrition or remedial action;
 - The need to promote specific and general deterrence and thereby to protect the public and ensure safe and proper practice; and
 - The range of sentences in other similar cases.
29. Counsel for the College also appropriately acknowledged that the Respondent's lack of a disciplinary record is a mitigating factor.

30. Based on its assessment of the case, the College seeks the following disciplinary action:
- a) A reprimand;
 - b) An eight month suspension of registration to commence on the first day that the Respondent is granted reinstatement of registration in the event that the Respondent seeks reinstatement with the College;
 - c) Payment of hearing costs;
 - d) A pre-condition to reinstatement that the Respondent must first pass the QAP Assessment Tool and complete the PROBE Program at his cost and obtain an unconditional pass;
 - e) A pre-condition to reinstatement that the Respondent complete a reflective paper of not less than 2000 words (exclusive of references) outlining his statutory and professional obligations as a registrant of the College and his duty to respond to College communications and cooperate with College investigations;
 - f) A condition on practice following reinstatement that the Respondent must successfully complete any outstanding requirements imposed by the Quality Assurance Committee prior to the expiration of his registration within thirty (30) days of reinstatement; and
 - g) A condition on practice following reinstatement that the Respondent must contact on the first day of each month as long as he holds full registration to ensure he is receiving, reviewing and responding to communications from the College and to ensure that he has provided up-to-date contact information to the College at all times.
31. Counsel for the College submitted that conditions on eligibility for reinstatement and conditions on practice following reinstatement were appropriate and necessary given the findings of professional misconduct made by the Panel.
32. In support of her submission that the Respondent should be suspended for eight months, counsel for the College referred the Panel to a number of cases involving similar conduct, including the following:
- a. In *Ontario (College of Massage Therapists of Ontario) v Wenjie Bai*, 2016 ONCMTO 6, the registrant failed to comply with the required quality assurance program and engaged in conduct that would reasonably be regarded as disgraceful, dishonourable or unprofessional. The registrant declined to participate in the disciplinary hearing process. In determining an appropriate penalty, the panel considered, as a mitigating factor, the registrant's lack of disciplinary record and, as an aggravating factor, his failure to respond to or participate in the disciplinary hearing process. The panel imposed a seven-month suspension which could be remitted by two months following compliance with several terms and conditions and \$3500 in costs.

- b. In *College of Nurses of Ontario v Kaastra*, 2011 CanLII 99846, the registrant was required to complete a remedial program. Despite repeated reminders and extensions, the registrant failed to do so. The matter was referred to discipline. The registrant did not attend or participate at the disciplinary hearing. The panel found the registrant's non-compliance demonstrated "a serious lack of governability" and imposed, among other things, a minimum six-month suspension.
 - c. In *Ontario (College of Massage Therapists of Ontario) v. Dartnall*, 2016 ONCMTO 3, the registrant was directed to complete a continuing education course. The registrant failed to do so and as a result, the college imposed several additional terms and conditions, which the registrant also failed to comply with. The matter was referred to discipline. The registrant admitted to the allegations and the discipline hearing proceeded by way of joint submissions on penalty and costs. The panel imposed, among other things, a six-month suspension of registration which could be remitted by two months following compliance with terms and conditions, and costs in the amount of \$2500.
33. Counsel for the College submitted the Respondent's misconduct in this case, which included misleading statements to the College, requires a longer suspension than in any of the cases referred to above.
34. Finally, counsel for the College referred the Panel to a number of cases from the College of Dental Hygienists of Ontario, in which the failure to comply with a regulatory requirement, such as a quality assurance requirement, resulted in the registrant's registration being "revoked": *College of Dental Hygienists of Ontario v. Karen Allen*, November 27, 2014; *College of Dental Hygienists of Ontario and Dikran Derderian*, November 27, 2014; *Ontario (College of Dental Hygienists of Ontario) v Plasaj*, 2016 ONCDHO 2; *College of Dental Hygienists of Ontario and Wendel Washington McFarlane*, March 18, 2013)
35. As stated above, the Respondent did not provide a submission.

6. Panel's decision on Penalty

36. As detailed in the Findings Decision, the Panel found that the Respondent committed professional misconduct by failing to complete the QAP Assessment Tool as required, by providing misleading information to the College on two occasions, and by failing to respond to College communications on four occasions.
37. These are all core regulatory matters. Each of them represents a significant failure by the Respondent to carry out his obligations as a registrant of the College.
38. In reaching its decision on penalty, the Panel substantially accepted the submission made by counsel for the College.
39. The Panel has applied the considerations emphasized by counsel for the College. In particular, the Panel considered the serious nature of the findings against the Respondent, the absence of any evidence from the Respondent to explain or mitigate

the misconduct, the need for specific and general deterrence with respect to this type of misconduct, and the range of penalties ordered in similar cases.

A. Reprimand and suspension

40. The Panel accepts the College's submission that the Respondent should receive a reprimand and an eight month suspension.
41. In reaching this conclusion, the Panel considered that the misconduct was more serious than the *Wenjie Bai* case (7-month suspension), the *Kaastra* case (6-month suspension), or the *Dartnall* case (6-month suspension). The Respondent's misleading statements to the College and failure to respond to the College point to a lengthier suspension. Additionally, that type of misconduct, which frustrates the College's ability to carry out its statutory mandate, requires a level of general deterrence.
42. While this misconduct is more serious than those cases, the Panel was not prepared to order cancellation of the Respondent's registration, despite some precedent for doing so from the College of Dental Hygienists of Ontario. In the Panel's view, a reprimand and an eight month suspension, combined with the other conditions ordered, appropriately responds to the Respondent's misconduct and is consistent with the authorities presented.
43. Lastly on this point, the Panel accepts the College's submission that the suspension should be imposed if and when the Respondent obtains reinstatement of registration. The Panel did not see any utility in suspending the Respondent at a time when he has already chosen to be out of the profession.
44. The Panel therefore orders that the Respondent is reprimanded and that the Respondent is suspended for eight months to begin on the first day that the Respondent is granted reinstatement.

B. Conditions on eligibility to return to practice

45. Section 39(8)(a) of the HPA states as follows:

(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...
46. Counsel for the College seeks conditions on the Respondent's eligibility to apply for reinstatement of registration under this section. In support of the submission that the Panel should impose conditions on the Respondent's eligibility for reinstatement, counsel for the College stated that the Respondent's behaviour "demonstrates a blatant disregard for the College's regulatory authority and undermines its ability to protect the public".
47. The Panel agrees that, given the nature of the Respondent's misconduct, an order for remedial action prior to his return to practice is appropriate. There is also the matter of

the outstanding QAP Assessment Tool – a requirement of the Respondent's registration that was never completed, as discussed in the Findings Decision.

48. While the Panel agrees that these remedial issues must be addressed, having decided to suspend and not cancel the Respondent's registration, the Panel orders that they should constitute conditions on the *lifting of the Respondent's suspension*, rather than conditions on *his eligibility to apply for reinstatement of registration*.
49. The Panel considers that this approach is more compatible with the wording of section 39(8)(a) and the rest of its order, while still ensuring that the Respondent will be required to take the necessary measures before returning to practice as a dental hygienist.
50. The Panel therefore orders that, as conditions on the lifting of the Respondent's suspension, the Respondent must:
 - a. Successfully complete the College's QAP Assessment Tool;
 - b. Complete the PROBE (Professional/Problem-Based Ethics) program at his own cost and obtain an unconditional pass; and
 - c. Complete a reflective paper of not less than 2000 words (exclusive of references) outlining his statutory and professional obligations as a registrant of the College, including in particular, his duty to respond to College communications and cooperate with College investigations.
51. For greater certainty, these conditions apply in addition to the eight month suspension ordered by the Panel. The Respondent is suspended for eight months in any event, but if, at the conclusion of the eight month suspension period, he has not completed each and every one of the requirements above, the suspension will not be lifted until he does so.

C. Conditions on practice following return to practice

52. Section 39(8)(c) of the HPA states as follows:

(8)If the registration of the respondent is suspended or cancelled under subsection (2), the discipline committee may

...

(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.
53. In her supplemental submissions, counsel for the College clarified her submission that the Respondent should be ordered to “successfully complete any outstanding requirements imposed by the Quality Assurance Committee prior to the expiration of his registration within thirty (30) days of reinstatement.” The rationale for this proposed order is that, at present, the only outstanding requirement on the Respondent is the QAP Assessment Tool itself, but that the results of the QAP Assessment Tool may dictate additional or ongoing learning requirements. Therefore, the proposed condition is meant

to require the Respondent to complete any further requirements that could only be known once he completes the QAP Assessment Tool.

54. The College further submitted that the requirement that the Respondent contact the College on the first day of the month was necessary to ensure that he is receiving, reviewing and responding to communications from the College and to ensure that he has provided up-to-date contact information to the College at all times.
55. In her supplemental submissions, counsel for the College stated that the College did not intend to be prescriptive about the means of contact, and recognized that allowance could be made for when the College may not be open on the first day of the month.
56. The Panel agrees that these conditions are appropriate in light of the Respondent's failure to complete the QAP Assessment Tool and failure to respond to the College, as discussed in the Findings Decision. However, for similar reasons to those discussed above at paragraphs 48-49, the Panel's view is that these conditions should apply *after the lifting of the Respondent's suspension*, rather than *after his reinstatement of registration*.
57. The Panel orders that, following the lifting of the Respondent's suspension, the Respondent is subject to the following conditions on his practice:
 - a. The Respondent must successfully complete any additional requirements arising from his completion of the QAP Assessment Tool, within 30 days of the lifting of the suspension; and
 - b. The Respondent must contact the College, by email or telephone, on the first business day of each month as long as he holds full registration.
58. The Panel recognizes that under section 20(2.1)(a) of the HPA, the Registration Committee retains the ability to refuse registration, to grant registration for a limited period, or to grant registration and impose limits or conditions on the Respondent's practice if he applies for reinstatement.
59. For greater certainty, the Panel's orders above are made without prejudice to any decision that the Registration Committee might make under section 20(2.1)(a), including any order by the Registration Committee to impose other limits or conditions on the Respondent's practice.

7. Costs

60. Having determined to make the orders above, section 39(5) of the HPA provides that the Panel may award costs to the College against the Respondent.
61. College Bylaw 59.3(3) requires the Panel to assess an award of costs in accordance with Schedule H of the College Bylaws.
62. Schedule H of the College Bylaws states that up to 50% of legal costs may be awarded, and 100% of "reasonable and necessary" disbursements.

63. In its Amended Bill of Costs, the College seeks costs of \$10,795.45, consisting of \$5,585.00 in legal fees and \$5,210.45 in disbursements.
64. The College has claimed 50% of its legal fees as provided for under Schedule H, and since making its submission has incurred further legal fees making supplemental submissions, for which no claim was made. The Panel has determined the legal fees claimed are reasonable and awards them in full as claimed by the College.
65. The Panel approves the College's disbursements as presented with one exception: the Panel has not awarded disbursements associated with a potential witness who was ultimately not called to give evidence at the hearing.
66. The Panel appreciates that the College may have initially intended to call this witness. However, the Panel could not find that the attendance expenses of a witness who did not provide evidence is a "necessary" expense which can be awarded against the Respondent in accordance with the tariff in Schedule H of the College Bylaws. The Panel has deducted the expenses associated with the potential witness from the disbursements claimed by the College.
67. Accounting for that deduction, the Panel orders costs payable by the Respondent in the amount of \$10,018.60 within 30 days.

8. Order of the Panel

68. The Panel makes the following order:
 - a. The Respondent is reprimanded;
 - b. The Respondent is suspended for a period of eight months:
 - i. The suspension will begin on the first day that the Respondent is granted reinstatement of registration in the event that he obtains reinstatement as a registrant of the College, and run for a minimum of eight months from that day;
 - ii. As conditions on the lifting of the suspension, the Respondent must do all of the following before the suspension is lifted:
 1. Successfully complete the College's QAP Assessment Tool;
 2. Complete the PROBE (Professional/Problem-Based Ethics) program at his own cost and obtain an unconditional pass; and
 3. Complete a reflective paper of not less than 2000 words (exclusive of references) outlining his statutory and professional obligations as a registrant of the College, including in particular, his duty to respond to College communications and cooperate with College investigations;

- c. After the lifting of the suspension, the Respondent is subject to the following conditions on his practice:
 - i. The Respondent must successfully complete any additional requirements arising from his completion of the QAP Assessment Tool within 30 days of the lifting of the suspension; and
 - ii. The Respondent must contact the College, by email or telephone, on the first business day of each month as long as he holds full registration; and
- d. The Respondent must pay costs in the amount of \$10,018.60 to the College within 30 days of this order.

69. The Panel's order above has an effective date of July 28, 2020.

9. Publication

70. In accordance with section 39.3 of the HPA, the Panel directs the College Registrar to notify the public of the Panel's order in this matter.

10. Notice to Respondent

71. The Respondent is advised that he has the right to appeal the Panel's order above to the BC Supreme Court. Under section 40(2) of the HPA, an appeal must be commenced within 30 days after the date on which this order is delivered.

These are the Panel's orders and reasons.

David MacPherson

 David MacPherson, Panel Chair

July 26, 2020

 Date

 Jennifer Aarestad

 Date

 Karen Lange

 Date

- c. After the lifting of the suspension, the Respondent is subject to the following conditions on his practice:
 - i. The Respondent must successfully complete any additional requirements arising from his completion of the QAP Assessment Tool within 30 days of the lifting of the suspension; and
 - ii. The Respondent must contact the College, by email or telephone, on the first business day of each month as long as he holds full registration; and
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David MacPherson, Panel Chair

Date



Jennifer Aarestad

July 26, 2020
Date

Karen Lange

Date

- c. After the lifting of the suspension, the Respondent is subject to the following conditions on his practice:
 - i. The Respondent must successfully complete any additional requirements arising from his completion of the QAP Assessment Tool within 30 days of the lifting of the suspension; and
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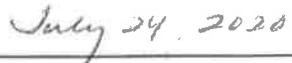
Date

Jennifer Aarestad

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Karen Lange



Date