IN THE MATTER OF THE BRITISH COLUMBIA COLLEGE OF NURSES AND MIDWIVES

AND A CITATION ISSUED UNDER THE *HEALTH PROFESSIONS ACT*

R.S.B.C. 1996, c. 183

BETWEEN

THE BRITISH COLUMBIA COLLEGE OF NURSES AND MIDWIVES

(the "College" or "BCCNM")

AND

AMY HAMM

(the "Respondent")

COLLEGE – CLOSING SUBMISSIONS

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INTRODUCTION

1. The heart of this case is the regulator's duty to discipline a registrant for engaging in conduct that is discriminatory towards a marginalized population and contrary to the fundamental values of the nursing profession.

2. Transgender people are a vulnerable group, with a history of facing barriers to accessing health services. They remain among the most marginalized groups in our society. It is vitally important for all participants in the health care system to protect the rights of transgender people and neither to discriminate against them, nor to send the implicit message that there are persons in the health care system who will discriminate against them.

3. Nurses, like other regulated professionals, hold positions of trust and influence in the community. The public is more likely to listen to, and give weight to, statements made by a regulated health professional than someone who does not have professional status.

4. The Respondent made a series of discriminatory statements, directed towards transgender people. The College's case, put simply, is that those discriminatory statements amount to unprofessional conduct. The statements conflict with fundamental values of the health care system, a key one being that the health care system should both be, and should perceived to be, non-discriminatory.

5. The Respondent made her statements across various online platforms including podcasts, videos, social media and published writings. While made "off duty", the statements were also made while the Respondent identified as a nurse or nurse educator. That brings the Respondent's statements within the purview of the College. The College has a duty to act.

6. The College bears the burden of proof and must prove the allegation against the Respondent in the Citation on a balance of probabilities. In the present case, there is no question that the Respondent made the statements at issue. The allegation in the Citation

will be made out if the Panel finds it is more likely than not that the College's characterization of those statements is correct.

7. The College's submissions are centered around three principal questions concerning the characterization of the statements:

   (a) Were the statements discriminatory and derogatory towards transgender people?
   (b) Do the statements amount to unprofessional conduct that brings the profession of nursing into disrepute?
   (c) Are the statements protected speech under s. 2 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), such that they are immune from discipline?

8. The College asserts that the first two questions should be answered in the affirmative, and that the third should be answered in the negative.

WITNESSES FOR THE COLLEGE

9. The College called three witnesses at the hearing:

> **Ms. Aisha Ohene-Asante**, legal counsel at BCCNM and the inspector who investigated the complaints received by the College regarding the Respondent.
>
> **Dr. Elizabeth Saewyc**, Distinguished University Scholar and Director of the School of Nursing at the University of British Columbia. Dr. Saewyc was qualified as an expert to give evidence in the areas of nursing practice and nursing of transgender people, and specifically as concerned:
>
> > A, nursing education; B, nursing standards, competencies, and guidelines; C, the health and mental health issues typically faced by and health outcomes of transgendered persons; and D, the harms that transgendered persons may experience in their interactions with health professionals. (*Transcript, Day 1, September 21, 2022, page 133, line 16 to page 134, line 2*)

Dr. Greta Bauer, Professor, Epidemiology and Biostatistics, Schulich School of Medicine and Dentistry, Western University. Dr. Bauer was qualified as an expert to give evidence in the areas of epidemiology and applied biostatistics with special expertise in social marginalization and the evidence-based health and well-being of sexual and gender minority people, including the effect of social marginalization on that population's health and well-being, and was specifically qualified to provide evidence on the following issues:

> Definitions of terms she will use in her expert evidence, including but not limited to agender, cisgender, gender affirmation, gender binary, gender creative, gender diversity, gender expression, gender identity, intersex mis-gender, nonbinary, physical sex, sex assigned at birth, transgender or trans, trans man, transphobia, trans woman, two spirit. And, B, the current scientific understanding regarding the components of and relationship between sex and gender. C, the way in which trans people are marginalized in Canadian society, taking into account erasure, structural barriers, and interpersonal mistreatment and how marginalization plays out in the health care setting and/or impacts the ability of trans people to seek appropriate health care. D, the evidence-based research regarding the use of transgendered washrooms by trans people in both relation to harms experienced by, (a) trans people and (b) cis people. E, the evidence-based research regarding the use by trans people of other gendered spaces, such as locker rooms, sports, prison wards, in relation to harms experienced by, (a) trans people and (b) cis people. F, of the materials in the extract regarding the respondent's alleged statements fit within the framework of sex and gender. And, G, whether the materials in the extract regarding the respondent's alleged statements are likely to cause harm to transgendered people and why or why not. (*Transcript, Day 3, September 23, 2022, page 98, line 20 to page 100, line 10*)

WITNESSES FOR THE RESPONDENT

10. In addition to Ms. Hamm, the Respondent called three witnesses:

Dr. James Cantor, a clinical psychologist licensed to practice in Ontario who practices and conducts research in relation to sexual minorities, including gender divergent persons.

Dr. Kathleen Stock, a former Professor of Philosophy in the UK who has published scholarly work on imagination, fiction, sexual objectification, sexual orientation, and the importance of referring to human sex in language.

Dr. Linda Blade, a former Canadian champion athlete and Sports Performance Professional Coach.

The College will address the evidence of each in the course of the submissions that follow.

TRANSGENDER PEOPLE

11. In assessing the Respondent's public statements made while identifying as a nurse or a nurse educator, it is important to understand the population her comments were directed towards.

12. To begin with, some key definitions:

    a) **Cisgender** (adj.): Designating a person whose sense of personal identity and gender corresponds to his or her sex at birth; of or relating to such persons. Contrasted with *transgender*. – Oxford English Dictionary.

        i. Dr. Bauer, elaborated on the meaning of "cisgender". "Cis" is a prefix that means on the same side of, whereas "trans" means on the opposite side of. So, cisgender refers to people whose gender identity is the same as or aligned with the sex that they were assigned at birth. (*Transcript, Day 3, September 23, 2022, page 105, lines 13 to 17*)

    b) **Misgendering**: Dr. Bauer, provided the following definition: the "accidental or deliberate reference to a person as a gender that differs from the gender they personally identify with". (*Exhibit 13, Expert Report of Dr. Greta Bauer, page 6*)

i. The College's first expert, Dr. Elizabeth Saewyc, also addressed the definition of misgendering in her testimony:

> Q. Okay. Mis-gendering, I'm just going to ask you. What is it, exactly?
>
> A. Mis-gendering is calling someone by a different gender from that which they have identified. So calling someone -- either using specific terms, like calling someone a man when their gender identity is a women or calling someone a woman when their gender identity is a man or calling them by gender terms such as "sir" or "ma'am" different from what -- their gender identities. Or using pronouns such as insisting on particular pronouns that are not the ones that they have identified as their pronouns. (*Transcript, Day 2, September 22, 2022, page 20, lines 2 to 14*)

c) **Transgender** (adj.): Denoting or relating to a person whose gender identity does not correspond with the sex registered for them at birth. – Oxford English Dictionary.

13. To understand who transgender people are, it is imperative to understand gender expression, gender identity and sex. As Dr. Bauer explained:

> **Gender expression** is the gendered expression one engages in with regard to how they present themselves in public and in private.
>
> **Gender identity** is the gender one knows themselves to be, whether as a man, woman, both, neither, or something else.
>
> **Sex** is a multidimensional concept that captures a range of biological characteristics, including sex chromosomes, hormonal milieu (endocenous hormonal production and exogenous sex hormones), sexed anatomy (primary and secondary, e.g., developed during pubertal processes), and sexed physiology; these dimensions may or may not be concordant within individuals. (*Exhibit 13, Expert Report of Dr. Greta Bauer, pages 6 and 7)*

14. Dr. Bauer testified that both sex and gender are multidimensional and interrelated. (*Transcript, Day 3, September 23, 2022, page 116, lines 2 to 3, and page 121, line 15 to page 122, line 9)*

15. Dr. Bauer elaborated on the meaning of gender expression in her testimony:

> Gender expression is about how one presents themselves. So that can be different than one's gender identity, for example. So gender expression is about how we present ourselves socially, how we dress, how we gender ourselves in terms of our appearance or our interactions. (*Transcript, Day 3, September 23, 2022, page 106, line 22 to page 107, line 3*)

16. That is the conceptual framework adopted by the Canadian Institute for Health Research; it is the foundation of medicine and explicitly underpins research in Canada. Dr. Bauer:

> … So I had mentioned that Canadian Institutes of Health Research is the major federal funder of research. It requires that all applicants -- and this is not just for research grants. This is for student awards as well. All applicants must address whether their research or their project -- how -- whether and how it addresses sex, and then separately in a separate section whether and how it addresses gender, and then those will be evaluated based on that. (*Transcript, Day 3, September 23, 2022, page 109, line 16 to page 110, line 1*)

17. This conceptual framework of sex and gender identity has the judicial sanction of the Supreme Court of Canada. *Hansman v. Neufeld*, 2023 SCC 14 [*Hansman*], concerns public debate centered on provincial efforts in British Columbia to promote inclusion and counter discrimination against transgender and other 2SLGBTQ+ people in schools.

18. In paragraphs 11 and 12 of *Hansman*, the SCC made these statements about, and offered definitions of, gender identity, gender expression and transgender people:

> In 2016, British Columbia amended its *Human Rights Code*, R.S.B.C. 1996, c. 210, to include a prohibition against discrimination based on "gender identity or expression". Gender identity refers to one's deeply felt and inherent sense of self in relation to gender, or the social system of roles, behaviours, and expressions associated with sex at birth.[1] Gender identity is distinct from gender expression, which refers to the way one outwardly expresses gender, through clothes, behaviour, speech, pronouns, and more.[2] While gender was once understood only in the binary of "male" or "female", today, society's understanding of gender has broadened to encompass a spectrum of gender

[1] American Psychological Association, "Guidelines for Psychological Practice With Transgender and Gender Nonconforming People" (2015), 70 *Am. Psychol.* 832, at p. 834.
[2] A. Veltman and G. Chaimowitz, "Mental Health Care for People Who Identify as Lesbian, Gay, Bisexual, Transgender, and (or) Queer" (2014), 59:11 *Can. J. Psychiatry* 1, at p. 4.

identities, modes of expression, and related terminology, all of which continue to evolve.[3]

Transgender people are individuals whose gender identity does not align with the sex assigned to them at birth.[4] In April 2022, Canada became the first country in the world to publish census data on transgender and non-binary people.[5] The census estimated that, as of May 2021, there were over 100,000 transgender or non-binary people aged 15 and older in Canada — about 1 out of every 300 people.

Harms That Transgender People Experience

19. Dr. Bauer testified about the many kinds of harm that transgender people experience in our society:

> In terms of the actual harms experienced by trans people, there's exclusion from employment, from housing, from social services, from home care services. There's violence, physical and sexual violence against people, as well as harassment and threats related to gender that may not include physical violence.
>
> There's the effects of transphobia and social exclusion, and when we talk about that, we -- social exclusion can include the exclusion from organizations and public spaces and things like that, but also can include kind of being pushed out of social groups and excluded in ways that are not structural. That can be done through messages that people don't belong, that they are not welcome, that they don't exist. And when we talk about transphobia, we usually include these things like violence as part of it or the structural things like job loss, but we also include these experiences, like in the measures of transphobia we use, of being made fun of or hearing that trans people as a group are not normal, including that trans people as a group are predators or trans people as a group are sick or that trans people don't exist.
>
> So there's a number of ways that trans people are told as a group that they don't exist, and that includes things like repeated misgendering or insisting that the only thing that matters is the single most unchangeable aspect of sex, and there's no room for any diversity around that, including of them. And being told that they're fictional or that they couldn't exist or they must be incorrect or, you know, all of the ways that

[3] American Psychological Association, at p. 834.
[4] Veltman and Chaimowitz, at p. 5.
[5] Statistics Canada, "Canada is the first country to provide census data on transgender and non-binary people", in The Daily, April 27, 2022 (online).

> the possibility of trans existence is disallowed in ways that sends the message to people that they don't exist in aren't recognized.
>
> And then there's -- I think I already mentioned equitable participation in public life and harassment, yeah. And access -- within the access to services too, you know, very trans and nonbinary specific for a lot of people is access to gender affirmation within that, in addition to all of the usual services somebody would access, and so that includes legal gender affirmation through changes of name and identity documents and -- so the inability to do that is associated with suicide risk in both Canadian and US data.
>
> So I would consider that a harm. And the inability to access gender affirmation to be able to alleviate gender dysphoria and to experience more of a sense of bodily integrity. Being excluded from that I would say is a harm as well, and as well as being excluded from social gender affirmation. I'm not sure if I've captured, cataloged the harms, but if I were to sum it up, I think that's the best I can do at the moment. (*Transcript, Day 5, October 25, 2022, page 103, line 16 to page 105, line 23*)

Transgender People and Health Care

20. Like all members of our society, transgender people need to access health care, be it for routine health screenings, treating illnesses, dealing with injuries, or accessing advanced care such as cancer treatments. In addition, they may need to seek medical treatment specifically in relation to their gender identity, such as hormone or surgical treatment to align their bodies with their gender identity.

21. Potential transgender specific health needs were detailed by Dr. Saewyc:

> There are also relatively unique points of care and interactions that transgender people may have with health professionals, specifically focused on their health needs around their gender rather than other health concerns. For example, health care providers may assess and identify gender dysphoria that a transgender person may be experiencing. They may help address that gender dysphoria by providing guidance or documentation to support social gender transitions, such as changes in name or gender markers on identification or travel documents. They may provide mental health counseling, or referrals to mental health professionals to treat mental health challenges such as depression or

> anxiety, which may be a result of the stigma and discrimination that transgender people face from society or from their families. Health professionals may also provide endocrine care to alter transgender people's secondary sex characteristics with hormone therapy and other medications. Health professionals might also provide treatment to delay the development of secondary sex characteristics through puberty blockers, medications that can temporarily halt pubertal development; puberty blockers give adolescents extra time to explore and understand their gender identity before potentially irreversible bodily changes might occur through increases of their own endogenous hormones during puberty or through prescribed hormone therapy. Health professionals may also provide clinical body modifications through surgical interventions, such as chest reconstructive surgeries (breast implants or mastectomy and pectoral implants), lower body surgeries (hysterectomy, orchidectomy, vaginoplasty, vulvoplasty, phalloplasty, metoidioplasty) and neck and facial surgeries (tracheal shaving, facial feminizing surgery). (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, page 6*)

22. The intersection of nurses with transgender specific health needs was also detailed by Dr. Saewyc:

> Nurses may interact with and provide care to transgender people as part of all of these various health situations. For example, nurses may be involved in screening and assessment around gender concerns, or may serve as health navigators to assist with referrals to relevant health care providers for gender-affirming care or other health care, and provide education on what to expect during health visits. Nurses may administer testosterone through injections, or may educate transgender patients on how to draw up and self-inject such hormones. Surgical nurses may provide pre-op patient preparation or post-operative monitoring and care in the post anesthesia recovery unit; nurses on medical surgical wards in hospitals or transitional care units may provide assessments, monitoring, and treatments for transgender patients while they are recovering from surgery, including changing dressings, administering medications, and providing health education about self-care after discharge. Nurses may follow up with patients after discharge by telehealth visits or through home visits to ensure healing is proceeding without complications and provide support, advice, or medication for pain management.
>
> Nurses may provide antenatal care to transgender men who have not had hysterectomies and who have decided to become

> pregnant; they may provide care for trans men during labour, childbirth, and during postpartum. Public health nurses may make home visits to new transgender parents, and lactation nurses may work with transmen in supporting chestfeeding. (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, pages 6 and 7*)

23. Transgender people may encounter interpersonal and systemic barriers to appropriate healthcare, including being erased by processes that don't take them into account, being misgendered, being actively discriminated against, or being denied appropriate or any care. Dr. Bauer and Dr. Saewyc outlined some of the mistreatment and barriers that transgender people experience.

24. Dr. Bauer:

> Trans people in Canada are marginalized through processes of erasure and the structural barriers these processes create, as well as through interpersonal discrimination, deliberate mistreatment or harassment.
>
> <u>Erasure and structural barriers in healthcare systems</u>
>
> There is a longstanding history of trans erasure in Canada, which has only recently begun to be remedied. Erasure encompasses the active or passive processes that exclude trans people from society and render them invisible; within healthcare these processes involve both institutional and informational erasure (Bauer, 2009).
>
> Information erasure includes the lack of inclusion in institutional policies and protocols (e.g., policies for medical records and forms), as well as in informational systems (e.g., textbooks, curricula) (Bauer, 2009).
>
> Erasure creates or reinforces a range of structural barriers to trans inclusion in healthcare, such as policies that assume staff or patients are cisgender, laboratory results that are inappropriate to a patient's sexed hormonal milieu, as well as lack of knowledge among health care providers. This results in a system wherein trans patients may not get their health care needs met, even if there were no blatantly intentional transphobic mistreatment (Bauer, 2009). In other words, it creates a system designed to exclude trans people at varying points of contact, which then requires active intervention to remedy. It is increasingly common, for example, to have patient navigators hired to help trans patients navigate their health care. Because of these barriers, facilitating

access to health care—whether primary care, emergency care, mental health care, or gender-affirming care—requires deliberate intervention to make healthcare systems welcoming.

Discrimination, mistreatment, or harassment in health care

Trans peoples' abilities to receive health care, and indeed to participate fully in society, are adversely impacted by interpersonal discrimination, mistreatment and harassment, and by the anticipation of such discrimination that may result, even for those who have not personally experienced that discrimination.

Trans-specific negative interactions are common in health care. Among those with a primary care doctor, an estimated 37.2% of transmasculine people and 38.1% of transfeminine people in Ontario reported trans-specific negative experiences (Bauer et al., 2015). These included refusing to discuss care or to examine parts of the body, or outright ending care, as well as telling one that they are not really trans or that the doctor doesn't know enough to provide care. Having had these negative experiences with a family physician previously predicted discomfort with discussion of trans-related health issues with one's current primary care doctor (Bauer et al., 2015); transfeminine people who reported three or more types of negative experiences were 2.26 times as likely, and transmasculine persons 1.61 times as likely, to report such discomfort. Denial of hormonal care by providers may also contribute to use of non-prescribed hormones, as patients take matters into their own hands (Rotondi et al., 2013).

Negative experiences in emergency rooms can be even more common, given the quick-moving nature of care and lack of long-standing provider-patient relationships. Of trans Ontarians who used the emergency room while presenting in their gender, 52% had experienced at least one trans-specific negative treatment (Bauer et al., 2014). Common such experiences (≥10% of patients) included the use of hurtful or insulting language (32%), being told a provider does not know enough to provide care (31%), having people think the gender marker on ones ID is a mistake (27%), being belittled or ridiculed for being trans (24%), having a provider refuse to discuss trans-related concerns (18%), being discouraged from exploring gender (14%), being told that one is not really trans (13%), and having a provider refuse to examine parts of one's body (12%) or refuse or end care altogether (10%). Perhaps not surprisingly, an estimated 21% of trans people overall had avoided going to the emergency room in a medical emergency, for fear of poor treatment (Bauer et al., 2014).

In health care contexts, trans-specific negative experiences then seem to clearly affect access to future care, either through discomfort with

addressing trans-specific concerns, use of non-prescribed medication to address gender-affirming care needs, or avoidance of health care settings, including emergency care, when needed. (*Exhibit 13, Expert Report of Dr. Greta Bauer, pages 12 to 14*)

25. Dr. Saewyc:

> Given the pervasiveness of binary gendered assumptions in the ways most health care settings are structured, from medical records to sex-segregated health units, trans and non-binary people regularly encounter processes and interactions that challenge patient privacy and create obstacles to respectful patient-centered care. Transgender people may be misgendered, that is, health professionals and clinical staff may use the wrong pronouns or gendered terms of address ("miss" instead of "sir," or Mr. instead of Ms. or Mx.) Clinical staff may insist on using the transgender person's current or former legal name instead of their preferred name, which can cause confusion or hostility for staff and other patients when the name does not appear to match the gender presentation of the transgender person, which can result in them being subjected to intrusive questions, disbelief, mockery, disrespect, hostility, or even denial of care. Misgendering or using the former name instead of the current or preferred name expresses disbelief or denial of someone's personal sense of identity, and is disrespectful…
>
> If a transgender person presents with a health issue that is not directly related to transgender identity, e.g., with a sprained ankle from playing sports, or with worsening symptoms of a chronic illness, when some health care providers learn the person is trans, they may divert their attention from focusing on the presenting problem and specific health needs, and instead focus on the trans person's medical history, their hormone status, or their genitalia, even when that is irrelevant to care. Or health care providers might refuse to provide treatment because they feel it would require specialized care that requires expertise they do not have.
>
> Other documented negative experiences that transgender people frequently experience in health care when clinical staff know their transgender status can include discrimination and mockery, insults, other disrespectful treatment. They may be pathologized; for example, nurses or other health care providers may believe gender dysphoria or a transgender identity to be a mental illness, even though current practice guidelines indicate that mental health symptoms are not due to a transgender identity, but may be related to the extra stress from stigma and discrimination that transgender people often experience in society. As well, health professionals may use coercive interactions to require patients to dress or

express their gender identity in line with their sex assigned at birth. (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, pages 7 and 8*)

26. *Christian* Medical *and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [*Christian Medical*] involved a challenge to a policy of the Ontario College of Physicians and Surgeons requiring physicians who object to providing certain medical procedures on religious belief grounds to provide referral to a non-objecting health care professional. The Court of Appeal recognized, at paragraph 140, that transgender people "encounter challenges in accessing appropriate healthcare, hormonal treatments and transition-related services."

LEGAL AND PUBLIC POLICY CONTEXT

27. Human expression does not occur in a vacuum; it occurs in a context. Understanding the context is essential to understanding the expression. An understanding of the legal and public policy context is essential to understanding the nature of the discrimination alleged in this case.

28. Transgender people are part of the ordinary and normal range of the human experience of sex and gender. Whatever may have been the case in earlier times, the law and public policy in Canada today recognizes and protects the existence of, and the rights of, transgender people.

29. Justice Karakatsanis recently addressed this for the majority of the Supreme Court of Canada in *Hansman*:

> [84] The transgender community is undeniably a marginalized group in Canadian society. The history of transgender individuals in our country has been marked by discrimination and disadvantage. Although being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities" (J. Drescher and E. Haller, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals*, 2018 (online)), transgender and other gender non-conforming

individuals were largely viewed with suspicion and prejudice until the latter half of the 20th century.

[85] Indeed, transgender people occupy a unique position of disadvantage in our society, given the long history in psychiatry "of conflating [transgender and other 2SLGBTQ+] identities with mental illness" and even resorting to harmful "conversion therapy" to "resolve" gender dysphoria, and "recondition" the individual to reduce "cross-gender behavior"…

[86] Transgender people have faced discrimination in many facets of Canadian society. Statistics Canada has concluded that they are at increased risk of violence, and report higher rates of poor mental health, suicidal ideation, and substance abuse as a means to cope with abuse or violence they have experienced (see *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018* (September 2020)). **Studies have concluded that they are disadvantaged relative to the general public in housing, employment, and healthcare** (Department of Justice Canada, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (2022), at p. 10; *XY v. Ontario (Government and Consumer Services) (No. 4)*, 2012 HRTO 726, 74 C.H.R.R. D/331, at paras. 164-66). And despite encountering a higher incidence of justiciable legal problems, studies have also found that transgender people have traditionally faced greater access to justice barriers than the broader population, in part due to a lack of explicit human rights protections (J. James et al., *Legal Problems Facing Trans People in Ontario*, TRANS*forming* JUSTICE Summary Report 1(1), September 6, 2018 (online); see also Department of Justice Canada, at p. 11).

[87] Significant legal advancements in transgender rights have only come in the last 35 years, with most change taking place in the last decade (S. Singer, "Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice" (2020), 35 *C.J.L.S.* 293, at p. 298). Once forced to advance claims of discrimination on the ground of "physical disability" (B. Findlay et al., *Finding Our Place: Transgendered Law Reform Project* (1996), at pp. 20-21), gender identity and/or expression are now prohibited grounds of discrimination in human rights codes across the country and included within the prohibition against hate speech under the *Criminal Code*, R.S.C. 1985, c. C-46…

…

> [89] Yet individual courts and tribunals have also recognized that, "despite some gains, transgender people remain among the most marginalized in our society" (*Oger*, at para. 62), and continue to live their lives facing "disadvantage, prejudice, stereotyping, and vulnerability" (*C.F. v. Director of Vital Statistics (Alta.)*, 2014 ABQB 237, 587 A.R. 332, at para. 58). [Emphasis added]

30. There are two decisions of the BC Human Rights Tribunal [the Tribunal] directly relevant to the present case because they address discrimination in ways of talking about, and talking to, transgender people.

31. The 2019 decision of the Tribunal in *Oger v. Whatcott (No. 7*), 2019 BCHRT 58 [*Oger*] establishes that it is discriminatory to deny or debate the existence of transgender people:

> [120] Indeed, the proposition that we should continue to debate and deny the existence of transpeople is at the root of the prejudice and stereotypes that continue to oppress them. It rests on the persistent belief, held by people like Mr. Whatcott, that a person's genitals are the essential determinant of their sex and, therefore, gender.

32. *Oger* involved a transgender candidate in a provincial election, Ms. Oger. Mr. Whatcott opposed Ms. Oger's election bid on the sole basis that Ms. Oger was transgender. In his efforts to oppose Ms. Oger's candidacy, Mr. Whatcott published a flyer which is described in paragraph 3 of *Oger*:

> Mr. Whatcott created a flyer entitled "Transgenderism vs. Truth in Vancouver-False Creek" [**Flyer**]. In it, he called Ms. Oger a "biological male who has renamed himself… after he embraced a transvestite lifestyle". He expressed a concern "about the promotion and growth of homosexuality and transvestitism in British Columbia and how it is obscuring the immutable truth about our God given gender". He described being transgender as an "impossibility", which exposes people to harm and constitutes a sin…

33. In analysing Ms. Oger's claim, under the *British Columbia Human Rights Code* which includes provisions protecting individuals against discrimination based on their "gender

identity or expression", that Mr. Whatcott had discriminated against her with his publication, the Tribunal's discussion is germane to the present case [Emphasis added]:

> [60] This is a significant time for trans and gender diverse people. Their long fight for equality is bearing some fruit, as society begins to adjust its traditionally static and binary understanding of gender, and its tolerance for people to identify and express their gender authentically. One indicator of this progress is the 2016 amendment to the *Code* that added the grounds of gender identity and expression.
>
> [61] However, as this hearing made clear, the journey is far from over. Unlike other groups protected by the *Code,* transgender people often find their very existence the subject of public debate and condemnation. What flows from this existential denial is, naturally, a view that transpeople are less worthy of dignity, respect, and rights…
>
> [62] And so, despite some gains, transgender people remain among the most marginalized in our society. Their lives are marked by "disadvantage, prejudice, stereotyping, and vulnerability": *F(C) v. Albert (Vital Statistics),* 2014 ABQB 237 at para. 58; see also *Rainbow Committee of Terrace v. City of Terrace,* 2002 BCHRT 26 at paras. 47-51. They are stereotyped as "diseased, confused, monsters and freaks*": Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1 at paras. 136-137, overturned 2005 BCCA 601 (not on this point). **Transpeople face barriers to employment and housing, inequitable access to health care and other vital public services**, and heightened risks of targeted harassment and violence…
>
> [63] It was within this context that, in 2016, the Legislature amended the *Code* to add the ground of "gender identity and expression" as a protected characteristic. While human rights law has protected transpeople for many years, this legislative amendment was intended to raise the profile for that protection. In doing so, then-Attorney General Suzanne Anton acknowledged the specific and unique challenges faced by transgender people in BC, and expressed the Legislature's clear intention to foster a society in which they are equal in dignity and rights:
>
> > There is no question that transgender persons can face challenges. They face violence. They face discrimination. They may be refused tenancies. They may be refused employment for no other reason than that they are transgender. They may be fired. It is important for transgender persons to know that they are protected, to know that government is with them. It is

> important for all of us in society to know that we may not discriminate against a person based on their gender identity or expression. It is important for all of us to treat each other with respect, but in particular, when one group of people suffers discrimination which is unusual in society and particular to them, it is very important that their rights be recognized.
>
> British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 40th Parl, 5th Sess (25 July 2016) at 1425

34. The basic position advanced by Mr. Whatcott is the same as that advanced by the Respondent: that the only material signifier is one's sex assigned at birth. Gender identity does not exist; sex is the only relevant aspect of one's identity.

35. The 2021 decision of the Tribunal in *Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others,* 2021 BCHRT 137 [*Nelson*], establishes that failure to use preferred pronouns is discriminatory:

> [82] Like a name, pronouns are a fundamental part of a person's identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are. Especially for trans, non-binary, or other non-cisgender people, using the correct pronouns validates and affirms they are a person equally deserving of respect and dignity…

36. The Canadian Human Rights Tribunal came to a similar conclusion and held that the use of "deadnames" (use of a person's name assigned at birth despite their requesting to use a new name that reflects their gender identity) is discriminatory, *Bilac v. Abbey et al*., 2023 CHRT 43 [*Bilac*]. Mr. Bilac was a transgender man who used masculine pronouns and the name Denny in all aspects of his life. Mr. Bilac brought a human rights claim alleging that at his employment he was repeatedly referred to by his deadname and was misgendered by the use of feminine pronouns. *Bilac* specifically endorses the above passage from *Nelson*, and at paragraph 173 states:

> Trans people should expect to be called by their chosen names and referred to by their chosen pronouns. The use of accurate and correct pronouns for trans people is not a question of preference, it is a matter of right.

37. Turning from the law to the broader public policy front, many institutions have developed trans-inclusive policies. For example, the B.C. Corrections Branch Adult Custody Policy (the Policy) recognizes that, "A transgender inmate is an individual whose gender identity or expression is different from the sex assigned at birth." (4.10.1.1) The Policy requires correctional staff to respect an inmate's pronoun choice (4.10.2.1); allows transgender inmates to indicate a preference of the gender of the staff who performs any frisk or strip search (4.10.3.3); and provides for the possible accommodation of a transgender inmate by placement to a different correctional centre (4.10.4.1).

38. Practice Directions have been issued in both the BC Provincial Court and BC Supreme Court regarding pronouns as part of the form of address in court proceedings. These directives seek to prevent the misgendering of courtroom participants.

39. In their article *Preventing Misgendering in Canadian Courts: Respectful Forms of Address Directives*, Samuel Singer and Amy Salyzyn, The Canadian Bar Review, Vol. 101, at page 339 note:

> Respectful forms of address directives work to prevent the harms of misgendering in several ways. Such directives can help courtroom participants avoid unintentional misgendering. When individuals indicate their appropriate titles and pronouns when introducing themselves, this helps others avoid unintended errors based on unfounded assumptions. Forms of address directives can also combat intentional misgendering. By signalling that the courtroom is a place where trans individuals are to be treated with respect, forms of address directives signal the unacceptability of misgendering.

40. One can also turn to the unanimous passing of legislation banning conversion therapy by the House of Commons in December 2021 and the BC government, in January 2022, allowing transgender people to change gender designations on BC government documents without the confirmation of a physician or psychologist. Minister of Health, Adrian Dix, in the government's January 14, 2022, News Release, stated:

> Our government is committed to advancing equity for two-spirit, transgender and gender-diverse people. This announcement will make it easier for people to have their true genders reflected on their B.C.

> identification documents. We will continue our work toward creating a health-care system that works for everyone.

41. The above indicates that the BC government has decided that for the purposes of one's identity documents – in other words for all legal purposes – you are legally who you identify as. It also indicates that such measures to better include transgender people in our society are explicitly connected to equality in the health care system; a prime concern for the College given the Respondent tying her statements to her professional designation.

42. Returning to *Oger*, that case also deals with statements which cast a person as being of bad character or suspect solely because they are transgender: "To cast a transgender person as immoral purely because of their gender identity is the very essence of discrimination" (at paragraph 140).

43. This form of discrimination is discussed by the British Columbia Court of Appeal in *Kempling v. British Columbia College of Teachers*, BCCA 2005 327 [*Kempling BCCA*], an analogous case involving a teacher making off duty public discriminatory comments about homosexuals:

> [33] There is, however, a second critical concept referred to by Gonthier J. that is neglected in the intervenor's argument: the "inherent dignity of the individual". A central tenet of democratic society is the belief that all people are equally deserving of respect, concern and consideration, and this belief flows from a recognition that each individual is inherently valuable. Statements critical of a person's way of life or which denounce a particular lifestyle are not in themselves discriminatory. In my view, it is only when these statements are made in disregard of an individual's inherent dignity that they become so. To hold an individual in contempt or to judge them, in the words of Abella J.A., as she then was, in ***R. v. Carmen M.*** (1995), 23 O.R. (3d) 629 at 633, "based not on their actual individual capacities, but on stereotypical characteristics ascribed to them because they are attributed to the group of which the individuals are a member", is to treat that individual in a manner which is not consonant with their inherent dignity. Statements and actions based on such judgments are the hallmark of discrimination.

> [35] Mr. Kempling's statements about homosexuals are based on stereotypical notions about homosexuality and demonstrate a willingness to judge individuals on the basis of those stereotypes. As a result, I am of the view that even if considered on a standard of correctness, as opposed to one of reasonableness, the conclusion that Mr. Kempling's writings were discriminatory is unassailable.

44. It is beyond dispute that statements denying the existence of transgender people, misgendering them, or stereotyping them with negative characteristics, are discriminatory. Legislation, public policy, and case law all establish unambiguously that gender identity exists (and therefore transgender people exist), and that transgender people are entitled to respect and accommodation. In adjudicating this matter, the Panel is treading a well-worn judicial, legislative, and public policy path.

THE RESPONDENT'S STATEMENTS

Overview

45. An overview of the intersection of the Respondent's statements with the experience of harm by transgender people was cogently provided by Dr. Saewyc:

> Some of the statements in the materials that were provided clearly challenge or deny the concepts or general definitions of gender and gender identity, even though these concepts and definitions are provided in standard nursing textbooks and professional literature. Other statements also discount the expressed identity of transgender people, especially transgender women, claiming they are not female, therefore they cannot be women, women cannot have penises, therefore they are men. Additional statements claim that providing gender-affirming care to transgender people and recognizing their gender identity harms the sex-based rights of women and children…
>
> … publicly denying someone's asserted gender identity or pronouns challenges their very existence as a trans person. In my opinion, most transgender people, upon hearing the statement that their gender identity is not real, and they should only be recognized as the sex they were assigned at birth, would feel that statement disrespects them and undermines their dignity. When such statements are made by a registered nurse, and that nurse further asserts that policies and practices that support transgender people's gender identity actually harm the rights of cisgender women and children, I think most transgender people would see

> the nurse as representing the nursing profession and health care, and interpret those statements to be a position of the nursing profession, or held by most nurses. If this is the perception, transgender people may reasonably fear discrimination and negative treatments in health care settings where the nurse is practicing, or health care settings overall. (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, page 12*)

46. The potential depressive effect of the Respondent's statements on transgender people accessing health care was further elaborated on in the cross-examination of Dr. Saewyc:

> Q. In your testimony in chief, you suggested that members of the public reading the – reading Ms. Hamm's statements and knowing that she is a nurse, that it may affect their willingness to access health care. Do you recall that?
>
> A. Yes. Yes. That trans and nonbinary people, knowing she's a nurse, and -- and hearing or reading her -- some of the public comments that she has made, may -- may believe that she is taking the position of nursing and -- and that this is the perspective of nurses, and that, as a result, this is the kind of -- or that they may expect mis-gendering in health care settings.
>
> Q. Okay. So just so that I'm clear on this, you think that they may take -- they may have the belief that she's reflecting the perspective of nursing in general? That's your concern? That's one of your concerns?
>
> A. Yes.
>
> Q. Okay. And so -- and then as a result of that, these transgendered people that see these public comments may then not access health care. They may decide not to access health care.
>
> A. Given that a fair amount of research has documented that transgender people are less likely to access or may avoid health care or may miss out on needed care, in part because they have had previously negative experiences and in other part because they're anticipating further, you know, discrimination or negative experiences in the health care setting than they might experience in the wider community, when a health professional makes statements that -- of that sort, then they may well infer that health care settings will be, again, a negative experience for them or that they will be discriminated against or that they can expect that they will be mis-gendered. (*Transcript, Day 2, September 22, 2022, page 155, line 24 to page 157, line 10*)

Statements that deny or debate the existence of transgender individuals, hence embodying a narrative of erasure

47. In her evidence, the Respondent acknowledged that she does not believe gender identity is real, or, in other words, that she actively denies the existence of transgender individuals:

> The, the base claim of gender identity is this notion that humans have within them in their brain a gendered soul, or a gender identity, and as far as I'm concerned, that is a metaphysical claim. There is no proof that it exists. It's unfalsifiable, and it's not something -- it's not something that a lot of people believe in, but women are being told you do have a gender identity, or you're a cis-woman, and I reject it wholesale. (*Transcript, Day 17, November 3, 2023, page 1250, lines 9 to 17*)

48. Then further stating about gender identity, "I just – I frankly think that it is anti-scientific, metaphysical nonsense". (*Transcript, Day 17, November 3, 2023, page 1251, lines 8 to 9*)

49. And on cross-examination:

> Q Well, the question as I recall it put to Dr. Bauer was is anybody in that research community trying to eliminate or do away with the fact or the concept of sex?
>
> A There's a difference between doing away with the concept entirely versus making the false claim that people can identify their way in and out of it or that a category that is binary, you're male or you're female, is a spectrum, which both of those things are scientifically untrue with no evidence to back them up… (*Transcript, Day 18, November 6, 2023, page 1422, line 25 to page 1423, line 9*)

50. And, again, on cross-examination:

> Q Okay. The centerpiece of your advocacy as I understand it is to have Canadians understand that trans women, regardless of their body parts, regardless of their legal gender, regardless of what they say about their own gender identity, are actually men because there are only two sexes and you cannot change your sex. Am I correct that that's a centrepiece of your advocacy?
>
> A Every human being is either a male or a female.

> Q Are you confirming or changing what I just said? I'm not sure.
>
> A My position is that every person on this earth is a male or a female and that is not something that you can change or change through surgeries or hormones and it's not something that you can change by making a declaration that you either are or are not a certain sex. (*Transcript, Day 19, November 7, 2023, page 1477, line 24 to page 1478, line 15*)

51. The position of the Respondent that gender identity is "metaphysical nonsense" permeates the tone and substance of her public statements, embodying a narrative of erasure targeted towards a marginalized group.

52. Dr. Bauer was asked about a statement the Respondent made in an interview with CBC News, posted September 12, 2020:

> "I don't think it's possible for women to defend their legal rights or even the definition of womanhood if anybody can say they're a woman and it will be so," said Hamm who also organizes gender identity ideology events through a group known as GIBYBR. (*Extract, Appendix 6, page 92*)

53. Dr. Bauer pointed out that gender identity is about who people say they are, whether they are cisgender or transgender:

> But when we're talking about gender identity, it's identity. It's really about who people say they are, and that's true for cisgender people as well as trans people. Nobody is tested (sic) to see if I'm in fact a woman. I can say that and have that to so, so to speak. And that is kind of how gender identity works socially, it's an identity, and it's something that people expressed about themselves … (*Transcript, Day 4, October 24, 2022, page 29, line 25 to page 30, line 8*)

54. When the Respondent says transgender people cannot assert a gender identity other than their sex assigned at birth, even though the rest of the population can self-identify, she is dismissing the lives of transgender people. This is discriminatory because it is refusing to accord social recognition to one segment of the population, while according that social recognition to all others.

Statements failing to respect pronoun choice, hence misgendering individuals

55. From the evidence of Dr. Bauer:

> Q. Thank you. I'm going to move on now to tab 12 where there are a series of tweets.
>
> In your report you said that the respondent also mis-genders trans people, and you've given an example that tweets that are at 12.011 and 12.012, which are at page 111, those tweets are:
>
> > "She definitely was a lesbian rejected by her family, but then I can't remember clearly if she reconciled with her family after becoming a trans man. Also, there is an episode of Queer Eye where they do a makeover on a trans man who was rejected by a religious American family when she came out as a lesbian. IRCCC the family accepted her as trans."
>
> In your view, did those statements contribute to harm for trans people, and if so how.
>
> A. Yes. If there's repeated mis-gendering, and I'll just make a distinction here is that mis-gendering can happen accidentally and I think that's something where people will often just make a correction. Repeated mis-gendering is something that is often used to harass people or to delegitimize them to say you're not really who you say you are. In cases of repeated mis-gendering that is definitely harmful. (*Transcript, Day 4, October 24, 2022, page 46, line 17 to page 47, line 17)*

Statements misstating the current understanding of sex and gender

56. From the cross-examination of Dr. Saewyc:

> Q. So I'm going to ask you about the way Ms. Hamm uses the word "woman" in public speech. So you say that when Ms. Hamm uses the word "woman" and says it excludes male to female transgendered persons, she is using the word "woman" disrespectfully. Is that what you say?
>
> A. When she uses the term "woman" and explicitly states that it does not include trans women but in fact asserts that it only includes women whose sex is assigned at birth -- and she doesn't clarify that she's only talking about them for a particular purpose, but if she actually is saying "when I say 'women,' I don't mean these people as well," she's -- in the things that I read, it was clear that she was conflating gender, being a woman, with sex assigned at birth or sex as a female, and -- and, therefore, in saying that trans women cannot be women, she's sort of conflating sex and gender, and that's inaccurate…

> And because in repeated times and places, it said within the context of speech that seems – that would appear to be not just assertive, but also -- I'm not sure what the right word is. It's disrespectful. Or -- or intentionally negative or mocking. Then it would seem to me that this is using the term intentionally disrespectfully. (*Transcript, Day 2, September 22, 2022, page 104, line 11 to page 105, line 14*)

57. Dr. Bauer was asked about an interview the Respondent did on September 14, 2020, on You Tube, "The Same Drugs Live with Amy Hamm on I heart JK Rowling". (The below excerpt from the interview can be found in the Extract, S3, Exhibit 8 Transcription, beginning at page 6, 8.63.)

> Q. At 8.63 the interviewer says:
>
> "I mean, maybe you can explain a little bit more to people in the comments, like, somebody's asking why do you care about gender. But I think I mean -- I think obviously you're talking about this all the time but it's like I think that the main part of the issue is that people don't understand the difference between sex and gender. So they don't understand that, you know, when we're talking about sex we're just literally talking about body's biology, and when we're talking about gender we're talking about things like social construct, these gender roles, these like stereotypes. But I mean people I think will ask things like, well, why can't we have both? Like, why can't we protect women's rights and also protect people who identify as the opposite sex or identify as transgender gender, so on and so forth. Like, why are we having an argument about this?
>
> And Ms. Hamm's response is:
>
> "Yeah, I mean, if you're a feminine man you should be protected on the basis of your sex. I don't know why -- there's no reason why you should have to be recognized literally as a woman, or legally as a woman to have the legal protections. Yes, I think our sex covers discrimination, it just kind of muddies the water to add gender. When you add gender it renders sex meaningless."
>
> Dr. Bauer, looking at that comment of the respondent, is that comment harmful – likely to be harmful or contribute to harms experienced by trans people or -- if so, why?

A. So in this one she's referring to transwomen as feminine men. I think that's clear. If you're a feminine man you should be protected. I don't know why -- there is no reason you should have to be recognized literally as a woman to have legal protection. So she's saying that the people who we are currently recognizing as women are in fact feminine men and that that should be protected under sex, which is interesting because if we were to look at femininity in cismen, the femininity is gender expression, right? Being a feminine cisgender man really brings together a combination of sex and gender for which people can be discriminated on.

But in this case -- so that protection, it's a combination of sex and gender in and of itself. But in fact here she's referring to transwomen as feminine men, and so that again is -- it's disallowing the possibility of trans people existing. It's saying you're not who you say you are, you're a man. I'm going to define you as a man. And that's who you are, you're a feminine man.

I don't see how it muddies the water to add gender to sex. I think it actually makes it more meaningful because when we look at discrimination, sometimes it's the more masculine female people or it's the more feminine male people, whether they're transgender or cisgender who are discriminated against because of the way that their gender is expressed relevant to the sex-based characteristics of their body.

So actually I think adding gender to sex is tremendously meaningful. It doesn't muddy it, it better describes, I think, some of the complexity about how discrimination happens and how protections are needed. (*Transcript, Day 4, October 24, 2022, page 76, line 5 to page 79, line 2*)

<u>Statements that cast transgender people as immoral or bad, for example stereotypes that they are dangerous and predatory</u>

58. From the evidence of Dr. Bauer:

Q. Is there any evidence of which you're aware of cisgender men dressing as women to go into gendered spaces for the purpose of harming --

A. -- if we're talking about research, no.

Q. Yes.

A. No. There's a long history of violence by cisgender men and some of that has occurred obviously in gendered spaces. (*Transcript, Day 4, October 24, 2022, page 40, lines 9 to 16*)

59. Dr. Bauer was asked about an interview the Respondent did on October 19, 2020, with The Line, "Q&A: Why I bought an "I Love J.K. Rowling" billboard in Vancouver". (The interview can be found in the Extract, Appendix 10, beginning at page 103.)

Q. [Interviewer] … I can understand why people who are on the transgender side of this particular debate would be angry at J.K. Rowling for insinuating that self-identity laws create the implication that transgender people are predatory or are seeking to harm women when in fact the opposite is usually true."

Ms. Hamm responds:

"I think the problem with that reasoning is that a lot of people who are feeling that way are basing what they have heard other people saying what J.K. Rowling said rather than her actual words. So if you were to read her essay about why she got into the sex and gender debate she specifically and clearly states that trans people deserve protection, and she's not suggesting that they are predatory people. She's suggesting that men as a sex class can take advantage of self-identification laws, and that is the crux of the issue. It's not trans people. It's the people that will take advantage of self-identification laws."

In your opinion, is that response by Ms. Hamm likely to cause or contribute to harm to transgender people.

…

A. Well, since the hypothetical of presumed cisgender men using the system loophole to be able to do something that remains criminal, is currently criminal, will be criminal, is enough of a reason to deny rights to trans people who are in very real ways excluded from society. So we're failing to address a very real document at issue and arguing that it's because of a hypothetical undocumented risk.

So is that harmful? Yes, it's saying that that fear of that risk is saying that we don't have research on (indiscernible) and that cisgender men have not needed as a loophole to attack women. That fear of that is so great that that overrides the very real safety needs and very real trans people

that have been documented and have been documented to have adverse effects on health. (*Transcript, Day 4, October 24, 2022, page 41, line 1 to page 43, line 11*)

Q. Thank you. At page 105 in that article there is this exchange:

"Question. Do you think that there's a real substantive threat to women brought about by -- I presume we're talking about cisgender heterosexual predatory men abusing self-identification to gain access to female spaces?" Does that seem like one of the bigger threats in the overall scheme of things?"

"Answer. There have been allegations of female prisoners who are arguably the most marginalized people in this country being sexually assaulted by biological males who are housed with them in a female prisons. We have seen Vancouver Rape Relief used to de-grant funding because they don't admit biological males into their rape shelter. We've seen another rape shelter in Vancouver with, and I'm assuming a trans-identified person, posting sexual pictures of themselves talking about the other women at the rape shelter, and we've seen the way that women's sports have been impacted by self-identification as well. So yes, I do think there's a real threat."

Looking at the response that Ms. Hamm gave to that question, is her response likely to harm or contribute to harm to transgender people and, if so, in what way?

A. First of all, I have to parse out since there's a lot going on in that response in terms of prisons, in terms of rape (indiscernible), in terms of sports.

So it's implying that having transwomen with cisgender women is itself a risk to cisgender women so that an entire class of people is in fact dangerous to cisgender women, rather than holding individual people accountable for their actions.
And I know that within prison systems there's a lot of violence that happens in prisons and there are ways that people are held accountable for that are separated out for that, whether that is addressed and dealt with.

But implying that the housing of any transperson in a prison where cisgender women is going to be a risk to cisgender women is about making assumptions about trans people that are not normal,

potentially violent and predatory, and their existence within the same space poses a risk to cisgender women. So yes, that's an idea that is harmful.

…

In terms of sports, again that's a different issue as well, and it's just a mention so it's just kind of lumped in here. But there haven't been safety concerns that I think have even been raised in terms of fears around sports. It's then an issue of competitive advantage in terms of decisions around that, and that is something that -- bringing it up in the context we're talking about violence might imply that that is being considered as a safety issue as well, when it's not, or it could just be lumped in here in terms of self-identification.

And we haven't talked much about sports, but it's not as (indiscernible) as self-identification issue, at least in competitive sports. There are other requirements around dimensions of sex. I'm not a hundred percent sure why that's -- in here. (*Transcript, Day 4, October 24, 2022, page 43, line 12 to page 46, line 16,* emphasis added)

Statements about "trans activists" in which their intelligence is denigrated or their motives questioned

60. From the cross-examination of Dr. Saewyc:

Q. Okay. So, for instance, at one point in the materials you reviewed, she says something like -- I don't have it in front of me, but it's something like "trans activists have half a brain." Do you recall that Twitter comment?

A. It sounds familiar.

Q. That's obviously disrespectful to trans activists.

A. Yes.

Q. Yes. But is that necessarily disrespectful to all transgendered persons?

A. No. Not necessarily. Well, unless all trans persons were trans activists, and they're not. (*Transcript, Day 2, September 22, 2022, page 105, line 15 to page 106, line 1*)

61. In answering a question regarding her tweet found in the Extract, Tab 12, tweet 12.058, the Respondent testified:

> … So what I've also noticed in even my own social circle is that there can be males who agree with you and espouse the same ideas that gender critical women do and they don't, they don't get, quote/unquote, "cancelled" or blacklisted. They don't lose their friends in the same way that women do.
>
> So to my mind, I think that just draws attention to the fact that a lot of what is driving trans activism is misogyny, anti-feminism and, yeah, just hatred of women. (*Transcript, Day 17, November 3, 2023, page 1320, lines 10 to 20*)

62. And in regard to a question on cross-examination about who trans activists are:

> Q … I'm not sure first of all who you are referring to when you say trans activists.
>
> A I'm referring to a large group of people, both some people are -- some of them are trans people and most of them are not, who promote gender ideology and promote the implementation of self-ID laws and have fought for legislation like bill C-16. [Bill C-16 amended the *Canadian Human Rights Act* in 2016 to add gender identity and gender expression to the list of prohibited grounds of discrimination.]
>
> I would also say the Pritzker family that employs Dr. Greta Bauer and they're a billionaire pharmaceutical family, and they've opened a lot of gender clinics. I would also classify them as trans activists. (*Transcript, Day 18, November 6, 2023, page 1421, line 22 to page 1422, line 7*)

63. The Respondent lumps together as "trans activists" all members of society who wish to see the advancement of protections for a marginalized population (such as the Members of Parliament who voted 248 to 40 for Bill C-16), those who fund or engage in health-related research regarding transgender people, and all those who provide gender affirming care within our health care system.

<u>Statements that refer to "gender wars" or equivalent</u>

64. In an interview the Respondent did on October 19, 2020, with The Line, "Q&A: Why I bought an "I Love J.K. Rowling" billboard in Vancouver", Ms. Hamm stated that "she has

been involved with the "gender wars" for several years as one of the founders of Gender Identity YVR (GIDYVR)". (*Extract, Appendix 10, at page 102*)

65. Ms. Hamm was interviewed by Meghan Murphy on her YouTube channel in a live stream entitled *The Same Drugs: Live with Amy Hamm on I <3 JK Rowling* on September 14, 2020. In introducing herself, Ms. Hamm stated, "And I also have been involved in kind of like the Gender Wars for quite a few years now." (*Exhibit 27, College's Supplementary Materials Vol. 1, Exhibit 8 transcription, page 1*)

66. The Respondent's framing of her advocacy as being involved in gender wars belies her assertions that her advocacy is intended to open a discussion in society or that she is simply engaging in a legitimate and permissible debate.

<u>Identifying as a nurse while engaged in advocacy</u>

67. Dr. Bauer was asked about an interview the Respondent. Hamm did on September 14, 2020, on You Tube, "The Same Drugs Live with Amy Hamm on I heart JK Rowling". (The below excerpt from the interview can be found in the Extract, S3, Exhibit 8 Transcription, beginning at page 1, 8.15.)

> Q. … The first part I would like to read to you is at 8:15. The interviewer has asked Ms. Hamm to identify herself.
>
> "I'm Amy Hamm. During the daytime I'm a nurse and outside of work I'm a mom, and I also have been involved in kind of like the gender wars for quite a few years now. First, just online and then I started doing GIDYVR with Holly and Megan. And since then I've been involved in some other initiatives like caWsbar, which is Canadian Women's Sex-Based Rights, a non-partisan coalition that wants to protect women's sex-based rights in Canada. And I sometimes do freelance --" pardon me "-- and I sometime does freelance writing, usually about gender and like feminism and, yeah, and then most recently I rented a billboard with a friend of mine named Chris Elston and just it said 'I heart J.K. Rowling'."
>
> In your opinion, Dr. Bauer, what message is a transperson likely to draw from that portion of the interview?

A. We came together being a nurse and being involved in what she calls the gender wars and then listing out a long series of commitments, including self-purchasing a billboard and being involved in various organizations. She's linking together nursing with involvement in what she calls the gender wars.

Q. And what would a transperson be likely to take from that?

A. Well, I talked a little bit about some of the issues with access to healthcare and with the ways that concerns others being treated poorly, anticipated concerns regardless of whether that actually happens, but anticipating those concerns are a major barrier for access. And so having someone position themselves as a healthcare professional while demonstrating a really very, very deep involvement in work that opposes trans rights or positions that is detrimental to cisgender women and girls is -- it's a level of commitment that suggests that that's incredibly important to the healthcare professional and it would make people concerned that they are going to be treated fairly. (*Transcript, Day 4, October 24, 2022, page 73, line 2 to page 74, line 23*)

Statements about access to services and safe spaces

68. From the evidence of Dr. Bauer:

Q. Is it possible, or logical perhaps is the better word, is it logical to say I support rights for trans people but I do not support the right for transwomen to participate in gendered spaces such as rape crisis centres or washrooms?

A. … And so because we do have spaces that are gendered there needs to be safe participation within that, and so I do think it's transphobic to say that trans people should not be allowed to participate in public life in the ways that people generally do. And of course when we talk about access to services that's another area that's incredibly important. Everybody needs equitable access to health and social services.

Q. What would be the consequence for transwomen if they are not permitted access, for example, to gendered spaces like rape crisis centres? What would happen in their lives?

A. Well, transwomen are -- unfortunately they experience high levels of violence, and that's something that is well documented. And we

have a system that is set up where a lot of the spaces around (indiscernible) are also gendered spaces.

I mean, my concern is that everybody have somewhere that they can go to get their needs met and to access services. That doesn't exist in another manner so a lot of people would not be able to access those services. (*Transcript, Day 4, October 24, 2022, page 31, line 4 to page 32, line 19*)

Statements about self-identification legislation

69. Turning again to the interview of October 19, 2020, with The Line, "Q&A: Why I bought an "I Love J.K. Rowling" billboard in Vancouver". (*Extract, Appendix 10, at page 102*), a portion of which was put to Dr. Bauer:

Q. Thank you. At page 106 the interviewer asks that:

"It's tough for me to read this billboard. You can read it as showing solidarity with J.K. Rowling or you can also read it as trying to generate attention off of issues that I think transgender rights activists would claim is their wellbeing or sense of personal safety, security in society. How would you respond to that kind of criticism?"

The respondent responds by saying:

"I completely disagree. Rowling and myself and other women who have spoken out about gender identity, ideology have consistently made it clear that we support equal rights for transgender persons. We don't want to suffer discrimination. We would like them to live their lives in peace and security.

That's not the issue for us. The issue is the way that self-identification legislation impacts the rights of women and children."

…

Q. In Canada what is -- what do you understand the reference to be to self-identification legislation?

A. We don't usually use that language. I think a lot of materials that I've seen come from the U.K. I think.

Q. Hm-hmm.

A. They have a different process where they have some gender recognition certificate or some kind of policy that is different than what we deal with in Canada.

Q. In Canada, as far as you understand, are people able to obtain, for want of a better term, carry documents such as their certificates, driver's licences and so on, that reflect their gender identity as opposed to their sex assigned at birth?

A. They are, and that's something that -- and it would have developed multi-conventionalities of people can do that based on different criteria. I know for driver's licence in Ontario, somebody being a psychologist or doctor just has to say it's appropriate for you, and so that doesn't necessarily mean it's based on gender identity. It could be appropriate for safety because of your gender presentation. So it's not encoded in exactly that way around gender identity, and I know that the processes are different across different types of documents in Canada, and many of those documents are provincial and some are federal and the process for changing that varies across the different types of documents. But yes, in every province and territory and at the federal level it is possible to change them.

Q. In your research is there any evidence that the ability in Canada to change carry cards to reflect gender identity or, as is otherwise appropriate, harms the rights of women and children, cisgender women and children?

A. There's no evidence that I know of. (*Transcript, Day 4, October 24, 2022, page 37, line 18 to page 40, line 8*)

70. The Respondent claims to support human rights for transgender people while at the same time advocating against a central human right claimed by them: respect for their gender identity and the right to participate in gendered spaces. Underpinning her opposition to participation in gendered spaces is a fear of harm to cisgender women by transgender women, when there is no evidence of such harm.

Statements about nursing education

71. Dr. Bauer was directed to specific tweets of the Respondent (*Extract, Appendix 4, at page 89, tweets 4.23 and 4.24*)

Q. … Ms. Hamm says:

“I feel like there’s a vast untapped outrage for trans activists in medical textbooks. FYI, the activists do get away with inserting a lot of this crap into nursing education, precisely because nursing education is far less rigorous than medicine and contains large amounts of social science contents. I studied nursing a decade ago and already there was an infiltration of this stuff. For instance, I had to take a whole class on intersectionality and it was bogus."

Q. In your opinion does it harm or contribute to harm for trans people to reject social science information about trans people as part of nursing education?

A. I can speak to health care education more broadly, I think. I think in my evolvement has been more medical education within nursing education, and it becomes important to bring social context into that -- social context, and also because social context plays a role in access to health care, which is not just about funding policies and being able to access, but it's about removing barriers to access health care in a way that allows people who might be less inclined to access the health care, might have less trust in the system or might have structural barriers around costs or transportation to be able to answer that, or to be able to access that, sorry. So social sciences or social knowledge is a key part of understanding how (indiscernible) is affected and also ensuring that there is equitable access to nursing and other health services.

Q. Is the view that you've expressed a mainstream view within medical education?

A. It is. Yes, it's very mainstream. You'll find chapters in books about that. You'll find a lot of research that reinforces the importance of understanding social context for patients.

Q. What impact, if any, do you think this treat (sic) would have on a transperson who read it and needed medical care?

A. I think that based on research, avoidance of care and on barriers to health care access there is a real role of anticipated discrimination, that's why there is avoidance of situations because of the expectation of poor treatment in health care settings. And that's not something that's unique to nursing. That can come from nurses, it can come from doctors, it can come from occupational therapists, administrative people as well. But I think when people are positioning themselves as health care professionals and then saying that people's concerns are not legitimate then their issues should not be included and there shouldn't be training on that.

> When that training is part of what has made health care systems more welcoming for trans people and for other groups of people, it's part of undoing the erasure that we talked about in my first day of testimony. That has the potential to increase avoidance of health care settings or to reinforce those barriers to health care because it affects people's expectations of the care that they are going to get and how they are going to be treated. (*Transcript, Day 4, October 24, 2022, page 49, line 9 to page 51, line 25*)

BILLBOARD

72. The Respondent was a co-organizer and funder of the "I [Heart] JK Rowling" billboard which was erected on Hastings Street in Vancouver on September 11, 2020. The billboard had no images: the entire text was "I [heart graphic] J. K. Rowling".

73. J.K. Rowling is a British novelist. The billboard was a reference to an article about transgender people that J. K. Rowling published on June 10, 2020, (J.K. Rowling Writes about Her Reasons for Speaking out on Sex and Gender Issues) in which she argued that although most transgender people are not dangerous, recognition of transgender rights offers an opportunity for men to assume a female identity in order to harass women:

> It's been clear to me for a while that the new trans activism is having (or is likely to have, if all its demands are met) a significant impact on many of the causes I support, because it's pushing to erode the legal definition of sex and replace it with gender.
>
> And
> When you throw open the doors of bathrooms and changing rooms to any man who believes or feels he's a woman – and, as I've said, gender confirmation certificates may now be granted without any need for surgery or hormones – then you open the door to any and all men who wish to come inside.
>
> And
>
> [the trans movement] ...is doing demonstrable harm in seeking to erode 'woman' as a political and biological class and offering cover to predators like few before it. I stand alongside the brave women and men, gay, straight and trans, who're standing up for freedom of speech and thought, and for the rights and safety of some of the most vulnerable in our --"community including "-- and women who are reliant on and wish

to retain their single sex spaces. (*Supplementary Materials – Volume 1, Tab 7, pages 133, 136, 137 respectively*)

74. Dr. Bauer was questioned about J.K. Rowlings views:

> Q. Taken as a whole, do views like the ones that Rowling has expressed in her article contribute to harms experienced by trans people and, if so, why or how?
>
> A. … I think when I look at harms against trans people I'm coming from a perspective of health. I'm looking at mental health, I'm looking at suicide risk. I'm looking at access to services and to participation …
>
> Q. Then…
>
> A. … effects of life, because that's the area that I focus on, right, and the things that I think people generally agree are important.
>
> I think statements like some of the ones she makes do portray transwomen as a risk to other people, like as a group. And so -- you know, when we look at transphobia and how it affects trans people's mental health some of the things we include in that are hearing that trans people are not normal, for example, and positioning trans people as a group as potential predators and as a risk to cisgender women and girls I think falls very much within the realm of saying trans people are not normal, in fact not safe, dangerous, you know, sick, so I think that is potentially harmful. (*Transcript, Day 4, October 24, 2022, page 21, line 20 to page 22, line 21*)

75. Dr. Bauer also testified that there is no evidence of the putative harms Rowling describes: no evidence that cisgender women are at risk from transwomen in washrooms or in prisons or in other gendered spaces. In fact, her evidence was that though there was no evidence that cisgender women were at risk of harm from transwomen, there is significant evidence that transwomen are harmed by policies or practices excluding transwomen from gendered spaces:

> I'm not sure how you support trans rights and you don't support someone's access to urinate which you need to do multiple times during the day… Broader infections is a result of that. That's a very, very basic right. (*Transcript, Day 4, October 24, 2022, page 31, lines 9 to 16*)

76. Dr. Bauer testified that the billboard in Vancouver would have been understood by people in the transgender community as agreeing with what J.K. Rowling was saying at that point:

> Q. How would that billboard have been understood by people in the trans community?
>
> A. It would've been understood as reiterating or agreeing with what J.K. Rowling was saying at that point and potentially also some of what her supporters were saying. (*Transcript, Day 4, October 24, 2022, page 23, line 23 to page 24, line 3*)

77. The billboard was up for approximately 30 hours, after which it was covered for violating the billboard owner's policies. The Respondent tweeted a picture of herself by the billboard on September 12, 2020. (*Exhibit 2, Affidavit of Aisha Ohene-Asante, page 102*)

78. In an attempt to keep the owner from taking the billboard down, the Respondent co-authored a letter to the owner in which she admitted to being a co-sponsor of the billboard. This letter was posted to her twitter account on September 12, 2020.

79. That letter said, in part, "J.K. Rowling is not transphobic and neither are we. Like her, we are concerned about the impact of gender identity ideology on the rights of women and girls. We believe most Canadians recognize that 'woman' is a biological reality rather than a feeling." (*Exhibit 2, Affidavit of Aisha Ohene-Asante, page 90*)

80. Asked about the impact of that statement, Dr. Bauer pointed out that the letter clearly excludes trans people from categories of 'women' or 'girls'. (*Transcript, Day 4, October 24, 2022, page 26, lines 7 and 8*)

81. The billboard garnered considerable attention and as a result the Respondent was interviewed by a number of media outlets: 2020 09 12 CBC article (*Exhibit 2, Affidavit of Aisha Ohene-Asante, page 91*); 2020 09 12 Georgia Straight article (*Exhibit 2, Affidavit of Aisha Ohene-Asante, page 95*); 2020 09 16 The Line article (*Exhibit 2, Affidavit of Aisha Ohene-Asante, page 101*). In each of these articles, the Respondent acknowledges co-sponsoring the billboard and in The Line article is identified as a "health-care worker".

82. The Respondent was interviewed by Meghan Murphy on her YouTube channel in a live stream entitled *The Same Drugs: Live with Amy Hamm on I <3 JK Rowling* during this time,

specifically on September 14, 2020. This interview is also available on Ms. Murphy's Same Drug podcast available on Apple podcast, Spotify and other podcast providers. In the interview, the Respondent introduces herself as a nurse and the billboard is discussed. (*Exhibit 27, College's Supplementary Materials Vol. 1, Tab 3, Exhibit 8 transcription, page 1*)

83. The Respondent's decision to co-sponsor the billboard at that time, which she knew or ought to have known would be understood by many in the transgender community, and in the community at large, as discriminatory towards transgender people, was intentionally provocative, aimed at securing a wider audience for her advocacy, and in keeping with her "gender wars" stance. As with her other prolific statements, the Respondent tied her personal views and advocacy to her professional designation.

84. It is the College's submission that, in light of the legal and public policy factors discussed above, along with the range of discrimination and harms transgender people face as articulated by Dr. Saewyc and Dr. Bauer, the Respondent's statements, including the billboard, must be found to be discriminatory and derogatory regarding transgender people. They are precisely of the character held to be discriminatory in *Oger* and *Nelson*. To paraphrase *Kempling BCCA*: Such a conclusion is unassailable.

THE RESPONDENT'S EXPERT EVIDENCE

85. Both Dr. Saewyc and Dr. Bauer testified at length as to how the Respondent's statements were discriminatory and derogatory towards transgender people. None of the Respondent's experts provided contrary evidence regarding specific statements by the Respondent.

I. Dr. James Cantor

86. The Respondent called Dr. Cantor to address the evidence of the College's experts. Dr. Cantor's evidence as an 'expert' should be rejected for any of several reasons, including:

(a) Bias

(b) Unreliability. His report and evidence:

(i) are logically unsupportable,

(ii) go beyond any underlying evidence, and

(iii) do not engage with the issues in this case.

a) Bias

87. *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] is the leading Supreme Court of Canada case on bias in an expert and, at paragraph 32, is unequivocal:

> Underlying the various formulations of the duty are three related concepts: impartiality, independence, and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. **It must be unbiased in the sense that it does not unfairly favour one party's position over another**… [Emphasis added]

88. Rule 11-2(1) of *the* B.C. Supreme Court Rules captures this duty for civil proceedings: In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

89. The Panel, by its ruling of October 27, 2023, permitted certain portions of Dr. Cantor's report to be admitted into evidence. However the College says that Dr. Cantor's testimony demonstrates a disqualifying bias: he is an advocate, rather than an objective expert.

i. <u>Dr Cantor is an Advocate, not an Expert</u>

90. In direct examination Dr. Cantor testified that he was accepting payment for his role in this case at a rate half of his usual fees. (The panel's ruling on the admissibility of evidence about Dr. Cantor's reduced fees can be found at Transcript, Day 17, November 3, 2023, page 1177, line 14 to page 1179, line 21.). Asked why he did so, Dr. Cantor replied:

> Because there have been so many -- a combination of things. One is the, the fees are greatly different between the U.S. and Canada. I had already had, you know, very many such cases in the, in the U.S. The money wasn't really important to me at this point exactly because there have been so many cases in the U.S. What was important to me was that Canada was not discussing this issue the way the U.S. did and so this case appeared to be a means of bringing it to broader, to broader attention.
>
> So it was -- as I say, so **it was worth just to bring the issue to where it can be discussed up here where, from my point of view, much of Canada, however well intentioned, is violating its own -- our own principles.**
>
> **As I say, for a lot of these issues, countries with philosophies supporting national public healthcare systems have gone, you know, in the opposite direction as the U.S. But for whatever reasons, Canada's doing things the American way and not in a way that aligns either with our usual basic social principles up here or with the science.**
>
> I'm also in a relatively novel position that none of this affects me. I have for -- really just by quirk of history, nothing can happen to me. I'm immune. I've already, you know, left, you know, the hospital where I was working, so I am able to provide what the science is and not be strongly affected by people's emotions around it. It left me with a -- left me being in a situation where if I didn't help bring this discussion, no one in Canada could. (*Transcript, Day 17, November 3, 2023, page 1180, line 7 to page 1181, line 12*) [Emphasis added]

91. Dr. Cantor's explicit agenda in this case is not to offer independent advice to the Panel, but to impact the direction of Canada's approach to transgender issues. The tone of his report is consistent with his stated agenda; he is sarcastically dismissive of views different from his own.

92. For example:

> Social media voices today loudly advocate "hormones-on-demand" while issuing hyperbolic warnings that teens will commit suicide unless this is not granted. Both adolescents and parents are exposed to the widely circulated slogan that 'I'd rather have a living son than a dead daughter', and such baseless threats and fears are treated as a justification for referring to affirming gender transitions as 'life-saving' or 'medically necessary'… (*Exhibit 37, Expert Report of Dr. James Cantor, paragraph 45)*

93. In his evidence he is dismissive, if not contemptuous, about transgender people, treating their very identities as illegitimate. For example, in direct examination he states:

> Q So in your experience, given the jargon that you've referred to you, would you say that socially as a society there's a shared understanding of what all these terms mean?
>
> A No. No, there really isn't. In fact, there's a lot of indication that as soon as a term becomes known, another term, term is invented, again, almost out of rebellion against any of the prior terms. It, as I say, much more about using a current pronoun as if one were using -- or term for a gender used as a fashion statement or used as its own example that somebody has been keeping up rather than using a prior term. (*Transcript, Day 15, November 1, 2023, page 963, lines 1 to 13*)

94. Dr. Cantor's view – offered as an expert opinion – mirrors the dismissive approach to recognition of the identities of transgender people that was held to be discriminatory in *Nelson*. (See paragraph 31 of these submissions)

95. Dr. Cantor's advocacy agenda is also evident from his testimony in U.S. cases. He has testified in cases, for example, that:

a) Transgender girls should be banned from participating on girls' sports teams (*BPC v. West Virginia State Board of Education*, Civil No. 2:21-cv-00316),

b) A law requiring all washrooms to be designated 'M' or 'F', and to be used according to the gender designation on a student's birth certificate, was appropriate (*Bridge v. Oklahoma State Department of Education*, Civil Action No. CIV-22-787-JD), and

c) A directive stating that medically necessary health care for young patients with gender dysphoria should be considered a form of child abuse, was appropriate (*PFLAG v. Texas (aka PLAG v. Abbott*), No. 03-22-00420-CV and 03-22-00587 (Texas Court of Appeals).

96. All of those situations would, in Canada, constitute violations of the human rights of transgender people. Importantly, although Dr. Cantor claims that he is just "bringing the science" for decision makers in those cases, there is nothing in his education or experience that qualifies him to give opinions about those issues. With respect, Dr. Cantor is trading – and, as addressed under the next heading, is making a profession of trading –

on his training and experience in other areas, to advance a specific agenda regarding transgender persons. This is bias.

ii. Financial interest

97. In the past two years Dr. Cantor has discovered a lucrative alternative to working in private practice as a clinical psychologist. He has earned his income solely as an expert for hire, an occupation which has doubled his income. (*Transcript, Day 13, October 25, 2023, page 727, lines 4 to 7*)

98. Dr Cantor has testified in more than two dozen cases about issues impacting transgender people in the U.S., always in defence of laws or policies limiting the rights of transgender people. (*Transcript, Day 12, October 24, 2023, page 604, line 257 to page 605, line 4*)

99. Dr. Cantor's full-time job is now to assist those seeking to limit transgender rights. He has a vested and personal interest in persuading the Panel – that is, in advocating for his position – as his future remuneration depends on demonstrating to other prospective clients that he has a good "track record". This, too, is an indicator of bias.

b) Unreliability

100. Dr. Cantor's report and evidence are unreliable, because:

i. his evidence is internally contradictory,
ii. he expresses opinions without a factual foundation, and
iii. his report and his evidence are unresponsive to the questions he was asked.

i. Internal inconsistencies

101. Dr. Cantor's report is replete with inconsistencies or incompleteness. To begin with, Dr. Cantor is inconsistent about central concepts in his evidence, which are also central concepts in this hearing: sex, gender identity, and sexual orientation.

'Sex'

102. In considering the concept of 'sex', Dr. Cantor asserts that "assigned male at birth" and "assigned female at birth" lack scientific validity because sex is determined as either male or female at conception. (*Exhibit 37, Expert Report of Dr. James Cantor, paragraph 22*). Yet, in the following paragraph, he acknowledges the existence of people who are intersex or have differences of sex development. The existence of people with DSD's [disorders or differences of sexual development] contradicts Dr. Cantor's assertion that sex is unambiguously male or female. In addition, he does not address Dr. Bauer's careful outline of the components of the concept of sex and the question of whether sex is determinable before birth. (*Exhibit 13, Expert Report of Dr. Greta Bauer, page 7, definitions, page 8, answer to Question 2, and Transcript, Day 4, October 24, 2022, page 126, line 23 to page 128, line 14*)

Sexual orientation

103. Dr. Cantor says that sexual orientation is different from gender identity because sexual orientation can be 'objectively' determined, referencing brain imaging studies on gay men (*Exhibit 37, Expert Report of Dr. James Cantor, paragraph 25*). Yet, in the same paragraph, he offers no references for the proposition that lesbian women's sexual orientation has the same etiology; nor does he even mention bisexual people. The result is that he relies on a comparison – between gender identity and sexual orientation – that holds only for some of his comparator group, an argument that patently lacks intellectual integrity.

Gender Identity

104. Dr. Cantor asserts that gender identity is an atypical sexuality, as is sexual orientation:

> THE CHAIRPERSON Okay. So do you include the term "gender dysphoria" under the umbrella of atypical sexuality?
>
> A Yes, yes, I do, broadly. But at the same time, especially in the past decade or so, people have been using it, you know, in different contexts to mean different things. I include it, again, because gender dysphoria is one of the phenomena that, that happens to people with atypical sexualities, as I say, such as be having an atypical sexual orientation, or a paraphilic interest. Because the gender dysphoria is motivated by an

atypical sexuality, it's really just labelling an aspect of the experience.
(*Transcript, Day 13, October 25, 2023, page 739, lines 5 to 18*)

105. Dr. Saewyc and Dr. Bauer do not treat gender identity as a sexuality, and certainly the law does not, distinguishing between discrimination on the basis of sexual orientation and discrimination on the basis of gender identity.

106. Then, later, Dr. Cantor states that sexual orientation and gender identity are different, because there are no objective indicators that gender identity has a physical component, despite having brain scan evidence about sexual orientation relating only to gay men. Dr. Cantor asserts that gender identity is not 'real' because it is not discernible in the brain yet dismisses the evidence of brain differences in transgender people as being "something different". (*Transcript, Day 14, October 31, 2023, page 865, lines 15 to 25*)

107. Whether or not there are discernible differences in the brain relating to gender identity is not, contrary to what Dr. Cantor asserts, determinative of whether gender identity is 'real'. It is a patent error to suggest that a phenomenon must be independently verifiable. If that were the case, all studies of pain – to take just one example - would have to be discounted. And, following Dr. Cantor's 'logic', only gay men, but not bisexual people or lesbians, would 'really' exist.

108. In relation to gender identity, Dr. Cantor, in paragraphs 28 and 29 of his report, describes only "late-onset" and "early-onset" (defined as pre-pubescent) transgender people, ignoring entirely the group of trans-identifying adolescents, and nonbinary people, though those groups are discussed in the reports of Dr. Bauer and Dr. Saewyc, and in the evidence of Dr. Bauer. (*Transcript, Day 6, October 26, 2022, page 6, line 25 to page 8, line 10)*

109. However, Dr. Cantor later refers to adolescents who identify as transgender, as at paragraph 45 of his report.

110. The result is that it is frequently unclear which population of transgender people Dr. Cantor includes, or excludes, in his discussion. For example, in paragraph 48 of his report he states in part, “No methodologically sound studies have provided meaningful evidence that medical transition reduces suicidality in minors”. Do those minors include the early-onset transgender people Dr. Cantor discusses in paragraph 29, or only those who identify as transgender for the first time as adolescents? And does his statement include transgender people who identify as nonbinary, or not?

111. Dr. Cantor asserts that a difference between gender identity and sexual orientation is that there are not substantial numbers of people who regret coming out as sexual minorities. (*Exhibit 37, Expert Report of Dr. James Cantor, paragraph 36*) Yet he offers no research in support of this surprising proposition.

ii. Methodological claims

112. As a critique of the work of Dr. Saewyc and Dr. Bauer, Dr. Cantor asserts that surveys are the lowest level – the least reliable – form of evidence:

> … Just putting out a survey on the internet, whoever wants to answer the survey can answer the survey. And people who claim to have whatever kind of background, claim to have whatever kind of background. And the scientist, you know, just runs the numbers saying, "People who say they experienced this also say they experienced that," and we have a correlation. (Transcript, Day 14, October 31, 2023, page 833, lines 2 to 9)

113. Dr. Cantor in effect dismisses without comment the entire field of epidemiology, with its careful and nuanced methodology of studying social phenomena. That methodology does not rely on ‘whoever wants to answer the survey’ but instead on sophisticated methodologies to identify and select respondents and to analyze the results. (See Dr. Bauer’s explanation of epidemiology at Transcript, Day 3, September 23, 2022, beginning at the bottom of page 43.)

114. Dr. Cantor then goes on to rely on a study embodying the worst features of his characterization of surveys. He references what he characterizes as “a peer-reviewed

study by Dr. Lisa Littman", "Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria"[6] to talk about adolescents with gender dysphoria, so-called Rapid Onset Gender Dysphoria (ROGD).

115. The article in question was based on (a) a survey, (b) drawn from responses to a questionnaire, (c) from respondents who frequented websites some of which opposed transition, and (d) were of *parents* of teens with gender dysphoria, not teens themselves. The Littman study had the worst of the methodological flaws Dr. Cantor incorrectly attributed to survey studies in general.

116. Further, Dr. Cantor does not mention that the journal in which Dr. Littman's article was published, in response to methodological criticisms of the article, conducted a highly unusual post-publication review and required a republication with revisions to the title, the abstract, the introduction, the discussion, and the conclusion sections of the original article.[7]

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[6] PLoS ONE 13(8) e0202330

[7] PloS One Notice of republication (2019):

> After publication of this article [1], questions were raised that prompted the journal to conduct a post-publication reassessment of the article, involving senior members of the journal's editorial team, two Academic Editors, a statistics reviewer, and an external expert reviewer. The post-publication review identified issues that needed to be addressed to ensure the article meets *PLOS ONE*'s publication criteria. Given the nature of the issues in this case, the *PLOS ONE* Editors decided to republish the article, replacing the original version of record with a revised version in which the author has updated the Title, Abstract, Introduction, Discussion, and Conclusion sections, to address the concerns raised in the editorial reassessment. The Materials and methods section was updated to include new information and more detailed descriptions about recruitment sites and to remove two figures due to copyright restrictions. Other than the addition of a few missing values in Table 13, the Results section is unchanged in the updated version of the article. The Competing Interests statement and the Data Availability statement have also been updated in the revised version. The original version of the published article is appended to this Correction as S1 File.
>
> This Correction Notice serves to provide additional clarifications and context for the article in response to questions raised during the post-publication review of this work. https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0214157.

117. Finally, Dr. Littman herself described her study as hypothesis-generating, i.e. not evidence; yet Dr. Cantor treats the study as being evidence of the hypothesis it describes, namely 'rapid onset gender dysphoria' in adolescents. Dr. Cantor's reliance on and treatment of the study is another indicator of bias: it does not demonstrate an objective and even-handed witness, but rather one engaged in a tainted form of "cherry picking" to support a desired outcome.

118. That Dr. Cantor criticizes Dr. Bauer's evidence-based attempt to test the hypothesis advanced by Dr. Littman, without himself referencing the deficiencies in Dr. Littman's study, is intellectually dishonest.

iii. Conclusory misrepresentations

119. Dr. Cantor's argument springboarded from Dr. Littman's hypothesis of ROGD to suggest that gender dysphoria in adolescents was not 'real' but was instead a phenomenon in response to social media, noting that the increase in adolescents, particularly adolescents assigned female at birth, identifying as having gender dysphoria corresponded with the time frame during which social media came into its own.

120. Such a conclusion is a patent example of a logical fallacy which Dr. Cantor himself described: a confusion between correlation and causation. Though it may be true[8] that there was an increase in numbers of adolescents with gender dysphoria around the same time as social media use expanded, that is a correlation. That correlation does not permit a conclusion that it is social media that has caused an increase in the numbers of gender-dysphoric adolescents: in fact, in response to a question from the Panel, Dr. Cantor admitted that there was no evidence to support such a conclusion, except for the discredited study by Dr. Littman:

[8] Expressed hypothetically because some of the indicators of increase relate to who and how many people are making their way to gender clinics. Equally plausible alternative explanations include that the medical profession became more knowledgeable about gender dysphoria and made more referrals to gender clinics; or that young transgender people recognized themselves in the mirror of social media and were able to name their experience.

MS. CESSFORD: Can you point to any specific studies that indicate social media as being responsible for rapid onset gender dysphoria or adolescent onset gender dysphoria?

A I wish such a, such a research project could be done…

…

So I don't want to overstate it and say, "Aha, there it is. Here's the proof," and handover the concrete evidence. What we have is the -- this is the only explanation we have, this is the only thing that makes sense, so we kind of have to go along with it. Acknowledging alternative -- the potential existence of alternatives, we have no choice but to go along with it until we have a better, better idea.

So I guess what I'm saying is that because we can't randomly assign children to have no social media, this is as good as evidence gets.

MS. CESSFORD: Thank you for that response. I take it from your response that -- and correct me if I'm wrong, that you're not aware of any research or scientific studies that are looking at that particular phenomenon, Dr. Cantor?

A No, I would say it's stronger than that. Not strong enough that we can say responsibility, but stronger than, you know, "No studies have looked at"…

MS. CESSFORD: Okay, and we're talking about as it relates to the social media being responsible for rapid onset gender dysphoria or adolescent onset gender dysphoria, not social media in general?

A … The studies that are specific to gender dysphoria have come from parental reports where parents are reporting that the onset of gender dysphoria in adolescence has coincided with enormous amounts of increased social media use. So we have a strong correlation and really so far just one way to explain it…

MS. CESSFORD: I think you've answered my question. I just wanted to know if you can identify any research or scientific studies that you're looking at in relation to that issue?

A Sure, and the specific studies that have, I'll say gave us the "ah-hah, that makes sense," would be Lisa Littman's study which as I was describing which was the study of the parents' reports describing what was going on with their kids when their kids started expressing gender dysphoria, despite having a history. (*Transcript, Day 17, November 3, 2023, page 1200, line19 to page 1204, line 5*)

121. In fact, Dr. Littman's study does not mention social media at all.

122. Dr. Cantor's reliance on Dr. Littman's discredited 2018 article lies somewhere between disingenuous and deceptive; in either case it undercuts not only his assertions about adolescence but his qualifications as an expert versed in social science, and his objectivity.

iv. Dr. Cantor does not engage with the issues in this case

123. We have focused on only a few representative examples of the bias, the logical fallacies, the rhetorical elisions, and the impermissible advocacy which permeate Dr. Cantor's report and evidence, as to do a complete review would require an exegesis. Such an exegesis is unwarranted because at the end of the day Dr. Cantor's evidence is, in its entirety, irrelevant to the issues in this proceeding.

124. Whether gender identity is understood as a sexuality, or not; whether there are currently many more gender-dysphoric adolescents than previously, and why; whether gender-dysphoric teens are suicidal, or commit suicide, in disproportionate numbers – the answers to none of these questions impact the issues in this hearing. The issues in this hearing are whether the statements made off-duty by the Respondent while identifying as a nurse are discriminatory or harmful to transgender people, and therefore counter to the professional standards of nursing. None of Dr. Cantor's fatally flawed report and evidence bear on those issues.

v. College experts are uncontradicted

125. Dr. Cantor's report, and his evidence, fails to address the evidence of the College's experts, Dr. Saewyc and Dr. Bauer, almost in their entirety. The core evidence of the College – that the Respondent's statements are harmful to transgender people and contravene the standards of the profession - is uncontradicted, unimpeached, and must stand. Wherever Dr. Cantor's evidence differs from that of Dr. Saewyc or Dr. Bauer, their evidence must be preferred, given their extensive qualifications in relation to transgender people coupled with their fulsome, measured answers to all questions put to them, especially when compared to the paucity of Dr. Cantor's qualifications and his prevaricating, unresponsive answers.

II. Dr. Kathleen Stock

126. In the Panel's ruling on the expert qualifications of Dr. Stock, dated February 2, 2023, at paragraph 56, the Panel noted that, "Dr. Stock's expertise is also confined to a philosophical perspective on the issues she has addressed."

127. In paragraph 57, the Panel qualified Dr. Stock in narrower areas of expertise than those for which she was tendered, specifically:

> … Dr. Stock is qualified to address: (a) the use of language relating to sex and gender, including the need for sex-based language and biological sex categories, the meaning of transphobia and the risks of defining transphobia too broadly; (b) the conflict of rights from a philosophical perspective between sex-based and gender-based categorizations; (c) the impact of "self-identification" on women's rights and interests; (d) whether sex-based language exposes transgender people to serious harm; and (e) the social value of sex-based speech.

128. Dr. Stock provided her philosophical perspective in the areas she was qualified in, with, understandably, a greater focus on the situation in the UK than in Canada.

129. As a result of the Panel upholding the College's objection to Dr. Stock answering questions about the statements of the Respondent, Dr. Stock's evidence did not include any analysis of the specific statements which form the grounds for the allegation in the Citation.

III. Dr. Linda Blade

130. Following submissions on the relevancy of Dr. Blade's proposed evidence, the Panel qualified Dr. Blade as follows:

> In summary, the Panel qualifies Dr. Blade as a kinesiologist with expertise in sexual dimorphism, a former professional athlete and a professional coach who is qualified to address the first two questions set out in her report, namely ways in which women and girls are impacted by the prioritization of gender identity over biological sex in sports and how gender ideology has become so prevalent in women's sports.
>
> Dr. Blade will not be permitted to address the third question addressed in her report as it does not meet the test for necessity. (*Transcript, Day 20, November 8, 2023, page 1633, lines 13 to 24*)

131. Dr. Blade addressed the two questions from her report on which she was qualified to opine. Her evidence did not include any analysis of the specific statements which form the grounds for the allegation in the Citation.

APPLICABILITY OF THE *CHARTER* TO THE COLLEGE

132. A preliminary question is whether the *Charter* applies to the College in general and to the Discipline Committee conducting a discipline hearing in particular. In this case, the answer is yes.

133. The case of *Ross v. New Brunswick School District No. 15*, 1996 SCC 237 [*Ross*] concerned a teacher who had publicly made discriminatory statements while off duty. One of the issues was whether the imposition of a disciplinary penalty by a school board infringed upon the teacher's freedom of expression as guaranteed under section 2(b) of the *Charter*. At paragraph 66 the Court states:

> In the present case, the purpose of the Board's order, while intended to remedy the discrimination with respect to services available to the public, is to prevent the respondent from publicly espousing his views while he is employed as a public school teacher. On its face, the purpose of the order is to restrict the respondent's expression; it has a direct effect on the respondent's freedom of expression, and so violates s. 2(b) of the *Charter*.

134. The case of *Gordon v. British Columbia (Superintendent of Motor Vehicles)*, 2022 BCCA 260 [*Gordon*] is also instructive. At paragraph 53 the court states:

> The consideration of *Charter* values is not required in every discretionary administrative decision. Rather, the obligation arises when the outcome of an administrative decision limits *Charter* rights, as was the case, for example, in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32. It also arises in cases, such as this one, where a party has "squarely" raised the issue and asks the decision maker to review state conduct that is contended to have interfered with a *Charter* right: *Canada (Attorney General) v. Robinson*, 2022 FCA 59 at para. 28.

135. Without commenting on the broader question of whether the *Charter* applies to all decisions or actions of the College, the College acknowledges that in the case of a

disciplinary proceeding such as the current one where the outcome could limit the Respondent's expressive rights, the *Charter* does apply.

FREEDOM OF EXPRESSION: SECTION 2 (b) OF THE *CHARTER*

136. Section 2 of the *Charter* provides:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

137. The College acknowledges that one's freedom of expression, guaranteed under the *Charter*, is vitally important.

138. From the Supreme Court of Canada in *Ross*:

> 59 Section 2(*b*) must be given a broad, purposive interpretation; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfilment; see *Zundel*, *supra*. As Cory J. put it in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336, "[i]t is difficult to imagine a guaranteed right more important to a democratic society"; as such, freedom of expression should only be restricted in the clearest of circumstances.
>
> 60 Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee of freedom of expression; see *Irwin Toy*, *supra*, at p. 969. The scope of constitutional protection of expression is, therefore, very broad. It is not restricted to views shared or accepted by the majority, nor to truthful opinions. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be …

139. The College acknowledges that the broad interpretation afforded the freedom of expression right under the *Charter* encompasses the Respondent's statements which are at issue in this case, even if held to be discriminatory and derogatory. As such, any regulatory action directed towards curtailing the Respondent's ability to express those views while identifying as a nurse must, as a starting point, be considered an infringement of her s. 2 (b) *Charter* rights.

140. That, however, is not the conclusion of the *Charter* analysis. The question then becomes whether such an infringement can be justified under the law, which entails a balancing of the Respondent's expressive rights with the College's statutory objectives, including the broader question of ensuring equal access for all to the health care system.

DUTY OF THE COLLEGE

141. The College, like all regulatory bodies for self-governing professions, is created by statute; in the College's case the *Health Professions Act* (the Act). As with other provincial health regulators, the College's primary mandate is to govern the professions of nursing and midwifery in the public interest. This is codified in the Act:

> **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.

142. The nature of this duty was affirmed, in the context of the self-governing profession of lawyers, in the case of the *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*Trinity Western*] at para. 32:

> The legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation. In exchange, the profession must exercise this privilege in the public interest (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 36, quoting D. A. A. Stager and H. W. Arthurs in *Lawyers in Canada* (1990), at p. 31). The statutory object of the LSBC is, broadly, to uphold and protect the public interest in the administration of justice.

143. This public interest duty, flowing from the "privilege of self-regulation", extends to the College's Discipline Committee; the Panel must perform its duties in the public interest. By analogy with the mandate of the Law Society "to uphold and protect the public interest in the administration of justice", the College's mandate includes upholding the public interest and confidence in the health care system.

OFF DUTY CONDUCT

144. The next step in the analysis of the Respondent's statements and the authority for the Panel to discipline her for them is to examine the ability of a regulator to discipline off duty conduct when the regulated professional has tied that conduct to their professional designation.

145. From the Supreme Court of Canada decision in *Ross*:

> 44 By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion" (see *Re Cromer and British Columbia Teachers' Federation* (1986), 1986 CanLII 143 (BC CA), 29 D.L.R. (4th) 641 (B.C.C.A.), at p. 660); teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. Reyes affirms this point in her article, *supra*, at p. 37:
>
> > The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with the values which the education system perpetuates. [Emphasis in original.]
>
> I find the following passage from the British Columbia Court of Appeal's decision in *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 1987 CanLII 159 (BCCA), 21 B.C.L.R. (2d) 93, at p. 97, equally relevant in this regard:

> The reason why off-the-job conduct may amount to misconduct is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and other teachers generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system.
>
> 45 It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system…

146. The College submits that the above description of why a teacher's conduct may be evaluated on the basis of their position rather than where the conduct occurred, and the assertion that teachers hold positions of "trust and influence" is analogous to nurses' conduct and position in society. Like teachers, nurses are held to "high standards both on and off duty". Paraphrasing from the *Reyes* quote above, while the Respondent's statements outside her workplace may not directly impact her ability to nurse, they do conflict with the values of the health care system.

147. Further, the statement, "Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion", can be fairly translated for the purposes of the present case to: Nurses are seen by the community to be the medium for the health care message and because of the community position they occupy, they are not able to "choose which hat they will wear on what occasion".

148. The "high standards" and positions of "trust and influence" that attach to nurses are reflected in the Canadian Nurses Association, Code of Ethics, 2017 Edition, at page 4:

> It is important for all nurses to work toward adhering to the values in the *Code* at all times for persons receiving care — regardless of attributes such as age, race, gender, gender identity, gender expression, sexual orientation, disability, and others — in order to uphold the dignity of all.

149. And at page 15:

> **F. Promoting Justice**
>
> Nurses uphold principles of justice by safeguarding **human rights**, equity and **fairness** and by promoting the **public good**.
>
> ***Ethical responsibilities:***
>
> 1. Nurses do not discriminate on the basis of a person's race, ethnicity, **culture**, political and spiritual beliefs, social or marital status, gender, gender identity, gender expression, sexual orientation, age, health status, place of origin, lifestyle, mental or physical ability, socio-economic status, or any other attribute.

150. That nurses occupy a position of "trust and influence" in our society was directly addressed by Dr. Saewyc:

> Health professionals, especially nurses, enjoy a trusted status in Canadian society, and as a result, their opinions and statements wield significant influence in shaping public opinion and influencing both practice environments and people's perceptions of the care they are likely to receive in those clinical settings. When health professionals express views that deny transgender persons' identities, or discount their experiences, or refuse to use the transgender person's pronouns, it shows profound disrespect for their personhood. If they identify as nurses or other health professionals in making those statements, transgender people may assume these views are part of their professional education, or accepted professional practice, and that most or all nurses or health professionals will hold similar views…
>
> Further, when someone from a respected profession makes statements that disparages or denies the personhood of a recognizable group, that can give tacit permission to others in the community to react with prejudice or violence. (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, pages 11 and 12*)

151. The Respondent's position of trust and influence is all the greater given her role as a nurse educator. As described by Dr. Saewyc:

> Nurse educators may also have educator roles within health care settings. In BC, nurse educators in the Health Authorities are usually experienced nurses who may also have postgraduate education in nursing (such as a masters degree). In addition to direct patient care, a nurse educator's role is also to provide support to newly graduated nurses and /or to

> experienced nurses who are transitioning to a new practice area. They are often responsible for developing continuing practice education sessions to teach updates to nursing practice within a specific unit, or for developing education modules to be disseminated throughout a health region across many types of clinical settings. They may serve as preceptors to students from universities or community colleges, and sometimes will take a short part time contract as a clinical instructor for one of the Schools of Nursing. Like their counterparts in universities and colleges, nurse educators in clinical settings have a responsibility to remain current in the advances in their field and in evidence-based practices, as well as knowing and teaching the practice standards, competencies and guidelines for nursing practice in their place of employment, and in the province where they live and practice. (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, page 4*)

152. The Respondent acknowledged the leadership and mentoring responsibilities of her current position (which she has held since 2016) in her testimony:

> Q All right, can you describe your current position?
>
> A Sure. It's considered a frontline leadership role because there's a little bit of crossover between, you know, you're working with staff on the frontlines, sometimes helping directly with patient care. Though I'm not -- you know, I don't take a patient assignment. I'm not doing a direct patient care role, but I do interact with patients still. And it's the sort of job where you are involved in hiring and onboarding new nurses and getting -- you know, doing their education and orientation for the unit. Offering just in time education for, for existing staff if they need in the moment support in their practice. Helping -- (*Transcript, Day 17, November 3, 2023, page 1226, line 20 to page 1227, line 8*)

153. That there are higher standards in off duty conduct for nurses as regulated professionals is reflected in guidelines for nurses regarding the use of social media. Steers, M. N., and Gallups, S. F. (December, 2020), *Ethical tipping point: Nurses' presence on social media,* published in Nursing, Volume 50, Number 12, at pages 52-54:

> The public expects nurses (and healthcare professionals at large) to maintain a level of decorum and professionalism that extends beyond their working hours. Failure to live up to these expectations can have serious personal and professional consequences for nurses.
>
> …

> According to the ANA Code of Ethics, a nurse's primary commitment is to gain the trust of patients, families, and communities by practicing with compassion and respect. This includes recognizing and setting aside any personal prejudices or biases, respecting the personal beliefs and decisions of patients, and maintaining professional boundaries.
>
> …
>
> Before posting to social media, nurses must consider whether they may be inadvertently exacerbating cultural differences and misunderstandings, such as perpetuating stereotypes, or enabling discriminatory behavior…
>
> …
>
> Trust is the foundation of the nurse-patient relationship, and the ability to cultivate and maintain it is critical for nurses as they promote health and provide patient-centered care.

154. That a regulated professional may be disciplined by their regulator for off duty conduct, including making public statements, is a well-established legal principle. *Kempling v. The British Columbia College of Teachers*, 2004 BCSC 133 [*Kempling BCSC*] at paragraph 40:

> The conduct for which the appellant is being sanctioned occurred off-duty. However, where that off-duty conduct negatively impacts the school system or on the appellant's ability to carry out his professional and legal obligations as a teacher fully and fairly, he can properly be disciplined for that conduct.

155. *Strom v. Saskatchewan* Registered *Nurses' Association*, 2020 SKCA 112 [*Strom*] involved a nurse who made public comments critical of the health care a family member received. *Strom* elaborates on the above proposition from *Kempling BCSC*, while incorporating issues of the public interest and professional misconduct, at paragraph 89:

> Rather, off-duty conduct may be found to be professional misconduct if there is a sufficient nexus or relationship of the appropriate kind between the personal conduct and the profession to engage the regulator's obligation to promote and protect the public interest. More specifically, I would state the issue this way: was the impugned conduct such that it would have a sufficiently negative impact on the ability of the professional to carry out their professional duties or on the profession to constitute misconduct? (See *The Regulation of Professions in Canada*, vol 2 at 13.4.)

156. *Strom*, at paragraph 165, discusses the reality that when assessing the conduct of a regulated professional, it is not only their rights at play, but also their responsibilities as a member of a profession, even when it comes to freedom of expression:

> … Becoming a member of a regulated profession comes with benefits but at a cost. Those who sign up as doctors, nurses, lawyers, engineers, or any other of the regulated professions that crowd the statute books choose to subject themselves to the requirements, rules and processes imposed by legislation, to applicable codes of conduct and professional standards, and to the authority of the regulator. It is entirely legitimate for a professional regulator to impose requirements relating to civility, respectful communication, confidentiality, advertising, and other matters that impact freedom of expression. Failing to abide by such rules can be found to constitute professional misconduct.

157. The College's core statutory mandate is to regulate in the public interest. The College submits that the key issue to be considered by the Panel regarding the Respondent's conduct is whether her public statements have a sufficient nexus to, and negative impact on, the nursing profession to warrant regulatory intervention.

158. No one loses their *Charter* rights by being a member of a regulated profession. However, as a member of a regulated profession, the Respondent cannot hold herself out as a nurse or nurse educator while conducting herself in a manner that brings the profession into disrepute. The Respondent retains her *Charter* rights as a regulated professional, but she also acquires responsibilities; some of the public interest mandate falls onto her shoulders.

159. As a regulated professional the Respondent has an obligation to ensure that the expression of her views accords with the College's Professional and Practice Standards, whether she is on or off duty. This duty is amplified given that the Respondent is a nurse educator and in a mentoring role.

160. Registrants do not breach the College's standards simply by engaging in debate in the public sphere on controversial subjects or by expressing views that some may consider unpalatable. However, engaging in public debate while identifying as a member of the

nursing profession necessarily engages regulatory oversight. This is a well-established proposition supported by the above cited case law, and recently confirmed in *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685 (leave to appeal refused, COA-23-OM-0242, January 16, 2024) [*Peterson*].

161. *Peterson* involved the Judicial Review of a decision of the College of Psychologists of Ontario to require Dr. Peterson to take a remedial course in professional communication following its finding that some of Dr. Peterson's off duty public statements, made while identifying as a clinical psychologist, could be taken as degrading and demeaning. The Court rejected Dr. Peterson's appeal, stating in the opening paragraph:

> When individuals join a regulated profession, they do not lose their *Charter* right to freedom of expression. At the same time, however, they take on obligations and must abide by the rules of their regulatory body that may limit their freedom of expression. This case raises the clash between a regulated clinical psychologist's right to speak in a certain manner and the regulator's power to require the member to moderate that speech.

162. The Court in *Peterson* went on to state at paragraph 54:

> Many other professional discipline cases have involved situations in which a member's misconduct in their personal life, or outside the immediate context of practising their profession, has nevertheless resulted in regulatory action. As observed by Copeland J. (as she then was) in *Dr. Jha* at para. 119:
>
> > It is well-established that actions of members of a profession in their private lives may in some cases be relevant to and have an impact on their professional lives – including where the conduct is not consistent with the core values of a profession and/or where there is a need for a regulated profession to maintain confidence of the public in the profession and not be seen to condone certain types of conduct by its members …

163. Flowing from the above, all registrants must, when identifying themselves as a nurse, engage in public discourse in a respectful and professional manner that is not harmful, derogatory or discriminatory to any members of the public, particularly members of marginalized groups.

164. Language matters. It can serve as a tool of discrimination, and it can serve as a tool against discrimination. From the Registered Nurses Association of Ontario's Best Practice Guideline (for which Dr. Saewyc served as co-chair), Promoting 2SLGBTQI+ Health Equity (June 2021) at page 6:

> The use of terminology in this BPG is critically important. Appropriate terminology and language convey meanings that affirm and empower 2SLGBTQI+ people and communities, whereas inappropriate and offensive words and language promote and perpetuate discrimination, oppression and negative power dynamics.

165. The College submits that the Respondent's off duty public statements made while identifying as a nurse or nurse educator were discriminatory and negatively impacted both the nursing profession and the health care system. The nexus and impact are such that they rise to the level of unprofessional conduct, engaging the regulator's obligation to restore and protect the public interest. The College has a legal right and a public interest duty to discipline the Respondent.

PROPORTIONALITY TEST

166. The Panel's deliberations on whether to discipline the Respondent for her statements requires a balancing of the College's mandate with consideration of the Respondent's freedom of expression.

167. The legal framework for this analysis is set out by the Supreme Court of Canada in three cases: *Doré v. Barreau du Quebec*, 2012 SCC 12 [*Doré*]; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*]; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*Trinity Western*].

168. *Doré* introduces a legal framework for administrative decision makers to balance *Charter* rights with statutory objectives such as the College's public protection mandate. Factually, *Doré* deals with freedom of expression in the context of a lawyer having written a letter criticizing a judge.

169. *Doré* at paragraphs 6 and 7:

> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
>
> As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* pro66action, it is a reasonable one. [Emphasis added]

170. Distilled to its core, *Doré* stands for the proposition, at paragraph 58, that: "If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable."

171. *Loyola* concerns a private Catholic high school In Quebec which sought a Ministerial exemption from a provincial educational requirement for the teaching of a Program on Ethics and Religious Culture. While *Loyola* engages freedom of religion, rather than freedom of expression, the *Charter* analysis is comparable, paragraph 4:

> Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

172. *Trinity Western* centred on whether the Law Society of BC could refuse recognition to graduates of a law school at TWU on the basis that TWU required its students, staff and faculty to sign a 'covenant' promising not to have sex outside of a heterosexual marriage. TWU, a Christian university, said its covenant was protected by the *Charter* guarantee of freedom of religion. In paragraph 58, the Court lays out the sequencing of the factors an administrative decision maker must consider under *Dore* and *Loyola*:

> Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré*, at para. 57; *Loyola*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.

173. The proportionality test articulated in *Dore/Loyola* was applied in the nursing context by the Ontario Superior Court of Justice, Divisional Court, in *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513 [*Pitter/Alviano*]. The case involved two nurses who had made public statements that were contrary to public health guidelines and contained what could be harmful misinformation. Both had identified themselves as nurses when making the public statements. The College of Nurses of Ontario's Inquiries, Complaints and Reports Committee, directed the nurses appear to be cautioned and attend remedial education. The nurses sought Judicial Review of that decision.

174. At paragraph 7, the Court described the crux of the nurses' submissions as "that they were entitled to express unpopular views. In their submission, positive change cannot occur without constructive criticism of public institutions and policies", a view frequently advanced by the Respondent during the hearing.

175. The Court then indicated that *Dore/Loyola* was the applicable test:

> [9] The framework for administrative decision makers to consider alleged *Charter* violations is set out by the Supreme Court of Canada in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] S.C.R. 295, at paras. 55-58, and *Loyola High School v. Quebec (Attorney General*, 2015 SCC 12, [2015] S.C.R. 613, at para. 35. Under the *Doré/Loyola* framework, the administrative decision-maker first should consider its statutory objectives. Next, the decision-maker should ask how the *Charter* rights or values at issue will best be protected in view of the statutory objectives.
>
> [10] … The question is whether the administrative decision reflects a proportionate balancing of the statutory mandate and the *Charter* protections at play. If it does, the decision will be found to be reasonable: *Doré* at para. 58.

176. The Court upheld the College's decision. In doing so, the Court noted that in making public statements containing harmful misinformation in which they identified themselves as nurses: "This not only put the public at risk of being guided by false information, but also **risked impacting the reputation of the profession.**" [emphasis added]

177. As with the *Health Professions Act* here in British Columbia, the Ontario *Regulated Health Professions Act* stipulates that the College of Nurses overriding duty is to serve and protect the public interest.

<u>Pressing and Substantial Objectives</u>

178. *Kempling BCSC*, at paragraph 100, articulates several "pressing and substantial" objectives in disciplining the discriminatory speech of a regulated professional (in that case, a teacher):

> The BCCT had several pressing and substantial objectives that would justify overriding the appellant's exercise of his ***Charter*** rights in this case. These were: 1. To ensure an equal, tolerant, discrimination-free school environment; 2. To protect students, in particular gay and lesbian students, from the appellant's anti-homosexual discrimination; and 3. To restore and uphold the integrity of, and student and public confidence in, the public school system and the teaching profession as non-discriminatory entities.

179. *Strom* addresses the "pressing and substantial objective" aspect of the *Doré/Loyola* framework in the context of public speech by a nurse, at paragraph 151:

> I have described the purpose of the *Act* as being to provide for a professional regulatory body to license and regulate registered nurses, with an overriding objective of safeguarding the public interest. Professional discipline serves the public interest by protecting the standing of the profession. The speech at issue is public speech relating to healthcare, including registered nurses. I would characterize the statutory objective as protecting the public interest and the standing of the profession by setting and enforcing standards as to public speech by registered nurses relating to healthcare. I am satisfied that is a pressing and substantial objective.

(The Act referred to in the above passage is *The Registered Nurses Act*, the relevant Saskatchewan statute in the *Strom* case, and that province's equivalent statute to our *Health Professions Act*.)

180. The College submits that the pressing and substantial objective aspect of the *Doré/Loyola* framework is satisfied in the present case. The Act explicitly states that the overriding purpose of regulation is protecting the public interest. *Strom* endorses setting and enforcing standards for public speech by nurses relating to health care. By analogy, the setting and enforcing of standards for public speech by nurses relating to discriminatory and derogatory statements directed against a marginalized group, particularly one with barriers to accessing health care, must also be found to be a pressing and substantial objective.

181. Drawing from *Kempling BCSC*, disciplinary action in this case would serve the pressing and substantial objectives of restoring and upholding public confidence in the health care system and the nursing profession as non-discriminatory entities, and ensure an equal, tolerant, discrimination-free health care environment for all.

<u>Proportionality</u>

182. Moving to the question of proportionality, S*trom* notes, at paragraph 166:

> However, to paraphrase La Forest J.'s comment in *Ross*, that does not mean the entire life of a professional should be subject to inordinate scrutiny on the basis of more onerous standards of behaviour, as that would lead to a substantial invasion of the privacy rights and fundamental freedoms of professionals. The word "inordinate" can be understood as a shorthand expression of the need for proportionality… The professional bargain does not require that they fall silent. It does, however, allow the regulator to impose limits. The question as to whether it has imposed excessive limits is the proportionality question…

183. The College is not seeking for the Respondent to "fall silent". However, as a member of a regulated profession she is subject to some limits: specifically, that she cannot make public statements which are discriminatory and derogatory towards a vulnerable group while identifying as a nurse. For the Panel to impose that specific limit would be a proportionate balancing of the College's public interest mandate with the Respondent's expressive rights.

<u>Speech which lies further from the core values of s. 2(b)</u>

184. A key aspect of assessing the proportionality of regulatory intervention into speech, entails a consideration of the nature of the speech in question. *Kempling BCCA*, at paragraphs 75 to 77, discusses speech which lies further from the core values of s. 2(b) of the *Charter*:

> The Supreme Court has made it clear that the nature of the impugned expression will, in part, determine how difficult it will be to justify an infringement of s. 2(b). In ***Ross***, La Forest J. made the following comments at paragraph 89:
>
> > In my reasons in *RJR-MacDonald*, *supra*, I stated that the "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self development, and the promotion of public participation in the democratic process" (p. 280). This Court has subjected state action limiting such values to "a searching degree of scrutiny" (p. 281). This standard of scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s. 1 has been applied.

And in ***R v. Keegstra***, [1990] 3 S.C.R. 697 at 760, Dickson C.J. made the following observation:

> In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).
>
> There is undoubtedly a political element to Mr. Kempling's expression, and portions of his writings form a reasoned discourse, espousing his views as to detrimental aspects of homosexual relationships. Though his views may be unpopular, he was, in his more restrained writings, engaged in a rational debate of political and social issues; such writing is near the core of the s. 2(b) expression. However, not all of his writings were of this nature and as I have said, Mr. Kempling's writings at times clearly crossed the line of reasoned debate into discriminatory rhetoric.
>
> In a number of Mr. Kempling's published writings he relied upon stereotypical notions of homosexuality, and he expressed a willingness to judge individuals on the basis of these notions. In doing so, he ignored the inherent dignity of the individual; this concept is essential to a functioning democracy, and, in my view, political discourse which ignores it is not representative of the core values underlying s. 2(b). Accordingly, Mr. Kempling's published writings, taken as a whole, are not deserving of a high level of constitutional protection.

185. *Groia v. Law Society of Upper Canada*, 2018 SCC 27 [*Groia*] dealt with disciplinary proceedings against a lawyer based on uncivil behavior during a trial. The behavior in question included what were described as personal attacks against opposing counsel, sarcastic outbursts and allegations of professional impropriety against opposing counsel.

186. *Groia* affirms that the speech of a regulated professional that lies further from the core values of s. 2(b) of the *Charter* engages *Charter* protection to a lessor degree. At paragraph 117:

> That said, speech is not sacrosanct simply because it is uttered by a lawyer. Certain communications will be far removed from the core values s. 2(*b*) seeks to protect: the search for truth and the common good: *R. v. Keegstra*,

> [1990] 3 S.C.R. 697, at pp. 762 and 765. The protection afforded to expressive freedom diminishes the further the speech lies from the core values of s. 2(*b*): *Keegstra*, at pp. 760-62; *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 72-73. As such, a finding of professional misconduct is more likely to represent a proportionate balance of the Law Society's statutory objective with the lawyer's expressive rights where the impugned speech lies far from the core values of lawyers' expressive freedom.

187. The College submits that the speech of the Respondent at issue in this case clearly lies far from the core values of s. 2(b) of the *Charter* and as such should be afforded diminished protection. The Respondent's speech crosses "the line from reasoned debate into discriminatory rhetoric" and repeatedly ignores the "inherent dignity of the individual".

188. In reflecting on the important discussions in *Oger* and *Hansman* on the various forms of systemic discrimination transgender people face, and in reviewing the aggregate of the Respondent's statements, the Panel should find that the Respondent's speech does not "search for truth and the common good". Rather, the Respondent's speech perpetuates harm toward transgender people, diminishes the profession of nursing, and has a depressive effect on transgender people accessing the health care system, as detailed by the uncontradicted evidence of the College's two experts. Disciplinary intervention would not be a disproportionate infringement of her expressive freedom and would align squarely with the cases cited above.

189. The findings in *Kempling BCCA*, at paragraph 82 – particularly if one substitutes "nurse" for "teacher" and "health system" for "public school system" – are germane:

> Finally, I am in agreement with Holmes J. that the deleterious effects of the sanction were proportionate when weighed against their salutary effects. Mr. Kempling can remain a BCCT member and continue while off duty to express his views on homosexuality by way of reasoned discourse befitting a teacher and counsellor. What he cannot do is to advance such views in a discriminatory manner that will be seen publicly to be those of a teacher and counsellor in the public school system… the deleterious effects of the infringement are, nonetheless, relatively limited when compared to the salutary effects; namely, restoring the integrity of the school system and

> removing any obstacles preventing access for students to a tolerant school environment.

Connection between disciplinary action and statutory objective

190. Returning to *Kempling BCSC*, at paragraph 105:

> There is a rational connection between the BCCT's objectives and the means chosen to achieve those objectives. Sanctioning the appellant for publishing discriminatory statements and for publicly linking them to his professional status as teacher, is a statement that the teaching profession does not condone discrimination. It tells students and the public that what the appellant did was discriminatory and wrong, and helps to repair the damage done to the integrity of, and student and public confidence in, public schools and the teaching profession as non-discriminatory entities.

191. In making a finding that the Respondent's public statements were discriminatory and derogatory regarding transgender people, the Panel can send the important message that the nursing profession does not condone discrimination. Such a message would help repair the damage done to the public's confidence in the nursing profession and the health care system as non-discriminatory entities.

STROM: CONTEXTUAL FACTORS

192. Both *Loyola* and *Trinity Western* underscore the importance of context to the proportionality analysis. *Loyola* (paragraph 41): "The *Doré* analysis is also a highly contextual exercise." *Trinity Western* (end of paragraph 81): "This is a highly contextual inquiry."

193. In *Strom* at paragraph 145, the Court emphasises both the need for a full contextual inquiry in discipline cases involving freedom of expression, and that such an inquiry need be specific to the facts of each case:

> The specific contextual factors, including the concern with the reasonableness of Mr. Groia's allegations, reflect the facts in *Groia*. The requirement to undertake a complete contextual analysis in assessing the impugned speech, on the other hand, would apply in every case. As Moldaver J. put the matter, "a law society disciplinary tribunal must always

take into account the full panoply of contextual factors particular to an individual case before making that determination" (at para 83). The same is true of the Discipline Committee of the SRNA.

194. The court in *Strom* then went on to articulate a non-exclusive list of factors to be considered in a discipline proceeding involving a registered nurse and the issue of off duty statements, based on the specific facts of that case. *Strom* at paragraph 155:

> …The correct approach to assessing whether speech relating to healthcare constitutes professional misconduct would account for the unique circumstances of each case — such as what the registered nurse said, the context in which they said it and the reason it was said — thereby enabling the Discipline Committee to accurately gauge the value of the impugned speech. The relevant contextual factors might include, without limitation:
>
> (a) whether the speech was made while the nurse charged was on duty or was otherwise acting as a nurse;
>
> (b) whether the nurse charged identified themself as a registered nurse;
>
> (c) the extent of the professional connection between the nurse charged and the nurses or institution the nurse charged has criticized;
>
> (d) whether the speech related to services provided to the nurse charged or their family or friends;
>
> (e) whether the speech was the result of emotional distress or mental health issues;
>
> (f) the truth or fairness of any criticism levied by the nurse charged;
>
> (g) the extent of the publication and the size and nature of the audience;
>
> (h) whether the public expression by the nurse was intended to contribute to social or political discourse about an important issue; and
>
> (i) the nature and scope of the damage to the profession and the public interest.

195. Below, the College addresses those contextual factors from *Strom* relevant to the particular circumstances of this case – and proposes an additional factor.

Whether the nurse charged identified themself as a registered nurse

196. This factor is a key one in the present case. The short answer to the above questions is – yes, frequently and across multiple online platforms. This generates a nexus between the Respondent's statements and the profession, triggering regulatory oversight.

197. The Respondent advanced her views while identifying as a nurse on Twitter, various YouTube podcasts, and numerous online publications. In the articles authored by the Respondent and published by the Feminist Current the following is noted, "*Amy Eileen Hamm is a writer and registered nurse educator in New Westminster, BC. You can find her on Twitter @preta_6*". The Respondent is a co-founder of GIDYVR (Gender Identity YVR) and caWsbar (Canadian women's sex-based rights), and co-hosts a podcast series entitled Gender Critical Story Hour; she was identified as a nurse in all those platforms.

198. The Respondent's linking of her personal views and advocacy to her professional designation demonstrates a lack of insight into her obligations as a regulated professional. By identifying as a nurse, the Respondent may give the impression that her views are from a knowledge-based nursing perspective; her nursing status may be seen as lending credibility to her statements. This is an abdication of the responsibility that goes with being a professional or, as it was put in *Ross*, occupying a position of "trust and influence". It is particularly egregious because transgender people must interact with the health care system for gender affirming care, fundamental to their identity, and so have an urgent and very personal interest in whether health care providers support their right to exist.

199. The Respondent has been a nurse since 2012 and should have been aware of her responsibilities as a regulated professional. There are resources available to registrants regarding their professional responsibilities. Among the **BCCNM Entry Level Competencies for Registered Nurses** in the role of educators is:

> 2.8 Demonstrates professional judgement to ensure social media and information and communication technologies (ICTs) are used in a way that maintains public trust in the profession.

200. On the College's website there are various learning resources. Specifically for Registered Nurses, there is an extensive learning resource on social media use, including the expectation that nurses always act professionally and in a manner that maintains the public's confidence in the profession, and which includes case studies and links to relevant resources.

201. That nurses retain their professional responsibilities when engaged on social media is a proposition that extends beyond Canada's borders. From the Nursing and Midwifery Council (UK), *Guidance on using social* media *responsibly*, page 4, "Do not post anything on social media that may be viewed as discriminatory, does not recognise individual choice or does not preserve the dignity of those receiving care."

202. The International Council of Nurses in their Position Statement on *Nurses and social media* states, "Be aware of the image they are portraying when posting content even when not work related and help reinforce a positive global image of nursing."

203. Paraphrasing *Ross,* while the activities of nurses outside the clinical setting may not seem to impact directly on their ability to provide nursing care, they may conflict with the values which the health care system seeks to perpetuate. This is never more so than when a nurse engages in discriminatory and derogatory statements about a marginalized group with unique health care needs.

<u>The extent of the publication and the size and nature of the audience</u>

204. The Respondent indicated in her testimony that she chose Twitter for the larger audience she could reach:

> Q All right. And why did you choose Twitter as a forum for advocacy?
>
> A It's -- I mean, it's also a place where I can share my writing and to a bigger audience. And it's a platform that is pretty open at this point to having contentious discussions. (*Transcript, Day 17, November 3, 2023, page 1290, line 26 to page 1291, line 5*)

205. Further, Ms. Hamm testified that her advocacy via Twitter has resulted in a larger audience for her statements:

> Q Just out of curiosity, Ms. Hamm, how many Twitter followers do you think, do you recollect having when this all began, do you know? Do you remember what your Twitter follow count was at the time say of the billboard incident?
>
> A Oh, I don't recall, not a whole lot at that time. Probably only -- I don't know, like less than 10,000, maybe a few thousand, I'm not sure.
>
> Q And do you know offhand about how many you have now?
>
> A Yeah, now I'm -- like close to 40,000. (*Transcript, Day 17, November 3, 2023, page 1294, line 20 to page 1295, line 5*)

206. The Respondent's statements regarding transgender people, tied to her status as a nurse, have been widely disseminated, as was her intention. Aside from her Twitter followers, articles published by the Respondent have been shared hundreds of times, and YouTube podcasts featuring the Respondent have been viewed thousands of times. Some specific examples:

a) On January 27, 2020, the Respondent appeared on Meghan Murphy's YouTube channel. The title of the episode was *The Same Drugs Interview: Amy Hamm and Meghan Murphy on #GIDYVR*. This interview had over 4,500 views.

b) The Respondent's article, *After losing city grant, Vancouver Rape Relief say they have no plans to scale back services or public education*, published by the Feminist Current, was shared over 2,000 times since it was published on March 5, 2020.

c) The Respondent was interviewed in *Suing Jessica Yaniv Pulling the Trigger Podcast with Mark Hughes* on July 31, 2020, which had at least 1,578 views.

d) The Respondent's interview by Meghan Murphy on her YouTube channel entitled *The Same Drugs: Live with Amy Hamm on I <3 JK Rowling* on September 14, 2020, had at least 8,471 views.

e) The Respondent co-hosts a podcast called Gender Critical Story Hour. At least six episodes have been published. The podcast is available on google podcasts and rss.com. The podcast series is advertised on Twitter with the handle @GCstoryhour where the Respondent's Twitter handle, @preta_6 is linked. @GCstoryhour has 1,200 followers.

207. The billboard garnered mainstream media attention, expanding the reach of the Respondent's views when she was interviewed about it by CBC, the Georgia Straight and The Line.

208. When one considers the aggregate of the Respondent's online presence, the variety of platforms across which she advances her views, her co-sponsoring of the billboard, and her engagement with mainstream media when that opportunity presented itself, it is a reasonable conclusion that the Respondent was actively seeking as wide an audience as possible to express her views and advance her advocacy. In repeatedly linking her views and advocacy to her professional designation, her actions rise to the level of unprofessional conduct.

<u>Whether the public expression by the nurse was intended to contribute to social or political discourse about an important issue</u>

209. There is an extremism to many of the Respondent's statements which belies any assertion of engaging in reasoned social discourse. In fact, the Respondent's statements were consistently advanced in a divisive and disparaging manner, especially when one considers that they were targeted towards a marginalized population. One example:

> … I firmly disagree with the notion that children or minors are capable of providing informed consent to medical procedures that will impact them for the rest of their lives and likely sterilize them and remove healthy body tissue or -- you know, frankly, I think it amounts to mutilation. (*Transcript, Day 17, November 3, 2023, page 1249, line 22 to page 1250, line 2*)

210. The Respondent testified that some of the statements at issue in the hearing were intended as jokes:

> Q All right, and why would you think that satire would be something you should use? Or might use?
>
> A I mean its effective in getting people's attention, and getting people involved in an issue that they might not know about. And that's been a lot of my intent is to get people involved in a discussion. On the -- because it can seem a little bit shocking or offensive, I think it engages people. And it's definitely not meant to discriminate or hurt people. I

> would just hope that people see that I'm making a joke. (*Transcript, Day 17, November 3, 2023, page 1296, line 23 to page 1297, line 8*)

211. The intentional use of shocking or offensive statements for the purpose of getting people's attention does not align with advancing a reasoned debate and falls well short of the responsibility that goes with holding a position of trust and influence by virtue of one's professional status. This is not engaging in reasoned discourse, but rather amounts to "discriminatory rhetoric" which ignores "the inherent dignity of the individual" (*Kempling BCCA*). A public discussion on gender identity does not need to be a gender war.

<u>The nature and scope of the damage to the profession and the public interest</u>

212. By identifying herself as a nurse or a nurse educator while espousing public views that are discriminatory and derogatory, the Respondent has done significant damage to the reputation of the nursing profession and undermined public confidence in the health care system. Her statements are antithetical to the desired message to any vulnerable population that they are safe to approach the health care system and will be afforded respectful care. Her statements foster mistrust rather than trust.

213. A fair public expectation is that the health care system be a "non-discriminatory entity". It is vital to the public's confidence in the health care system that it both is – and is perceived to be – a place where any member of the public, regardless of race, sexual orientation, religion, ethnicity, gender identity, or any other factor, will be treated equally and respectfully.

214. To paraphrase from *Kempling BCSC* (paragraph 105), it is imperative that the Panel sanction the Respondent for publishing discriminatory statements and publicly linking them to her professional status. To do so would send the statement that the nursing profession does not condone discrimination. It would tell transgender individuals and the public that what the Respondent did was unacceptable. It would help repair the damage done to confidence in the health care system and the nursing profession as non-discriminatory entities.

215. The question of harm to a profession and the public interest has received extensive judicial consideration. *Ross* discusses the idea of harm that can be inferred without the need for direct evidence:

> [46] The next question is whether a finding of discrimination may be supported by an inference on the basis of what is reasonable to anticipate as an effect of the off-duty conduct. In *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, a public servant was discharged for publicly criticizing the government. Dickson C.J. observed two forms of impairment: impairment to perform the specific job and impairment in a wider sense… (pp. 472-73).
>
> [47] Similarly in this case, the Board found that the respondent's off-duty comments impaired his ability to fulfil his teaching position. The teaching occupation is uniquely important. This, combined with the substance of the respondent's writings and statements and the highly public media through which they were disseminated, i.e. television and published works, supports the conclusion that this finding of the Board is correct.
>
> [48] Returning to *Fraser*, *supra*, with respect to impairment in the wider sense, Dickson C.J. stated, at p. 473:
>
> > It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of [the impugned conduct].
> >
> > …
>
> [49] Pursuant to a television interview given by the respondent in 1989, the School Board itself characterized the effect produced by the respondent's conduct in this manner:
>
> > . . . the climate created by this aggressive approach creates hostility that permeates and interferes with the desired tolerance required by the school system to show respect for the rights of all students and their families to practice their religious faith.
>
> As to whether there is impairment on a broader scale, I conclude on the authority of *Fraser*, *supra*, that a reasonable inference is sufficient in this case to support a finding that the continued employment of the respondent impaired the educational environment generally in

> creating a "poisoned" environment characterized by a lack of equality and tolerance. The respondent's off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught.

216. *Kempling BCSC* applies the idea of inferring harm in the wider sense from *Ross* in the context of discriminatory statements against homosexuals that were publicly made by a teacher:

> [42] The harm visited on the public school system by the appellant's published writings is of two types: harm per se, and harm that could be inferred as the reasonable and probable consequences of that conduct [***Ross***, *supra*, at 859-60]. In my view, the appellant's published writings were harmful to the public school system *per se*, not only because of their discriminatory content, but also because he explicitly linked that content to his position as a teacher and counsellor.
>
> …
>
> [46] By publicly linking his private, discriminatory views of homosexuality with his status and professional judgment as a teacher and secondary school counsellor, the appellant called into question his own preparedness to be impartial in the fulfilment of his professional and legal obligations to all students, as well as the impartiality of the school system. That in itself is a harmful impact on the school system as a non-discriminatory entity.
>
> …
>
> [48] … From the appellant's published writings and his publicly linking them to his teaching and school counselling position, a negative inference could reasonably be drawn as to the appellant's ability to be impartial as a teacher. It would be reasonable to expect that student and public confidence in the appellant and the public school system would be undermined. It would also be reasonable to anticipate that homosexual students would generally be reluctant to approach him for guidance counselling, which would impair his ability to fully carry out his professional duties in fact.

217. Key to the concept of inferred harm discussed above is the proposition that certain institutions in our society, such as the justice system, the education system and the health care system, are intended to be non-discriminatory. The question is not whether any participant in the institution suffered direct harm; the question is whether the institution

as a whole suffered harm. It is necessary to maintaining the health care system as non-discriminatory that regulators take disciplinary action against registrants who engage in public discriminatory expression tied to their professional designation.

218. *Kempling BCCA*:

> [43] Non-discrimination is a core value of the public education system; the integrity of that system is dependent upon teachers upholding that value by ensuring the school environment is accepting of all students. When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result.
>
> [45] … Proof that he had actually discriminated against a particular student, or evidence of a poisoned school environment, was not required to prove that the school system had sustained harm. Mr. Kempling's statements damaged the integrity of the school system as a whole. They undermined the core value of non-discrimination by denying homosexual students an education environment accepting of them.

219. And later in the judgement at paragraph 79:

> As I have said, the harm in evidence in this case is not that of discriminatory actions directed against particular individuals, but rather is that sustained by the school system as a whole. … Evidence that particular students no longer felt welcome within the school system, or that homosexual students refused to go to Mr. Kempling for counselling, is not required to establish that harm has been caused. Mr. Kempling's statements, even in the absence of any further actions, present an obstacle for homosexual students in accessing a discrimination-free education environment. These statements are therefore inherently harmful, not only because they deny access, but because in doing so they have damaged the integrity of the school system as a whole.

220. A fundamental tenet of Canada's health care system is universality: that the health care system is open to all citizens. The tenet of universality is linked to the concept of the inherent dignity of every individual discussed in the case law, a concept whose roots lie deep. From *Understanding the relevance of human rights in healthcare and nursing practice*, Louise Terry and Roger Newham, Nursing Standard, Volume 36, Number 8, August 2021, at page 29:

> The notion that human rights belong to all people rather than individuals within a certain country or legal jurisdiction is based on morality. Immanuel Kant was an 18th century moral philosopher who asserted that every individual should have their dignity and personhood respected by virtue of being human, and this notion underpins modern Western concepts of healthcare (Rothhaar 2010).

221. Universality is enshrined in the Canada *Health Act*, R.S.C., 1985, c. C-6, first in s. 3:

> **Primary objective of Canadian health care policy**
>
> **3** It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

222. Then, more explicitly, in s. 10:

> **Universality**
>
> **10** In order to satisfy the criterion respecting universality, the health care insurance plan of a province must entitle one hundred per cent of the insured persons of the province to the insured health services provided for by the plan on uniform terms and conditions.

223. A World Health Organization Fact Sheet on *Human rights and health* (December 2017) states, "The right to health must be enjoyed without discrimination on the grounds of race, age, ethnicity or any other status**."**

224. The International Council of Nurses in their Position Statement on *Nurses and human rights* states, "ICN views health care as a right of all individuals, that is available, affordable and culturally acceptable, regardless of financial, social, political, geographic, racial or religious considerations.

225. A combined Office of the United Nations High Commissioner for Human Rights and World Health Organization Fact Sheet (2008) on *The Right to Health*, at page 7 states, "Non-discrimination and equality are fundamental human rights principles and critical components of the right to health."

STROM: ADDITIONAL CONTEXTUAL FACTOR

226. The contextual factors set out in *Strom* were intended to be non-exhaustive. As the Court indicated at paragraph 155, "The relevant contextual factors might include, without limitation…" The *Strom* factors arose from the specific circumstances of that case: a nurse who made public statements critical of care that had been provided to a family member. As such, the College submits that it is appropriate for the Panel to consider adding another contextual factor to be assessed, arising from the circumstances of this case: the making of discriminatory statements directed towards a marginalized group, in particular a group facing barriers to accessing health care.

<u>Were the statements directed towards a marginalized group, in particular a group facing barriers to accessing health care</u>

227. In assessing this contextual factor, a helpful starting point is to examine the parallels between the situation facing the transgender community and the situation facing Indigenous peoples when it comes to accessing health care. In June 2020, British Columbia's Minister of Health directed a review of Indigenous-specific racism in the provincial health care system. The report flowing from that review, *In Plain Sight, Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care*, [*In Plain Sight*] was issued in November 2020.

228. *In Plain Sight* describes a cycle which results in negative health and wellness impacts for Indigenous people. There is the negative stereotyping of Indigenous people: the assigning of characteristics to all members of the group based on corrosive stereotypes rather than assessing individuals on their particular merits. This discrimination manifests itself in the health care context as negative interactions with health care workers, inappropriate health care interventions, and greater likelihood of medical mistakes. This in turn has a depressive effect on Indigenous people's access to health care as it is an unwelcoming environment characterized by stigma, mutual mistrust and negative interactions. Reduced access to health care inevitably leads to poorer health outcomes, particularly in regard to reduced access to preventative care measures.

229. While *In Plain Sight* addresses racism against Indigenous people in British Columbia's health care system, its findings can be extrapolated out to the assertion that discrimination arising from within, or associated with, a societal system (such as education, health care, justice) targeted towards a particular population will have a depressive effect on that population's utilization of the system in question. When the system is the health care system, poorer health outcomes are a predictable and measurable result.

230. For transgender people, discrimination and health inequities intersect. *Oger* at paragraphs 64 and 65:

> Mr. Whatcott and the JCCF [Justice Centre for Constitutional Freedoms] sought to rely on statistics about the poor health and social outcomes for transgender people as proof that – at best – the merits of being transgender was a matter for ongoing study and debate and – at worst – it was a bad lifestyle choice, which ought to be publicly discouraged. I agree with Ms. Oger that this is an ill-conceived attempt to "take the data about the consequences of being a victim of oppression, or the consequences of being marginalized, and turn that into the root cause of the issue".
>
> The poor health, economic, and social outcomes for many transgender people are not a signal of their inherent worth but rather of the significant degree to which they continue to face marginalization, stigma, and discrimination. They illustrate how much work remains to be done to make the *Code's* objective of an equal society into a reality.

231. This reality is acknowledged in the Registered Nurses Association of Ontario's Best Practice Guideline, Promoting 2SLGBTQI+ Health Equity, at page 11:

> In Canada and internationally, 2SLGBTQI+ people may experience numerous health inequities. A number of factors contribute to these health inequities, including discrimination and stigmatization.

232. That vulnerable populations face poorer health outcomes, and that a nurse has a professional responsibility to advocate for greater health equity, are articulated in the Canadian Nurses Association, Code of Ethics, 2017, in Part II. Ethical Endeavours Related to Broad Societal Issues, at page 18:

> **Ethical nursing practice addresses broad aspects of social justice that are associated with health and well-being.** These aspects are focused on improving systems and societal structures to create greater equity for all. Individually and collectively, nurses keep abreast of current issues and concerns and are strong advocates for fair policies and practices. They can do so by:
>
> 9. Recognizing that **vulnerable groups** in society are systemically disadvantaged (which leads to diminished health and well-being), and advocating to improve their quality of life while taking action to overcome barriers to health care.

233. Trust is foundational to the nurse/patient relationship and the erosion of trust among a population directly correlates with poorer health outcomes for that population. As stated by Dr. Saewyc, after detailing the potential barriers and harms transgender people face in accessing health care:

> All of these negative experiences disrespect or discriminate against, or humiliate transgender people. They contribute to distress and erode trust in health professionals. They foster reluctance to disclose their gender identity to health professionals, and to avoid further health care…
>
> Because of higher rates of stigma and discrimination towards them, transgender people are at greater risk of stress-related health issues, such as anxiety, depression, suicidality, and potentially cardiovascular disease and cancer. Worse, by avoiding health care, they may miss needed screening or treatment for health issues, such as cancer, until it is too late. A research study about transgender people in Ontario documented. (*Exhibit 3, Expert Report of Dr. Elizabeth Saewyc, page 8*)

234. The Respondent's public discriminatory statements directed towards transgender people erodes the trust of that marginalized population in the health care system and exacerbates health inequities, the opposite of the Respondent's ethical duty.

PROFESSIONAL STANDARDS AND UNPROFESSIONAL CONDUCT

235. The College's Professional Standards set out the expected and achievable level of performance against which actual performance can be compared. It is the minimum level of acceptable performance.

236. In terms of the Respondent's statements and the College's Professional Standards, the College submits that three are engaged, as set out in the Citation: the Responsibility and Accountability Professional Standard, the Client–Focused Provision of Service Professional Standard and the Ethical Practice Professional Standard.

237. For the **Responsibility and Accountability Professional Standard**, the College submits that the following components of that standard are engaged by the Respondent's statements:

> **Clinical Practice**:
>
> No. 1 Is accountable and takes responsibility for own nursing actions and professional conduct.
>
> No. 4 Takes action to promote the provision of safe, appropriate and ethical care to clients.
>
> No. 5 Advocates for and/or helps to develop policies and practices consistent with the standards of the profession.
>
> No. 8 Understands the role of the regulatory body and the relationship of the regulatory body to one's own practice.
>
> **Education:**
>
> No. 1 Is accountable and takes responsibility for own nursing actions and professional conduct.
>
> No. 4 Takes action to promote the provision of safe, appropriate and ethical care.
>
> No. 5 Advocates for and/or helps to develop policies, practices and education consistent with the standards of the profession.
>
> No. 8 Understands the role of the regulatory body and the relationship of the regulatory body to one's own practice.

238. For the **Client-Focused Provision of Service Professional Standard**, the College submits that the following components of that standard are engaged:

> **Clinical Practice:**
>
> No. 7 Participates in changes that improve client care and nursing practice.
>
> No. 9 Understands and communicates the role of nursing in the health of clients.
>
> **Education:**
>
> No. 7 Acts to implement changes that improve client care and educational practice.
>
> No. 9 Understands and communicates the role of nursing in the health of clients.

239. For the **Ethical Practice Professional Standard**, the College submits that the following components of that standard are engaged:

> **Clinical Practice:**
>
> No. 3 Demonstrates honesty and integrity.
>
> No. 7 Promotes and maintains respectful communication in all professional interactions.
>
> No. 12 Identifies ethical issues; consults with the appropriate person or body; takes action to resolve and evaluates the effectiveness of actions.
>
> **Education:**
>
> No. 3 Demonstrates honesty and integrity.
>
> No. 7 Promotes and maintains respectful communication in all professional interactions; educates others to do the same.

240. When dealing with off duty conduct, as in this case, a finding of unprofessional conduct can be made irrespective of breaches of specific professional standards. *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 (leave to appeal refused, [2013] 2 S.C.R. xii) [*Sazant*] deals with a physician alleged to have sexually abused boys and the physician's challenge to the College's authority to investigate his off duty conduct:

> [93] The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, at para. 26, citing Elmer A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p.87.
>
> [94] Applying this approach to the case at bar, I agree with the Divisional Court that the main purposes of the Regulated Health Professions Act, 1991, and the Code, are the proper regulation of the medical profession and the protection of the public.
>
> …
>
> [97] In O. Reg. 856/93, "professional misconduct" is broadly defined to include, for example [in s. 1(1), para. 34], "conduct unbecoming a physician" and [in s. 1(1), para. 33] "an act or omission relevant to the practice of medicine that . . . would reasonably be regarded by members as disgraceful, dishonourable or unprofessional" (emphasis added).
>
> [98] Clearly, the aim of this broad definition is to ensure that members are, and remain, fit to carry out their practice according to the standards the profession sets for itself. **Fitness in this context includes conduct in the physician's private life that reflects on his or her integrity**: Richard Steinecke, A Complete Guide to the Regulated Health Professions Act, looseleaf (Toronto: Canada Law Book, 2001), at 6:60.20(6). [emphasis added]

241. That a finding of unprofessional conduct can be made independent of a breach of a professional standard is codified in s. 39(1) of the Act:

> **39** (1) On completion of a hearing, the discipline committee may, by order, dismiss the matter or determine that the respondent
>
> (a) has not complied with this Act, a regulation or a bylaw,
>
> (b) has not complied with a standard, limit or condition imposed under this Act,
>
> (c) has committed professional misconduct or unprofessional conduct,
>
> (d) has incompetently practised the designated health profession, or

> (e) suffers from a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs their ability to practise the designated health profession.

242. In *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 SCC 26 [*Pearlman*] the Supreme Court of Canada held at page 869 that professional misconduct is a "wide and general term," which encompasses "conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well-respected brethren in the group -- persons of integrity and good reputation amongst the membership".

243. The College submits that the conduct alleged in the Citation readily meets the description in *Pearlman* and constitutes unprofessional conduct as defined in the Act. The Respondent made discriminatory and derogatory public statements regarding transgender individuals, while identifying as a nurse. In doing so she had a depressive effect on a marginalized population accessing health care and undermined the public's confidence in the nursing profession and the health care system: hallmarks of conduct unbecoming a member of the profession.

244. The assertion that the Respondent's statements constitute unprofessional conduct is supported by the findings in *Kempling BCSC* at paragraphs 39, and 50:

> [39] … The question before the Panel was whether the making and publication of those statements in the circumstances and context in which it was done fell below acceptable standards of professional conduct. Because non-discrimination is a core value of the educational system, a finding that those writings were of a discriminatory and derogatory nature can properly form part of the basis of a determination of conduct unbecoming.
>
> [50] The harm, whether *per se* or inferred, to the school system, the teaching profession, and student and public confidence in them, resulting from the appellant's writings published off-duty warrant a finding that his conduct was unbecoming a BCCT member.

CONCLUSION

245. The Supreme Court of Canada in *F.H. v McDougall 2008 SCC 53* [*McDougall*] at paragraphs 40, 44 and 46, confirmed that the standard of proof in professional discipline matters is the "balance of probabilities", meaning that an allegation has been made out where the Panel finds it is more likely than not that the alleged conduct took place. In the present case, there is no question that the Respondent made the statements at issue. As to the characterization of those statements, the College submits that the evidence clearly establishes the statements were discriminatory and derogatory, meaning the allegation in the Citation is established.

246. The Respondent's statements warrant disciplinary action as:

(a) they are discriminatory and derogatory;

(b) they violate the standards of the profession;

(c) they violate the currently accepted understanding of transgender people and the appropriate medical care, as a vulnerable population, they are entitled to;

(d) they may reasonably be expected to reduce trust and increase the reluctance of transgender people to access health care, causing harm;

(e) they constitute unprofessional conduct, bringing the profession of nursing into disrepute and undermining public confidence in the health care system as a non-discriminatory entity; and

(f) to discipline the Respondent for them would be a proportionate balancing of the College's statutory objective and the Respondent's freedom of expression.

RESPECTFULLY SUBMITTED THIS 26th DAY OF JANUARY 2024

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