

**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 – REPLY SUBMISSIONS

INTRODUCTION

1. The College begins its reply submissions by reminding the Panel what this hearing is about – and what it is not about.

What the hearing is about

2. This hearing is an administrative disciplinary proceeding into the conduct of a regulated professional by that professional’s regulator. The parameters of the hearing are established by the Citation and are whether the Respondent’s public statements, made while identifying as a nurse or a nurse educator, were discriminatory and derogatory towards transgender people.

3. The principal issue is whether the Respondent's statements made while identifying as a nurse or nurse educator are properly characterized as discriminatory and derogatory towards transgender people. If the Panel concludes that they are, then an analysis of the law regarding off duty conduct and the proportionate balancing of the Respondent's expressive rights with the College's mandate is triggered. The Panel will also then have to determine whether the statements violate any of the College's standards and/or constitute unprofessional conduct.
4. There is only one respondent in this disciplinary hearing: Ms. Hamm. It is solely her conduct under review. The only question is whether the College has presented the necessary evidence, coupled with legal arguments, to establish the allegation in the Citation to the requisite standard.
5. The Panel must make its decision based on evidence and legal argument. The Panel is not assisted in adjudicating the matter by inflammatory language such as (a) characterizing the allegation against the Respondent as amounting to "heresy" (paragraph 29 of the Respondent's Closing Submissions); (b) accusing the College of being "the enforcement arm of trans activists" (paragraph 62 of the Respondent's Closing Submissions); or (c) asserting that should the Panel uphold the allegation in the Citation, "it would demonstrate to the public that the College deploys its regulatory power to punish political dissidents who do are not on the side of "trans rights activists"" (paragraph 142 of the Respondent's Closing Submissions). The Respondent appears before the Panel as a regulated professional, not a political dissident. Such language, and the focus on the motivation of the complainants (and like issues) are distractions; they do not assist the Panel in its decision making.

What the hearing is not about

6. This hearing is not about:
 - (a) whether one agrees or does not agree with the legal and public policy landscape of Canada where rights for transgender people are protected;

- (b) whether one agrees or does not agree with the fact that gender identity is accepted and supported by medical, legal and educational institutions in Canada;
- (c) whether one agrees or does not agree with the fact that gender affirming care is provided by medical professionals in Canada; and
- (d) how governments in other jurisdictions have treated issues of gender identity.

SPECIFIC REPLY POINTS

Context

7. The Panel must determine whether the Respondent's public statements were discriminatory and derogatory toward transgender people. In doing so, the Panel should be mindful of the impact of those statements as those statements would have been received at the time they were made. For some her statements, the Respondent offered explanations as to her intent. Notably, however, the Respondent did not provide that context in the first instance. The question is not how the Respondent explained her rationale for saying what she said on the witness stand; it remains about the context at the time of those statements, and whether those statements were discriminatory and derogatory.

Framing of the Respondent's statements

8. The Respondent's statements are characterized at different points in the Respondent's Closing Submissions as being (a) advocacy directed to "concerns about the impacts of gender ideology on women and children" (paragraph 224); (b) "meant to contribute to social or political discourse about an important issue" (paragraph 234); and (c) as gender critical speech that is socially valuable (in the section beginning at paragraph 237).
9. However, the different framings of the Respondent's statements are accompanied by an absence of analysis about one of the core concerns raised by the Respondent's statements: the depressive effect those statements are likely to have on transgender people accessing

health care, resulting in harm. The question before the Panel remains the same: are the statements in evidence discriminatory and derogatory towards transgender people.

Political speech

10. Similarly, the framing of the Respondent's statements as political speech for the purpose of the *Doré/Loyola* proportionality analysis does not alter the Panel's main question: were the Respondent's statements (regardless of how characterized) discriminatory.

Case law from other jurisdictions

11. In the section titled, *Gender critical speech is socially valuable and deserves protection* (beginning at paragraph 237 of the Respondent's Closing Submissions), the cases cited are drawn primarily from the United States and the United Kingdom. However, those jurisdictions have significantly different legal, constitutional and public policy landscapes, particularly on issues of gender identity. The Panel would risk being led into error if it placed reliance on authorities from those jurisdictions.
12. There is abundant case law from the regulatory context here in Canada addressing one of the key questions arising in this case: does a regulator have the authority and responsibility to intervene in a regulated professionals off duty speech when it brings the profession into disrepute (regardless of whether that speech is considered gender critical speech or otherwise). That question has been answered in the affirmative by:
 - (a) the Supreme Court of Canada, in *Ross v. New Brunswick School District No. 15*, 1996 SCC 237 and in *Groia v. Law Society of Upper Canada*, 2018 SCC 27;
 - (b) the British Columbia Court of Appeal in *Kempling v. British Columbia College of Teachers*, BCCA 2005 327;
 - (c) the British Columbia Supreme Court in *Kempling v. British Columbia College of Teachers*, 2004 BCSC 133;
 - (d) the Saskatchewan Court of Appeal in *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (note that while in *Strom* the court found on the

particular facts of that case that the regulator was not justified in disciplining the nurse for her off duty public statements, the court affirmed that nurses could be disciplined by their regulator for off duty public statements and provided a set of contextual factors to be considered in making that determination); and

(e) the Ontario Superior Court of Justice in *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685 and *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513.

13. Given the rich discussion in those cases on the various contextual factors to be considered in determining whether to intervene in a regulated professionals off duty public speech, there is no need for the Panel to look further afield for guidance in its decision making.

Causation

14. In the section of the Respondent's Closing Submissions titled, *Hypothetical "Harm"*, beginning at paragraph 206, the Respondent asserts that the College has the burden of showing a causal connection between the Respondent's statements and the alleged harms. This is incorrect. It is permissible for the Panel as decision maker to draw inferences from the evidence.
15. That harm can be inferred by a decision maker is clearly established in the above cited case law. For example, in *Kempling v. British Columbia College of Teachers*, 2004 BCSC 133:

[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.

CONCLUSION

16. The College encourages the Panel to answer the questions it is tasked with answering based on the evidence and the law, to avoid being distracted by inflammatory language, and to not embark on determinations that lie beyond the scope of a professional disciplinary proceeding. The College also encourages the Panel to exercise its discretion to draw reasonable inferences from the evidence. To assist with that, the Panel may accord what weight it deems appropriate to the expert evidence of Dr. Elizabeth Saewyc and Dr. Greta Bauer, which evidence, the College submits, was not undercut on cross, and recognize in its decision the considerable harms occasioned by the Respondent's discriminatory and derogatory statements.

RESPECTFULLY SUBMITTED THIS 26th DAY OF FEBRUARY, 2024



Michael Seaborn
Counsel for BCCNM



barbara findlay, KC
Co-counsel for BCCNM



Brent Olthuis, KC
Co-counsel for BCCNM