

**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”)

CLOSING SUBMISSIONS OF AMY HAMM

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PART I – INTRODUCTION

“If liberty means anything at all, it means the right to tell people what they do not want to hear.”

George Orwell, *Animal Farm*

1. In today’s polarized political climate, those who hold and express political and social opinions outside of a narrow range of acceptable views are seen as adversaries (or worse). They often face ‘cancellation’ from jobs or careers, ‘deplatforming’ from speaking engagements, social media shaming, intimidating mass protests, and threats of physical harm. Some of these consequences occur with the full support and encouragement of institutions that were meant to be neutral, but have taken a side in the so-called “culture wars.”
2. In such a climate, those who wield institutional and administrative powers may be tempted to use those powers to tip the scales against those with counter-narrative opinions. A self-perpetuating illusion of consensus can emerge, as dissenting voices are stifled or punished, preventing even good faith dialogue and debate. This is anti-scientific, anti-democratic and illiberal. Professional regulators, in particular, must be on guard against this and maintain political neutrality if they are to properly govern in the public interest and not lose the public’s trust. Regulators have no statutory authority to engage in political issues—to do so is to use their powers for an ulterior purpose and is an abuse of their discretion.
3. As a professional, standing up to this juggernaut, speaking the truth, and being guided by one’s conscience rather than popular opinion, takes immense fortitude and bravery. Those who do so, like Amy Hamm, demonstrate one of the highest ideals of the nursing profession: ethical and moral courage.¹
4. What is the truth that she professes? There are two sexes. Males and females are biologically different from one another. Women and girls ought to have certain sex-based protections as a result of these biological differences. It is not possible to change one’s sex. Transwomen are not *literally* women.

¹ **ethical (or moral) courage.** When nurses stand firm on a point of moral principle or a particular decision about something in the face of overwhelming fear or threat to themselves. Canadian Nurses Association, *Code of Ethics*, 2017 edition: www.cna-aiic.ca/ethics

5. Speaking the truth should not be a punishable offence.

6. The College says that these views are transphobic. The mere assertion that there are only two sexes in humans (a statement of basic biology) qualifies *prima facie* as “discrimination” against transgender people, according to the College in its opening submissions, and must be subject to regulatory discipline. This is absurd.

7. Amy Hamm’s general concerns that she has expressed, properly understood, are that: (1) gender identity ideology has a harmful impact on women, children, as well as on gays and lesbians;² (2) children are actively being taught that if they do not fit sex stereotypes (e.g. “tomboy” girls or effeminate boys), they may have been born in the “wrong body”;³ (3) such children may then be put on an irreversible path of puberty blockers, cross-sex hormones, and ultimately risky surgeries, under the misnomer of “gender-affirming care”; however, if they had been left alone, the vast majority would have ended up comfortable in their own bodies after puberty, frequently discovering that they are simply gay or lesbian;⁴ (4) males, *as a sex class*, are, *on average*, physically stronger and more violent than women;⁵ (5) *some* males, self-identifying as women (often fully intact and heterosexual), with none of the historical gatekeeping in place since “gender identity” achieved protected status, can and do abuse this statutory protection of gender identity to enter women’s sex-segregated spaces, including prisons, rape shelters, and changerooms;⁶ (6) there is an inherent conflict between sex and gender identity with real-world impacts, particularly due to this unconstrained ability to “self-identify”, which must be resolved or clarified through robust discussion and debate;⁷ (7) radical activists have been pushing gender identity ideology into most of our institutions over the last decade, using false or misleading moral claims of “harm”, and shaming, punishing or driving out those who oppose;⁸ and (8) she cannot, in good conscience, stand by and watch this happen without speaking up.⁹

² Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1256, line 18 to page 1258, line 6

³ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1250, line 25 to page 1251, line 9

⁴ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1249, line 19 to page 1250, line 4; and page 1322, line 22 to page 1324, line 3

⁵ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1235, lines 2 to 17; Transcript, Day 19, November 7, 2023, Cross-Examination of Amy Hamm, page 1477, lines 7 to 23

⁶ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1235, line 4 to page 1237, line 22

⁷ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1326, line 20 to page 1327, line 8

⁸ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1252, line 7 to page 1253, line 18

⁹ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1258, lines 17 to 25; Day 19, November 7, 2023, page 1513, lines 12-16

8. Amy Hamm’s opinions have social value and have contributed to an important public debate that is only recently losing some of the censoriousness, as courage spreads and more voices (including politicians) speak up. This has resulted in court protection in the United Kingdom for “gender critical” views like Ms. Hamm’s (discussed below), and an increasing willingness to look critically at the harms of gender ideology on young people in particular (as the Tavistock Clinic report demonstrates).¹⁰ This has all changed in the last couple of years in the UK—to Dr. Stock, it is a welcome change from the environment where she was driven off campus and out of her career by masked mobs for expressing these same gender critical views.¹¹

9. The College concedes that Ms. Hamm’s right to freedom of expression, guaranteed under *Canadian Charter of Rights and Freedoms* (the “**Charter**”) would be infringed by a finding against her.

10. As will be summarized below, it is the respondent’s submission that i) there is no evidence of breach of standards or bylaws, nor a case for a finding of unprofessional conduct; ii) her statements do not have a sufficient nexus to her status as a nurse to warrant regulatory interference; iii) her speech is reasonable and scientifically supportable; iv) there is social value to her speech; v) her advocacy is conducted in good faith, including to effect political change; vi) she believes in the truth of her statements; vii) there is no evidence of “discrimination” or “harm”; and viii) the infringement of her *Charter* right to freedom of expression, belief and opinion cannot be justified on a proportionate balancing against the objectives of the College.

PART II – SUMMARY OF FACTS AND EVIDENCE

A. The Citation

11. The Citation issued by the College’s Inquiry Committee, which initiated this disciplinary proceeding, alleges that:

Between approximately July 2018 and March 2021, you made discriminatory and derogatory statements regarding transgender people, while identifying yourself as a nurse or nurse

¹⁰ Transcript, Day 8, January 10, 2023, Cross-Examination of Dr. Greta Bauer, page 105, line 3 to page 106, line 5; page 113, line 14 to page 116, line 5

¹¹ Transcript, Day 19, November 7, 2023, Direct Examination of Dr. Kathleen Stock, page 1589, line 20 to page 1590, line 7; and page 1601, line 6 to page 1602, line 5

educator. These statements were made across various online platforms, including but not limited to, podcasts, videos, published writings and social media.

12. The Citation further alleges states that this conduct is contrary to certain professional standards and/or constitutes unprofessional conduct.

13. Registered Nurses are regulated under the *Health Professions Act*¹² (the “*Act*”) and section 39(1) of the *Act* makes it an offence to engage in unprofessional conduct. This phrase is not defined in the statute, beyond stating that it “includes professional misconduct” and by implication is therefore broader.

14. There is no allegation that Ms. Hamm has engaged in any behaviour or conduct in the workplace that would cause the College to question her professional competence and, notably, she has continued to work as a nurse for the more than three years since the investigation commenced. The Citation is directed solely towards her public commentary.

15. An earlier version of the Citation alleged that some of her statements “included medically inaccurate information,”¹³ however this was withdrawn shortly before the hearing was commenced.

16. At the time her comments were made (and continuing to the present), they were well-supported in the medical and scientific literature. There was nothing misleading or unscientific about Ms. Hamm’s comments. As Dr. Cantor testified, “I don’t recall there being any contradictions between what she said in anything that’s scientifically established.”¹⁴

B. The College’s Allegations

17. This case arises out of two complaints by adversarial members of the public, after Ms. Hamm participated in the installation of an “I ♥ JK Rowling” billboard in Vancouver, which they apparently found offensive. This prompted a College investigation and a review of her Twitter (now known as “X”) account and other public commentary, resulting in a 330+ page dossier, which was presented to the Investigation Committee. When asked by the Disciplinary Committee (“the **Panel**”) during the hearing to pare down the impugned expression in the dossier to a “list of specific statements or words

¹² *Health Professions Act*, [RSBC 1996] Chapter 183

¹³ Transcript, Day 1, September 21, 2022, Cross-Examination of Aisha Ohene-Asante, page 62, line 17 to page 63, line 2

¹⁴ Transcript, Day 15, November 1, 2023, Direct Examination of Dr. James Cantor, page 1000, lines 23-25

that are of concern,”¹⁵ the College produced an “Extract Document” which still consisted of 189 pages and was asked by Panel counsel to further “drill down to the next level” to identify “exactly what are the phrases, words that you say cross the impermissible line.”

18. It is interesting to review the materials that have allegedly “crossed the line” into statements deserving of punishment. A few will be examined here, including those the College saw fit to specifically draw attention to in its closing submissions. A closer review of the evidence from all witnesses will be undertaken during oral submissions.

19. During the hearing, the College took their expert, Dr. Greta Bauer, through statements made by children’s author JK Rowling, trying to establish that her views were harmful or transphobic¹⁶ and, by association, so were Ms. Hamm’s. Ms. Rowling had come to the defence of Maya Forstater, a UK woman who was going through a court case over her “gender critical views” in December 2019, in a tweet that caused massive outrage (and support) from around the world. What was the Rowling tweet that triggered this whole affair?

Dress however you please. Call yourself whatever you like. Sleep with any consenting adult who’ll have you. Live your best life in peace and security. But force women out of their jobs for stating that sex is real? #IStandWithMaya #ThisIsNotADrill¹⁷

20. Following the lead of another gender critical feminist in the UK, Amy Hamm co-sponsored a similar billboard in Vancouver to show support for Rowling. Complaints ensued and the billboard was immediately targeted with paintballs. In its review of impugned statements by Ms. Hamm in its submissions, the College identified the following letter, written to Pattison Billboards. The letter reads:

We rented a Vancouver billboard from your company that states “I ♥ JK Rowling”. We did this because we were inspired by Rowling standing up for the rights of women, girls, and children.

JK 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.

¹⁵ Transcript, Day 2, September 22, 2022, page 169, lines 2-11; page 171, lines 3-12

¹⁶ Transcript, Day 4, October 24, 2022, Direct Examination of Dr. Bauer, page 22, lines 9-22

¹⁷ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1268, lines 12-26; Exhibit 48

21. Consider what was said here and how it was said: this is a temperate, reasonable expression of concern about the impact of a burgeoning ideology on the rights of women and girls. It is rather astonishing that the College finds this statement among those worthy of punishment, but it does shed light on the motivations for this investigation and ensuing disciplinary proceeding: JK Rowling has been deemed by activists to be “transphobic,” despite her nuanced, sensitive and liberal comments, and an essay that highlighted concerns with the secondary impacts flowing from the prioritization of gender identity over sex, particularly as a woman who has experienced sexual assault herself.¹⁸ (The Panel is encouraged to read the entire essay, which was put to Dr. Bauer only selectively.)

22. No matter how nuanced, however, Rowling has been declared an irredeemable transphobe. Anyone who is on her side cannot merely be seen as questioning or skeptical of gender ideology. Rather, to question is to be on the side of transphobes. And transphobes must be punished.

23. We encourage the Panel to dispassionately reflect: are JK Rowling’s comments and essay, as introduced into evidence, objectively hateful or discriminatory? Or do they ask serious questions and point out a concerning conflict of rights (or perceived rights) that may have an adverse impact on the safety, fairness and dignity of women and children? Must all of society simply bend to the will of those pushing this new orthodoxy? Or can there be space for someone to be gender critical? Must anyone who is gender critical be driven from the professions because they will be deemed by their regulator to be harmful transphobes? And what authority does the College have to take a side at all – a regulator of professions must be politically neutral, focused on competency and nursing standards. On what authority does the College police the political views of registrants, or come down on one side of a legitimate debate in the public square? More will be said about the existence and legitimacy of that debate below, along with a review of UK cases which have found “gender critical” speech to be worthy of protection.

24. Another statement that is apparently “across the line” is the Q&A interview at Tab 10 of the Extract.¹⁹ Ms. Hamm says:

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 them to suffer discrimination, we would like them to live their lives in peace and security.

¹⁸ Exhibit 27: *JK Rowling Writes about Her Reasons for Speaking out on Sex and Gender Issues*, June 10, 2020, College’s Supplementary Materials, Volume 1, page 132

¹⁹ Exhibit 26: *Q&A: Why I bought an “I Love J.K. Rowling” billboard in Vancouver*, September 26, 2020, Extract Document, page 30

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

25. On any other topic, this anodyne statement would be unremarkable. But, again, Ms. Hamm is on the wrong side of a political and policy debate on which the College has improperly staked a position (which is an abuse of discretion).

26. The lack of specificity on how, exactly, each of the 330 pages (or 189 pages in the Extract) of statements allegedly veer into "unprofessional conduct" lends an element of procedural unfairness to this prosecution. If we are to assume that every single statement, of even the pared down Extract, "crosses the line" in some fashion, then it can only be concluded (because of the innocuousness of most of it) that simply speaking about gender identity or women's sex-based rights is misconduct. That appears to be the conclusion the College wants the Panel to reach.

27. In its closing submissions, the College has identified several categories of comments which they allege invite sanction by the Panel. The attempts to characterize these comments as causing "harm," and what is meant by that term, are discussed below.

Allegation that statements deny or debate the existence of transgender individuals:

28. The impugned testimony of Ms. Hamm, set out in the College's submissions to support a finding of unprofessional conduct, includes the following statements:

- i) "...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..."
- ii) "There's a difference between doing away with the concept [of sex] 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."
- iii) "Every human being is either a male or a female."
- iv) "My position is that every person on this earth is a male or a female and that is not something that you can...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."

29. Her statements, although introduced to establish Ms. Hamm's heresy for not agreeing with gender ideology, demonstrate that she is evidence and reality-based in her views. Particularly for members of the healthcare professions, reality and science should not give way to fantastical thinking, no matter how well-intentioned. That does not mean that people should be unkind to transgender people or deny them services, and Ms. Hamm has made this clear in her statements and testimony. One can be critical of transgender activism and gender identity ideology, and the policies flowing therefrom, while treating such people with full human dignity and without "denying their existence," as alleged by the College.

30. Ms. Hamm does not deny the existence of people who believe that they have an internal sense of self that differs from their biological reality. She does, however, reject the notion that *everyone* experiences this, as this series of answers during her testimony explains:²⁰

A I do not believe people can literally change their sex, and you know, there's no science to support that that can happen either. What I do have is I have a lot of compassion for people who suffer from gender dysphoria and are uncomfortable in their bodies, and I completely support the right of adults to make the decision to do whatever they would like to do with their bodies and to try to live their life and present the way that they look on the outside, to whether it's -- you know, they want to appear as the opposite sex. I have zero issue with that at all.

A I believe everyone has a biological sex, and they have a personality and that males and females, you know, there are stereotypes associated with males and females when it comes to their interests and behaviors, but I think everyone is a unique individual and I reject the notion that someone's adherence or non-adherence to the sex stereotypes or "gender stereotypes" somehow reflects an internal gender identity or gender soul. I just -- I frankly think that it is anti-scientific, metaphysical nonsense.

A 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. And the concern that I have about policies based on enshrining gender identity into law is that we're now in this situation where gender identity often supersedes women's sex-based rights.

²⁰ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1250, line 9 to page 1251, line 24

31. Dr. Greta Bauer admitted on cross-examination²¹ that it is okay to believe that not everyone has a soul. This is no different in Ms. Hamm's view. The claims are equally metaphysical and taken on faith.

Q So you would agree today still that's your position, everyone has a gender identity?

A Yes, I would.

Q If it's a feeling or a knowing of oneself, as you called it the other day, that would be entirely subjective, would it not?

A Subjective meaning one understands themselves, one knows themselves. It's part of their subject. It's their own sense of knowing, yes.

Q All right. Now, if a religion person says that everyone has a soul they are entitled to have that belief, are they not?

A They are indeed.

Q And I'm entitled say I don't believe in that religion that I do not in fact have a soul; is that correct?

A That would be your personal belief.

Q Right. And now, if I had said that in certain periods of medieval history perhaps I might have been brought up on blasphemy charges or sent to a star chamber, but today I would be free to say that, would I not?

A I'm assuming so. I hope so.

Q I hope so. And likewise, you can believe everyone that has a gender identity. You're entitled to that belief but I'm free to reject that belief, am I not?

A You are.

Q And a nurse should also be free to reject that belief for herself, would you agree?

A Correct.

Q Okay. And a nurse can also reject the idea that all people have a soul, right?

A Correct.

Q And we wouldn't then say that she is an inherent danger to Catholics in the provision of nursing care, would we?

²¹ Transcript, Day 6, October 26, 2022, Cross-Examination of Dr. Bauer, page 128, line 10 to page 130, line 4

A I feel like I'm losing you a bit here.

Q Well, you can just answer the question. Would -- if she doesn't believe that there's a soul would she be an inherent danger to Catholics in the provision of nursing care?

A If she has a personal belief that there is no soul and assuming that Catholics do, then no, not necessarily.

32. People are entitled to believe whatever they wish, and Amy Hamm is no exception. Some people are religious and there are countless faiths, belief systems, sects and denominations around the globe. Others are atheist and do not believe in metaphysical claims of the existence of a supernatural power at all. Some people believe in the unfalsifiable and metaphysical claim that they and/or others have a gender identity that stands apart from their biological sex. Others do not believe this. The College does not have the power to determine what all registrants are required to believe, and should not be dictating which beliefs they can or cannot espouse in the public square or even in their professional lives.

33. If a nurse were publicly critical of Christianity and those who practice it, staking her position as an atheist, she would undoubtedly not be facing a proceeding such as this, despite the fact that religion is a protected ground under the *Human Rights Act* (assuming she wasn't denying services to Christians). There would be no question that an atheist nurse could provide appropriate care to a Catholic, and vice versa. Dr. Bauer admitted this in her cross-examination, set out above.

34. But gender identity has, indeed, become an unquestionable belief system over the last decade. More people like Amy Hamm should be brave enough to ask why that is, especially those in the health sciences.

35. At paragraph 52 of the College's closing submissions, reference is made critically to a statement made by Ms. Hamm to the CBC following the erection of the billboard:

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.

The College then paraphrases Dr. Bauer's opinion: that *gender identity is about who people say they are, whether they are cisgender or transgender*.

36. Furthering that notion, the College makes a rather bizarre assertion at para. 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. [Emphasis added]

37. Ms. Hamm has not said that. First of all, people do not “self-identify” into their sex. It just is. Secondly, Ms. Hamm does not say that transgender people cannot identify however they please, but there are consequences and conflicts arising out of that self-identification in some instances (competitive women’s sports is a good example).²²

38. This focus on identity by the College and its experts elides an important truism: women have sex-based rights and protections under the *Charter*, and under all human rights legislation, based on the biological reality that women have historically faced barriers due to their sex, particularly the consequences of reproduction. Women experience varying degrees of differential treatment and outcomes on the basis of their sex, across all cultures and places and over all time, not because they “self-identified” into being a woman and are now denying transpeople this “right”, but because they are female.²³

39. This was recognized in the 1989 Supreme Court of Canada decision in *Brooks v. Canada Safeway*²⁴, where the court said this:

Having found that the Safeway plan discriminates by reason of pregnancy, it is necessary to consider whether pregnancy-based discrimination is discrimination on the basis of sex. I venture to think that the response to that question by a non-legal person would be immediate and affirmative. In retrospect, one can only ask -- how could pregnancy discrimination be anything other than sex discrimination? The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to woman. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.

...

The capacity to become pregnant is unique to the female gender. As the appellants state in their factum: "The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women. A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not".

²² Transcript, Day 20, November 8, 2023, Direct-Examination of Dr. Linda Blade, page 1634, line 8 to page 1639, line 12

²³ Transcript, Day 17, November 3, 2023, Direct-Examination of Amy Hamm, page 1234, line 18 to page 1235, line 1

²⁴ *Brooks v. Canada Safeway Ltd.*, 1989 CanLII 96 (SCC), [1989] 1 SCR 1219, <https://canlii.ca/t/1ft72>

Distinctions based on pregnancy can be nothing other than distinctions based on sex or, at least, strongly, "sex related".

Allegations that statements misstate the “current understanding” of sex and gender

40. Fast-forward to today, and Dr. Greta Bauer and the College say that anyone can be a “woman” if they believe it to be so.²⁵ Surely, then, the word “*female*” is reserved to the sex-class formerly known as women? Dr. Bauer says no—that “depends how you define” female.²⁶ Over the better part of a day under cross-examination, Dr. Bauer prevaricated over a definition of “female.” At several points, she noted that there aren’t two gametes, large and small, like everyone thought. There are actually three: large, small and “neither.”²⁷ And we cannot use the word “female” to describe the large gamete producers, because some people have had hysterectomies (*non*-uterus havers, they might be called), some people have “micro-chimerism” from carrying “boys” (if we can call them that) *in utero*,²⁸ and some older men might not be fully carrying XY chromosomes as they age.²⁹ (This proves, she says, that our sex chromosomes are not immutable, but fails to explain how this process turns a male into a female.³⁰)

41. At one point, a proposed definition was put to her that might encompass exceptions like loss of one’s uterus, but still retain a common understanding of “female”³¹:

Q Okay. Thank you, Dr. Bauer. You know, I was struck a little bit just before we went on the break there about how we were struggling with the definition of female, and so I want to put a proposition because I want to make sure we have a working definition for that as well.

Could you agree with the definition that females are individuals who do or did or will or would, but for developmental or genetic anomalies, produce eggs? Is that a definition that covers your various dimensions but still helps us understand what a female is when we're speaking of it?

A So in research we would define things often for a very specific purpose depending on what is it that we're looking at and so we would be looking at, you know, specific sex dimensions if that is what was of interest. So when we're talking about kind of trying to create general categories of male or female it's always and many exceptions apply. So from a

²⁵ Transcript, Day 8, January 10, 2023, Cross-Examination of Dr. Bauer, page 123, line 24 to page 124, line 6

²⁶ Transcript, Day 6, October 26, 2022, Cross-Examination of Dr. Bauer, page 143, lines 17-19

²⁷ Transcript, Day 6, October 26, 2022, Cross-Examination of Dr. Bauer, page 145, lines 15-23

²⁸ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 179, lines 11-13

²⁹ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 179, line 24 to page 180, line 5

³⁰ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 181, lines 10 to 16

³¹ Transcript, Day 6, October 26, 2022, Cross-Examination of Dr. Bauer, page 50, line 20 to page 51, line 21

scientific perspective that definition might vary depending on what health condition it is that we're interested in.

42. Dr. Bauer's opinion, evidently, is that phenomena cannot be categorized meaningfully unless the categories have no exceptions. This is a rather wild theory that, if accepted, would entirely undermine medical science.

43. Many people formerly known as "women" (along with men, and including gays and lesbians) have been rejecting this "current understanding of sex and gender" and fighting to preserve those sex-based categories and the language necessary to describe them, and it is not "transphobic" to do so. Amy Hamm should be free to advocate for women's sex-based rights and protections, and it is not "transphobic" for her to do so either. Transwomen are free to advocate for rights for transwomen. Advocating and lobbying policymakers may continue before and after laws have changed, because they can change again. Such is life in a democratic system.

44. The College (at paragraph 56 of its closing submissions) cites their expert, Dr. Elizabeth Saewyc, as saying, "When she [Ms. Hamm] uses the word "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,"...it was clear that she was conflating gender, being a woman, with sex assigned at birth or sex as a female, and ...therefore, in saying that trans women cannot be women, she's sort of conflating sex and gender, and that's inaccurate."

45. Ms. Hamm is being disciplined by her professional regulator for not adopting this "current understanding of sex and gender," which is about as clear as mud. (Recall that the word "female," which Dr. Saewyc would use for the female sex, does not, to Dr. Bauer, actually include just the female sex.)

46. Not to be outdone, in paragraph 57, Dr. Bauer is quoted as saying, "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

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...."

47. At the start of their submissions, the College required two pages of definitions so the Panel could follow this "current understanding of sex and gender." Yet Ms. Hamm is being disciplined by her professional regulator for arguing that the traditional understanding of sex and gender is far more scientifically accurate and clear.

48. To redefine and manipulate the language to suit activists, and then find that a registrant is in violation of this "Newspeak," is outrageous. The College has no power to compel the speech of its registrants and to force them to utter particular words or adopt certain beliefs.

Allegations that statements fail to respect pronoun choice, hence misgendering individuals

49. There was no evidence in this hearing that Ms. Hamm has ever failed to "respect pronoun choice" in her work as a nurse. In fact, she testified that she does respect and use preferred pronouns at work and always has.³² There is no evidence that she misgendered a person who expressed their choice of pronoun to her. The best the College can apparently find is some reference on X to her talking about a participant on a US television program without using the pronouns that Dr. Bauer and the College *presume* that the participant preferred (paragraph 55). This is such a stretch for disciplinary proceedings that it does not warrant further response.

Allegations that statements cast transgender people as immoral or bad, for example stereotypes that they are dangerous or predatory

50. Ms. Hamm responds to this quite clearly in the cited passage at the College's paragraph 59. In referring to the views of JK Rowling, Ms. Hamm says, "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 the actual article where Ms. Hamm explains this threat, the examples she gave of situations where this occurred were hyperlinked to sources.

³² Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1232 lines 16-20

51. But Dr. Bauer was invited by College counsel to do a bait-and-switch in her testimony, when asked about this concern on reviewing the position statement of caWsbars (Canadian Women's Sex-Based Rights, the organisation co-founded by Amy Hamm with a group of women) about the inclusion of males in the definition of women through gender self-identification. Counsel asked Dr. Bauer: "Is it your understanding that men, cis men, are being included as women anywhere?" Dr. Bauer responded: I have not seen that in the text of any of the policies that I read or have been asked to serve as an expert witness on."³³ It is either disingenuous or naïve to think that only sincere and gentle transwomen would take advantage of self-identification. The door has been swung wide open for all.

52. Dr. Cantor, during his testimony, described the differences between those who were formerly known as transsexuals who, before "self-identification" was normalized, typically went through a gatekeeping process before accessing women's spaces. Those who transitioned in that era were typically "so gay he really is happier living life as a woman."³⁴ With the elimination of all boundaries and barriers, males who have a paraphilia known as "autogynephilia" (sexual attraction to oneself as a woman), or who are cross-dressers, or who have other paraphilias or psychopathologies, including exhibitionism and voyeurism, are now able to enter into women's spaces without restriction.³⁵ People that woman historically would have been on guard against when alone can now simply walk into their spaces and satisfy their fetish (of being seen as a woman):

Rather than being attracted to men or being attracted to women, they're largely attracted to women, but they're attracted to being the woman. They're sexually aroused at the image of themselves in female form.

And so the term -- where gynephilia is the technical term we use for attracted to female, autogynephilia is attracted to oneself as female. And these people, unlike the childhood onset types who were recognizably effeminate, the adult onset types are not. They're unremarkably masculine. You -- nobody would pick them out in a crowd. They are very often married to women, have children, and people are surprised when they come out as transgendered.

Now, if they're otherwise mentally healthy, they in general can do perfectly fine in their new sex. The complication is that there are many other people with other mental health issues, one of -- and they are also autogynephilic. It's not the only issue that they're dealing with. For example, autogynephilia for many people is one of several sexual atypical phenomena that they experience. So usually what the clinician then needs to consider is that is this person acting out of autogynephilia or one of these other interests and just taking advantage of transition in order to fulfill some other interest?

³³ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 189, line 23 to page 190, line 2

³⁴ Transcript, Day 13, October 25, 2023, Qualification Voir Dire of Dr. Cantor, page 737, lines 14-15

³⁵ Transcript, Day 14, October 31, 2023, Direct Examination of Dr. Cantor, page 806, line 23 to page 807, line 15

One of the most common ones of those would be sexual masochism or exhibitionism. For example, an exhibitionist is sexually turned on by the idea of showing himself either naked or showing his genitals or surprising, usually female, onlookers where they weren't expecting to be presented with it. Well, if one is an exhibitionist, one often would try hard to take advantage of opportunities where they get to be naked surrounded by females.

So now it's a clinical question, when somebody asks to be deemed female, are they asking to be deemed female because it's a genuine case of autogynephilia and they might do fine living as female or is this an exhibitionist taking advantage of a situation where he or she can just, as I say, take advantage of the situation in order to enact the exhibitionism?

So it's situations like that that require an assessor who is aware of all of the various potential motivations as a gatekeeper, somebody objective, to help make sure that the people who are undergoing transition and being deemed female, well, can be associated with the expectation of a healthy outcome.

But when the gatekeeping procedures are removed and a person is simply self-identifying, they now become, you know, subject to abuse. If a person merely has to declare out loud that they belong to the other and there's nobody objective or there's very little power in somebody objective to determine who counts, now it's ripe for abuse and anybody for less healthy reasons can be, as I say, taking advantage of society's developing appreciation and desire to embrace sexual diversity.³⁶

53. During her cross-examination, Dr. Bauer became visibly agitated by the reference to "autogynephilia." She quickly changed the language on that term as well, calling the men who fit this profile "transgender lesbians."³⁷

Q So in your earlier testimony when we talked about prisons you identified a picture of a trans -- a verbal picture of a trans woman in the prison context as possibly having transitioned at a very young age, very effeminate, likely vulnerable to male violence. Do you remember describing that to me?

A I believe that's when you were asking about a blanket ban on all trans women in prison.

Q Right, and would we -- do you know if we might call somebody who is -- would be described that way as a homosexual transsexual? Would that be a categorization, perhaps?

A That would be as a homosexual transsexual?

Q Mm-hmm.

³⁶ Transcript, Day 14, October 31, 2023, Direct Examination of Dr. Cantor, page 808, line 6 to page 810, line 13

³⁷ Transcript, Day 8, January 10, 2023, Cross-Examination of Dr. Bauer, page 117, line 10 to page 124, line 8

A Well first of all, you've given no information on the sexual orientation, I don't think, of that person. And that's very outdated language at this point.

Q Is it? Okay. There are other types of presentations for trans women beside those who would perhaps transition very young, as very easily be very effeminate. Do you -- are you familiar with the term autogynephilia?

A I am, yes.

Q Okay. And so would you agree with me that some males transition much later to trans women, even after -- even after having been fathers. That is another type of presentation of a trans woman, is that fair?

A I think there's a lot of argument as to whether there are types of trans women, but it is true that people transition across the age spectrum.

Q Right. And are you -- do you want to give me a description of autogynephilia or shall I put one to you?

A Autogynephilia is a controversial hypothesis that basically states that there are two types of trans women, one of whom is kind of the sexual fetishist to the extreme and that's an autogynephile, and one of them is kind of a gay man to the extreme. It doesn't resonate with a lot of trans women who find that neither one of those necessarily matches their own experience. But it's a typology that was advanced by a couple of academics years ago and there's been additional research on it to try to critique it. And to look the various (audio drops) CIS gender women actually experience some of the same things.

Q Right. So there's different -- it takes different forms and so you would agree with me that there are some trans women who are not homosexual, they still retain an attraction to females and have a sexual interest in perceiving themselves as, in female form?

A Okay, so you're using very outdated language. So you're talking about trans women who are lesbians or attracted to women and have a sexual -- that doesn't necessarily go together, that's part of the problem with this as a theory. Is it basically says that all trans-lesbians are sexual fetishists and that's absolutely not true.

Q Okay, so these are trans-lesbians though who do not have surgery, so they're trans-lesbians who have penises, is that correct? In many cases at least.

A These are trans-lesbians at all different types of gender (audio drops) medical care or not. Sexual orientation is different from gender forming medical care status.

Q Are there also people who would not be transgender necessarily, who would perhaps cross-dress occasionally, or would they be -- would that be under the umbrella of transgender?

A It depends on how you define that umbrella, because cross-dressers generally don't identify as woman, and male cross-dressers don't generally identify as women.

Q But they can present as woman?

A They may from time-to-time.

Q Mm-hmm. All right. And so those individuals, the autogynephilia type if you want to call it that, or if you don't, those who maybe transition later in life, they don't -- do not typically have gender affirming surgery. They do not typically have surgery on the -- they may be on hormones but not necessarily surgery, is that correct?

A I think you're confusing cross-dressers with an obsolete category of autogynephiles. Those were never the same group even back when that theory was being debated more seriously.

Q I'm not trying to (audio dropped) I'm looking at various presentations of what might be called trans women today. So I wasn't actually suggesting that cross-dressers were autogynephilia, I'm just looking at the various presentations. So, referring to autogynephilia, who are males who transition late in life.

A Okay, those aren't the same groups, those are not the same groups. And autogynephilia is not something that's accepted as a category, it's a theory. And there is ongoing research on it and most people would not, would not agree that there is this kind of typology of trans women who fit into these distinct types or categories.

Q There are people that might thought, right? I mean it's not -- you're uncomfortable with it, but that doesn't mean that everybody else is --

A No, I'm actually not uncomfortable with it, so. But it's something that's more historic at this point. It's something that's not an accepted typology, so I can't say this is how we (audio dropped) trans women into groups because that's not how it works.

There's a variation within trans women, there's certainly trans women who are attracted just to men, just to women and, you know, across multiple genders. So there's definitely variation in sexual orientation and there's variation at the age at which people come out. And the age at which they undergo gender affirming medical care. That doesn't mean that those align in really neat ways or that they fit into these distinct groups.

Q And so someone who is presenting as a male last year, but this year has perhaps gotten a wig and possibly large prosthetic breast, and I'm not making this up, you don't disagree with me that those -- that individuals who present in that way are calling themselves transgender, is that right?

A Many people may don wigs and prosthetics and not call themselves transgender. And some transgender people may don wigs -- so they're separate issues, putting on wig and being transgender.

Q Okay, you don't dispute, though, that that is happening, that people are putting on --

A That trans men --

Q (Inaudible) in fact --

A Costumes?

Q (audio drops) as female?

A Do you mean -- I don't dispute that trans women sometimes wear wigs, and I won't dispute that trans people and cisgender people will wear prosthetics, including cisgender woman who've had breast cancer. People will wear prosthetics.

Q Are you familiar with the story out of Oakville, Ontario with the --

A Oh, I am.

Q Yes, okay. So that's the visual. Are all of these people women in your opinion who -

MS. FINDLAY: I'm sorry if you -- excuse me, Madam Chair, if the rest of us are to understand the -- I don't have that visual.

MS. BILDY: May I put a picture to the witness?³⁸

THE CHAIRPERSON: Yes, you may.

MS. BILDY:

Q All right, I'm just going to -- I'm going to share my screen again. This is a story in Ontario, I don't know if our friends in B.C. have seen this story. It's a bit controversial here at the moment. So somebody who is dressed in that fashion, and describes themselves as a woman, in your opinion, Dr. Bauer, is that a woman?

A I have no information on this person, I'd just seen the headlines, so.

Q But if you say they're a woman, if that person says they're a woman, are they a woman?

A If she identifies as a woman?

Q Yes.

A Yes, then her gender identity is a woman.

Q All right, with full access to female spaces if that's in fact what they identify as?

A As per the law.

Q Okay. All right, thank you, I have no further questions.

³⁸ Exhibit 31: "*Teacher wearing huge fake breasts to class sparks review of standards*" – National Post, dated October 13, 2022

54. That Dr. Bauer was unwilling to recognize that “transgender lesbians” (straight males with penises) having unfettered access to women’s safe spaces, prisons and rape shelters might be a reasonable concern, is a clear indication that she is a gender activist. No nuance was permitted in this discussion—no recognition of any potential risk. The College (incorrectly) alleges that Ms. Hamm views ALL people who claim to be transgender as dangerous and predatory. But the College and its experts deny and obfuscate ANY harms that women like Ms. Hamm are concerned about.

55. Dr. Bauer says in her evidence (at paragraph 58 of the College’s submissions) that, “There’s a long history of violence by cisgender men and some of that has occurred obviously in gendered spaces.” In other words, ALL transgender people are perfectly safe, and if they happen to ‘take advantage of self-identity laws’ then they aren’t really transgender.³⁹ But women aren’t allowed to ask that question. If someone like the Ontario teacher who showed up to school last year with a wig and massive fetish breasts (shown to the panel in the cross-examination excerpted above, and marked as Exhibit 31) says they are a woman, then according to Dr. Bauer they ARE a woman, for all legal purposes. Including women’s spaces.

56. Ms. Hamm has been careful to say that it is males *as a sex class* who are physically stronger and more violent.⁴⁰ That doesn’t mean *all* men, but women must rely on their instincts around strange men to avoid leaving themselves in vulnerable situations. By pretending that there is absolutely no threat, because every single male who says he is a woman is, in fact, a woman with no ill intent, and is no risk of violence, the College and its experts, and others who think this way, are doing a grave disservice to women and very likely causing harm themselves.

57. Dr. Cantor made this clear in his evidence as well, in connection with transgender women in prison:⁴¹

As I had explained earlier, there are two with rapid onset or adolescent onset now representing a third. But there are two major motivations or groups that go on to transition. One strongly related to homosexuality, especially in biological males, and one related to autogynephilia in the adult-onset cases.

For the biological males or the male to female transsexuals or transgendered folk who are attracted to males, the ones who are incarcerated, the ones who are in jails and prisons, their

³⁹ Transcript, Day 7, October 27, 2022, Cross-Examination of Dr. Bauer, page 27, lines 2 to 20

⁴⁰ *Supra*, note 5

⁴¹ Transcript, Day 15, November 1, 2023, Direct Examination of Dr. Cantor, page 1014, line 5 to page 1015, line 24

offences usually are related to relatively minor drug offences or prostitution and so on. They in general pose a very, very low risk of violence or sexual offending, again, outside of sex work or related ones.

That's very, very different from the phenomena associated with the adult onset transitioners. Autogynephilia, one of the atypical sexual patterns, somebody who has one often has others. And it's the presence of those others that often contribute to their commission of other sexual offences. Those are the ones that tend to be more violent, involve rape, they involve paraphilic interest patterns such as sexual sadism. And those people are more likely to commit future sexual offences.

Now, again, I don't want to be mistaken to be overstating what I'm saying either. As I say, it's a minority who go on to commit a pattern of offences, but very many of the people who have a long line of sexual offences are acting out a sexual interest pattern. Because one of the unusual sexual interest patterns can motivate gender dysphoria, there is a statistical association between them. And so the way that that gets factored into any of these formal risk assessments depends on those formal -- the nature of those formal risk assessments.

None of them -- so what I'm saying is that it's not the gender dysphoria or transgender status per se that influences likelihood of recidivist offences, but the psychological phenomena that motivates gender dysphoria can also be motivating the commission of sexual offences.

So that's why it becomes important for a clinician to understand and appreciate the motivation for somebody's gender dysphoria, but it's not exactly the gender dysphoria itself.

58. It should not be a punishable offence, or be considered “discriminatory,” to recognize these issues, be concerned about them, and publicly discuss them.

Allegation that Ms. Hamm made statements about “trans activists” in which their intelligence is denigrated or their motives questioned

59. To this allegation, we would point the Panel to Exhibit 49, which was a sample of the tweets and comments from “trans activists” who attacked JK Rowling online, and to the evidence of Amy Hamm, who told of the 15,000 or so comments she received in response to the billboard which called her horrible names or threatened death and rape,⁴² and to the evidence of her hosting events for women to meet, and discuss the impact of gender identity on their lives, which were attacked, protested, cancelled, and thronged, and where a “mock guillotine” was in the demonstration.⁴³ These were all “trans activists” too.

⁴² Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1276, line 14 to page 1277, line 9

⁴³ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1262, line 2 to page 1263, line 16

60. Is the College seriously suggesting that Ms. Hamm has to play nicely with such people? Is that because she is a woman? Is she not allowed to point out the misogyny and hatred of women she has experienced and observed from many trans activists? It is extremely hard to fathom what could be punishable about these statements, except for the obvious conclusion: Amy Hamm is **not** a trans rights activist and is therefore on the wrong team—the team that must be punished.

61. There is no requirement that professionals be unfailingly polite or civil in all of their public discourse. In fact, the Supreme Court of Canada in *Groia* confirms that, “Overemphasizing civility has the potential to thwart this good [holding *all* justice system participants accountable] by chilling well-founded criticism...Proportionately balancing lawyers’ expressive rights, therefore, ‘may involve disciplinary bodies tolerating a degree of discordant criticism’: *Doré*, at para. 65.”⁴⁴

Statements that refer to “gender wars”

62. Ms. Hamm’s testimony about the events she organized in Vancouver should make it clear that “gender wars” is a very accurate characterization.⁴⁵ Similarly, Dr. Stock’s evidence of being hounded off campus by masked protestors and driven out of her career for expressing gender critical views would support this statement⁴⁶ (see the cases cited below under “gender critical beliefs” for additional support). The fact that the terrain where her advocacy takes place has sometimes been hostile, does not mean that it is illegitimate. Through conflict can come awareness and resolution. The more people hear from her, and from others who advocate similarly, the more likely the concerns she raises will result in the change she seeks (safeguarding, fairness and dignity for women and children). Activists might indeed fear this and want her to be punished to stop her from creating greater awareness. The College, however, is not and should not be the enforcement arm of trans activists.

Identifying as a nurse while engaged in advocacy

63. On the statement that begins, “I’m Amy Hamm. During the daytime I’m a nurse and outside of work I’m a mom...”, Dr. Bauer was apparently able to opine on what a transgender person is likely to conclude from that message (College’s submission, paragraph 67). First of all, Dr. Bauer isn’t a transperson. No transpeople were called to testify as to what they thought about Ms. Hamm’s

⁴⁴ *Groia v. Law Society of Upper Canada*, 2018 SCC 27 (CanLII), [2018] 1 SCR 772, <https://canlii.ca/t/hsb9d>, paragraph 115]

⁴⁵ *Supra*, note 43

⁴⁶ *Supra*, note 11

statements. Dr. Bauer does not say how she could possibly know what a transperson would think in a given instance (unless she had done a broad survey on that very question, which is still not conclusive), nor could she possibly speak for all transpeople. This sort of questioning and evidence is of little value to the Panel, who can guess just as well (or not) as anyone as to what a transperson might think about this brief reference to a biographical detail in the context of a discussion on her advocacy work.

64. Amy Hamm also states in her biographical details that she is a mom. It's usually the first thing she lists. She is no more speaking "as a mom" than "as a nurse" by these brief references. If it had found a reference in the investigation materials to Ms. Hamm relying on her professional status to bolster her opinions, the College would have referenced it, since that is the foundation for the "nexus" it needs to establish to govern Ms. Hamm's off-duty conduct. The record for this is exceedingly thin, as will be discussed further below in the section on the regulation of off-duty conduct.

Alleged statements about access to services and safe spaces

65. Amy Hamm does not say that transgender-identified males shouldn't participate in public life; just that, in some instances, sex-based participation is appropriate. In sports, where physical bodies compete, not identities, it is important that people be placed in the appropriate category for fair competition and safety.⁴⁷

66. Transmen, being biological females, are welcome in women's spaces, according to Ms. Hamm and the caWsbar statement she has acknowledged.⁴⁸

Alleged statements about self-identification legislation

67. The College claims at paragraph 70 of its closing submissions that Ms. Hamm advocates against the right of transgender people (in particular, biological males) to participate in gendered spaces. It is alleged that this is based on a fear of harm to cisgender women by transgender women, when there is no evidence of such harm. It is disingenuous of the College and its experts to state so categorically that there is "no evidence of such harm." Dr. Bauer does not study this, and she

⁴⁷ *Supra*, note 22

⁴⁸ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1287, lines 9-20

conveniently suggests that where someone claims to be transgender and causes harm, they were just frauds.⁴⁹ Or she chalks it up to “disgust.”⁵⁰

68. Dr. Cantor certainly identifies the risk of harm from the lack of gatekeeping associated with self-identification in his evidence.⁵¹ And Dr. Stock testified to harms from self-identification policies as well⁵²:

But, no, it's not very complicated to explain why people are worried about females being in places where they undress, where they sleep, where they are otherwise vulnerable to sexual assault, and having policies and laws that say that any male who identifies as a woman can go into those spaces. That's not hard to understand for most people about why that might be a problem.

Even if you just take out feelings, just in terms of risk management and safeguarding, obviously this is a worry about males. It's not a worry about trans women, this is a worry about males. And since males are responsible for the vast proportion of sexual assaults against females, it's a reasonable concern to have.

But if you take -- if you put back in feelings, does it have to be disgust? No, it could be fear. It could be fear. And in particular if you've suffered sexual assault at the hands of a male before, and many women have, it can be fear on behalf of your young child, your young daughter. I mean in Scotland in 2018 -- I mean there's been many cases in Britain of trans-identified males as in trans women, offending, sexually offending or violently offending and they're on record. But there was one particular case of a trans woman called Katy Dolotoski who sexually assaulted a 12-year-old girl in a female washroom.

So, to think that the only reason that reasonable people would worry about these policies which, you know, don't involve any kind of safeguarding -- there's no character reference for people that come into these washrooms, it's just -- all we have is the norm that this is a woman-only space. And that's been taken away.

Of course, it's not just disgust. It's fear, it's worries about privacy, it's about menstruation and dealing with that and wanting to do that in a private space with no males around. There's all sorts of things it might be that aren't disgust.

Q So you sometimes hear that the worry is that cisgendered men will pretend to be women to take advantage of these spaces. They are not really trans. What would you say to that?

A I would say how are we supposed to know the difference? Because the whole point of these, what we're being asked to accept is that anyone who says they have the feeling is a trans

⁴⁹ *Supra*, note 39

⁵⁰ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 151, line 9, to page 153, line 21

⁵¹ *Supra*, note 41

⁵² Transcript, Day 19, November 7, 2023, Direct Examination of Dr. Stock, 1572, line 17, to page 1574, line 21

woman and therefore is a woman and therefore gets into all the different spaces. So if you're going to start changing the rules and saying, "Oh, no, we didn't mean them. We didn't mean the ones that do the bad things," well, that's a whole change in your definition, because the definition starts out by saying all you need is this feeling. And none of us can argue with the feeling once it's apparent, once it's declared. So that's what I would say about that.

69. In the passage identified in the College's submissions at paragraph 69, Dr. Bauer perhaps deliberately obfuscates the question about "self-identification" laws by talking about drivers' licences and other ID. Since gender identity is a protected ground under human rights laws, like Bill C-16, merely stating that one is the opposite gender will suffice to be treated as such. This fairly recent change is what Amy Hamm describes as a precipitating event for her advocacy.⁵³

70. In any event, this is far overstepping the College's role. In a democratic society, any citizen, whether identified as a regulated professional or not, can engage in the political process, and that includes criticizing laws (which are always subject to change by the next government) free of sanction by their professional regulator.

Statements about nursing education

71. In the quote referenced in the College's submissions at paragraph 71, Ms. Hamm is indeed blunt and honest. But the nursing profession is not immune to criticism, as the highly relevant decision of *Strom v. Saskatchewan Registered Nurses' Association* ("**Strom**"),⁵⁴ discussed below, makes clear. The College has not provided the entire tweet thread for context as to what Ms. Hamm was referring to specifically, but noting that non-scientific social justice material is making its way into nursing textbooks is fair comment.

The Billboard

72. Referencing the Colleges submissions on this at paragraphs 73 and 74, Dr. Bauer criticizes JK Rowling's essay, in which she laments the loss of gatekeepers, "When you throw open the doors of bathrooms and changing rooms to any man who believes or feels he's a woman...without any need for surgery or hormones—then you open the door to any and all men who wish to come inside."

⁵³ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1235, line 12 to page 1237, line 22;

⁵⁴ *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII), <https://canlii.ca/t/j9z2w>

73. Dr. Bauer is so incredibly one-sided on this issue throughout her testimony – refusing to acknowledge any legitimate concerns of women to this significant development, denying ANY harms occurring at all, adamantly insisting (as she did on the prisons issue, among others) that the real harms were and always are **to** transgender people. Women have no right or justification to complain. This is clearly the testimony of an activist, and the Panel should give very little weight to her testimony on harms on the basis that she is biased.

74. As noted above, Dr. Cantor described in his testimony that a loss of gatekeeping has occurred, and discussed who might be taking advantage of that fact (people who claim to be transgender but may have other paraphilias, yet are fully accepted as transgender by Dr. Bauer on the basis of their declaration of womanhood). Rowling (and Hamm) are expressing legitimate concerns, but they are also seeking solutions. It is not incongruent for Ms. Hamm to feel sympathy for people suffering from gender dysphoria, but also wish to protect women. Solutions may be found to this conflict, but not if discussion is censored.

Who is Amy Hamm?

75. The College has painted a picture of Amy Hamm as an unprofessional, uninformed provocateur. Her testimony tells a different story – one that was unchallenged on cross-examination.

76. Ms. Hamm described how she has always had a strong desire to serve members of the community who had fallen through the cracks, including her volunteer work with Elizabeth Fry and her time on the Downtown Eastside of Vancouver, in her early nursing career.⁵⁵ She told of how she had a particular fondness for a transgender client in that community and used preferred pronouns. Her concern about marginalized Indigenous women, who are overrepresented in the prison population, was one of the motivators for getting involved in the gender issues involving prisons.⁵⁶

77. Amy Hamm became involved in advocating for women's sex-based protections around 2016, when she noticed the discourse from extreme online communities was leaking into popular discourse. She was astonished at how women were being told to shut up while talking about their bodies and their experiences, if their speech made males who identify as females feel excluded. This was all

⁵⁵ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1216, lines 16 to 26

⁵⁶ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1236, lines 18 to 26

happening under the guise of “inclusivity” but, to Ms. Hamm, it was apparent that it was designed to exclude and belittle women.⁵⁷ She began to understand how Canada’s gender identity legislation conflicted with the sex-based rights of women. She noticed that trans activists were making increasingly anti-scientific claims about the nature of identity and biological sex, and how anyone who dared question this narrative was being labelled a bigot. She began writing about the issue and then organizing talks for women to come together to discuss these concerns in Vancouver.⁵⁸ This made her a target for countless threats of violence, death and rape – simply for wanting to talk about women’s sex-based rights.

78. Amy Hamm has become an advocate for women and children in her off-duty public life, but it by no means follows that she is transphobic or is unkind or unprofessional to individual trans-identified people. This is an important distinction to understand. Transpeople and gender ideology are two very different things.⁵⁹

79. Ms. Hamm’s opinions are scientifically supported, despite an early attempt by the College to allege medical misinformation. Dr. Cantor confirmed that there was nothing her statements that was unsupported in the science.⁶⁰

80. Amy Hamm has provided excellent care for many transgendered persons in her 12 years since becoming a nurse. She has had no prior disciplinary issues and has never had a patient complaint. She testified that she has nothing but empathy towards persons suffering from gender dysphoria.⁶¹ She believes that consenting adults should be free to do with their bodies as they please. There is no evidence that she has been unable to separate her views from her professional responsibilities, and her views are not problematic in any event. Unless, of course, women’s rights are transphobic.

81. In our submission, her comments were squarely within the range of rational and reasonable public debate. The College asserts in its submissions (page 7) that Ms. Hamm’s comments must be understood in light of the population that they were directed toward. First of all, her comments were directed toward advocacy for the rights, safety and dignity of women and children, to the public at

⁵⁷ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1252, line 25 to page 1253, line 10

⁵⁸ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1261, line 7 to page 1265, line 16

⁵⁹ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1251, line 25 to page 1252, line 21

⁶⁰ *Supra*, note 14

⁶¹ Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1251, lines 13-24

large, and to policy makers. They were not directed at transpeople (excepting the occasional interaction with an activist who targeted her online). That a population of people might or might not take exception to her comments is part of living in a liberal democracy. No one has the right not to be offended.

82. During her testimony, she addressed most of the scattershot collection of posts and statements the College identified as “over the line” and described her advocacy goals and motivations behind each one. She admitted that some used humour and satire to make a point.⁶² Given the ridiculousness and viciousness of some of the things she was countering in the public square, this was perfectly appropriate. Dr. Stock noted that the use of satire or mockery are established ways of making political points.⁶³

Q In the discourse about this debate, if one were to use satirical or mocking language, would that be prima facie an example of transphobia?

A No. No, I mean mockery and satire are established ways of making political points. And they enrich society. Of course sometimes it's not very funny, and quite often it's offensive to some group, but of course, offence is not harm and that's foundational to a liberal society, that we don't just let the offended people decide what we can say or what we can laugh at. So mockery and satire have been ways of dismantling repressive regimes.

You know, in communist Russia, there was a really rich vein of comedy and dark black comedy. People laughing about the communist regime through stories and jokes. There's books you can read about it. So no, of course it isn't.

83. Even in this hearing, some of the more astonishing things she had to testify to, in supporting her gender critical beliefs were: i) women do not have penises;⁶⁴ ii) lesbians do not have penises;⁶⁵ iii) males cannot be lesbians; iv) males calling themselves lesbians are heterosexual men; iv) homosexuality is same sex attraction;⁶⁶ v) you cannot literally change your sex;⁶⁷ vi) your sex is not “assigned at birth.”⁶⁸

84. To say there is a clash of worldviews here is an understatement.

⁶² Transcript, Day 17, November 3, 2023, Direct Examination of Amy Hamm, page 1296, line 23 to page 1297, line 8

⁶³ Transcript, Day 19, November 7, 2023, Direct Examination of Dr. Stock, page 1588, lines 9 to 26

⁶⁴ Transcript, Day 18, November 6, 2023, Cross-Examination of Amy Hamm, page 1449, lines 2-4

⁶⁵ Transcript, Day 19, November 7, 2023, Cross-Examination of Amy Hamm, page 1491, lines 11-14

⁶⁶ Transcript, Day 19, November 7, 2023, Cross-Examination of Amy Hamm, page 1492, lines 12-17

⁶⁷ Transcript, Day 19, November 7, 2023, Cross-Examination of Amy Hamm, page 1557, lines 10-17

⁶⁸ Transcript, Day 19, November 7, 2023, Cross-Examination of Amy Hamm, page 1480, lines 5-8

C. The College's Witnesses

85. The College has endeavoured to tie Ms. Hamm's comments to the health profession to justify its punishment of her off-duty speech. To that end, it retained two members of the controversial WPATH organization as experts to support its hypothetical claims of harm to transgender people from Ms. Hamm's advocacy for women and children. Dr. Cantor's evidence has undermined the credibility of these assertions.

86. The Panel should take note of the fact that the College is relying heavily on the expert reports prepared by Dr. Bauer and Dr. Saewyc in its closing submissions, rather than on the testimony of the experts in direct and cross. Expert reports, although tendered into evidence as exhibits in this case, are prepared for the purpose of putting counsel on notice of what evidence will be provided during the hearing. Little weight should be given to the submissions that are based on excerpts from the expert reports, which were not tendered under oath.

i. Aisha Ohene-Asante

87. Ms. Ohene-Asante testified on behalf of the College, as the in-house lawyer assigned to investigate this matter. New to her position, she instructed an outside security firm to gather all of Ms. Hamm's communications on the topic of gender identity. She testified that she did not look into the surrounding context of any of the communications, and no assessment was made of any risk of harm.⁶⁹

ii. Dr. Elizabeth Saewyc

88. In its submissions, the College quotes at length from Dr. Saewyc's expert report, where she outlined the hypothetical harms faced by transgender people in relation to the healthcare system. She notes critically that Amy Hamm has made statements to suggest that "women cannot have penises."⁷⁰ This is a rather alarming statement for a nurse like Dr. Saewyc to make, who must have some basic understanding of human biology. This supports a finding that she is an activist, or at least an advocate, for gender identity ideology, rather than a neutral expert, and the weight given to her testimony should be minimal.

⁶⁹ Transcript, Day 1, September 21, 2022, Cross-Examination of Aisha Ohene-Asante, Page 48, Line 56 to page 49, line 17

⁷⁰ Transcript, Day 1, September 22, 2022, Direct Examination of Dr. Elizabeth Saewyc, page 155, lines 2-3

89. Dr. Saewyc is an academic nurse, not a clinician. She has spent her career taking her views from academia into the literature, onto the conference circuit, and out into the public via an extensive media platform. Her CV is 154 pages of extremely fine print, including approximately 32 pages of media interviews alone, albeit on varied topics besides gender identity. The CV lists that she has worked with the College's other expert, Dr. Bauer, in advancing the now highly controversial "gender-affirming medical care" model for adolescents, including in a competitive presentation to WPATH in the fall of 2022.

90. As a member of the transgender advocacy group, WPATH,⁷¹ Dr. Saewyc was not a neutral witness, but rather an advocate for gender identity ideology and "gender-affirming care," which is coming under increasing scrutiny for its push to socially and medically (and ultimately surgically) transition children and teenagers without appropriate psychological screening. Dr. Cantor was critical of the organization presenting itself to be based on science and evidence when it was demonstrably not.⁷²

91. Dr. Saewyc criticizes the statements claiming that providing gender-affirming care to transgender people harms the sex-based rights of women and children. Ms. Hamm has not said that adults should not have "gender-affirming care," but she has expressed concern when it comes to children and adolescents. Dr. Saewyc confirmed that she was not closely following the issues with the closure of the UK's Tavistock gender clinic and not read the report⁷³ which sounded the alarm on gender-affirming care for the younger groups. For someone who is promoting this life-altering "care" for adolescents, it would behoove her to review the most damning critiques. That she has not is further evidence that she is biased on this issue.

92. Although Dr. Saewyc was qualified as an expert to give evidence in the areas of nursing standards, and the harm that transgendered persons may experience in their interactions with health professionals, her evidence was severely undermined in cross-examination. Not only did she have no clinical experience with transgender people to draw upon, but her career has been almost entirely academic since 1999,⁷⁴ and she had never personally witnessed any of the alleged harms she alluded

⁷¹ Transcript, Day 1, September 21, 2022, Direct Examination of Dr. Saewyc on Qualifications, page 116, lines 4-7

⁷² Transcript, Day 16, November 2, 2023, Cross-Examination of Dr. Cantor, page 1139, lines 11-20, among other references

⁷³ Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 163, line 21 to page 164, line 3

⁷⁴ Transcript, Day 1, September 21, 2022, Cross-Examination of Dr. Saewyc on Qualifications, page 131, lines 11-18

to. The following exchanges are between counsel for the respondent and Dr. Saewyc in cross-examination:⁷⁵

Q: I want you to give me an example of something you have personally observed where a transgendered person's privacy is not respected in the clinical context. This is referred to in part 5 of your report.

A: Well, I would have to think back. Because I have not provided care within clinics that include a large number of transgender people, I cannot identify a specific occurrence that I have personally observed. Instead, I can report on the research that we have conducted in which we have actually conducted qualitative interviewed with trans and nonbinary young people and adults around their experiences of health care. ...

Q: Okay. So when you're referring in this section of your report of an example of how a transgendered person's privacy is not respected in the clinical context, you're not drawing on reports from nurses or hospital workers about a transgendered person's privacy not being respected in the clinical context. You're drawing on questionnaires filled out by transgendered people about their experience in health care. Is that fair to say?

A: No, because some of the -- some of the material has included health care providers who talk about --

Q: And what studies -- what studies have you done that included interviews of health care providers about this -- this question?

A: I have not done a study that solely focusses on health care providers. But I do know some health care providers were part of those studies.

93. The studies upon which she based her opinions were extremely low-powered⁷⁶:

Q: You said you conducted qualitative studies where you interviewed people about their experiences with health care. Is that correct?

A: Yes. We conducted a qualitative study with trans and nonbinary people who had experienced health care in BC over the past five years. This was done in 2017, I believe. And there were 35 interviews with people. And it did include some people who were health professionals in one sort or another. We also -- I was the supervisor of a doctoral dissertation that included interviews with health care providers who provided care to trans and nonbinary people. Specifically, adolescents. And I also have spoken with and read and observed conversations with researchers who have presented research about the experiences of mis-gendering and hostile treatment by health care providers. Most of it by the people who are experiencing it, yes, but some of which other clinicians have observed as well.

⁷⁵ Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 27 line 9 to page 28, line 2; page 28, lines 15-20

⁷⁶ Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 29, lines 4-30; page 30, lines 6-16

...

Q: How many interviews were done for that dissertation? Approximately how many people were involved in that study?

A: There would have been at least 10 clinicians and probably -- I don't remember if it was -- well, more than 15, but I'm not exactly sure how many more young people. And about the same number of parents.

Q: Okay. So when you say more than 15, do you mean more than 15, less than 20?

A: I believe so.

94. The “harm” she predominantly focused on was about transgender people being addressed by the wrong name or pronoun when dealing with the healthcare system,⁷⁷ although she acknowledged on cross-examination that healthcare professionals are often just referring to medical records (and therefore not intentionally misgendering) and people who are not transgender can also be called names they do not commonly use.⁷⁸ She gave other examples of harm she had no evidence for, and drew her conclusions about transgender peoples’ perceptions of their treatment in the health system from low-value, and low-powered respondent-driven studies or anecdotal information.⁷⁹

95. She was asked in cross-examination for her support for the proposition that transgender people were being denied care: “So I have not personally observed someone in clinical practice denied care because they are trans, transgender, or nonbinary.”⁸⁰

96. Her testimony was speculative and qualified, for example: where healthcare workers “deny their identities” it “*may* lead transgender people to assume that these are part of the professional views;” and it “*may* reinforce their expectations of poor treatment, and that *may* further discourage them from accessing needed health care...”⁸¹ [Emphasis added.]

97. Dr. Saewyc states that “by publicly insisting that transgender women are not women, which is a gender category, but are men, which is also a gender category, that is misgendering someone.”⁸²

⁷⁷ Transcript, Day 1, September 21, 2022, Direct Examination of Dr. Saewyc, page 140, line 2 to page 141, line 12

⁷⁸ Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 40, line 17 to page 42, line 5

⁷⁹ Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 39, lines 12-25

⁸⁰ Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 50, lines 16-18 and following

⁸¹ Transcript, Day 1, September 21, 2022, Direct Examination of Dr. Saewyc, page 151 line 20 to page 152, line 20 to page 152, line 2, and page 152, lines 10-14

⁸² Transcript, Day 2, September 22, 2022, Cross-Examination of Dr. Saewyc, page 23, lines 5-9

At some point, academics like Dr. Saewyc decided that the word “woman” solely relates to gender (while also redefining the word “gender” in the process). This change in language is top-down and does not necessarily reflect the common person’s understanding of the word “woman.” Ms. Hamm should not be disciplined for her understanding of and adherence to traditional (until very recently) concepts of gender and for not being on board with a fundamental and categorical change to a term that historically defined biological females.

98. During one exchange in cross-examination about the “cotton ceiling,” Dr. Saewyc stated: “So if a lesbian woman who is biologically female at birth made a public statement that they only want to date other people who are biologically female at birth...I’m not sure that I could say it is or isn’t transphobic, because I think it would depend on the way it was stated and the full context of what was said.”

Q: So your evidence is that there are circumstances in which it could be transphobic to make this statement. That’s your evidence?

A: It might be. I think that it would really depend on the full amount of what was said, yes.

99. For it to even remotely be transphobic for a lesbian to state that she was not interested in so-called ‘transgender lesbians’ (as Dr. Bauer described these often straight, transgender-identifying males with penises)⁸³ suggests that Dr. Saewyc’s views are those of a gender activist.

100. Again, her evidence proved to be of low value, with an obvious bias toward gender identity ideology as promoted by WPATH. Dr. Saewyc should be disqualified on the grounds of bias, or alternatively very little weight should be given to her evidence.

iii. Dr. Greta Bauer

101. Dr. Bauer is an academic who focuses primarily on gender identity. Her survey research is well-funded by government grants, and she conceded that she has had a broad platform from which to spread her views on transgender health and related issues.⁸⁴ Upon her new appointment to the

⁸³ *Supra*, note 37

⁸⁴ Transcript, Day 3, September 23, 2022, Cross-Examination of Dr. Bauer on Qualifications, page 94, line 18 to page 95, line 6.

University of Minnesota, she was described by the Dean as a respected activist.⁸⁵ Upon hearing her evidence over multiple days, there is little question that she is an activist for gender identity ideology.

102. This was clear from the fact that much of her report and testimony was devoted to definitions and language changes, necessary to push through dramatic changes to human understanding of biology and gender. This is what activists do.

103. Definitions of terms she provided included: 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.

104. But novel new terms were not the only focus of her evidence – as noted above, she also wants to redefine “woman” to include anyone who says they are (it’s not sufficient to be called a “transwoman”). And there is apparently no common ground on the meaning of the word female, as discussed above.

105. In critiquing the caWsbars position statement, she took exception to the point that there are only two sexes – female and male”. She replied that “sex is multidimensional, and people may have a female characteristic for one dimension of sex and a male characteristic for another, or be missing particular characteristics that are assumed to be biologically female or male. And so it doesn’t fall neatly into two.”⁸⁶ Here, she refers to only two sexes—male and female—to somehow make the point that there are more than two sexes. At no point does Dr. Bauer provide the name of any other sex that is not male or female. But Amy Hamm is being disciplined for saying there are only two sexes.

106. One aspect of Amy Hamm’s advocacy is to challenge this wholesale upending of language. Women cannot advocate for their rights if they cannot use the word “women,” or even “female” with a shared understanding of meaning.

⁸⁵ Transcript, Day 3, September 23, 2022, Cross-Examination of Dr. Bauer on Qualifications, page 95, line 14 to page 96, line 14.

⁸⁶ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 176, lines 17-23

107. Dr. Bauer wants to redefine the word “lesbian” to include males with penises. She does not like the word “auto-gynephilia” however, which is a much more descriptive term about what is going on here.⁸⁷

108. What is evident from listening to Dr. Bauer’s evidence about her research area is that we have moved from small, low-powered studies to massive societal changes in a very short time. Even she appears to concede that there may be some cause for concern surrounding de-transitioners, whom she says some of her colleagues are studying. She referenced the hypothesis of Lisa Littman, described as Rapid Onset Gender Dysphoria, which is “basically a pure contagion model where vulnerable adolescents will be exposed to ideas from their friends, particularly online friends, and will decide they’re trans with the – the implication that they will later regret that and de-transition. So those are related.”⁸⁸ This idea of “desistance” leading people to “de-transition,” this concerning trend (especially in young people who have only been “affirmed” in their new identity as unquestionably transgender) is confirmed by Dr. Bauer as something that should be further studied.⁸⁹ But when Amy Hamm talks about de-transitioners, it ends up in a folder of materials for investigation.⁹⁰

109. As Dr. Cantor’s testified, however, Dr. Bauer’s review of Littman’s work missed the mark – she measured the wrong population with the wrong parameters:⁹¹

A She failed to account for pubertal status. That there was a specific dividing line and whether recency -- somebody 14 versus 16 would be recent, but wouldn't qualify as pre-pubescent at either one of those ages. What Dr. Littman found was that what's important was the development post puberty. But Dr. Bauer was just looking at how recent it was, regardless of what the person's pubertal status was. So she just changed the definition but -- and said that she got different results without pointing out the obvious reason she got different results is because she changed the definition of who she was looking at.

110. The evidence shows that in the vast majority of cases, doing nothing will result in an alleviation of dysphoric symptoms post-puberty. Many of these children will grow up to be gay.

⁸⁷ *Supra*, note 37

⁸⁸ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 156, lines 7-12

⁸⁹ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 160, lines 8-20

⁹⁰ See the Report of Paladin Risk Solutions, dated December 17, 2020, contained in the Supplementary Materials Vol. 1 Folder, Exhibit 27, page 26: “We located posts uploaded by the Twitter profile ‘Gender Critical Story Hour’, including posts about transgender matters as well as detransition from being transgender.”

⁹¹ Transcript Day 15, November 1, 2023, Direct Examination of Dr. Cantor, page 1002, line 5, to page 1004, line 17

“Affirmation” of gender identity in children and young adults can result in irreversible harm and effectively convert gay children. Dr. Bauer confirmed the studies on this point, but added:

And these studies also -- I will say this with a giant caveat -- a lot of the youth in a lot of these studies don't actually meet the clinical criteria for -- they're mostly a little bit older, so what was called "gender identity disorder" in a previous DSM. So when you look at some of these studies, they contain this mixed population of -- of different ages and people who do and do not meet the criteria for actually having gender identity disorder or gender dysphoria.⁹²

111. But in the current “affirmation only” era, such kids are being put on this pathway toward medicalization and surgery, even if they are just gay. It is perfectly appropriate for Ms. Hamm and other critics of gender ideology to point these concerns out. Indeed, it is incumbent on medical professionals to operate in the world of reality, truth and evidence, and not fall victim to the idea that “soul-like internal knowing,” especially in kids and young adults, takes unquestioning precedence over biological reality and sound evidence. Do no harm.

112. As nurses and midwives, this profession should be deeply concerned about the possibility and impact of inappropriate medical diagnoses and treatment that may occur where professionals are labouring under the presumption that sex is subordinated to gender or is irrelevant, or are afraid to speak up. Punishing a nurse for raising such concerns will have a chilling effect on the profession that may, indeed will, cost lives.

113. Similarly to Dr. Saewyc, as a member of the transgender advocacy group, WPATH,⁹³ Dr. Bauer was not a neutral witness, but rather an advocate for gender identity ideology.

D. The Respondent’s Witnesses

114. It is worth noting that each of the Respondent’s experts was subjected to challenge by the College in lengthy written submissions, as it sought to have them struck solely on the basis of *their own* expert’s testimony about them. When the Panel denied the request, Dr. Grossman and Dr. Cantor, in particular, as well as Dr. Stock, were additionally put through multi-day *voir dire*s in an attempt to have them disqualified as experts. While a party is always free to challenge its opponent’s experts on the relevant *Mohan* criteria, the College’s attempts to silence **all** of the Respondent’s experts (even

⁹² Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer, page 162, lines 3-12

⁹³ Transcript, Day 3, September 23, 2022, Direct Examination of Dr. Bauer on Qualifications, page 47, line 13 to page 48, line 2

before their qualification hearing) is telling. If the theory of the College’s case, as expressed by co-counsel during one of these *voir dres*, is that “There is not a debate here [Canada]. Here, the debate is settled,”⁹⁴ then clearly no matter what Ms. Hamm said on the topic, no matter how nuanced and temperate, she must be silenced. This is no way for a neutral professional regulator to behave.

i. Dr. James Cantor

115. Dr. Cantor was asked to provide an opinion in response to the College’s allegations of harm, and to demonstrate the firm scientific foundation upon which Ms. Hamm’s opinions and statements rest. His testimony was not successfully undermined in cross-examination.

116. He is the only expert in this case with any clinical experience dealing with transgender people and other sexual minorities. Neither Dr. Bauer nor Dr. Saewyc had anything other than an academic interest, and their work was based on low-value, respondent-driven questionnaires. This is at the bottom of the evidentiary scale:⁹⁵

Q Can you tell me what you think of the list of documents at pages 14 and 15 of Dr. Saewyc's report? As an expert, as you've been qualified, a clinician, neuroscientist, research expert with a degree in statistics.

A They are uniformly very, very low quality evidence. They consisted almost exclusively on surveys, which as I pointed out before is entirely beneath the pyramid of evidence that we use for assessing clinical information.

117. The College says that his evidence should be rejected because of “bias” and “unreliability”. They try to cast shade on him for being paid for his work as an expert witness. First, the College criticizes him for doing this case below cost; then it alleges he is biased because he makes too much in other cases. They do not say how much they paid their own experts, and it is to be expected that experts do not typically work for free. Dr. Cantor was honest and forthright in his evidence, stating that he was able to work on this case at a low rate because it is an important case:⁹⁶

Q Dr. Cantor, my question is why did you agree to provide evidence in this case at a rate that was much lower than you ordinarily charge?

A 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

⁹⁴ Transcript, Day 10, January 12, 2023, Argument, page 330, lines 7-8

⁹⁵ Transcript, Day 16, November 2, 2023, Direct Examination of Dr. Cantor, page 1042, line 8 to line 17

⁹⁶ Transcript, Day 17, November 3, 2023, Cross-Examination of Dr. Cantor, page 1180, line 4 to 1181, line 12

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.

118. He's not wrong. This case is one of the first times that gender ideology and its harms has been fully explored in a legal proceeding in Canada. He also confirmed that he is one of the few experts able to opine on this from a critical perspective, because (as we can see from what Ms. Hamm has been put through) few other doctors, clinicians or regulated professionals are willing to risk their careers by speaking against the gender orthodoxy. His evidence, accordingly, was a breath of fresh air. It is not surprising that the College wanted it suppressed.

119. Money was explored with Dr. Bauer, too, during her qualification *voir dire*. She acknowledged receiving federal grant money in the millions in order to study this tiny population of people.⁹⁷ As an academic, she is paid to advocate full-time on gender issues, as her lengthy CV shows.

120. Dr. Cantor made it clear in his testimony that he provides his expert opinion to parties who request it based on the science alone. He does not advise on policy. His job is to opine on the science, and the science is the science, no matter who requests it.⁹⁸

⁹⁷ Transcript, Day 3, September 23, 2022, Cross-Examination of Dr. Bauer on Qualifications, page 90, line 2 to page 92, line 18

⁹⁸ Transcript, Day 17, November 3, 2023, Cross-Examination of Dr. Cantor, page 1189, lines 2-8

121. The College has taken Dr. Cantor’s evidence out of context in its written submissions, attempting to paint him in an unflattering light or misrepresenting him entirely. These points will be elaborated upon in oral submissions, but in brief:

- His testimony was not “sarcastically dismissive”, and in relation to the manipulative suicide warnings by certain gender ideologues (“would you rather have a son or a dead daughter?”), those statistics have been debunked.⁹⁹ For such egregious manipulation of well-intentioned parents, “sarcastic dismissiveness” is far too kind.
- The suggestion by the College (para. 107) that “it is a patent error to suggest that a phenomenon must be independently verifiable” is to disregard the entire scientific method.
- The Littman study was not “discredited” – it was attacked by activists, pulled-down briefly, modest changes were made (the Results section was unchanged), and it was published again.
- The study was merely hypothesis-generating, but it gave the first plausible explanations (social media and peer group influence on adolescents with no history of gender dysphoria) to help understand what clinicians like Dr. Cantor and Dr. Zucker were seeing on the ground – an entirely new cohort of people seeking gender transition.¹⁰⁰
- The assertion by the College at paragraph 121 (that the study didn’t mention social media at all) is flatly wrong: “social media” was mentioned in the original Littman study 28 times, including the very first paragraph.
- The assertions about the failure to include intersex conditions in his definition is a distraction. Referenced in paragraph 20 of his report are the definitions of sex from the various professional associations, which also define it without reference to DSD/intersex. That the definition of sex must include DSD is apparently the College’s own testimony in paragraph 102 of its submissions.

⁹⁹ Transcript, Day 14, October 31, 2023, Direct Examination of Dr. Cantor, page 878, beginning at line 20

¹⁰⁰ As referenced in his co-written editorial in the Journal of Sex and Marital Therapy, “Is Gender Identity Disorder in Adolescents Coming out of the Closet?” in 2008 (item 10 under “Letters and Commentaries” in his CV)

- Dr. Cantor’s comments on objective determination of homosexuality were not meant to be exhaustive – they were specifically in response to Dr. Bauer’s claim that “we don’t understand how sexual orientation develops.” Referencing gay men (and not lesbians or bisexual people) was sufficient to undermine Dr. Bauer’s incorrect assertion.
- The allegation at paragraph 111 of the College’s submission leaves out half of the sentence from Dr. Cantor’s report in order to critique him in a misleading fashion.
- Nothing he said dismisses “the entire field of epidemiology.” The hierarchy of evidence is what it is (and this field is not studied with survey evidence, typically).

122. Regarding suicide studies, Dr. Bauer, in dismissing the findings of the UK’s Tavistock clinic’s whistleblower, Marcus Evans, says the research has been fairly consistent in studies of older adolescents and adults that 35-40 percent will report that they have attempted suicide. This aligned with her own work.¹⁰¹ But Dr. Cantor provides the necessary context that Dr. Bauer doesn’t address and effectively debunks her assertions.

123. Of course, it is not for this Panel to decide the answer to all of these controversies and scientific debates. They will be sorted out in due course in the appropriate scientific manner – provided, of course, that professionals are allowed to discuss, study and debate these issues. A chill on speech by a regulator could very well impact that scientific progress, at least in Canada.

ii. Dr. Kathleen Stock

124. Dr. Stock’s testimony provided a relevant philosophical and linguistic perspective on the matter. She describes the importance of having words to explain the two different kinds of humans, broadly speaking—in every natural language since the dawn of time, these distinctions have been important to humans, and there are consequences to losing this language.¹⁰²

So if we say males can be girls or females can be boys, we’ve lost that whole set of language. So when I hear people say trans women are women, firstly I don’t think that’s literally true, they are not. If they were women, they wouldn’t be trans. That’s the whole point.

¹⁰¹ Transcript, Day 4, October 24, 2022, Direct Examination of Dr. Bauer, page 10, line 17 to page 11, line 21

¹⁰² Transcript, Day 19, November 7, 2023, Direct Examination of Dr. Stock, page 1557, line 18 to page 1559, line 13

But secondly, I think it's best understood as a fiction. We're being asked to immerse ourselves in a fiction that it is true.

Now, from my own philosophical background, I am fully aware that we participate in fictions all the time, not just at the theatre or at the movies or watching telly or reading a novel, but in role play or on line there's a lot of fiction, fictionalizing of ourselves. So it's a common enough human activity, there's nothing wrong with it, and I think it might be the right thing to do to go along with this fiction sometimes. You know, people differ on this, and that's okay. It's reasonable to differ.

But you know, personally I think it's okay to go along with this fiction sometimes, but we should not be compelled to go along with it, because it's not, strictly speaking, true and certainly we can't force people to believe it. So that's what I mean, that it's a fiction. It's not true, it's not literally true that trans women are women and trans men are men and that non-binary people aren't men or women or men or female, but we can go along with it sometimes for certain defined purposes. But we shouldn't be forced to.

iii. Dr. Linda Blade

125. Dr. Linda Blade is a former Canadian Champion athlete, and her PhD doctoral dissertation was in human biology. She has worked as a professional coach for over 25 years and was co-author of the book *“UNSPORTING: How Trans Activism and Science Denial are Destroying Sport.”* Her evidence demonstrated the social value and importance of Amy Hamm’s speech and advocacy in the protection and rights of girls and women, whether spoken as a nurse or not. As she testified:¹⁰³

I think there's a way, and I've argued this, there is a way to be inclusive without undermining the sex-based rights of women and girls in sport. And those are the ways that we need -- we've been working hard to look and find for those conditions. But at the foundational level biological sex is a root of sporting excellence, it's at the very root of it. And for anybody to be speaking about that and using sex-based terms and language and lexicon, it is in no way hateful or problematic, it's a necessity.

E. Weighing the Evidence

126. The burden of proof is on the College to establish on a balance of probabilities (more likely than not) that Ms. Hamm’s statements breached applicable nursing standards or constituted unprofessional conduct. Because the *Charter* rights of Ms. Hamm are also being infringed, the College must also prove that a disciplinary finding is proportionate and minimally impairs her constitutional rights.

¹⁰³ Transcript, Day 20, November 8, 2023, Direct Examination of Linda Blade, page 1638, lines 1-12

127. Both of the College experts could fairly be characterized as advocates for the integration of gender ideology into the health care system. Rather than challenge the admissibility of their testimony at the outset, the Respondent's submissions on the evidence of the College's experts address its weight and bias. Unlike the College, which fought aggressively to block all of Ms. Hamm's proposed expert opinions from being heard, she wanted the Panel to know what these advocates think and believe. However, even where an expert is initially "qualified" to give an opinion to the panel, they can later be excluded on the basis of demonstrable lack of impartiality.

128. The College argues that Dr. Cantor is an "activist," but when one considers his testimony against that of Dr. Bauer, in particular, it is apparent who the activist actually is.

129. In considering the expert testimony, the Panel should note that Dr. Bauer and Dr. Saewyc were unwilling to concede where there might be legitimate points of concern from women, gays and lesbians, and for children and adolescents. They insisted that there were no harms, which is patently false. They were obviously protecting a narrative – one that is highly convoluted, non-sensical, and ideological.

130. In stark contrast, Dr. Cantor was retained not to talk about possible feelings some people might have—hypothetically—but to advise the Panel on the science. He was asked whether there was a scientific foundation grounding Ms. Hamm's commentary, and he confirmed that there was. Dr. Cantor was the only clinician who testified. He testified to his long history of treating and supporting transgender people and his advocacy for their access to healthcare services¹⁰⁴ He is a gay man himself, whose career has been devoted to studying the vast array of atypical sexualities. He understands these issues from both a clinical and an academic or scientific perspective, and presented his evidence in a nuanced and balanced manner. He takes apart the conflation of the various subgroups, to help us understand why there has been a dramatic increase in adolescent females declaring themselves to be transgender over the last decade (social contagion, which females are susceptible to, combined with the advent of social media and smart phones); as well as understanding why the burgeoning number of new transgender people in the middle age population is mainly male (often heterosexual fetishists who are now able to live out their fantasies out in the real world, encouraged by the removal of any

¹⁰⁴ Transcript, Day 12, Cross-Examination of Dr. Cantor on Qualifications, page 682, line 16 to page 683, line 22

gatekeeping function). He described the population of transsexuals (mostly gay males) that was historically the very small population that he saw in his clinical practice at CAMH.¹⁰⁵

131. Dr. Kathleen Stock provided the epistemological and philosophical foundation for gender critical views like Ms. Hamm holds, and why some people do not and cannot simply fall in line with this “current understanding of sex and gender.” She described how we are being asked not merely to accept a legal fiction as a kindness, but to have this fiction replace reality.¹⁰⁶

132. The purpose of the College’s experts was to bolster the assertion that transgender people might, hypothetically, be harmed by Amy Hamm’s words. There is no direct evidence and no complainant, so experts were deemed necessary to provide some academic dressing in the claim. But both are academics only, and members of the controversial WPATH. Their opinions on whether these statements might be harmful are spoken as people who are advocates for gender identity at all costs. Their opinions are slanted and biased and should largely be disregarded by the Panel.

PART III – LAW AND ARGUMENT

A. Unprofessional Conduct

i. Defining the Terms

133. Pursuant to section 26 of the *Act*, “professional misconduct” includes sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession. The terms are not further defined, and are largely subjective.

134. While the *Strom* decision is pertinent to the analysis in this case, it should be noted that the definition of professional misconduct in the Saskatchewan legislation specifically includes “harm to the standing of the profession of nursing.” In British Columbia, it does not.

135. Although the *Act* gives little guidance as to what conduct might be captured under this language, the College’s cited Supreme Court of Canada case, *Pearlman*, referenced at paragraph 242 of its closing submissions, provides a workable definition: “conduct which would be reasonably regarded as disgraceful, dishonourable, or unbecoming a member of the profession” looked at

¹⁰⁵ *Supra*, note 34

¹⁰⁶ *Supra*, note 102

objectively by persons of good reputation in the membership. The College then makes a conclusory statement that Ms. Hamm's statements meet this definition because they "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."

136. This is a remarkable conclusion to draw about Ms. Hamm's advocacy for women and girls in the public square – no evidence supports a finding that her statements had any of these effects, nor is there any legal authority provided to support this expansive definition of "conduct unbecoming."

ii. Bringing the Profession into Disrepute

137. Again, this is a term not included in the statute, but which finds itself in the "three principal questions" the College suggests the Panel must decide (para. 7): "Do the statements amount to unprofessional conduct that brings the profession of nursing into disrepute?"

138. First of all, the College has led no evidence to support that Ms. Hamm's comments have brought the profession into disrepute. They are required to do so. The College again makes conclusory statements in its submissions (para. 212) that, "The Respondent has done significant damage to the reputation of the nursing profession and undermined public confidence in the health care system," but it has not presented evidence that actually supports this contention.

139. There was no evidence put forward to support the bald assertion by the College that the public would give more credence to the speech of a nurse than to anyone else, when speaking about non-medical issues. That might be the case when speaking about medical treatment, as a nurse, since the public would expect a modicum of expertise; however, it takes a rather paternalistic view of the public to suggest that simply identifying oneself as a nurse in passing would result in deference to her opinions on non-medical issues.

140. On the contrary, one would expect that a nurse has a basic understanding of biology, and the public might take a dim view of the profession if nurses started talking about female penises, or suggesting that men can give birth.

141. At no time did Ms. Hamm rely on her nursing background to advise the public to take a particular course of action, or even suggest some particular expertise. It was a largely irrelevant and minor biographical detail, which she listed after “mom”, but it apparently gave the College a “hook” with which to catch Ms. Hamm’s allegedly heretical speech.

142. Assuming it were possible for a single nurse, expressing her opinions on the “gender wars”, to bring the entire profession into disrepute, *quaere* whether the act of a nursing regulator to punish mainstream opinion, might have more power to bring that profession into disrepute. Public trust is especially sensitive to the conduct of institutional actors (like the BCCNM) rather than the conduct of an individual nurse. Should the Panel convict Ms. Hamm, 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.” That would seriously harm the public and the standing of the profession.

143. Although it has been stated in the College’s materials and opening statement that it has no intention of curtailing or regulating her speech except to the extent that she has identified herself as a nurse while doing so, this is disingenuous. The broad forensic investigation undertaken by the College showed no discernment in terms of what, exactly, constituted unprofessional conduct. The College hired a security company called Paladin, which scraped the internet for keywords.¹⁰⁷ Anything and everything Amy Hamm said in print or recorded form that touched on gender identity was caught up in the net and sent off to the investigation committee, and on to discipline, without any sober assessment of what crossed the line and why (although it left out her relevant published article during the same time frame, such as “*Wrong Thinking Trans People Speak Out on Transgender Day of Visibility*,” an article about transpeople she admired, demonstrating a clear bias against Ms. Hamm).¹⁰⁸

144. This sends a message to the rest of the profession (and other regulated professions) that any and all criticism of gender ideology will “bring the profession into disrepute.” This overly broad, shotgun approach makes the College’s case untenable and itself causes harm to the profession by failing to provide meaningful regulatory guidance and rational discernment.

¹⁰⁷ Transcript, Day 1, September 21, 2022, Cross-Examination of Aisha Ohene-Asante, page 39, line 19 to page 40, line 4.

¹⁰⁸ Exhibit 50, introduced through Amy Hamm on Day 17

145. A recent Court of Appeal decision from New Brunswick¹⁰⁹ canvassed the question of whether conduct by a lawyer (entering into a peace bond after charges were laid and then dropped) would impact the public's perception of the justice system. The court held:

[42] The panel of the Discipline Committee subjected Mr. Hughes' conduct to what it considered would be public perception of the integrity of the profession and the administration of justice. Assuming, without deciding, this was the standard to be applied in the circumstances, properly stated the standard would be that of a reasonable public perception held by a reasonable and right-minded public aware of all the circumstances and viewing the matter realistically and practically.

[43] On the facts that were before the panel, such a reasonable and properly informed public would: (1) understand that Mr. Hughes was the victim of assault on the night in question; (2) know Mr. Hughes co-operated with the authorities throughout; (3) be uncertain of the reason why it was him who was charged and not the other party; (4) understand the inherent risks of a trial where the testimony of one is pitted against that of another; (5) know of the Crown's offer and defence counsel's recommendation to resolve the matter by a peace bond without any admission of guilt; and (6) know Mr. Hughes complied with the provisions of the peace bond. In these circumstances, it is simply inconceivable there would be negative public perception "upon the integrity of the profession and the administration of justice."

146. Similarly, in Ms. Hamm's case, a reasonably informed public would understand that her comments were intended to advocate for the interests of women and children in the face of a concerning and recent ideology. Her courage in speaking up would be appreciated, and seeing a member of the healthcare profession uphold evidence-based medicine, even if it goes against what activists believe, would ensure that the balance of public perception weighs in her favour. A reasonably informed public would also be more likely to have concerns about the integrity of the nursing profession if Ms. Hamm were to be convicted for her gender critical views and advocacy.

147. While Ms. Hamm understands that she is a member of a regulated profession and has responsibilities as such, she expects her regulator to use its powers dispassionately, neutrally and reasonably. Ultimately, the College's decision to prosecute gender critical speech will do far more to damage the public trust and undermine its legislated mandate to govern in the public interest, than any comments a single nurse might make. Furthermore, the College's membership, comprised of mainly female nurses and midwives, many of whom work with female anatomy in their daily practice, must

¹⁰⁹ *Hughes v. Law Society of New Brunswick*, 2020 NBCA 68 (CanLII), <https://canlii.ca/t/jb187>

be licenced by a regulator that would put its thumb on the scale and punish someone with the courage to advocate for women.

148. The College must prove on a balance of probabilities that Ms. Hamm’s comments constitute unprofessional conduct which bring the nursing profession into disrepute. It has failed to do so.

149. Contextual factors relevant to the individual case must also be considered by the Panel in making a finding of unprofessional conduct. These are set out below under the *Charter* section, where such factors are also relevant to the analysis.

iii. Regulation of Off-Duty Conduct

150. A key issue to be considered by the Panel regarding the Respondent’s conduct is whether her public statements have a sufficient nexus to the nursing profession to warrant regulatory intervention.

151. It is conceded that regulators have some ability to discipline professionals for certain off-duty conduct, and the extent of the authority “typically falls under the broad umbrella of conduct that is unbecoming, improper, unprofessional or discreditable...That said, the application of this standard to the facts of each case remains challenging, if not uncertain.”¹¹⁰

152. It is not unreasonable to expect professionals to adhere to objective standards in self-governing professions. Regulatory bodies are statutorily empowered to ensure that their members are competent, ethical and professional while they are performing their roles as doctors, lawyers, nurses, etc. In what should be rare instances, and where there is a clear nexus with the profession, off-duty and non-client or non-patient related conduct can also be subject to regulation. But such bodies cannot be permitted to run roughshod over professionals’ lives or abuse their powers by extending beyond their statutory mandate.

153. On the question of the nexus between professional and personal life to warrant regulatory interest, the Court in *Strom* held:

[O]ff-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,

¹¹⁰ *The College of Physicians and Surgeons of Saskatchewan v Leontowicz*, 2023 SKCA 110 (CanLII), <https://canlii.ca/t/k0f6v>, at paragraph 84.

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?”¹¹¹ [Emphasis added.]

154. The College bears the burden to establish that the off-duty conduct alleged to be unprofessional has a sufficiently negative impact on the ability of the registered nurse to carry out her professional duties, or on the profession.

155. Off-duty social media posts made by a registered nurse, whether truthful or popular or not;¹¹² whether undesirable or improper or not;¹¹³ whether blunt and upsetting or not;¹¹⁴ or even critical posts without restraint and with frustration, hyperbole, colourful “and even perhaps disrespectful language” aimed at reform,¹¹⁵ does not invite a finding of professional misconduct without the College meeting its burden of establishing a material and negative impact to the profession so as to have a “poisoning effect.”¹¹⁶

156. In the 2008 decision of *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*,¹¹⁷ Mr. Whatcott, a licensed practical nurse, was picketing aggressively and with inflammatory language against abortion in front of a Planned Parenthood office. The Court of Appeal considered whether there was a nexus between his picketing and his profession to warrant regulatory interference, and concluded that there was not. The Court held:

Clearly the Discipline Committee believed that by disciplining Mr. Whatcott, and thereby prohibiting him from picketing in the manner that he did, the outcome would maintain public respect for the status and standing of the nurse.

[66] Is there a rational connection between the objective and the decision? Will the public have greater respect for licensed practical nurses because Mr. Whatcott can no longer work as a practical nurse? There is no evidence of this. There is no suggestion that Mr. Whatcott held himself out as a licensed practical nurse while picketing. Few persons would have known that he held a licence as a practical nurse. It was only after PPR filed a complaint with the SALPN that Mr. Whatcott issued a press release that referred to him as a licensed practical nurse.

...

¹¹¹ *Strom*, para. 89

¹¹² *Strom*, para. 138

¹¹³ *Strom*, para. 93

¹¹⁴ *Strom*, para. 138

¹¹⁵ *Strom*, para. 136

¹¹⁶ *Strom*, para. 92

¹¹⁷ *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6 (CanLII), <https://canlii.ca/t/1vhtj>; leave to appeal to SCC denied

[68] What is at stake is the image of the licensed nursing profession, but there is no evidence that any member of the public thinks or will think less of nurses because of Mr. Whatcott's behaviour. In the absence of evidence, one way or the other, one might as easily hypothesize that licensed practical nurses are respected, as a general rule, not for what occurs during their off duty hours, but for their direct activities in the care of patients. Thus, I conclude there is no rational connection between the decision and the objective of maintaining respect for the position of the nurse in the interests of the public. The Discipline Committee's decision founders at this step of the proportionality test.

157. Although he had not announced he was a nurse at the time (it eventually became known), his behaviour (signs and shouting things like, "Planned Parenthood will give you AIDS") was found by the Discipline Committee to warrant a finding. It focused on the falsity of Mr. Whatcott's pronouncements, and the Chambers judge at the first appellate level latched onto this finding and concluded that Whatcott's statements caused harm. The Saskatchewan Court of Appeal took a more reasoned approach:

[73] The Discipline Committee characterized as "false" statements to the effect that "Planned Parenthood corrupts women." The chambers judge accepted this characterization when he said that Mr. Whatcott made lying and defamatory comments. But it is difficult to apply a test of "true or false" to such statements. They are an expression linked to belief and opinion. It is a matter that individuals in a society can debate. McLachlin C.J. addressed the difficulty with determining whether statements were false or true in *Zundel*:

...The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s. 2(b) of the *Charter*. The second lies in the difficulty of determining the meaning of a statement and whether it is false.

The first difficulty results from the premise that deliberate lies can never have value. Exaggeration—even clear falsification—may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.

All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfilment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.

...

The second difficulty lies in the assumption that we can identify the essence of the communication and determine that it is false with sufficient accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing of conflicting values and interests, while useful under s. 1 of the *Charter*, can be unfair if used to deny *prima facie* protection.

One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader: *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at p. 767, and *Irwin Toy, supra*, at p. 976. The result is that a statement that is true on one level or for one person may be false on another level for a different person.

...

A second problem arises in determining whether the particular meaning assigned to the statement is true or false. This may be easy in many cases; it may even be easy in this case. But in others, particularly where complex social and historical facts are involved, it may prove exceedingly difficult.

...

Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) hitherto adhered to by this Court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s. 2(b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s. 1.

[Emphasis added]

Admittedly, these comments were made at the first stage of the constitutional analysis in determining whether "false" statements are protected by the freedom of expression guarantee in s. 2(b) of the *Charter*. Nonetheless, they remain applicable at this stage as indicative of the difficulty in determining what is false and what is true.

[74] In the within case, the effect of the decision is to prohibit Mr. Whatcott from picketing in the manner he has chosen and remain a member of the SALPN. The Discipline Committee did not engage in any of the balancing necessary to weigh Mr. Whatcott's right to work, the high standards to which nurses must aspire and free speech. Given the existence of the interim injunction and the means to enforce it, one would not think the Discipline Committee's decision was a proportionate response.

158. In addition to confirming that what is true and false may be in the eye of the beholder (and therefore not beyond the protection of the Constitution), what is also germane to the present case, is

the Court of Appeal's skepticism that Whatcott's conduct and expression could harm the public perception of the profession more than not. In other words, an allegation of harm to the perception of the profession requires a high degree of scrutiny – it should not be assumed.

159. A few cases relied on by the College on the issue of off-duty speech and institutional "harm" can be distinguished on their facts, as follows.

160. In *Ross*, the teacher was circulating antisemitic articles denying the Holocaust. A Jewish parent filed a complaint to a human rights tribunal, and human rights legislation was applicable. His speech was low value and did not involve a conflict of rights or any possible good faith interpretation. Since this was not a regulatory decision, it is of limited assistance to the Panel. Teachers also operate in an entirely different context than nurses, in terms of the direct influence they have on impressionable children. In *Ross*, Justice La Forest described the type of off-duty conduct that will give rise to discipline in the following way at para. 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. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a "poisoned" environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

161. The *Kempling* decision also involved a teacher and counsellor who explicitly linked his writings to his professional role, by essentially proposing conversion therapy to homosexual students in his guidance counselling office. He made it clear that his beliefs would inform his actions. The decision quoted *Ross* on the question of why harm to the profession might be inferred (as the College is trying to do in this case, improperly).

162. In *Fountain v. College of Teachers (BC)*¹¹⁸, the BC Supreme Court returned a decision to the disciplinary panel on appeal for reconsideration (a subsequent appeal in 2013 considered the revised decision and dismissed entirely the charge against the teacher, who had fired a gun over the heads of his young adult sons to send them a message). The Court reviewed the law on the type of off-duty

¹¹⁸ *Fountain v. British Columbia College of Teachers*, 2007 BCSC 830 (CanLII), <https://canlii.ca/t/1rr85>

conduct that will give rise to discipline, namely i) where a “poisoned” environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole (*Ross*); and ii) citing *Trinity Western University v. British Columbia College of Teachers*,¹¹⁹ holding a discriminatory belief will not be a cause for discipline unless those beliefs are acted on – disciplinary measures can be taken when discriminatory off-duty conduct “poisons the school environment.” The Court concluded:

[65] In summary, the framework for the analysis of off-duty conduct that arises from the case law is:

- (a) some, but not all, off-duty conduct can give rise to discipline for professional misconduct or conduct unbecoming;
- (b) in considering whether the particular conduct at issue is such as to give rise to discipline, the Panel should consider whether the conduct evidences direct impairment of the ability to function in the professional capacity or impairment in the wider sense as described in the case law; and
- (c) direct evidence of impairment is not always required. In an appropriate case, impairment can be inferred. In the absence of direct evidence of impairment, the Panel will need to consider whether it is appropriate to draw on inference of impairment in the circumstances.

163. Accordingly, while direct evidence of harm to the profession may not be required, more than a mere conclusory statement by the College is necessary. There is no basis on which to even infer that a poisoned environment in the health profession might ensue from Ms. Hamm’s comments.

164. The *Pitter* case is also distinguishable from Ms. Hamm’s because the nurses in that case were advising the public, as nurses, about medical treatments they should avoid (the Covid mRNA vaccine).

165. Ms. Hamm’s comments do not involve treatment recommendations at all,¹²⁰ but were expressions of opinion on gender identity ideology and policy. This, again, is at the extreme edge and, we submit, outside the bounds of appropriate regulatory control.

¹¹⁹*Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 (CanLII), [2001] 1 SCR 772, <https://canlii.ca/t/dmd>, para. 36 and 37

¹²⁰ While treatment recommendations are more appropriate for regulatory limits, even here, practitioners have the right to adhere to a minority viewpoint supported by a “responsible and competent body of professional opinion” (*Brett v. Ontario (Board of Directors of Physiotherapy)*, 1991 CanLII 8286 (ON SCDC), 77 D.L.R. (4th) (Div. Ct.), at para. 35).

166. The assertion of regulatory authority over such speech must be based on an obvious connection to the professional services under its jurisdiction, and “edge cases” should be resolved in favour of expansive freedoms. Alternative viewpoints and vigorous advocacy alone are not grounds for censure. Regulators must tolerate “a degree of discordant criticism”¹²¹ in a free and democratic society.

167. The further the regulator moves away from regulating professional standards and competence, the more it must demonstrate the existence of an applicable statutory objective to balance against the restriction on *Charter* rights, and the more stringently the protections of those rights must be upheld.

168. There was a time in the recent past when regulatory bodies would have dismissed public complaints over a professional’s political opinions. In the pre-pandemic Ontario Health Professions Appeal and Review Board decision involving a complaint against a physician for her gun control stance,¹²² the Board restated the Investigation Committee’s decision as follows:

The Committee determined to take no action on the basis that the Applicant was using the College’s complaints process as a tool to advance his own political/policy agenda, constituting an abuse of the complaints process. The Committee stated that it was concerning that the Respondent has been subjected to what appears to be a campaign to dissuade her from voicing her views. The Committee stated that physicians’ roles include responsible advocacy with respect to matters affecting public health. The Committee stated that the complaints process should not be used as a tool to silence or intimidate physicians. The Committee determined that there were no issues of clinical care or professional conduct raised in this complaint. The Committee opined that the Applicant’s sole concern related to the Respondent’s statements in a public forum, as part of a political discourse, and as such, the College has no role in regulating this political debate.

169. It bears asking whether it is the nature of the political views, and whether they align with the dominant views of the Investigation Committee, which warrants such an outcome, or whether this principle that the complaints process should not be used as a tool to silence or intimidate professionals from their political opinions has general application. It is respectfully submitted that it is not for the BCCNM to decide *which* political and policy perspectives are permitted to be held and expressed by nurses and midwives.

¹²¹ *Doré*, *supra* note 32, at para. 65.

¹²² *M.R.M. v N.A.A.*, 2020 CanLII 22968 (ON HPARB), para. 25.

170. Indeed, as an earlier decision of the Supreme Court of Canada held, “it is a feeble notion of pluralism that transforms ‘tolerance’ into ‘mandated approval or acceptance’”¹²³:

132 Beyond this, nothing in *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, or the existing s. 15 case law speaks to a constitutionally enforced inability of Canadian citizens to morally disapprove of homosexual behaviour or relationships: it is a feeble notion of pluralism that transforms “tolerance” into “mandated approval or acceptance”. In my view, the inherent dignity of the individual not only survives such moral disapproval, but to insist on the alternative risks treating another person in a manner inconsistent with their human dignity: there is a potential for a collision of dignities. Surely a person’s s. 2(a) or s. 2(b) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person’s s. 15 rights, just like a person’s s. 15 rights cannot be trumped by s. 2(a) or 2(b) rights. In such cases, there is a need for reasonable accommodation or balancing. In my view, in the context of this case, the decision reflects a constitutionally acceptable balance.

171. This was a pertinent issue in the recent disciplinary decision¹²⁴ involving a Saskatchewan nurse, Leah McInnis, who spoke out at rallies and on social media as a nurse against Covid-19 vaccine mandates. The Investigation Committee took the position that her statements were “misinformation” and directed her to a hearing. The Discipline Committee considered the nexus of her off-duty conduct with her professional role, and concluded that her attendance at the rally with signs critical of government policy did not impair the public’s trust in the profession of nursing. Furthermore, her statements were not misinformation. It was evident that the IC in that case “took a side” on Covid vaccine policies, and should not have sent the matter to discipline.

172. In Ms. Hamm’s case, it is not unprofessional or irresponsible to raise concerns about a dramatic and rapid change to all of society, predicated on the apparent notion that gender identity trumps all other interests and rights. The impact on language, dignity for women as women (and not as “menstruators” and “uterus havers”), fairness (competing in sports on the basis of physical bodies and not internal identities), and safety (both for women in female spaces, and for children from an ideology that convinces many that they were born in the wrong body and must be medically and surgically altered) has been profound—indeed, by Ms. Hamm’s ethical standards, it was irresponsible not to speak up against this overwhelming culture shift.

¹²³ *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 (CanLII), [2002] 4 SCR 710, <https://canlii.ca/t/1g2w5>

¹²⁴ <https://www.crnsc.ca/wp-content/uploads/2024/01/McInnes-Leah-Decision-of-the-Discipline-Committee.pdf>

173. Like Leah McInnis, Amy Hamm is doing so, even though her opinions may be in the minority (for now) and vilified by some. Unlike Leah McInnis, who posted her profession on a sign at a rally, the only references connecting her profession with her speech are minor biographical details.

174. The fact is that professionals do have private lives. Merely saying in the introduction to a podcast or in a biographical statement at the bottom of an article that one works as a nurse should not be enough of a nexus to pull 300 pages of tweets and interviews over several years under the purview of the regulator, especially when there is no meaningful connection between that speech and the profession.

B. The *Charter of Rights and Freedoms*

175. The Panel could dismiss the charge against Ms. Hamm on the basis that the College has failed to establish that her statements either i) did not rise to the level of unprofessional conduct as defined in the *Act*; or, ii) that there was an insufficient nexus to the profession to bring them under the remit of the regulator, without addressing the *Charter*. However, as the College concedes, Ms. Hamm's *Charter* rights are infringed by these proceedings, and the following submissions are intended to guide the Panel through the requisite proportionate balancing analysis that must be conducted.

176. As an institution created by statute, the College is bound by the *Charter* and may not restrict the content of lawful expression. Further, the College is legally obligated to uphold, as part of freedom of expression, the right of citizens to hear and consider all views and perspectives. Section 2(b) of the *Charter* protects the right to receive expressive material as much as it does the right to speak.

i. Freedoms of Expression, Belief and Opinion –Sections 2(b)

177. The Supreme Court of Canada has stated that freedom of thought, belief, opinion and expression, guaranteed under Section 2(b) of the *Charter* ensures that “everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is...“fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.... And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".¹²⁵ [Emphasis added]

178. In *Libman v. Quebec (Attorney General)*,¹²⁶ the Supreme Court of Canada re-affirmed the broad scope of freedom of expression:

The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the Canadian Charter to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian Charter (*Irwin Toy*, supra, at p. 970; *Zundel*, supra, at p. 753).

179. The Saskatchewan Court of Appeal in the recent (and highly relevant) decision of *Strom v. Saskatchewan Registered Nurses' Association*¹²⁷ considered the significance of Section 2(b) of the *Charter* to the consideration of the allegations against Ms. Strom:

[136] The s. 2(b) right to freedom of expression is a core constitutional right. As Cory J.A. (as he then was) said in *R v Kopyto* (1987), 1987 CanLII 176 (ON CA), 47 DLR (4th) 213 (WL) (Ont CA) at para 194 [*Kopyto*]:

Considering now the purpose of s. 2(b), it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful, language may be the necessary touchstone to fire the interest and imagination of the public to the need for reform and to suggest the manner in which that reform may be achieved. [Emphasis added]

180. The Court in *Strom* “explained what has often been considered the most important reason freedom of expression cannot be unduly constrained to avoid offending others. Criticism will tend to upset the target of that criticism. Criticism, even blunt criticism, is essential to healthy debate. Indeed, it is when our expression may be objectionable to others that it needs protection. As the Court

¹²⁵ *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, <https://canlii.ca/t/1ft6g>

¹²⁶ *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 SCR 569, <https://canlii.ca/t/1fr09>, para. 31

¹²⁷ *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII), <https://canlii.ca/t/j9z2w>

references in *Strom*, “Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be...” (*Strom*, para. 138, emphasis added).

181. Ms. Hamm’s advocacy obviously falls within the *Charter*’s protection. It is equally obvious her advocacy needs protection: her views were those of the unpopular, even vilified, minority (at least, of those courageous enough to speak up).

182. Ms. Hamm’s advocacy amounted to a search for truth and participation in the democratic process of addressing important public policy and healthcare issues, and its infringement will be difficult to justify, as any such arguments against it should be “subjected to a searching degree of scrutiny” (*Strom*, para. 161).

183. Unprofessional conduct must not be redefined to include speaking unpopular truths that those working within the governing institution do not want to hear, and *Charter* rights, as described above, should not be dismissed as mere words on a page to be paid lip service on the way to limiting the expression. To do so is to steadily chip away at the very foundations of liberal democracy, until the edifice can no longer stand.

ii. Equality Rights – Section 15 of the *Charter*

184. In her impugned statements, and in her testimony during the hearing, Amy Hamm has made it clear that she is a strong, passionate advocate for women’s rights. As noted earlier when referring to the *Brooks v. Canada Safeway* decision about protection against discrimination on the basis of sex, women’s sex-based rights have been hard won. Transgender people are not the only group seeking protection against discrimination and unfairness – women, too, have both *Charter* and human rights to equality and dignity. Women are expressly protected from discrimination and disparate outcomes by s. 15 of the *Charter*. Ms. Hamm’s advocacy stems from the recognition that there are impacts and harms to women, as a class, from the prioritization of gender identity over sex. The position statement of caWsbar sets out these concerns succinctly.¹²⁸

185. Forgotten (or ignored) in all of the evidence, reports and studies relied on by the College and their experts about alleged harms to the transgender community from gender critical opinions like Ms.

¹²⁸ Exhibit 26: Extract document, page 64

Hamm’s, is the adverse impact on women. In this conflict of alleged rights, which remains unresolved, it is not for the College to take a side in a good faith debate. In our respectful submission, it simply cannot be unprofessional conduct to advocate for the *Charter* protected rights of women and girls to fairness, dignity and safety, even as (or especially as) a nurse. This is a *Charter* value that the Panel must consider in its decision. Women’s rights are not transphobic.

C. The College’s Statutory Objectives

i. The Public Interest

186. As will be discussed in a later section, the proportionate balancing exercise that the Panel must conduct (the *Doré/Loyola* analysis) requires that *Charter* protections “are upheld to the fullest extent possible given the statutory objectives within a particular administrative context.”¹²⁹

187. The first question is, what statutory objectives is the decision-maker tasked to uphold? The College’s purpose is set out in the *Act*, namely, to serve and protect the public and to exercise its powers and discharge its responsibilities in the public interest.¹³⁰ Its powers are constrained by the *Act*.

188. While this does suggest legislative breadth, one must always be wary of subjective terms that can be conveniently applied as necessary – “public interest” is such a term. It is assumed by the College that it is in the public interest for there to be “no debate” on gender identity; but, for many people, and in many situations, this is against their interests and even harmful to them. For *those* members of the public, it is in their interest to have advocates with the courage and intellect to articulate arguments in response. It is not enough to say “it is in the public interest” without more.

189. In *Strom*, the Court cited this passage with approval:

[78] The public interest and effective professional regulation are, of course, not separate. As is noted in James T. Casey, *The Regulation of Professions in Canada*, loose-leaf (2020-Rel 6) vol 1 (Toronto: Thomson Reuters, 2019) at 2.5:

... [T]he correct view is that the primary purpose of legislation regulating professions is the protection of the public. However, it is critical to appreciate that the public interest is also served by the protection and promotion of properly functioning, self-governing professions. [Emphasis added.]

¹²⁹ *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 (CanLII), <https://canlii.ca/t/jxnwq>, para. 146

¹³⁰ *Health Professions Act*, s. 16(1)

190. In determining the scope of its duties to act in the public interest, the College should not let its complaints system become weaponized by activists to punish contrarian views; nor should the College put its thumb on the scale, advocating for a “side” in matters of legitimate public debate, particularly when that “side” is using all available methods to shut down any such debate. More categorically: the “public interest” does not mean taking any side on a political issue, or “public interest” becomes a means of converting the College into a political agent – clearly not its mandate.

ii. College Misapprehends its Authority

191. The College states at the outset of its closing submissions that, “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.” That is incorrect. The heart of this case is whether Ms. Hamm’s *Charter*-protected expression rises to the level of unprofessional conduct that can justifiably be sanctioned by the regulator. The College is importing language into the definition of unprofessional conduct or its statutory objectives that does not exist in its governing legislation.

192. “Discrimination” is a term of art, applicable to the human rights context and relating to a refusal to provide a service. It cannot be relied on as basis to prosecute Ms. Hamm, because there is no evidence or allegation that she failed to provide service to a transgender person in contravention of human rights law, nor that she expressed any intention to do so. No transgender people came forward to allege discrimination or even “harm” (another word thrown around loosely and hypothetically in these proceedings). An act of “discrimination” or an expression of “intention to discriminate” simply did not happen and the Panel should disregard any references to that phrase.

193. Since political beliefs are protected under the *BC Human Rights Code*,¹³¹ and Ms. Hamm is facing licensing restrictions for her gender critical socio-political beliefs, it appears the only individual identified in these proceedings facing actual discrimination is Ms. Hamm herself.¹³²

194. To illegally discriminate is to deny services in housing, employment, education, etc. on the basis of certain described grounds. Although human rights laws vary across the country, this typically

¹³¹ *Human Rights Code*, [RSBC 1996] CH. 210, section 14.

https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96210_01#section14

¹³² *Bratzer v. Victoria Police Department (No. 3)*, 2016 BCHRT 50 (CanLII), <https://canlii.ca/t/gpm62>

includes grounds such as race, sex, creed, country of origin, family status and, in the last decade or so, gender identity and expression.

195. In the non-legal, common use of the word, discrimination is a useful tool that helps people make decisions – to have “discriminating tastes” means that one can discern quality over poor imitations, for example. It is not inherently bad to be discriminatory—in the dating context, it is perfectly acceptable to have discriminating tastes, so as not to end up with the first person, however ill-suited, who “swipes right.” But “discrimination” is now becoming weaponized as a concept, and this was evident in the testimony of the expert witnesses for the College. It might be “discrimination,” in their view, for a lesbian not to want to date a transwoman with a penis.

196. Some discrimination, in the legal sense of the word, is acceptable because it serves legislative goals set out in the human rights codes across the country (for example, as an ameliorative program for a marginalized group, such as programs open only to First Nations people). Sometimes discrimination is permissible (and is therefore not discrimination) because to accommodate a particular protected ground would require undue hardship.

197. Ms. Hamm does not contest that gender identity is protected under various human rights legislation and other laws and policies in Canada. However, the characterization of Ms. Hamm’s statements as being “discriminatory and derogatory” is not set out in or derived from its constituting legislation, nor is it contained in any of the professional standards produced by the College.

198. The College relies on two cases from the BC Human Rights Tribunal involving transgender people. These cases are not relevant to a professional misconduct hearing. Calling Ms. Hamm’s comments “discriminatory” outside the human rights context attempts to paint them with some additional level of impropriety. In fact, her statements simply reflect one side of an important debate. It is very easy to use the phrase “discriminatory and derogatory” as a trump card to censor speech. This, however, is not the correct way to use the concept of discrimination. If there were a particular person who was discriminated against by Ms. Hamm, they could bring an application for redress under the *Human Rights Code*. In the case that concerns the Panel, there is no “victim,” no transgender “complainant”, no actual person alleging discrimination or harm against themselves. These cases are not germane to the question of unprofessional conduct under the *Act*.

199. The Tribunal decision in *Nelson v. Goodberry Restaurant Group*, referred to by the College at paragraph 35, is therefore irrelevant to the question before this Panel. Ms. Hamm has not been accused of failing to use a particular person’s preferred pronouns (other than the reference to a television program she tweeted about, which may or may not have used the wrong pronouns – there is no evidence as to what the participant on the program wished to be called). Indeed, Ms. Hamm made it clear in her testimony that she always addresses transgender people in her workplace by the pronouns they preferred. This decision is another “red herring” presented by the College to make it appear that this is a human rights case or that it involves actual discrimination. It does not.

200. The same applies to the *Bilac* decision of the Canadian Human Rights Tribunal, referred to in paragraph 35, regarding “deadnaming” of a transperson (using the name they were born with, rather than the name they adopted on transition). Again, there is no complaint of “deadnaming” here, and no evidence that Ms. Hamm has ever done such a thing. These cases are included to bolster an irrelevant argument and make Ms. Hamm appear to be complicit in human rights violations. She is not.

201. The fact that many institutions have adopted “trans-inclusive policies” is also irrelevant to a finding of unprofessional conduct. Part of living in a liberal democracy is having the ability to criticize policies and challenge public institutions when their policies are found to have unanticipated downstream consequences, as have many of the policies which prioritize gender identity over sex. The fact that so many institutions have brought in such policies, despite a litany of concerns from women’s groups and other sectors of society, shows that the transgender population and their allies and activists have a tremendous amount of institutional power. That criticizing these policies, most of which have been brought in only over the last decade, can result in a flurry of institutional powers being marshalled against someone, belies the claim of “marginalization.”

202. Furthermore, the College’s submissions go to great lengths to show just how many institutions have lined up to use the powers of the state to compel speech, criminalize efforts to prevent children from making life-altering decisions about their sexuality and sexual function, forcing female guards to “frisk” male-born inmates, and to prevent any criticism of this from seeing the light of day. This is not something to be proud of in an erstwhile free and democratic society. Nor is it relevant to the question of whether Ms. Hamm committed unprofessional conduct.

203. The reference to the Canadian Bar Association’s paper on the use of pronouns in court is similarly irrelevant. It is an opinion only, not a law, and the directives in the court are not mandatory and are not being enforced. Again, it is irrelevant, other than to show the strength of institutional power marshalled against anyone who would dare to question gender identity ideology.

204. Reference to the prison system (paragraph 37) highlights this. A male who self-identifies as a woman between conviction and sentencing can force a female guard to strip search them and may be accommodated into the women’s prison population. The implication from the College’s submissions (and from the existence of these proceedings generally) is that the College thinks there can be no possible reason to be concerned about this. It’s just fine. Amy Hamm is entitled to disagree with this policy, and her disagreement with it has nothing to do with her professionalism as a nurse.

205. The *Kempling* case is similarly distinguishable (para. 43 of the College’s submissions). Although the BC *Human Rights Code* is one of a handful of codes that have a provision against making statements that discriminate or threaten to discriminate, this again is a term of art. As the tribunal held, “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.” Amy Hamm has testified that she respects the inherent dignity of transgender individuals and there is no evidence that she has treated any transgender person in a discriminatory manner. In *Kempling*, the governing teachers’ college did attempt to import the concept of “discriminatory and derogatory speech” into its disciplinary proceeding; however this teacher was unrepresented by counsel, and was offering conversion therapy services to homosexual students at the school where he was a guidance counsellor. There are no other cases, on a keyword search, where this language was imported into professional disciplinary proceedings, or where there was no “victim” involved to take the matter directly to the human rights tribunal.

iii. Hypothetical “Harm”

206. Much of the focus of the experts for the College in their reports and testimony was about the harms that transgender people allegedly face in society. This is summarized at length in the College’s closing submissions, beginning at paragraph 19.

207. However, no evidence was led of a casual connection between Amy Hamm’s speech and the alleged harms that are identified here, including any denial of health care or barriers to health care. It is purely speculative and hypothetical. Dr. Saewyc admitted in cross-examination, that despite her work on transgender health, she had not observed a single incident where such harms occurred.

208. Furthermore, as Dr. Cantor testified, the evidence that was led of transgender persons experiencing harms in health care was of a low value on the hierarchy of scientific evidence.

209. The concept of harm is also tacked onto the “discriminatory and derogatory” language discussed above, presumably to bolster the claim of “unprofessional conduct”. The College clearly does not like Ms. Hamm’s advocacy for the wrong team. But dislike is not enough to support a finding of “unprofessional conduct” and the curtailment of her constitutional rights of expression. So the College has gone to great lengths to import concepts of “harm” and “discrimination” to support its efforts to bring the impugned statements under its remit.

210. Any “harm” emanating from Ms. Hamm’s comments is only to the “ideology” that cannot be debated, since such speech might open the door to dialogue and compromise. Disciplining professionals with allegations that unknown transgender people are harmed by criticizing gender identity ideology ensures that controversial ideas remain untouchable.

211. “Erasure” (at p. 13 of College submissions) is another new concept which has been introduced as a fact, despite a lack of evidence. (For what is a small population, the transgender community has attracted disproportionate celebration, power, resources and attention – the opposite of erasure.) From the evidence that was heard in this hearing, and a review of the Language Guide that was included in the materials, if anyone is going to claim erasure, it is women, whose descriptors have been co-opted and who are increasingly being described by their reproductive organs rather than simply as “women”.

iv. The “Fundamental Values” of the Profession

212. The phrase “fundamental values” is another term that has no foundation in the governing legislation. The College’s submissions state that Ms. Hamm’s statements conflict with “fundamental values of the health care system,” one of which is that it should be perceived to be non-discriminatory. While we do not object to the notion of a non-discriminatory health care system being a Canadian

value, there is no evidence that Ms. Hamm has ever discriminated against transgender people, or threatened to do so. This is yet another “red herring”.

213. In the opening paragraph of its submissions, the College claims that “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 [discussed above; no evidence of that] and contrary to the fundamental values of the nursing profession.” We can assume that these “fundamental values of the nursing profession” are similar to “fundamental values of the health care system,” but this is not clear. The governing statute requires the College to “serve and protect the public.” It says nothing about establishing or enforcing particular political “values.”

214. The *Canadian Nurses Code of Ethics, 2017 Edition*, appears to establish “ethical values” for nurses. It does not refer to “fundamental values of the health care system” or of the profession generally. Ethical values to be embraced by individual nurses include:

- A. Providing safe, compassionate, competent and ethical care
- B. Promoting health and well-being
- C. Promoting and respecting informed decision-making
- D. Honouring dignity
- E. Maintaining privacy and confidentiality
- F. Promoting justice
- G. Being accountable

215. These are specifically directed to individual nurses’ professional relationships with persons receiving care, as well as with students, nursing colleagues and other health-care providers. There is no indication that this *Code* applies to off-duty conduct, nor does it establish profession-wide or system wide “values.” It is also specifically noted (page 9) that “nursing ethics” are not part of nurses’ regulated responsibilities, but are “important educational and motivational tools for all nurses.”

216. There is no evidence that Ms. Hamm has not abided by these ethical values in her professional life, indeed, she testified that she is always in compliance with policies and workplace responsibilities.

217. The *Professional Standards* of the College state (p. 7) that they “reflect the values of the nursing profession” but do not delimit these values. Furthermore, these standards do not apply outside of the workplace.

218. Ms. Hamm is and has always been in compliance with all *Professional Standards* in the workplace, and the College has not identified any specific standard that she has breached. As there was no clear or explicit interdiction against Ms. Hamm’s speech in the *Professional Standards*, the Panel would need to hear expert evidence as to the applicable standard of the profession on this point.¹³³ None was adduced. It appears from its submissions that the College is not pressing a finding for a breach of the Standards or Bylaws of the College.

219. So, by its reference to “fundamental values,” the College appears to insert a subjective criterion, known and defined only by the College, into the definition of “unprofessional conduct.” This uncertainty and vagueness cannot be a basis for such a finding.

D. Proportionate Balancing

As noted above, and as the College concedes, Ms. Hamm’s *Charter* rights under section 2(b) would be infringed by a disciplinary finding against her.

i. The *Doré/Loyola* Analysis

220. In order to assess whether such an infringement is demonstrably justified by the College, the Panel must conduct a proportionate balancing, known as the *Doré/Loyola*¹³⁴ analysis, between the *Charter* rights being infringed on the one hand, and the statutory objectives of the College on the other, which must be “pressing and substantial.” This is a highly contextual analysis, with many factors to consider. The purported statutory objectives identified earlier are broadly “the protection of the public” and the “public interest.”

221. The College has attempted to fashion a public protection angle in this case, arguing that Ms. Hamm’s speech is “discriminatory and derogatory against a marginalized group” and would lead such people to avoid necessary healthcare. This characterization is key to the College’s argument that there is a pressing and substantial objective justifying its violation of Ms. Hamm’s *Charter* rights.

222. But this characterization is a fig-leaf covering its actual purpose: *censoring dissenting viewpoints on matters of gender ideology*. This is not only **not** in the public interest, but it is also *ultra*

¹³³ *Council for Licensed Practical Nurses v. Walsh*, 2010 NLCA 11 (CanLII) at paragraph 19: <https://canlii.ca/t/285q0>

¹³⁴ Both decisions are cited and contained in the College’s Brief of Authorities.

vires (or “beyond the powers”) of their statutory authority, and therefore **cannot be** a pressing and substantial objective. The Panel may conclude at this stage of the analysis that there is no pressing and substantial objective that warrants infringing Ms. Hamm’s constitutional rights, and dismiss the charge.

ii. Good Faith Intentions and Contextual Factors Must be Considered

223. If the Panel continues the analysis to the next stage, there are a “full panoply of contextual factors particular to an individual case”¹³⁵ that must be taken into account before making a finding of professional misconduct, and also as part of the proportional balancing analysis required by the *Doré/Loyola* test. The College has assumed and alleged that Ms. Hamm is acting in bad faith and that there is no social value to her speech (in addition to alleging discrimination, which is expressly denied by Ms. Hamm, is and discussed above). These factors are addressed in the next two sections.

224. Ms. Hamm testified as to what precipitated her advocacy – concerns about the impacts of gender ideology on women and children, particularly on the marginalized women who are in prison (disproportionately Indigenous woman, whom the College claims a special responsibility toward) and rape shelters. Her advocacy in the public square emanates from a position of good faith and her statements are meant to encourage debate and policy change, reflecting a pluralism of ideas that are to be fostered in a free and democratic society. This is a factor the Panel must consider.

225. In *Groia v. Law Society of Upper Canada*, the Supreme Court of Canada found in the particular instances of that case (a lawyer making erroneous accusations against opposing counsel in the thrust and parry of his advocacy) that it was not professional misconduct where advocacy was undertaken in good faith, even if zealous: “Mr. Groia’s allegations were made in good faith and they were reasonably based. As such, the allegations themselves could not reasonably support a finding of professional misconduct.”¹³⁶

226. The highest court in the land found that:

[S]anctioning a lawyer for good faith, reasonably based allegations that are grounded in legal error does not reflect a proportionate balancing. Advancing good faith, reasonable allegations — even those based on legal error — helps maintain the integrity of the justice system by holding other participants accountable. Well-founded arguments exposing misconduct on the

¹³⁵ *Groia*, paragraph 83

¹³⁶ *Groia*, paragraph 7

part of opposing counsel thus lie close to the core of the s. 2(b) values underpinning a lawyer's expressive freedom. Discouraging lawyers from bringing forward such allegations does nothing to further the Law Society's statutory mandate of advancing the cause of justice and the rule of law. If anything, silencing lawyers in this manner undercuts the rule of law and the cause of justice by making it more likely that misconduct will go unchecked.¹³⁷

227. This can be summarized by an old saying, "Sunlight is the best disinfectant." The integrity of systems, whether the justice system or the health system, are made more robust by open dialogue. Silencing dissident voices is rarely the sign of a healthy society.

228. In *Re Klein v. Law Society of Upper Canada*¹³⁸ the rules of the governing body for lawyers prohibited members from contacting the news media on matter in which they were involved in a professional capacity. Klein challenged the rule on the basis it unduly infringed his section 2(b) rights under the *Charter*. The Court agreed with Klein and stated:

[143] A lawyer has a moral, civic, and professional duty to speak out where he sees an injustice. ... Speech of this kind surely lies at the core of the constitutional right guaranteed by s. 2(b). ... A threat of discipline by one's governing professional body is a grave and weighty one which will substantially restrict the willingness to speak out on matters of public interest. The effect of the Rule, in my view, is to impair the right of the lawyer, client and the public to disseminate and receive information to an extent which greatly exceeds any legitimate legislative or regulatory purpose of the respondent Law Society. This Rule, in my view, will have an unjustifiable chilling effect on the exercise of the freedom of expression.

229. For a nurse, exemplifying "ethical (moral) courage" by speaking out against injustices that she observes also lies at the core of s. 2(b) protection and should not be restricted lightly.

230. *Strom* considered the *Groia* decision and provides guidance on the contextual factors relevant to a proportionality analysis:

[153] Having established a rational connection to a pressing and substantial objective, the SRNA submits that the *DC Decision* was a binary decision. On that basis, it says that the decision that Ms. Strom was guilty of professional misconduct was the least intrusive option available to promote this objective and, as such, infringed freedom of expression no more than was reasonably necessary.

[154] With respect, the SRNA's approach misses the point made in *Groia* that there is a second aspect to the proportionality analysis. The *DC Decision* was not a simple binary decision about misconduct. As the SRNA states in its factum, the Discipline Committee decided that Ms. Strom was subject to a rule that registered nurses who wish to make

¹³⁷ *Groia*, paragraph 120

¹³⁸ *Re Klein and Law Society of Upper Canada*, 1985 CanLII 3086 (Div. Ct.), <https://canlii.ca/t/gb1n8>, 143

statements criticizing other nurses or healthcare institutions must first “gather the facts” (that is, they must corroborate the facts with those nurses or that institution); must make all criticisms through specified channels; and must exhaust all of those channels, including appealing to the Minister, before going public. The Discipline Committee also decided that little or no weight should be accorded to contextual factors such as anger or distress as a result of the personal connection of the accused nurse to a person harmed by a perceived failure to meet the standard of care; the extent of the professional connection between the nurse who is accused of misconduct and the institution where the care was delivered; and whether the impugned public expression was true, or, for that matter, was made in good faith to advocate for systemic change.

[155] This, then, was the Discipline Committee’s approach to assessing whether public expression by a registered nurse warrants SRNA discipline. Accordingly, it is subject to the second aspect of the proportionality analysis described in *Groia*, and with the greatest respect, does not pass muster. To paraphrase *Groia*, the Discipline Committee did not adopt an approach that provided for the consideration of the “full panoply of contextual factors” particular to Ms. Strom’s case before deciding she should be disciplined despite the infringement of her right of free expression. 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 themselves 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.

231. The two most relevant contextual factors in the above list are i) whether the public expression by the nurse was intended to contribute to social or political discourse about an important issue; and ii) the truth or fairness of any criticism levied by the nurse charged.

232. The College's input on the first of these factors is to characterize Ms. Hamm's statements as "extremism." An example they provide is this testimony:

... 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*)

233. That the College would find a legitimate concern that children and adolescents are being rushed into life-altering procedures (which was amply discussed during the hearing) to be "extremism," particularly in light of evidence that other countries, like the UK and Sweden are putting the brakes on these procedures out of similar concern, is troubling. A nurse speaking out about what she perceives to be a massive medical scandal—a view that is increasingly of such concern that lawmakers and healthcare professionals in some jurisdictions are doing an about-face—should be lauded for her immense courage. Not punished.

234. As discussed above, Ms. Hamm's intentions were in good faith and were indeed meant to contribute to social or political discourse about an important issue. She made that clear on the very day that the Billboard went up in her quote to CBC.¹³⁹

235. The evidence of Dr. Blade, although limited to the issue of fairness for women and girls in sports, shows that there are legitimate issues at play that many people are attempting to deal with and resolve. Amy Hamm may have been one of the earlier voices in the wilderness in this issue, arranging events to discuss women's rights in an environment that was threatening, frightening and censorious. But in the space of the last five years, the topic has moved much more onto the public consciousness and policy changes are afoot that attempt to find a better balance. Ms. Hamm's speech has been part of that positive change.

¹³⁹ Exhibit 26: Extract document, page 19

236. The truth or fairness of her commentary is supported by the evidence of Dr. Cantor on the scientific front, Dr. Stock on a philosophical level. As Dr. Stock noted, the UK is much further ahead on this issue than Canada, and the courts have gone so far as to protect “gender critical speech” as a belief system, to protect women from being “cancelled” from their jobs – the very point that JK Rowling made in her infamous tweet in December of 2019 that kicked off this entire chapter: “Dress however you please. Call yourself whatever you like. Sleep with any consenting adult who’ll have you. Live your best life in peace and security. But force women out of their jobs for stating that sex is real? #IStandWithMaya #ThisIsNotADrill”

iii. Gender critical speech is socially valuable and deserves protection

237. At this juncture, it is worth looking at other, similar fact cases (where a “gender critical feminist” has come into conflict with “transgender rights activism”). The only reported Canadian case to mention “gender critical” views is *University of Alberta v Association of Academic Staff: University of Alberta*,¹⁴⁰ a labour arbitration case involving a professor who alleged she was removed from an administrative position due to her gender critical views. Although the case was not decided on that basis, there was considerable commentary on gender critical views and the hostility toward them of transgender rights activists. See, for example, the following passages [emphasis added]:

Second, there was, at the time, internationally and locally, a growing academic dispute and a related dispute “on-the-ground” over the nature of and appropriate protection for persons generally identified as transgender, within both society at large and, more specifically, within the gay community sometimes described by more inclusive acronyms like LGBTQ2S+. Closely tied to these disputes has been the growing use of, and in the view of some, the pressure to identify, one’s choice of pronouns. Such disputes will be identified further in these reasons where relevant. However, doing so is not intended to take any position pro or con on the views themselves. They constitute important background facts, but this case is not ultimately about whose views, or actions based on such views, are “right” but on more prosaic questions of labour relations and academic collective bargaining.

These are very important social and academic issues, but they are not issues on which an arbitrator has any particular expertise. There are many academic specialists with considerably more wisdom on the topic; such specialists nonetheless often express strongly divergent views. Professor Lowrey holds, and expresses, what are described as “gender critical” views. She is clearly sincere in her views, which reflect her personal experience and her academic research. She expressed those views articulately. Some colleagues and some students, in the Anthropology Department and elsewhere, find such views abhorrent.

¹⁴⁰ *University of Alberta v Association of Academic Staff: University of Alberta*, 2023 CanLII 45765 (AB GAA), <https://canlii.ca/t/jxfbk>

A June 5, 2021 article from the International edition of the Economist Magazine provides a useful summary of such disputes. Referring to a report compiled over events at Essex University in England, it reported:

... [the] report marks a challenge to the transgender dogma that originated on American campuses and has spread to universities around the English-speaking world. Its proponents hold that gender identity - the feeling that one is a man or a woman - is as important as biological sex and that trans people should in all circumstances be regarded as the gender with which they identify. This has increasingly influenced policy-makers; several places allow trans women into spaces that were once reserved for females, from sports teams to prisons and shelters for victims of domestic violence.

The opposing viewpoint, which is often described as “gender-critical”, might once have been considered mainstream. It argues that, since biological sex is unchangeable, even with hormones, surgery or any other form of treatment, the conviction that one has been born in the wrong body should not be dispositive.

Gender critics argue that biological differences between the sexes make the continued provision of female-only spaces necessary. Trans activists say that trans women should have access to those places, too. “The emphasis that so-called gender-critical women place on what they describe as threats to women ignores the fact that trans women are overwhelmingly those who are threatened in single-sex spaces,” says Lisa Miracchi, an assistant professor at the University of Pennsylvania who has signed open letters disapproving of gender-critical feminists.

The article goes on to opine:

The arguments the two sides put forward, in other words, are complex and debatable. But many trans activists think that any disagreement is tantamount to hate speech and try to oppress it. Some universities with policies that reflect the belief that trans women are women have acted on complaints about people who do nothing more than express a contrary view.

The article referred to cases elsewhere and included a reference to Professor Lowrey’s view that she was removed as the Chair of an Undergraduate Program after students complained they felt unsafe. It reported her as saying “... she reckons gender-critical posters in her office were to blame”.

238. The facts of the case showcase a hostile environment for gender critical speech, and an institution struggling to navigate the conflict (paragraph numbering not available):

I have also considered whether the fury, or just rumblings, were the product of one or more allied persons leading a narrow but organized campaign directed at Professor Lowrey. In the bullying literature such conduct is sometimes described as “swarming”. The evidence here suggests a broader base of concerns coming mostly from persons offended by “Gender Critical” views (often referred to by the derogatory term “TERF”), and from persons supportive of the rights of transgender persons. It was the issue itself as much as Professor

Lowrey's specific activities that was causing any furor. I am inclined to the view that news of activities in other Universities also added considerable fuel to the debate.

...

The conversation turned to overload work, teaching relief and stipend. Then, Professor Lowrey raised a counterpoint. Allowing transgender students and their supporters to target those with differing views invited an opposite fear among those who hold gender critical views. They are themselves scared by what may appear to them to be enforced ideological conformity. She made reference to the use of the term TERF, an acronym that has become a derogatory epithet against those who feel transgender self-identifying women have no place in the feminist movement or female spaces. It is a term sometimes used to try to align them with certain entirely different commentators on the subject who take the view that God, or nature, created nothing beyond men and women. The Dean listened and replied, "Thank you, let me mull that over".

239. The arbitrator concluded (emphasis added):

It [a policy permitting anonymous complaints] also protects academic freedom by not prematurely pursuing what may well be dubious attacks on an academic's freedom. Some of what was being said about Professor Lowrey, and as to what should happen to her, was hyperbolic beyond anything contemplated in the agreement or at law, and would, if pursued, stunt the growth of academic freedom generally. Just by way of example, the somewhat Maoist suggestion in the May 7th formal complaint of "a lack of self reflection and remorse for transphobic behavior/promotion" based on the expression of gender critical views could itself spurn endless inquiry. Not every such assertion should, as a matter of fairness, be investigated and pursued. At times general observations about the state of a department's overall academic health can be made without formal investigation. This goes to the root of Professor Lowrey's complaints; the view that her position could only be vacated by particularized misconduct on her part, and only once those particulars had been investigated, exposed to rebuttal, and resulted in a finding of individual misconduct.

For all these reasons, while I find I have authority in this matter, I find the grievance itself must be dismissed. I thank Counsel for their helpful assistance in this difficult case. I repeat, once again, the case is not in any way a ruling on the strongly held views of the protagonists in the debate over transgender rights and accommodation, or over gender critical views.

240. What is clear from reading cases such as this (and the UK and US decisions to follow), is that the College has allowed itself and its disciplinary process to become participants in a conflict on which it should not be taking a side. It is hoped that the Panel will notice the similarities in these cases to the behaviour of the College in striving to prevent all of Amy Hamm's expert witnesses from testifying at all, and in declaring that there is "no debate" on these matters. The College should be a neutral institution. It has lost its way.

241. Given the dearth of Canadian case law or legislation that protects the expression of gender critical views, it is appropriate to turn to other common law jurisdictions. That takes us to the United Kingdom and includes the decisions in *Miller v. The College of Policing and the Chief Constable of Humberside*,¹⁴¹ *Alison Bailey v. Stonewall Equality Ltd, Garden Court Chambers et al*,¹⁴² and *Forstater v. CGD Europe & Others (Religion or Belief Discrimination)*,¹⁴³ all of which are cases that directly addressed the exercise of freedom of expression in stating gender critical views, the social value of gender critical views, and whether free expression rights ought to be curtailed because of harms allegedly caused to transgender persons.

242. Gender-critical speech has now been recognised in England as protected speech under the *Equality Act* as recommended by the U.K. Law Reform Commission’s 2021 Report, *Hate Crimes Law: Final Report*¹⁴⁴ which stated:

“a blanket restriction on the expression of gender critical views would likely be in breach of Articles 9 and 10, because it would be an unnecessary and disproportionate interference with the rights to hold and express those protected beliefs. Moreover, where – as with discussions on reform of the Gender Recognition Act 2004 – the expression was a contribution on a matter of political debate – the scope for interference with the right would be limited”.

243. Ms. Hamm’s gender critical statements, and whether they amount to unprofessional conduct, must be assessed within the context of what has become an international debate on the care of transgender people, especially children and youth. For example, as the Panel heard, “gender-affirming care” is a benign-sounding term which belies the extreme and irreversible nature of the treatment that may be provided in many cases, and other countries are beginning to re-evaluate.

244. Although the College has not explicitly said that they accuse Ms. Hamm of “hate” as in this UK case, the phrase “discriminatory and derogatory” is of a piece with that allegation.

¹⁴¹ *The Queen on the Application of Harry Miller v. The College of Policing and the Chief Constable of Humberside*, [2020] EWHC (Admin), <https://www.judiciary.uk/wp-content/uploads/2020/02/miller-v-college-of-police-judgment.pdf>

¹⁴² *Alison Bailey v. Stonewall Equality Ltd, Garden Court Chambers et al*, Employment Tribunals, U.K. Case No. 2202172/2020, https://assets.publishing.service.gov.uk/media/62e1307c8fa8f5649a40110a/Ms_A_Bailey_vs_Stonewall_Equality_Limited_Reserve_d.pdf.

¹⁴³ *Forstater v. CGD Europe & Others (Religion or Belief Discrimination)*, Employment Appeals Tribunal, 0105_20_1006 (10 June 2021), <https://www.judiciary.uk/wp-content/uploads/2022/07/Forstater-v-CGD-Europe-and-others-judgment.pdf>

¹⁴⁴ *Law Commission: Hate Crime Laws Final Report* dated December 6, 2021, page 479, para 10.506, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11j5xou24uy7q/uploads/2021/12/Hate-crime-report-accessible.pdf>.

245. In *Miller*, where a man was reported for a “non-crime hate incident” for tweeting about transgenderism, the Court opened its decision with a quote from George Orwell, and then set out the basic facts (some passages are reproduced below), which followed the announcement of a new law called the *Gender Recognition Act*:

14. On one side of the debate there are those who are concerned that such an approach will carry risks for women because, for instance, it might make it easier for trans women (ie, those born biologically male but who identify as female) to use single-sex spaces such as women’s prisons, women’s changing rooms and women’s refuges. On the other side, there are those who consider it of paramount importance for trans individuals to be able more easily to obtain formal legal recognition of the gender with which they identify.

15. Broadly speaking, the Claimant holds the first of these viewpoints. He posted a number of tweets which Mrs B reported to the police as ‘transphobic’. Under the policy issued by the First Defendant, the Hate Crime Operational Guidance (HCOG), the messages were recorded by Humberside Police as a ‘non-crime hate incident’. An officer went to the Claimant’s place of work to speak to him about them.

...

20. The Claimant goes on to say that he does not have, and has never had, ‘any hatred towards members of the LGBT community in general, nor the transgender community in particular’. Nor, he says, does he have any interest in challenging the protection currently afforded to transgender individuals under either the GRA 2004 or the Equality Act 2010. He asserts that when tweeting, he typically uses ‘sarcasm, satire and simple questioning’ to challenge the beliefs that underpin the proposed reforms to the GRA 2004.

...

74. In my judgment there was no evidence that the tweets were ‘designed’ to cause deep offence, even leaving aside the Claimant’s evidence about his motives. Mrs B’s report was inaccurate. The tweets were not directed at the transgender community. They were primarily directed at the Claimant’s Twitter followers. In *Monroe v Hopkins* [2017] EWHC 433 (QB), [36], Warby J remarked that it could be assumed in that case that the parties’ Twitter followers (and visitors to their homepages) were likely to be sympathetic to their contrasting political stances (left wing v right wing). I assume the same to be true here. It can be assumed that the Claimant’s followers are broadly sympathetic to his gender critical views, as are those others who read his tweets.

75. The Crime Report has this entry for 5 January 2019:

“Victim states that she has not been contacted by the suspect. She was informed that the suspect had made comments about the transgender community by another person. Victim states they would like the suspect speaking to but on further research the victim has herself been making derogatory comments on [REDACTED] about people who are making comments about transgender people.”

...

240. It is very important to recognise that the Claimant was not tweeting in a vacuum. He was contributing to an ongoing debate that is complex and multi-faceted. In order to understand the contours of that debate I have been assisted by the first witness statement of Professor Kathleen Stock, Professor of Philosophy at Sussex University. She researches and teaches the philosophy of fiction and feminist philosophy. Her intellectual pedigree is impeccable.” [Emphasis added.]

...

250. I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock’s evidence shows that some involved in the debate are readily willing to label those with different viewpoints as ‘transphobic’ or as displaying ‘hatred’ when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.

251. The Claimant’s tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1). I am quite clear that they were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by Ms Ginsberg’s evidence, which shows that many other people hold concerns similar to those held by the Claimant.

252. The Defendants submitted that this contextual evidence was not relevant to the issues in this case. I disagree. It is relevant because in the Article 10 context, special protection is afforded to political speech and debate on questions of public interest.

...

280. I hesitate to be overly critical of Mrs B, given she has not given evidence, but I consider it fair to say that her reaction to the Claimant’s tweets was, at times, at the outer margins of rationality. For example, her suggestion that the Claimant would have been anti-Semitic eighty years ago had no proper basis and represents an extreme mindset on her behalf. Equally, her statement that if the Claimant wins this case, transgender people will have to ‘kiss their rights goodbye’ was simply wrong. The *Equality Act 2010* will remain in force. The evidence of Professor Stock shows that the Claimant is far from alone in a debate which is complex and multi-faceted. Mrs B profoundly disagrees with his views, but such is the nature of free speech in a democracy. Professor Stock’s evidence demonstrates how quickly some involved in the transgender debate are prepared to accuse others with whom they disagree of showing hatred, or as being transphobic when they are not, but simply hold a different view. Mrs B’s evidence would tend to confirm Professor Stock’s evidence.

246. The Court concluded, as it began, with a pertinent quote:

288. In his treatise *On Liberty* (1859) John Stuart Mill wrote:

“If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”

289. For the reasons I have set out, whilst Mrs B made a complaint that was recorded under HCOG, the police’s treatment of the Claimant thereafter disproportionately interfered with his right of freedom of expression, which is an essential component of democracy for all of the reasons I explained at the beginning of this judgment.

247. In *Alison Bailey v. Stonewall Equality Ltd, Garden Court Chambers et al*,¹⁴⁵ Bailey, a self-employed English barrister, brought a claim under the U.K. *Equality Act*¹⁴⁶ alleging that her colleagues and the group that owned the offices where she worked (the “Chambers”) had discriminated against her on the basis of her beliefs about the primacy of biological sex over gender, and that said discrimination had been induced by Stonewall Ltd, an English group that advocates for transgender rights.

248. The Employment Tribunal stated that “belief about sex and gender lies at the heart of this case.” The tribunal sets out a brief history of the debate and the U.K. legal position which, although not binding in this case and not evidence, provides relevant social context as the Panel deliberates the potential curtailment of Ms. Hamm’s freedom of expression:

The philosophical approach to sex and gender

41. Belief about sex and gender lies at the heart of this case. We set out some background to assist understanding of what occurred. Discussion of whether the claimant’s belief was protected comes later.

42. For thousands of years human societies have identified a difference between men and women on the basis of their observable physical characteristics. In most societies this brought in its train received ideas about what men and women could do, or should do, and the different roles each sex (as defined by their bodies) should play in social relations, in work, in government, ownership of property, and so on. In post-enlightenment Europe the idea developed that female biology was not determinative of social roles, indeed that social roles might restrict the development of sporting or intellectual capacity, so that many of the differences in men and women’s abilities were not, as many thought, determined by the biological differences, but a product of socialisation. Male and female bodies were not the same thing as masculine and feminine behaviour. Mary Wollstonecraft and John Stuart Mill developed this. In the post war period these ideas received more attention. Particularly

¹⁴⁵ *Bailey v. Stonewall Equality Ltd, Garden Court Chambers et al*, Employment Tribunals, U.K. Case No. 2202172/2020

¹⁴⁶ *Equality Act*, 2010 UK Public General Acts, 2010 c.15

influential was Simone de Beauvoir's publication in 1948 of *The Second Sex*, a detailed examination of how women were thought to be different from men, and how women were in fact taught to be women. In part two, she began: "one is not born, but rather becomes, a woman". From this developed a philosophical exploration, initiated by Judith Butler, of the idea that woman is a socially determined category, rather than someone with particular physical characteristics linked to childbearing. People could identify as of a gender other than that observed at birth, or both, or neither, in whichever they were comfortable. It was not just that women, defined biologically, should have rights and opportunities equal to those of men, but that the biological differences did not matter. This is gender self-identity.

The legal position on sex and gender

43. UK law defined the difference between men and women on the basis of their observable birth sex. From time to time some men and women have felt profoundly uncomfortable with their bodies, and decided to live as the opposite sex. If they lived in their acquired sex (with or without surgery) there were often legal difficulties. In 2002 the European Court of Human Rights held in *Goodwin v United Kingdom* that there must be some legal recognition for a person born a man who had undergone gender reassignment surgery and was now living as a woman. It was unsatisfactory that they had to live without dignity in a twilight zone. That case led to the enactment in the UK of the Gender Recognition Act 2004. A transsexual (the term used in the legislation) could now obtain a certificate that for legal purposes they now had an acquired sex different from that recorded at birth. To get a certificate it had to be shown that they had, or had had, gender dysphoria; there must be two medical certificates, one from a specialist in the area, discussing details of the diagnosis and treatment; the person must have lived in the acquired gender for two years and make a declaration that they intended to live in that gender for the rest of their life. Someone issued with a certificate becomes for all legal purposes the acquired gender.

44. On 2018 figures, around 5,000 people in the UK hold gender recognition certificates. Until the 2021 census is published, it is not known how many more people identify in the opposite gender without formal recognition. The Government Equality Office national LGBT survey research report in July 2018 suggested there could be 200,000 or even 500,000.

45. Some transgender people have undergone surgery, some not. It is not a requirement of a gender recognition certificate. In the course of the evidence we were taken to a July 2020 report on a YouGov survey of public opinion on transgender rights. Some of the questions were asked twice, on the second occasion specifying that the transgender person had not had gender reassignment surgery. This caused a plurality of the women surveyed to change their answer from allowing transwomen access to women's changing rooms and toilets to disallowing access. It seemed to show that many respondents to the survey had at first assumed a transwoman would have had surgery.

46. The case we heard was all about men transitioning to live as women. There are of course natal females who transition to live as men, indeed recent figures from the Tavistock GIDS service for young people with gender dysphoria record that up to 70% of recent referrals are natal girls.

Transition in this direction has not attracted the same attention.

52. The debate on reform has been polarised, often uncompromising, and sometimes hostile and abusive. Men and women who oppose gender self-identity can be labelled transphobes. Transgender people are in turn accused of homophobia and misogyny. It is probably relevant to the uncompromising tone that the issue is not one of philosophy but of the practical consequences. Many transpeople live in fear of challenge, ridicule and threats. Transwomen are subjected to open abuse and sometimes violence - as gay men sometimes are, possibly by the same people, policing masculinity. They also fear unpleasant challenges from women if they try to use women's toilets and changing rooms. From the other side, the long and continuing history of male violence towards women can make women fearful and mistrustful of admitting people with male bodies to protected spaces where they are vulnerable, such as rape crisis centres, public toilets, changing rooms and refuges. Others fear losing the chance to correct historic disadvantage, for example, in collecting equal pay statistics. People who are same-sex attracted are concerned that younger people may find it hard to recognise they are gay or lesbian when it is suggested to them that their confused feelings mean they are in fact of another gender. Opponents talk of women, or gays or lesbians, being "erased".

249. After setting out the background to the debate, the tribunal stated:

53. This tribunal does not have to adjudicate on whether it is correct to say that the difference between men and women is about biology (sex) or social role (gender). The decision of the Employment Appeal Tribunal in *Forstater v CGD Europe Ltd* (2022) ICR 525 makes that clear. Both the belief that women are defined by sex, and the belief that gender is a matter of self-identity, are protected as beliefs. Toleration of difference is an essential characteristic of an open, pluralist society.

250. The tribunal then concluded that Bailey's beliefs were protected and did not need to be expressed nicely to retain that character:

296. In other words, belief need not only be expressed nicely in a democratic society. John Stuart Mill wrote, in *On Liberty*, that "truth, in the great practical concerns of life... has to be made by the rough process of the struggle between combatants fighting under hostile banners", adding "not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil". (Though he did go on to recommend "studied moderation of language and the most cautious avoidance of unnecessary offence", in order to get a hearing for anything that was not already received opinion). In the words of Sedley L J in *Redmond-Bate v DPP* (1999) EWHC Admin 733, "free speech includes not only the inoffensive but also the irritating, the contentious, the eccentric, the heretical, the unwelcome and provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having".¹⁴⁷

¹⁴⁷ *Bailey v. Stonewall Equality Ltd, Garden Court Chambers et al*, Employment Tribunals, U.K. Case No. 2202172/2020, para 296

251. While the tribunal concluded that Stonewall, in its role as an advocacy group, had not induced the discrimination of Bailey, it found that Bailey’s colleagues had discriminated against her on the basis of a protected beliefs, and awarded damages to Bailey.

252. In *Forstater*,¹⁴⁸ the claimant worked as consultant for the Centre for Global Development Europe, the European arm of the Centre for Global Development, a Washington-based think tank. Her consultancy and a visiting fellowship were not renewed after complaints were made by both colleagues and transgender people regarding her expression of gender critical beliefs, which she had posted in debates on social media.

253. Forstater had tweeted: "I don't think people should be compelled to play along with literal delusions like trans-women are women" and "radically expanding the legal definition of 'women' so that it can include both males and females makes it a meaningless concept, and will undermine women's rights and protection for vulnerable women and girls". Some staff at the CGD complained that Ms Forstater's tweets were transphobic, exclusionary, offensive and made them feel uncomfortable. CGD launched an investigation into the tweets and decided not to renew Ms Forstater's contract.

254. Forstater applied to the Employment Tribunal and alleged direct discrimination due to her gender critical beliefs, which she argued were protected by the *Equality Act*. Although she lost at the tribunal level, the Employment Appeals Tribunal overturned that decision. Mr. Justice Choudhury wrote:

1. The Claimant holds the belief that biological sex is real, important, immutable and not to be conflated with gender identity. She considers that statements such as “woman means adult human female” or “trans women are male” are statements of neutral fact and are not expressions of antipathy towards trans people or “transphobic”. Some of the Claimant’s colleagues found the Claimant’s statements on Twitter offensive and complained. When her consultancy contract was not renewed, she brought proceedings before the Central London Employment Tribunal (“the Tribunal”) on the basis that, amongst other claims, she had been discriminated against because of her belief. After a six-day Preliminary Hearing, the Tribunal concluded that the Claimant’s belief, having regard to its “absolutist” nature, whereby she would “refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment”, was one that was “not worthy of respect in a democratic society”. Accordingly, the Judge found that the Claimant’s belief was not a “philosophical belief” within the meaning of section 10 of the **Equality Act 2010** (“EqA”). The sole issue in this appeal is whether the Tribunal erred in law in reaching that conclusion.

¹⁴⁸ *Forstater v. CGD Europe & Ors (RELIGION AND BELIEF DISCRIMINATION)* ukeat 0105_20_1006 (10 June 2021)

2. The issue is one that has generated strong feelings, with each side making dramatic claims as to the effect of upholding or reversing the Tribunal’s judgment. The Claimant suggests that the effect of the Tribunal’s conclusion is “Orwellian” in that it requires her to refer to a trans woman as a woman even though she does not believe that to be true; and the Respondents contend that to overturn the Tribunal’s conclusion would mean that no trans person would be safe in any workplace from the harassment inherent in being “misgendered”, that is to say being referred to by non-preferred pronouns or by a different gender to that in which they are living. Such positions are reflective of the debate in wider society about the rights of trans persons, which is often conducted in hyperbolic and intransigent terms. We wish to make clear at the outset that it is not the role of this Employment Appeal Tribunal to express any view as to the merits of either side of that debate (which we shall refer to as the “transgender debate”); its role is simply to determine whether, in reaching the conclusion that it did, the Tribunal erred in law. Our judgment should not therefore be read as providing support for or diminishing the views of either side in that debate.

255. While this Appeals Tribunal did not decide whether the beliefs she held had led to the discrimination against her (a subsequent decision found in her favour), it did determine that gender-critical beliefs and discourse were protected beliefs. The Appeals Tribunal noted the following principle, of which the College should take particular note:¹⁴⁹

The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other: *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 at paras 115 and 116. [Emphasis added.]

256. In the United States, there have been numerous cases involving the limits and conflicts of the various rights in issue. Just one is referenced here, to demonstrate another context for the “gender wars” which the BCCNM appears to suggest does not exist. In *Meriwether v. Hartop et al.*,¹⁵⁰ where a university instructor was disciplined for not using pronouns, the Court noted, in refusing to use gender-identity-based pronouns:

[T]he “point of his speech” (or his refusal to speak in a particular manner) was to convey a message. Taken in context, his speech “concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.” Professors’ Amicus Br. at 1. That is, his mode of address was the message. It reflected his conviction that one’s sex cannot be changed, a topic which has been in the news on many occasions and “has become an issue of contentious political . . . debate.”

¹⁴⁹ *Forstater*, paragraph 55

¹⁵⁰ *Meriwether v. Hartop et al.*, March 26, 2021, No. 20-3289, United States Court of Appeals for the Sixth Circuit, <https://law.justia.com/cases/federal/appellate-courts/ca6/20-3289/20-3289-2021-03-26.html>.

From courts to schoolrooms this controversy continues.

...

In short, the use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.

257. Before returning to the final analysis of the balancing the Panel must undertake, and having set out the relevant contextual factors of good faith advocacy and the validity of gender critical beliefs, we would add another factor to the non-exclusive list outlined in *Strom*. That is, the chilling effect of a finding of unprofessional conduct on other regulated professionals who wish to engage in what is already a censorious and punitive social context for gender critical debate (and/or other topics of general socio-political importance which are similarly outside of an increasingly narrow orthodoxy).

258. The College relies on the recent case of Dr. Jordan Peterson against his regulator, which required him to attend for “re-education” on his social media presence. This was not a disciplinary hearing on full evidence, but a judicial review of the Ontario equivalent of the Investigation Committee’s decision to offer a (non-optional) diversionary educational requirement in lieu of sending the matter to discipline.

259. While the Court in *Peterson* declared that “the ICRC decision does not prevent Dr. Peterson from expressing himself,” one academic has opined that “that is an extremely narrow understanding of ‘freedom of expression’. The freedom is not merely to be at liberty to speak, it is about freedom from post-speech, content-based sanctions from the state, or a publicly regulated professional body.”¹⁵¹

260. Looking at the example of Dr. Peterson, the author notes that he is a poor test case because he is so unrepresentative of most professionals due to his relative wealth:

A single moment of displeasure or disagreement can launch a tweet. A single tweet can launch an investigation, a ‘constructive conversation’, or even panel hearings. The costs of these proceedings are not borne by the complainant, who has probably moved on to their next twitter fight, but will be borne by the professional body, and by the speaker, of course.

¹⁵¹ Michael Ilg, “*It’s Not Easy Being Mean*”, (September 6, 2023), The University of Calgary Faculty of Law Blog

261. Indeed, the costs borne by Ms. Hamm of going through this disciplinary process for more than three years are a substantial burden. But also important are the costs borne by the rest of the regulated professionals, as they prudently (or cowardly) choose to keep silent in these censorious times on matters of medical, scientific and/or political controversy. The public's *Charter* right to hear their expression is violated, even though they may never appreciate the value of that which was silenced.

iv. Minimal Impairment of *Charter* Rights Required under *Doré* Analysis

262. The *Doré/Loyola* analysis requires that, where *Charter* rights are at stake, a decision-maker must engage in a proportionate balancing analysis. This is especially so when the speech being punished is of a political nature (as criticism of legislation and public policy certainly is). The Panel must consider the impact of its decision on Ms. Hamm's *Charter*-guaranteed freedoms of expression, conscience and opinion, to ensure that they are protected to the fullest degree possible while considering the regulator's mandate.

263. In *Strom*, this was one of the considerations the Court of Appeal expected the panel below to engage with. The Court first noted (at para. 115) that "the right to participate in social and political discourse is an important aspect of personal autonomy and free speech and is at the heart of a liberal democracy." It then held (at para 124):

Crucially, although the Discipline Committee did briefly address the s. 2(b) *Charter* argument as a separate issue, it did not otherwise refer to the impact on Ms. Strom's personal autonomy or freedom of speech. Nor did it refer to the related issue of public discourse relating to the healthcare system, including the possibility that participation by registered nurses in activity of that kind might, depending on the circumstances, enhance the reputation of registered nurses and advance the public interest. [Emphasis added.]

264. In other words, the public has a right to hear opinions from professionals which might be critical or skeptical, and not just those that toe the party line; and it is manifestly in the public interest that they do. These deficiencies, among others, led the Court to conclude that the panel below had unjustifiably infringed the nurse's right to free expression, and decline to even return the matter for reconsideration.

265. The onus is on the administrative decision maker, when undertaking a robust proportionality analysis, to ensure that any limit on that protection is minimally impairing.

266. A recent decision of the Ontario Court of Appeal summarized the requirement:

[148] What does a “robust proportionality analysis” involve? In my view, the analysis must advert to the proportionality analysis developed by the Supreme Court in *Oakes* for cases in which a government actor is seeking to limit a Charter right. The proportionality analysis from *Oakes* asks whether the limit on the right is proportionate in effect to the public benefit conferred by the limit. Two aspects must be carefully assessed: the negative effects on the individual whose rights are engaged, and the positive effects on the public good. Using the court’s own words, this analysis is to take “full account of the ‘severity of the deleterious effects of a measure on individuals or groups’”, that is, whether the “benefits of the impugned law are worth the cost of the rights limitation”, or, more precisely, whether “the deleterious effects are out of proportion to the public good achieved by the infringing measure”. This is to be a “broader assessment”. These principles apply with necessary modifications to tribunal decisions such as the disposition decision in this case.

267. The Panel must give proper consideration to the importance of the freedoms of expression and opinion that are protected under the *Charter*. Freedom of expression is of fundamental importance to democracy. As was cited by the Supreme Court of Canada in *Ford v. Quebec AG* at paragraph 56:

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision making, and (4) as maintaining the balance between stability and change in society.

268. Ms. Hamm’s goals in expressing her opinion serve these values in all respects. To punish and therefore effectively prohibit the type of commentary that was being offered by Ms. Hamm would be to prevent nurses from participating in the public square in support of those described values—unless they happen to align with the latest ideological fashions. Additionally, nurses like Ms. Hamm have opinions and views which are not only their right to express, but the public’s right to hear. The Panel must balance Ms. Hamm’s freedom of expression against any restrictions on that right that the College seeks to impose.

269. As was concluded by the Court in *Christian Heritage Party of Canada v. City of Hamilton*,¹⁵² a failure to consider the competing *Charter* rights of the party expressing gender-critical views, even when those views are in conflict with, in that case, the policies on transgender rights of the City of Hamilton, will be a reviewable error. In *Christian Heritage Party*, the City of Hamilton developed a

¹⁵² *CHP v. City of Hamilton*, 2018 ONSC 3690 (CanLII), <https://canlii.ca/t/hvdf4>>

transgender protocol, which the Christian Heritage Party (CHP) opposed. To that end the CHP distributed flyers stating:

“CHP Canada supports the need and right of females to be accommodated with facilities such as public washrooms, change rooms and showers where they can be in various states of disrobing, showering or carrying out various needs of feminine hygiene without the presence (or pending presence) of a male in that facility.”

270. Despite the clear wording of the City of Hamilton’s policies on transgenderism, the reviewing Court held that the City was obliged to consider the wider social and political context and balance the CHP’s *Charter* rights against the City policy on transgenderism, in coming to a determination. As it had failed to do so, the City’s decision to ban the activities of the CHP as contrary to its policy on transgenderism was over-turned. In other words, the existence of policies and laws does not mean the matter is “settled,” as alleged by the College during the hearing.

PART IV – CONCLUSION

271. To convict Ms. Hamm for expressing her views on matters of public importance in the public square, after a very public hearing, would be a disaster for the standing of the nursing profession in the public eye. It would suggest that the institution is incapable of the political neutrality required to govern the profession in the public interest. It would cast a chill on the many members of regulated professions who are also Canadian citizens entitled to hold and express opinions, and would remove from the rosters of professional organizations those individuals of high conscientiousness, ethics and a sense of duty who cannot sit idly by and say nothing while their personal alarm bells go off. This would be a disaster for every nurse or midwife who feels compelled to speak up and believes that the truth must prevail over legal fictions.

272. The Court in *Strom* noted that political expression is at the very core of the *Charter* protection of freedom of expression, and the advocacy Ms. Hamm undertakes is directly connected to legislative changes which have made gender identity ideology prevail over sex in harmful ways, particularly for women and children.

273. This is speech deserving of protection. As the *Strom* decision continues:

[168] The denial of the right to speak in these circumstances is important. Proportionality, of course, is not concerned solely with the severity of the impact on *Charter* rights. It is

concerned with the balance between rights and objectives. As noted above, there was evidence that some nurses and other staff at St. Joseph's were angry and upset. There was, however, no evidence that the fact these nurses took offence negatively impacted the broader public interest or the public standing of the profession or, indeed, of St. Joseph's and its staff. It bears repeating that speech cannot be unduly constrained to avoid offending others. Nor is there any evidence that punishing Ms. Strom would have a salutary effect, other than, perhaps, by providing some satisfaction to some staff at St. Joseph's. [Emphasis added.]

[169] For all of these reasons, the Discipline Committee was incorrect in finding that the infringement of Ms. Strom's Charter right to freedom of expression was justified. Having considered all of the relevant contextual factors, I have reached the opposite conclusion. The DC Decision unjustifiably infringed Ms. Strom's Charter right to freedom of expression.

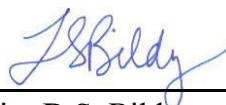
274. In our submission, the Panel should come to the same conclusion for Ms. Hamm.

PART V – ORDER SOUGHT

275. That the matter be dismissed, pursuant to s. 39(1), with costs payable to the Respondent pursuant to s. 39(4) in accordance with the tariff, on the basis that the matter was without merit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 19th day of February 2024.



Lisa D.S. Bilty
and Karen Bastow
for Amy Hamm