Court File No. VLC-S-S-252688
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF A STATUTORY APPEAL

PURSUANT TO SECTION 40 OF
THE HEALTH PROFESSIONS ACT, R.S.B.C. 1996, C. 183

BETWEEN:

AMY HAMM

PETITIONER

AND:

BRITISH COLUMBIA COLLEGE OF NURSES AND MIDWIVES

RESPONDENT

RESPONSE TO PETITION

Filed by: British Columbia College of Nurses and Midwives (the "Respondent" or "College")

THIS IS A RESPONSE TO the petition filed 14 April 2025.

The Respondent estimates that the application will take three days.

Part 1: ORDERS CONSENTED TO

The Respondent does not consent to the granting of any of the orders set out in Part 1 of the Petition.

Part 2: ORDERS OPPOSED

The Respondent opposes the granting of the orders set out in paragraphs 1 to 5 of Part 1 of the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

There are no paragraphs of Part 1 of the Petition in respect of which the Respondent takes no position.

Part 4: FACTUAL BASIS

Overview

1. Transgender people are those whose gender identity – their sense of who they are – is not congruent with the sex they were assigned at birth. They form a marginalized and vulnerable population (panel reasons, para 155).

2. Sex and gender are "two functionally distinct concepts". The former refers to biological attributes, the latter to "socially constructed roles, behaviours, expressions and identities of girls, women, boys, men, and gender diverse people … which influences how people perceive themselves and each other, how they act and interact, and with the distribution of power and resources in society" (para 165).

3. There is interplay between sex and gender, and each may change over the course of an individual's life (*ibid*).

4. Transgender people's experiences in the health care system differ from those of cisgender patients. Binary-gendered assumptions are pervasive in health care.

5. Transgender individuals can suffer harms in this connection that erode trust in the health care system, and may disincline them from disclosing their gender identity to health professionals to access necessary health care (paras 48, 175).

6. The Petitioner is a College registrant. She made a series of public comments about transgender people, which were disseminated widely. Following a lengthy discipline hearing, the Petitioner was found to have made discriminatory and/or derogatory statements directed at members of the transgender community, while identifying herself as a nurse or nurse educator (para 260). The panel held: "The statements are, for the most part, untruthful and unfair as they challenge the existence of transgender women, argue for less constitutional protection for transgender women, and are designed, in part, to elicit fear, contempt and outrage against members of the transgender community" (*ibid*).

Procedural background and present status of the administrative proceedings

7. The College issued the citation in this case on 1 April 2022. It amended the citation on 28 June 2022. The citation alleged that the Petitioner made discriminatory and derogatory statements regarding transgender people between July 2018 and March 2021, while identifying herself as a nurse or nurse educator. It further alleged that for the purposes of s 39(1) of the *Health Professions Act*, RSBC 1996, c 183 (the "Act") the statements constituted unprofessional conduct, or a breach of the Act or College bylaws.

8. After 23 days of hearing over the span of 18 months, a three-person panel of the College's Discipline Committee found that the Petitioner had engaged in unprofessional conduct in respect of certain off-duty statements made on four separate occasions. The panel first identified five occasions where the Petitioner used language that was discriminatory or derogatory in relation to transgender persons. The panel then found that, on balance, the off-duty conduct in question had a reasonable nexus to the practise of the nursing profession. Finally, after conducting a proportionate balancing of the protections offered

by the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and the College's statutory mandate, the panel found that it would not unjustifiably infringe the Petitioner's freedom of expression to make findings of unprofessional conduct in respect of four of the discriminatory and/or derogatory statements. It came to the contrary conclusion with respect to the fifth occasion, and declined to make a finding of unprofessional conduct in that case.

9. The penalty phase of the disciplinary process has been scheduled to proceed by way of written submissions in May and June, 2025. It has not completed as of the date of this response.

Decision on Appeal

(i) *Framing the Issues*

10. The College argued that the panel should make a finding of unprofessional conduct if it found the Petitioner's statements to be either discriminatory or derogatory, or both: i.e., that it was unnecessary for the College to prove that every impugned statement was both discriminatory and derogatory (para 8). The Petitioner did not challenge this interpretation, and the panel proceeded on that basis (para 9).

11. The panel identified three issues for determination (para 12):

(a) Were the Petitioner's off-duty statements discriminatory and/or derogatory to transgender persons, and did the Petitioner identify herself as a nurse, or nurse educator, when she made them?

(b) Was there a sufficient nexus between the Petitioner's off-duty statements and the profession of nursing?

(c) If so, would a finding that the off-duty statements constituted unprofessional conduct unjustifiably infringe the Petitioner's rights under s 2(*b*) of the *Charter*?

(ii) *Material Evidence and Findings*

12. A number of witnesses, including experts for both the College and Petitioner, testified during the discipline hearing. The panel's assessment of the expert evidence (paras 17-84, 86-138) comprised a material part of the ruling.

13. In her evidence, the Petitioner accepted that College standards require her to treat marginalized and vulnerable communicates with respect, care and dignity. She conceded that transgender people constitute such a marginalized and vulnerable population (para 155). (*ibid*).

14. The panel found that the evidence was "beyond clear" that transgender people constitute a *highly* vulnerable and marginalized group, which "has been subjected to a long history of discrimination and exclusion from society" (para 172). (This finding is consistent with *Hansman v Neufeld*, 2023 SCC 14 at para 84, in which Karakatsanis J wrote that "[t]he transgender community is undeniably a marginalized group in Canadian society. The

history of transgender individuals in our country has been marked by discrimination and disadvantage.") The panel also accepted that transgender people face significant mental health challenges (para 177).

15. The panel found that transgender persons have experienced harms in their interactions with the health care system, including: "infringements of personal privacy based on irrelevant and intrusive questions, intentional misgendering, lack of attention to presenting complaints, and a reluctance to provide care based on a concern that more specialized care is required" (para 175). The panel found that these harms "erode trust in the health care system and … may foster a reluctance on the part of transgender individuals to disclose their gender identity to health professionals or access necessary health care" (*ibid*).

16. The Petitioner further accepted that, as a member of a regulated health profession (nursing), she holds a special position of trust and influence (para 155).

17. In this connection, the panel also found that nurses, as integral members of the health care system, hold a trusted status in Canadian society (para 176). It held that:

> public statements and opinions expressed by nurses may be influential in shaping public opinions and perceptions regarding the delivery of health care and our health care system. When nurses make statements denying the identity or existence of transgender persons, or discount their experiences, there is a risk that members of that highly vulnerable community will assume those views are shared by at least some portion of the profession at large, further reinforcing concerns they will not receive proper treatment and/or discourage them from seeking health care. This cannot be reconciled with the fact that non-discrimination is a core value in our health care system generally and specifically in the nursing profession. (*Ibid.*)

(iii) *Legal Analysis*

a. MEANING OF "DISCRIMINATORY" AND "DEROGATORY"

18. The panel dismissed the Petitioner's argument that "discrimination" for the purposes of disciplinary proceedings under the Act was limited to violations of the *Human Rights Code* (i.e., refusals to provide services). It followed *Kempling v BC College of Teachers*, 2005 BCCA 327 to find that "statements are 'discriminatory' if they disparage or express negative judgments about individuals not only their individual merits or capacities but rather on stereotypical characteristics that are attributed to them because they belong to a group" (para 196). The speaker's intention is irrelevant, as statements can be discriminatory even in the absence of intent to discriminate.

19. Likewise, the panel found that statements may be derogatory "if they are critical of, express a low opinion of, detract from the character or standing of, or otherwise lower the reputation of an individual or group whether through ridicule, belittling, insults, or through some other means" (para 197).

b. IDENTIFICATION AND ASSESSMENT OF IMPUGNED STATEMENTS

20. The panel considered the factual context of each statements to determine: (a) whether it was discriminatory or derogatory to transgender people; and (b) whether the Petitioner had made any reference to her role as a nurse or nurse educator (para 203). Ultimately, the panel found that the Petitioner had made discriminatory and/or derogatory statements while identifying as a nurse or nurse educator on five specific occasions (para 205):

(a) The Petitioner wrote an online article identifying herself as "registered nurse educator" that contained the statement "trans activists determined to infiltrate or destroy women-only spaces". The panel held that "a reasonable person would associate those comments [*sic*] with members of the transgender community" and that "[t]he comment is discriminatory and derisive as it suggest all transgender activists will act in an improper and aggressive manner in attempting to infiltrate or destroy 'women-only spaces' and derogatory to the extent it is designed to lower the standing of transgender persons in the community and elicit outrage and contempt." (Appendix A, p 86)

(b) The Petitioner was identified as a registered nurse educator on a webpage of the Canadian Women's Sex-Based Rights organization ("caWsbar") listing her as one of the 10 founding members. The same website hosted a Position Statement that contained the assertions:

(i) "Gender identity and expression, which have yet to be defined in Canadian law, are culturally-based, stereotypical degrees of 'masculinity' and 'femininity' (e.g., men like hockey, women like fashion)" and "gender identity and expression" do not negate the material, biological reality of women and girls.

The panel found these statements "are discriminatory towards transgender people as they fail to acknowledge the personally held sense of gender that transgender individuals have and excludes them from the possibility of being women and girls." (Appendix A, p 106)

(ii) "[W]omen's and girls' sex-based *Charter* rights must be strongly asserted and preserved in public policy" and "must take precedence over any concept of gender".

The panel held that this statement "intentionally excludes transgender women and girls which is discriminatory," and that the "precedence" comment "suggests that constitutional rights based on gender identity and expression have a subordinate status which is not the case." (Appendix A, p 106)

(iii) The "inclusion of males in the definition of 'woman' under federal and provincial Human Rights legislation (i.e. gender self-identification) is regressive, unfair and perilous for Canadian women and girls," "[w]e will no longer stand by and watch the hard-won rights and protections of

Canadian women and girls be eroded through a confusion of sex with 'gender identity or expression' " and a demand that spaces and resources previously used only by women and girls continue to be sex-segregated.

The panel held that "[a]ll of these statements are discriminatory as they suggest that transgender women pose a risk to cisgender women and girls and should be denied access to sex-segregated spaces that cisgender women and girls have access to. These statements are based on stereotypical assumptions associated with a group without proper regard to the individual attributes and characteristics of transgender women and girls within that group." (Appendix A, pp 106-07).

(c) The Petitioner posted an article "On feeling like a woman" online, on 7 July 2018, identifying her as a nurse educator. The panel described it as "an introspective piece that explains the [Petitioner's] personal views of what it means to be a 'woman'." The panel found the statements in the article:

(i) "there is no absconding" from female bodies;

(ii) that the feeling of being a woman does not exist; and

(iii) there is no "incantation or initiation that can transcend bodily reality" without a female body;

"are discriminatory to transgender women because they deny the possibility that individuals born into male bodies can feel and identify as women." The panel found this to be a "type of erasure of transgender women" (Appendix A, pp 107-08).

(d) The Petitioner posted an online book review on 20 November 2019, identifying herself as a registered nurse educator. The panel found the following statements from the review to be discriminatory:

(i) that the book's author normalizes "the falsehood that babies can be 'born in the wrong body', or that humans can change their sex ";

(ii) that everyone "who believes in wrong bodies or innate genders – would rather devastate a child, telling him his father is not, in fact, his father, but (surprise!) has been someone else all along, than accept that men can look and behave and dress as 'feminine' as they would like, and still be men";

(iii) suggesting "that gender identity ideology is going to go down as something akin to the Satanic Panic craze";

(iv) "[l]esbians don't have penises";

(v) "a gender soul does not exist"; and

(vi) "men cannot literally become women"

on the ground that "they effectively deny the existence of transgender people". The panel also found that the statements in subparagraphs (ii) and (iii) are derogatory to transgender people (Appendix A, pp 110-11).

and

(e) The Petitioner appeared in a YouTube interview on 14 September 2020, and introduced herself at the outset as a nurse who has been involved in the "Gender Wars". During the interview, the Petitioner said:

> [I]f you're a feminine man, you should be protected on the basis of your sex. I don't know why they're to me, there's no reason that you should have to be recognized literally as a woman or legally as a woman to have legal protections. It's I think our sex covers discrimination. It just kind of muddies the water to add gender. When you add gender it renders sex meaningless.

The panel found this to be discriminatory and derogatory, as it "is effectively advocating for the denial of legal protections to transgender women based on gender identity, including the right to be recognized as the gender they identify as. This is contrary to the law which protects individuals based on gender identity and gender expression. The panel also found that a separate comment the Petitioner made in the interview, about people who have "taken control of the narrative and have taken control of institutions", is discriminatory and derogatory and "appear … designed to adversely impact the public's perception of transgender people and lower their standing and reputation in the community."

21. The above findings are consistent with court jurisprudence and the decisions of other tribunals, regarding discriminatory or derogatory treatment of transgender people.

c. ASSESSMENT OF NEXUS TO THE REGULATED PROFESSION

22. The panel noted that regulators may discipline those whom they oversee for conduct that occurs outside the practice of the profession, where a sufficient nexus exists (para 212). It identified that the Petitioner "used a variety of writing styles in her advocacy including sarcasm, mockery, insults, and hyperbole" (para 216). The panel noted in this regard that the Petitioner "acknowledged that her statements were intended to generate controversy to attract public attention" (para 217), and commenting that "[t]he note and content of the [Petitioner's] statements … appeared to be designed to elicit outrage and condemnation of the transgender community" (*ibid*).

23. The Petitioner had identified herself either as a nurse or nurse educator on the five impugned occasions. The panel held, "[b]y publicly linking her views regarding gender ideology with her status as a nurse or nurse educator, the [Petitioner] expressed opinions and made claims that cannot be reconciled with the core values of the health care system" (para 219). It continued:

> The Panel accepts that nurses are seen by the community in part as the medium for the fundamental values on which our health care system is based. Those values include equitable access to health care services and respect, dignity and equality for all patients and health care workers regardless of personal attributes. (*Ibid.*)

24. In response to the Petitioner's submission that the College needed to meet the onus of showing that the public would give more credence to the speech of a nurse than other members of the public on the "non-medical topics", the panel held (para 220):

> [T]his argument presupposes that the [Petitioner] was addressing matters unrelated to medical issues. The crux of the gender ideology debate is enmeshed in medical and scientific understanding of the nature of sex and gender which the [Petitioner] addresses. For example, the [Petitioner's] assertion that a person cannot become a woman if not born as a female or that babies cannot be born in the wrong body necessarily engages medical, scientific and ethical issues. Direct evidence is not necessary to demonstrate that the use of a professional title may lead the public to place more reliance on statements made by a professional such as a nurse.

25. Finally on the issue of nexus, the panel noted that the Petitioner's behaviour was not an isolated lapse of judgment. Instead, the Petitioner "repeatedly posted statements online that were critical of the transgender community while linking them to her professional status" (para 221). Addressing the Petitioner's submission that she had not intended to rely on her nursing background to suggest particular expertise in the area, the panel held (*ibid* [emphasis added]):

> Only the [Petitioner] knows what her intention was; however, the Panel finds that it is reasonable to infer that the use of the title "nurse" or "nurse educator" in the [Petitioner's] biographical description provided a degree of enhanced credibility and legitimacy to her views. The Panel finds that the [Petitioner] created a sufficient nexus to bring her conduct under the College's regulatory purview by citing or otherwise referencing her professional status as a nurse or nurse educator.

d. BALANCING OF *CHARTER* RIGHTS AND THE COLLEGE'S STATUTORY MANDATE

26. The panel cited *Groia v Law Society of Upper Canada*, 2018 SCC 27 ("*Groia*") at para 111 for the proposition that an administrative decision that limits *Charter* protections "will only be reasonable if it reflects a proportionate balancing of the *Charter* protections at play with the decision-maker's statutory mandate" (para 225).

27. Applying the framework from *Doré v Barreau du Québec*, 2012 SCC 12 ("*Doré*")—and cautioning itself as to the glosses in *Loyola High School v Quebec (AG)*, 2015 SCC 12 ("*Loyola High School*") and *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 ("*TWU* 2018")—the panel found:

(a) the College's relevant statutory objective "is to protect the public and the integrity and reputation of the nursing profession by setting and enforcing standards with

respect to public speech by nurses who identify their professional status in that speech and by ensuring they uphold the values central to ethical nursing practice" (para 231);

(b) the Petitioner's off-duty statements in this case "were directed at a marginalized and vulnerable group" and did not relate to nursing services (paras 235-39);

(c) while the Petitioner "did not make [the impugned] statements to actively incite fear and contempt towards transgender people" (para 240), the Petitioner "went to considerable lengths to disseminate her views as broadly as possible (para 241);

(d) certain of the impugned statements were neither true nor fair to transgender women (paras 249, 251) and others were "profoundly" unfair and/or untrue (paras 252, 254);

(e) finally, concerning the nature and scope of the damage the speech poses to the profession and the public interest (para 255):

> the [Petitioner's] statements repeatedly challenge the existence of transgender women, conflate sex and gender, and advocate for the denial of legal protections for transgender women whom she describes as feminine men. The Panel has no hesitation in finding that these statements are disrespectful, hurtful, and harmful to the transgender community. [...] A nurse who makes public statements using their professional status which challenge the existence of transgender women and appear to be designed to elicit hostility, fear and contempt for members of the transgender community erodes the trust that members of that community have in the health care system and likely foster a reluctance or unwillingness to access health care for fear they will face further discrimination.

28. The panel ultimately held that, for the statements summarized at paragraphs 20(a), (c), (d) and (e) of this petition response, above, a finding of unprofessional conduct would not impair the Petitioner's freedom of expression any more than is necessary to achieve the College's statutory goals (paras 258, 261 and 262). In so doing, it stated (para 258):

> The [Petitioner] is free to disseminate her views to the public without identifying herself as a nurse or nurse educator or her affiliation with the College. [...] The [Petitioner] is, of course, also free to disseminate her views, while identifying herself as a nurse or nurse educator, provided she does so in a way that does not discriminate against or denigrate members of a vulnerable community or otherwise express herself in a way that reflects poorly on the profession as a whole.

29. The panel noted that a separate hearing would be necessary to address penalty, publication and costs (para 264).

The Petitioner's Appeal Under Section 40 of the Act

30. The Petitioner commenced this statutory appeal, raising eight alleged errors. They are a mix of alleged errors of law, errors of mixed fact and law, and errors of fact.

Part 5: LEGAL BASIS

Standard(s) of Review

31. Pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37 (and as acknowledged in *Whieldon v British Columbia College of Nurses and Midwives*, 2021 BCSC 1648 at para 32), the applicable standard of review for a s 40 statutory appeal is the same as the typical appellate standard for judicial decisions. That is, alleged errors of law are reviewed on a correctness standard; alleged errors of mixed fact and law, and errors of fact, are reviewed on the "palpable and overriding error" standard.

32. The Petitioner's various alleged grounds of appeal have differing standards of review, according to their nature.

First Alleged Error

33. The Petitioner alleges that the panel erred in law or, alternatively, mixed fact and law, by "expanding the scope of the term 'discriminatory' to include disagreement with gender ideology and transgenderism generally and/or in finding that the Petitioner's statements were discriminatory (in circumstances where the Petitioner was neither providing a service nor offering a benefit), derogatory or otherwise constituted unprofessional conduct" (Petition, paras 27(a), 28-38).

34. In Part 3 of the petition, the Petitioner essentially reargues her submissions from before the panel. Without a real effort to identify error in the panel's reasoning, it is difficult for the College to respond substantively – including as to whether the Petitioner has in fact identified a pure question of law (as opposed to an alleged error of mixed fact and law). At this stage, the College is not in a position to say any more than that the Petitioner has not demonstrated a reversible error.

35. The College reserves the right to supplement its submissions on this point upon receipt of the Petitioner's more detailed written argument.

Second Alleged Error

36. The Petitioner asserts that the panel erred in law when it found "that the use of sarcasm, mockery, derision or other 'tone' which the Panel found unpalatable meant that the Petitioner's good faith intentions and the social value of her speech, otherwise relevant to the question of 'unprofessional conduct,' was invalidated" (Petition, paras 27(b), 39-46).

37. Here, too, Part 3 of the Petition does not place the College in a position where it can presently provide a substantive response. Two things can, however, be said at this stage. First, the alleged error is certainly not an error of law. An error of law occurs where a decision maker identifies the applicable legal rule or test: *Housen v Nikolaisen*, 2002 SCC

33 at paras 9, 27. This alleged error is, at best, an error of mixed fact and law—which is marked by application of the relevant legal standard to a set of facts: *Housen*, *ibid*, at para 26.

38. The second thing that can be said is that alleged error fails to engage with what the panel did and did not find as a matter of fact, and is thus unrooted to any proper foundation. For instance, the panel made no finding that the Petitioner had "good faith intentions". Likewise, it did not find that the Petitioner's speech had social value but that this was invalidated or negated by the use of sarcasm, etc.

Third Alleged Error

39. The Petitioner submits that the panel "erred in law, or mixed law and fact, in finding a sufficient nexus between the impugned comments and the profession" (Petition, paras 27(c), 47-56).

40. At this stage, the College can say at least that this is neither an error of law nor an error of mixed fact and law. Whether the comments had a nexus to the profession of nursing is simply an exercise of fact-finding. Where a decision-maker makes a mistake in drawing factual findings (regardless of whether they are "direct" or the product of inferences), this is an error of fact: *Housen*, *ibid.*

41. As noted above, the standard of review for an alleged error of fact is "palpable and overriding error". The first of these terms identifies that the error must be "clear to the mind or plain to see" (*Housen*, *ibid*, at para 5; *L(H) v Canada (AG)*, 2005 SCC 25 at para 69). The second identifies that the error must be such as to discredit the result (*L(H)*, *ibid*).

42. Part 3 of the Petition does not identify with particularity the manner in which the panel allegedly fell into palpable and overriding error in its finding that the impugned comments had a sufficient nexus to the practice of nursing to ground a finding of unprofessional conduct.

Fourth Alleged Error

43. The Petitioner alleges that the panel erred in law by balancing her *Charter* right to free expression "against a non-existent statutory objective and/or by prioritizing alleged harms to the integrity of the nursing profession" (Petition, paras 27(d), 57-67).

44. The legal test at issue is set out in the cases cited in paragraphs 26 and 27 of this Petition Response: *Doré*, *Loyola High School*, *Groia* and *TWU* 2018. The Petitioner is not here asserting that the panel erred in identifying that test. Her complaint is with the result of that test. In other words, she is alleged an error of mixed fact and law. The "palpable and overriding error" standard applies.

45. Beyond this, Part 3 of the Petition offers little assistance, other than by highlighting that this is not a question of law. For instance, the Petitioner cites *Whatcott v The Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6 and says the court there "noted that there was no evidence that members of the public thought less of nurses as a result of

Whatcott's conduct in demonstrating outside of an abortion clinic" (Petition, para 59). The "no evidence" reference makes abundantly clear that we are speaking here of factual findings. Factual findings typically turn on context. One of the important contextual factors in *Whatcott* was that Mr Whatcott did not hold himself out as a nurse while he was picketing. As the Court of Appeal of Alberta later held in *Zuk v Alberta Dental Association and College*, 2018 ABCA 270 at para 133: "Had [Mr Whatcott held himself out as a nurse while he was picketing and expressing anti-abortion opinions], there would have been a rational connection between the objective of ensuring respect for the status of the profession and sanctioning him for unprofessional conduct. The link would have been obvious."

46. As with the other alleged errors, the Petitioner largely seeks under this fourth head to reargue points decided against her below. She does not devote much effort to identifying errors.

Fifth Alleged Error

47. The Petitioner alleges that the panel "erred in interpreting the protection of s. 2(*b*) to be limited to political speech, or less available to non-political speech" (Petition, paras 27(e), 68-71).

48. The Petitioner alleges here that the panel, when addressing the individual impugned statements, lost sight of all but one rationale for freedom of expression. She says, "the Panel only considered whether the speech was of a *political* character and, if not, it was not protected" (Petition, para 71 [emphasis in original]).

49. Although this might arguably identify an alleged error of law (see *Housen* at para 27; *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 39), the Petitioner's attempt to demonstrate the error parses the panel's reasons unfairly. The panel did not ignore other justifications for freedom of expression.

Sixth Alleged Error

50. The Petitioner argues that the panel "erred by favouring one 'marginalized' group over another and demeaning women's rights and protections, contrary to ss. 15(*a*) and 28 of the *Charter*" (Petition, paras 27(f), 72-84).

51. It is not clear why the Petitioner put quotation marks around the word *marginalized*. She does not expressly allege that the finding that transgender persons are marginalized was the product of palpable and overriding error. Indeed, she could not. There was ample evidence to support that finding.

52. The Petitioner in her sixth alleged error seeks to set up a scheme of competing rights (*viz* protections on the basis of sex "vs." protections on the basis of gender identity). This is inconsistent with the approach in Canadian law, which seeks to balance rights in a minimally impairing manner.

Seventh Alleged Error

53. The Petitioner submits that the panel made a palpable and overriding error of mixed fact and law "by accepting, without reservation, a scientifically novel and unsettled opinion on the multidimensional nature of sex" presented by the College's experts "without clearly stating why their evidence was favo[u]red over that of the Petitioner's experts" (Petition, paras 27(g), 85-97).

54. The Petitioner acknowledges the length at which the panel discussed the expert evidence (Petition, para 85), but alleges that the panel nevertheless failed to assess the expert witnesses' "credibility" (*ibid*, para 91).

55. Credibility is not a typical criterion on which expert evidence is judged. Reliability, on the other hand, can be. "Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately (i) observe; (ii) recall; and (iii) recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence" (*R v C(H)*, 2009 ONCA 56 at para 41, as cited in *Huang v Li*, 2020 BCSC 1727 at para 318).

56. The law of evidence applicable in our courts generally excludes opinion evidence. There is a special, two-step test for the admission of opinion evidence. At the first step, the party tendering the evidence must establish the threshold requirements for admissibility: relevance, necessity, absence of an exclusionary rule, and a properly qualified expert. In cases based on novel or contested science (or science used for a novel purpose), the court must also consider the reliability of the underlying science for that purpose: *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("*White Burgess*") at para 23. At the second step, the decision-maker balances potential risks and benefits to decide whether the "pros" outweigh the "cons". This has also been called the "reliability versus effect factor" (*White Burgess* at para 24; *R v Mohan*, [1994] 2 SCR 9 at 21).

57. The Petitioner asserts that the panel reserved its only criticisms of the expert evidence for her experts (Petition, para 94). She builds upon this observation, alleging that the panel subjected her evidence to a higher degree of scrutiny than the College's, and that this was an error of law (*ibid*, para 96). The case she cites does not assist her. *Miller v College of Optometrists of Ontario*, 2020 ONSC 2573 (Div Ct) was a case alleging sexual assault, and involved evidence from the complainant and the regulated professional. It addresses the procedural unfairness of using a higher degree of scrutiny to assess the credibility or reliability of evidence adduced by one party over that adduced by the adversary. That is not what occurred here.

58. The law does not require decision-makers to find the expert evidence of opposing parties to be equally persuasive. Her seventh alleged error is not an error at all; it is merely disagreement with the conclusions of the finder of fact.

Eighth Alleged Error

59. The Petitioner alleges that the panel erred in law by holding her to the standard of a lawyer (Petition, para 27(h), 98-104).

60. This, again, does not identify a pure question of law. At best, it raises a question of mixed fact and law, governed by the palpable and overriding error standard. The College is not in a position to say much further about this alleged error at this time.

Stay of Proceedings

61. The Petitioner seeks, in Part 1, para 3, of the Petition, a stay of the penalty and costs phase of the discipline proceedings. She expands upon this relief in Part 3, paras 102-04 of the Petition.

62. The Act, in s 39(9), provides jurisdiction for the discipline committee to grant a stay of the penalty phase of the process. It states that, "[i]f an order made under subsection (2) [penalty] is appealed under section 40, the discipline committee, on application of the [Petitioner], may, by order, (a) stay the order made under subsection (2) pending the hearing of the appeal". The Act does not create any jurisdiction to stay the liability phase of the proceedings pending penalty.

63. This legislative omission must have meaning. It is clear that the drafters favoured disciplinary proceedings in which the two phases proceed in relatively quick succession. The policy basis for this choice is manifest: it makes most sense for the parties, and the discipline panel, to address penalty when the liability findings remain "fresh". Delay not only leads to inefficiencies as the parties and decision-makers reacquaint themselves with the facts, but it also creates risks on the scheduling front: with a lengthier delay, there is an increased likelihood that counsel or a member of the hearing panel might have conflicting time commitments, leaving the proceedings in an extended period of limbo.

64. In view of this legislative choice, the generally high threshold for obtaining what amounts to an order of prohibition is entirely appropriate. The College will refrain from further comment on this point, pending receipt of the Petitioner's argument as to how she meets the "exceptional circumstance" criteria enumerated in *Chu v British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174 at para 66.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Carolyn McKeen Becker, made 14 April 2025;

2. Affidavit #1 of Leila Hodges, to be made and filed at a later date; and

3. Such further and other material as counsel may advise and this honourable court may permit.

Date: 21/MAY/2025

Signature of ☐ Petition Respondent
☒ Lawyer for Petition Respondent

Brent Olthuis KC

Petition Respondent's address for service:
c/o Brent Olthuis KC
[redacted]

Fax number address for service (if any):

E-mail address for service (if any): [redacted]n

Name of the Petition Respondent's lawyer, if any:
Brent Olthuis KC