

**DISCIPLINE COMMITTEE OF THE COLLEGE  
OF NURSES OF ONTARIO**

<b>PANEL:</b>	Susan Roger, RN	Chairperson
	Dawn Cutler, RN	Member
	Renate Davidson	Public Member
	David Edwards, RPN	Member

**BETWEEN:**

COLLEGE OF NURSES OF ONTARIO	)	<u>MEGAN SHORTREED</u> for
	)	College of Nurses of Ontario
- and -	)	
	)	
MIGUEL A. ROJAS LEAL	)	<u>JANE LETTON</u> for
Registration. No. 06292674	)	Miguel A. Rojas Leal
	)	
	)	<u>LUISA RITACCA</u>
	)	Independent Legal Counsel
	)	
	)	
	)	Heard: April 30, 2019

**DECISION AND REASONS ON PENALTY**

In reasons released on January 28, 2019, the Panel made findings of professional misconduct against Miguel A. Rojas-Leal (the “Member”). The Panel found that the Member committed acts of professional misconduct as alleged in paragraphs 1(a)(i); 2(a)(i); 3(a)(i) and 3(b)(i) of the Notice of Hearing, and that the Member engaged in conduct that would reasonably be considered by members of the profession to be disgraceful, dishonourable and unprofessional. The Panel made no findings with respect to the allegations in paragraphs 1(a)(ii); 2(a)(ii); 3(a)(ii) and 3(b)(ii) of the Notice of Hearing.

The Panel reconvened on April 30, 2019 at the College of Nurses of Ontario (the “College”) for the penalty hearing. The Panel’s decision and reasons on penalty and costs are set out below.

**Publication Ban**

On November 8, 2017, during a preliminary motion hearing, College Counsel brought a motion pursuant to s.45(3) of the *Health Professions Procedural Code 1991* (the “Code”), for an order preventing the public disclosure of the name and any identifying information of the complainant, including a ban on publication or broadcasting of those matters referred to in this discipline hearing. The Panel accepted submissions from all parties involved and ordered a publication and broadcasting ban, which remains in effect.

## **Penalty Submissions**

The College submitted that the Panel should make an order as to penalty and costs as follows:

1. An order directing the Executive Director to immediately revoke the Member's certificate of registration;
2. An order requiring that the Member appear before the Panel to receive an oral reprimand;
3. An order requiring the Member to reimburse the College for funding provided to the Complainant for therapy and counselling up to \$5,000.00;
4. An order requiring the Member to pay part of the College's costs in the amount of \$135,000.00, representing approximately 65% of the College's total hearing costs.

To support its position, the College relied on the Panel's findings that the Member committed sexual abuse of a patient as defined in s. 51(1) of the Code. The College argued that having found that the misconduct included touching a patient's genitals when there was no clinical purpose to do so, the consequences must be significant. Further, the College relied on the fact that the Panel found that the Member's conduct would be reasonably regarded as disgraceful, dishonourable and unprofessional.

In support of its position, the College provided the Panel with a copy of a Letter of Caution delivered to the Member on February 15, 2012, by the College's Inquiries, Complaints and Reports Committee. At that time, it had been reported that the Member had breached professional boundaries and/or failed to maintain the therapeutic nurse-client relationship. The Letter of Caution served as a reminder to the Member of his responsibilities as a professional and his accountability to the College to uphold professional standards of behaviour.

The College argued that revocation was mandatory given the particular misconduct at issue. The College explained that pursuant to the amendments made to s. 51(5) of the Code, pursuant to the *Protecting Patients Act, 2017*, S.O. 2017 c.11, the act of touching in a sexual nature a patient's genitals triggers a mandatory revocation. While there was initially some debate between the parties as to the retrospective applicability of the amendments, the Member ultimately conceded that given the Panel's findings and the amendments in the Code, revocation was mandatory.

The Panel also received into evidence a written victim impact statement dated December 6, 2018. This statement reiterated that sexual abuse has dramatic effects on clients. The Complainant, [ ], described the impact of this incident as a "deeply emotional task" and described his withdrawal from his partner and subsequent breakdown of that relationship, his loss of trust in physical intimacy, suicidal thoughts and self-loathing. His statement comes to a close by stating that he "genuinely want(s) everyone to be as happy and safe as possible. I want everyone to treat each other right." The Complainant also acknowledges the Member as a "human being" and his hope is that the Member uses this incident as "an opportunity to get help for (him)self."

The Member did not oppose the College's request for revocation or for a reprimand. He made no submissions with respect to the request for reimbursement of the College for funding for therapy and counselling.

### **Penalty Decision**

Having considered the findings of professional misconduct, including sexual abuse of a patient, and submissions of both parties, the Panel orders as follows:

1. The Member to appear before the Panel to be reprimanded within three (3) months of the date of this order.
2. The Executive Director to immediately revoke the Member's certificate of registration.
3. The Member is required to reimburse the College up to \$5,000 for funding for therapy and counselling for the Complainant, under the program required under s.85.7 of the *Health Professions Procedural Code*.
4. The Member is required to post security in the amount of \$5000.00 to the College, within 30 days of this Order becoming final, to guarantee reimbursement of any funding (up to \$5000.00) the College may provide the patient under the program required under section 85.7 of the *Health Professions Procedural Code*.

### **Reasons for Penalty Decision**

The Panel understands that the penalty ordered should protect the public and enhance public confidence in the ability of the College to regulate nurses. This is achieved through a penalty that addresses specific deterrence, general deterrence and, where appropriate, rehabilitation and remediation. Given the nature of the misconduct, the Panel found that at this stage rehabilitation and remediation were not an applicable consideration.

In reviewing the submissions from both parties, the Panel found that revocation, together with a reprimand is an appropriate sanction in the circumstances. The Panel agrees with the parties that in light of the amendments to the Code, the mandatory revocation provisions apply. We are satisfied that this is an instance where the assumption against retrospectivity is rebutted given the clear purpose of the Code to protect the public. (see *Brosseau v. Alberta Securities Commission* (1989)). There can be no doubt that the legislature intended for the amendments to apply retrospectively so to best ensure public safety and protection on a go-forward basis.

The amendments to the Code were put in place to allow colleges to better protect patients. The Panel was supported in its decision by s. 3(2) of the Code which states "*In carrying out its objects, the College has a duty to serve and protect the public interest.*"

The Panel notes that while there were submissions from the College on the retrospectivity of legislative amendments, the Member advised that there was no dispute and that the mandatory revocation provisions apply. As set out above, the Panel is satisfied that the amendments apply retrospectively.

The Panel found that the additional aspect of the order, requiring the Member to reimburse the College for funding, up to the amount of \$5,000.00, provided for the Complainant, should the Complainant access the College's funding program for sexual abuse survivors, is reasonable and in the public interest in light of the Member's misconduct.

The Panel finds that the penalty as a whole satisfies the principles of deterrence and public protection. The penalty sends a strong message to the Member, and the membership as a whole, that engaging in acts of sexual abuse and failing to maintain the standards of practice will not be tolerated. Confidence in the nursing profession and protection of public safety will be strengthened by this message.

## **Costs**

### **Submissions on Costs**

#### *College's Position*

The College sought an order requiring the Member to pay a portion of the College's costs of the hearing. The College sought \$135,000.00, representing 65% of its total costs including fees, disbursements and HST. The College provided the Panel with affidavit evidence setting out the particulars for the fees and expenses incurred for every stage of the hearing, including the prehearing motions and the liability phase.

In support of its position, the College set out in its affidavit the various steps taken by both it and the Member in the years leading up to the hearing on the merits. The College argued that while the Member had a right to defend himself against the allegations, the membership at large should not be solely responsible for paying the costs of the process, particularly where the Member and his previous counsel took steps which unnecessarily lengthened and complicated the proceedings. Of note, the College explained that there were at least five prehearing conferences with the Chair of Discipline before the Member was prepared to set dates for his prehearing motion. Further, despite efforts by the Complainant's counsel to assist in narrowing the issues raised by the Member on his prehearing motion, the motion proceeded on a fully contested basis, with cross-examinations having taken place prior to the hearing, which itself lasted three days. Finally, the College noted that even after the Panel rendered its decision on the motion, the Member's previous counsel sought to make additional submissions to the Panel on the issue.

As set out above, the College submitted that the membership at large should not be responsible [for] the burden of paying costs. The Panel was reminded that the College is primarily funded through nurses' membership fees and those members should not bear the burden of a single Member that commits a serious act of professional misconduct.

The College reminded the Panel that there is a two-step process in ordering costs; first, the Panel is to deem whether this is an appropriate case to award costs and if so to determine the quantum of costs that is fair and reasonable given the circumstances. Counsel stressed that awarding costs are to compensate the College in having to lead the case and not to punish the Member.

### *Member's Position*

While the Member did not oppose the College's position that costs were appropriate in the circumstance, he did oppose the amount sought by the College. The Member testified that he has had difficulty holding down steady employment since his interim suspension in September 2016. He cannot find a job outside of nursing and he testified that he has no skills in any other areas. Since his suspension, the Member testified he has been able to sustain himself by holding numerous jobs with temp agencies and by using his savings. In describing his situation, the Member testified that he is never assured that he will have a job to go to from one day to the next and that even if he is called in to work, he is only receiving \$14.00/hr minimum wage.

When asked by his current counsel what he plans on doing now that his certificate will be revoked, the Member testified that he does not know what is in store for his future. The Member stated he cannot go back to school due to lack of income and that he needs employment right away as bills continue to mount.

In terms of his savings accounts, the Member testified that he no longer has savings and he had removed his Registered Retirement Savings Plans ("RRSP") to take care of himself and his mother. The Member added that he also has to pay the government back for his early withdrawals and stated that at present he has \$200 in his bank account. Member's counsel asked about his annual income prior to his suspension, which the Member replied was between \$84,000 and \$85,000/year.

With respect to the preliminary third party records motion, the Member testified that he was advised by his previous counsel that it was important to go back and review the Complainant's psychiatric history. The Member testified that he was kept informed by his counsel through e-mail, but that he would simply take his advice with respect to decisions about how to respond to the College's prosecution.

Under cross-examination, the Member acknowledged that his original counsel copied him on e-mail correspondence between all parties involved and did send him copies of letters as well. The Member testified that he did receive correspondence between his counsel and the Complainant's counsel, but he could not identify which e-mails he remembered reviewing.

With respect to legal expenses, the Member acknowledged that he would periodically receive a copy of his counsel's bills. However, the Ontario Nurses Association ("ONA") was responsible for paying them. The Member testified that he could see on the bills, the services his counsel was providing but was not aware of the dollar amounts attached to those services. College Counsel asked the Member if a representative from ONA would check in to ensure he was happy with the services his counsel was providing to which the Member testified, "...he's okay."

With respect to his employment history since the complaint, the Member acknowledged that he worked as a nurse for three months from the date of the complaint to the September 2016 suspension, but that he has not been able to work as a nurse since. The Member reiterated his original testimony that he was working for temp agencies and had done everything to find a job.

The Member acknowledged that he did not file any documentary evidence to support his position with respect to his income, debts, assets or current net worth.

### *Appropriateness of Costs*

In determining appropriateness, the College cited a Divisional Court case re: *Venneri v. College of Chiropractors of Ontario, 2010*. In this case, Venneri appealed an order of the Discipline Committee to pay costs of \$128,000 over a period of 30 months arguing that the Discipline Committee lacked the jurisdiction to award costs. Ultimately the Divisional Court wrote in its decision that, “*the panels costs order was reasonable given all of the circumstances, including the fact that the College was successful in proving four of five allegations of professional misconduct that were considered at the hearing, given the serious nature of the professional misconduct, given the length and complexity of the hearing, given Dr. Venneri’s defence and given his refusal to admit any wrongdoing.*”

The College argued given the findings, the length and complexity of the hearing and in particular the prehearing process, and given the Member’s unwillingness to attempt to streamline the process at any stage, an order for costs is appropriate in the circumstances.

The Member did not oppose the College’s submission that an order for costs was appropriate in the circumstances.

### *Quantum of Costs*

In its submissions on quantum, the College referred to the following cases:

- Divisional Court case re: *Clokier v. The Royal College of Dental Surgeons of Ontario, 2017*. In this case, the appellant was found to have committed sexual abuse of a patient and was subsequently ordered to pay costs in the amount of \$318,297.87 which he was appealing. Ultimately, the Court found that the appellant had failed to demonstrate that the costs were unreasonable in the circumstances of this case. The Divisional Court decision outlines s.53.1 of the Code which states:
  - “53.1 In an appropriate case, a panel may make an order requiring a member who the panel finds has committed an act of professional misconduct or finds to be incompetent to pay all or part of the following costs and expenses:
    1. The College’s legal costs and expenses
    2. The College’s costs and expenses incurred in investigating the matter
    3. The College’s costs and expenses incurred in conducting the hearing.”
- Divisional Court case re: *Bayfield v College of Physiotherapists of Ontario, 2014*. In this case, the Member pleaded guilty to instances of professional misconduct and the panel ordered a 12 month suspension and partial costs of 2/3 of the college’s expenses in the amount of \$25,000. The Courts decision states, “*The percentage was used as a guide, much like 60% is often used by judges in this Province as a guide for partial indemnity costs.*” In

this case, the appeal was dismissed and in addition to the original costs, the college was also awarded an additional \$7,500 in appeal expenses.

- Divisional Court case re: *Reid v College of Chiropractors of Ontario, 2016*. In this case, the appellant was arguing the entire decision of the panel including costs of \$166,194.50, which was 51% of the expense amount claimed by the College. The Court found the cost order to be reasonable and fell within the range of acceptable reasonable outcomes and subsequently dismissed the appeal.
- Divisional Court case re: *Robinson v College of Early Childhood Educators, 2018*. In this case the member was found to have committed sexual abuse and had his certificate of registration revoked and was ordered to pay 2/3 costs in the amount of \$257,353.76. In this case, the decision was appealed as “*The costs order represents over five times what the Appellant earned in his final year of employment and over fourteen times what he earned in 2016.*” However, the Divisional Court upheld the original decision and the appeal was dismissed.

The College argued that the Member’s counsel was advised from the outset that costs would be sought. Further, the College argued that the Member had failed to establish financial hardship.

The Member reminded the Panel of his right to mount a rigorous defence, particularly in the fact of the most serious of allegations. Counsel contended that it was appropriate to inquire into the mental health of the Complainant, and that as such it was appropriate for him to bring a third party records motion. The Member’s counsel reminded the Panel that while it ultimately decided that true relevance had not been established, the Panel did order that some of the Complainant’s records be provided to the Panel for review. This illustrates that the Panel was convinced that at least those limited records were arguably likely relevant, and as such it was not unreasonable for the Member to pursue the motion.

With respect to the hearing on the merits, the Member submitted that it was run expeditiously. With new counsel in place, the Member conceded, prior to the hearing, that if the touching took place, there would have been no clinical reason for it. This concession obviated the need to call any expert evidence on the question of professional standards, thus saving time and resources for the parties.

Member’s counsel submitted that the Member has provided testimonial evidence of financial hardship and that while the costs are not meant to be punitive, they are substantial. Counsel submits that repayment is a substantial burden for anyone to bear, especially since the Member will not be able to work in his chosen profession for the foreseeable future.

In support of the Member’s position, his counsel cited the Divisional Court case re: *Robinson v College of Early Childhood Educators, 2018*. Counsel submitted that while not the same case, the request is significant and the Court has advised the substantial costs were unusual.

### *Independent Legal Counsel (“ILC”) Advice*

ILC was called by the Panel to provide clarification on the legal tests and arguments involved in the penalty hearing at issue.

ILC advised that neither the College nor Member’s Counsel took issue with the reprimand, mandatory revocation or the reimbursement of funding (up to \$5000.00) for therapy for the Complainant.

With respect to costs, ILC advised the Panel there has been no dispute by either party on the Panel’s jurisdiction to award costs as per s.53.1 of the Code. ILC reiterated that the Panel will need to look at the appropriateness of this case to award costs and then to determine a fair and reasonable quantum to order. ILC added additional factors the Panel should review:

- Did the Member take unnecessary steps and/or unreasonably prolong the hearing?
- What was the College’s degree of success?
- Was the Member’s position reasonable to take?
- Were the allegations serious, to which ILC added the parties agree they were.
- Did the Member take steps to shorten the process?
- Were the resources expended reasonable?
- Is there evidence of financial hardship?
- Assess the Members oral evidence or other documentary evidence.

ILC advised the Panel to fairly take note that there is no financial documentary evidence from the Member.

ILC submitted to the Panel that if costs are found to be appropriate, an order for costs was not meant to be punitive and added that the case law is clear that members of the College as a whole should not bear 100% of the costs.

### **Decision on Costs**

Having considered the Panel’s findings on the merits of the case and submissions of both parties, the Panel orders the following;

1. The Member is required to pay costs to the College, for partial payment of the College’s legal costs and expenses and the College’s costs and expenses incurred in conducting the hearing, in the amount of \$135,000.00.
2. The Member has until May 31, 2021 to pay the amount of \$135,000.00 to the College.

### **Reasons for Decision on Costs**

The Panel has the jurisdiction under s.53.1 of the Code to order costs. The Panel acknowledges that an award for costs is not imposed automatically, nor is it imposed without clear and thoughtful



deliberation. In ordering costs, the Panel carefully considered the submissions of College Counsel, Member's Counsel and the advice of Independent Legal Counsel.

The Panel underwent a two-step process. With respect to the appropriateness to award costs, the Panel considered the unchallenged submissions from College Counsel that at the outset of this process, the Member knew that costs would be sought. In light of the complexity of the issues raised at the prehearing motion, the findings made following the hearing and the length of time it took to move this matter toward completion, the Panel is satisfied that this is an appropriate case in which to order costs.

The Panel considered the numerous and varying cases submitted by the parties in determining costs and the capacious scale ranging from \$4000 to \$257,353 in previous cost awards. The Panel relied on the additional factors as set out by ILC.

- The Panel reviewed the Affidavit entered as Exhibit #6, which provided the Panel with the chronology to more appropriately assess the actions taken by the Member. The Panel remained cognizant that the Member had reasonable time to make full answer and defence and appreciated that the Member was under interim suspension during this period.
- The Panel notes that the College was successful in proving the Member engaged in touching of a sexual nature. However, the Panel could not find on a balance of probabilities that additional allegations were proven.
- The misconduct was serious and a significant breach of the public trust and public safety.
- The Panel referred to the chronology as set out in Exhibit #6 and noted that the Member did not agree to set appropriate timelines throughout the process and even sought an opportunity to make further submissions, following the release of the Panel's decision on the prehearing motion.
- The Panel acknowledges, however, that the process was expedited when the Member obtained new counsel.
- College Counsel presented the Panel with a bill of costs that Member's Counsel agreed was appropriate.
- The Panel notes the Member gave oral testimony that he had \$200 in his bank account. However, no documentary or other evidence was provided to substantiate his testimony.
- The Panel considered the Member's testimony, however was unable to substantiate it given that it was presented with no documentary evidence, as to his net worth, tax liability, debts, or other assets. Further, other than the Member's testimony on the

subject, the Panel had very little information about the nature of the Member's current employment situation.

The Panel understands that costs provide for some restitution for the costs incurred by the College on prosecuting a matter. While the Member certainly had the right to make full answer and defence, there were a number of steps taken throughout the process that increased the length of time of the hearing process. Of particular concern for the Panel is a fourteen month period from the time the Inquiries Complaints and Reports Committee allegations were referred to the Discipline Committee on September 14, 2016 to the preliminary motion hearing which commenced on November 8, 2017.

The Panel acknowledges that any case where costs are awarded is an extraordinary circumstance. The Panel finds that costs of this process should not be borne entirely by the membership of the College and that as such the Member should bear responsibility for a portion of these costs.

The costs as ordered are reasonable and fair in the circumstances.

I, Susan Roger, RN, sign this decision and reasons for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel.