

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

PANEL:	Terry Holland, RPN	Chairperson
	Carly Gilchrist, RPN	Member
	Carly Hourigan	Public Member
	Carolyn Kargiannakis, RN	Member
	Natalie Montgomery	Public Member

BETWEEN:

COLLEGE OF NURSES OF ONTARIO)	<u>ALYSHA SHORE</u> for
)	College of Nurses of Ontario
- and -)	
)	
GRAHAM BARROW)	<u>NO REPRESENTATION</u> for
Registration No.: AD080077)	Graham Barrow
)	
)	<u>CHRISTOPHER WIRTH</u>
)	Independent Legal Counsel
)	
)	Heard: August 18, 2020

AMENDED DECISION AND REASONS

This matter came on for hearing before a panel of the Discipline Committee (the “Panel”) of the College of Nurses of Ontario (the “College”) on August 18, 2020, via videoconference.

Publication Ban

College Counsel brought a motion pursuant to s.45(3) of the *Health Professions Procedural Code* of the *Nursing Act*, 1991, for an order preventing public disclosure and banning publication or broadcasting of the name, or any information that could disclose the identity of the victim referred to orally or in any documents presented in the Discipline hearing of Graham Barrow (the “Member”).

The Panel considered the submissions of College Counsel and has decided that there be an order preventing public disclosure and banning publication or broadcasting of the name, or any information that could disclose the identity of the victim referred to orally or in any documents presented in the Discipline hearing of Graham Barrow.

The Allegations

The allegations against the Member as stated in the Notice of Hearing dated July 6, 2020 are as follows.

IT IS ALLEGED THAT:

1. You have committed an act of professional misconduct as provided by subsection 51(1)(a) of the *Health Professions Procedural Code of the Nursing Act, 1991*, S.O. 1991, c. 32, as amended, in that on June 28, 2016, in the Ontario Court of Justice in Sudbury, Ontario, you were found guilty of an offence relevant to your suitability to practice as follows:
 - (a) On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did, for a sexual purpose, touch [], a person under the age of 16 years directly with a part of your body, to wit: hands and mouth, contrary to Section 151(a) of the *Criminal Code of Canada*; and/or
2. You have committed an act of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Nursing Act, 1991*, S.O. 1991, c. 32, as amended, and defined in subsection 1(18) of *Ontario Regulation 799/93*, in that, on or around June 28, 2016, you contravened a term, condition or limitation on your certificate of registration, imposed pursuant to s. 1.5(1)1.i. of *Ontario Regulation 275/94*, in that you failed to report findings of guilt to the Executive Director of the College of Nurses (“CNO”), in particular, that on June 28, 2016, you were found guilty of the following offence, which you did not report:
 - (a) On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did, for a sexual purpose, touch [], a person under the age of 16 years directly with a part of your body, to wit: hands and mouth, contrary to Section 151(a) of the *Criminal Code of Canada*; and/or
3. You have committed an act of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Nursing Act, 1991*, S.O. 1991, c. 32, as amended, and defined in subsection 1(18) of *Ontario Regulation 799/93*, in that, in or around April 2016, you contravened a term, condition or limitation on your certificate of registration, imposed pursuant to s. 1.5(1)1.(ii) of *Ontario Regulation 275/94*, in that you failed to report charges relating to any offence to the Executive Director of CNO, and in particular, that you were charged with the following offences on or around April 12, 2016:
 - (a) On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did, for a sexual purpose, touch [], a person under the age of 16 years directly with a part of your body, to wit: hands and mouth, contrary to Section 151(a) of the *Criminal Code of Canada*;
 - (b) On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region, being in a position of trust or authority towards [], a young person, did for a sexual purpose touch directly the body of [], a young person, with a part of your body,

to wit: hands and mouth, contrary to Section 153(a) of the *Criminal Code of Canada*; and/or

- (c) On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did commit a sexual assault on [], contrary to Section 271 of the *Criminal Code of Canada*;
4. You have committed an act of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Nursing Act, 1991*, S.O. 1991, c. 32, as amended, and defined in subsection 1(19) of *Ontario Regulation 799/93*, in that you contravened a provision of the *Nursing Act, 1991*, the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, or the regulations under either of those Acts, and in particular, section 85.6.1 of the *Health Professions Procedural Code*, in that, on June 28, 2016, you failed to report findings of guilt to the Registrar (being the Executive Director) of CNO, as follows:
- (a) On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did, for a sexual purpose, touch [], a person under the age of 16 years directly with a part of your body, to wit: hands and mouth, contrary to Section 151(a) of the *Criminal Code of Canada*; and/or
5. You have committed an act of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Nursing Act, 1991*, S.O. 1991, c. 32, as amended, and defined in subsection 1(37) of *Ontario Regulation 799/93*, in that you engaged in conduct or performed an act, relevant to the practice of nursing, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, in that you failed to report charges and/or findings of guilt to the Executive Director of CNO, as follows:
- (a) On or around April 12, 2016, you were charged with the following offences, which you did not report:
 - i. On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did, for a sexual purpose, touch [], a person under the age of 16 years directly with a part of your body, to wit: hands and mouth, contrary to Section 151(a) of the *Criminal Code of Canada*;
 - ii. On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region, being in a position of trust or authority towards [], a young person, did for a sexual purpose touch directly the body of [], a young person, with a part of your body, to wit: hands and mouth, contrary to Section 153(a) of the *Criminal Code of Canada*; and/or
 - iii. On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did commit a sexual assault on [], contrary to Section 271 of the *Criminal Code of Canada*;
 - (b) On June 28, 2016, you were convicted of the following offence, which you did not report:

- i. On or about the 11th day of March, 2016 at the City of Greater Sudbury in the said region did, for a sexual purpose, touch [], a person under the age of 16 years directly with a part of your body, to wit: hands and mouth, contrary to Section 151(a) of the *Criminal Code of Canada*.

Member's Plea

The Member admitted the allegations set out in paragraphs 1(a), 2(a), 3(a), 3(b), 3(c), 4(a) and 5(a)(i), (ii), (iii), 5(b)(i), in the Notice of Hearing. The Panel received a written plea inquiry which was signed by the Member. The Panel also conducted an oral plea inquiry and was satisfied that the Member's admission was voluntary, informed and unequivocal.

Agreed Statement of Facts

College Counsel and the Member advised the Panel that agreement had been reached on the facts and introduced an Agreed Statement of Facts, which as reads, unedited, as follows:

THE MEMBER

1. Graham Barrow (the "Member") obtained a diploma in nursing from Cambrian College in 2014.
2. The Member registered with the College of Nurses of Ontario ("CNO") as a Registered Practical Nurse ("RPN") on November 11, 2014. He resigned his certificate of registration on November 25, 2019 and is not currently entitled to practice nursing in Ontario.
3. The Member was employed as a PSW at the North Bay Regional Health Centre's Northeast Mental Health Centre – Sudbury Site ("the Facility") from February 1, 2011 until his resignation on July 25, 2019. During his employment, the Member was assigned to the Specialized Dementia Care Unit. He worked with non-verbal and uncommunicative elderly patients.

INCIDENTS RELEVANT TO ALLEGATIONS OF PROFESSIONAL MISCONDUCT

Criminal Charges and Finding of Guilt for Sexual Interference of a Minor

4. On April 12, 2016, the Member was charged with three offences under the following sections of the *Criminal Code of Canada*:
 - touching for a sexual purpose, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years contrary to section 151(a);
 - touching for a sexual purpose, directly or indirectly, with a part of the body or with an object, any part of the body of the young person while in a position of trust or authority towards a young person contrary to section 153(a); and

- sexual assault contrary to section 271.
5. At the time of the incident the Member was living in a common-law relationship with his spouse and her 14-year-old daughter (“[]”).
 6. The Member entered []’s room while she was sleeping. He kissed her, held her down by the left arm and shoulder area, removed her bra strap, and grabbed and sucked on her breast.
 7. If [] were to testify, she would state that she tried to fight off the Member by pushing him away, but she was too scared to yell for help. Despite her protests, the Member did not stop touching her.
 8. The Member did eventually stop the sexual assault. He apologized and told [] not to tell her mother, or words to that effect. Approximately half an hour after entering her room, the Member left []’s bedroom.
 9. The Member left []’s bedroom and went downstairs, where his spouse found him the following morning, covered in his own vomit.
 10. Later that day, [] told her mother what happened with the Member. He was asked to immediately leave the residence.
 11. If the Member were to testify, he would state that he was severely intoxicated at the time of the incident and that he entered the wrong bedroom. He thought he was in his spouse’s room. When he realized what he had done to his stepdaughter, he sat by her bed, cried and apologized.

Criminal Trial

12. Upon entering a guilty plea on June 28, 2016, the Ontario Court of Justice (Sudbury) found the Member guilty of sexual interference contrary to section 151(a) of the *Criminal Code of Canada*. Specifically, the Member was found guilty of having touched []’s body with his hands and mouth for a sexual purpose.
13. The Crown withdrew the other two charges.
14. The Member was sentenced to 18 months of probation, 90 days in jail (to be served on weekends), entry onto the Sex Offender Registry for a period of 10 years, and 5-year ban from interacting with persons under 16 years in various capacities.

Failure to Report Charges and Finding of Guilt

15. On July 16, 2019, CNO received an anonymous call advising that the Member was charged and subsequently found guilty of a crime of a sexual nature.

16. On July 26, 2019, the Member's Facility reported the criminal charges and finding of guilt to CNO. At no time had the Member disclosed his criminal charges and finding of guilt to the Facility. The Facility became aware of the criminal charges and finding of guilt through a third-party.
17. On July 30, 2019, approximately three years after the criminal trial, the Member self-reported the criminal charges and finding of guilt to CNO.
18. The Member was under an obligation to report criminal charges to CNO, as a condition of his certificate of registration pursuant to s. 1.5(1)1.(ii) of *Ontario Regulation 275/94* of the *Nursing Act, 1991*.
19. The Member was also under an obligation to report any findings of guilt to CNO, as a condition of his certificate of registration, in accordance with s. 1.5(1)1.(i) of *Ontario Regulation 275/94* of the *Nursing Act, 1991*, as well as under s. 85.6.1 of the *Health Professions Procedural Code*.
20. If the Member were to testify, he would state that he was advised by his criminal counsel not to reveal his criminal charges and conviction to CNO when they occurred. However, he acknowledges that it was his professional responsibility to report charges and findings of guilt to CNO, as required by legislation. The self-reporting obligation rested solely on the Member.

ADMISSIONS OF PROFESSIONAL MISCONDUCT

21. The Member admits that he committed the acts of professional misconduct as alleged in paragraph 1 - 5 of the Notice of Hearing, as described in paragraphs 4 - 19 above.

In her submissions, College Counsel asked the Panel to make findings against the Member and reviewed with the Panel the previous decision of *CNO vs Laviolette* (2018) and encouraged the Panel to view it as a comparison as it had similar facts and dealt with whether a member's conviction pursuant to s. 151 of the *Criminal Code of Canada* was an offence relevant to the member's suitability to practice and as well, a member's failure to report charges and a finding of guilt.

The Member had no submissions.

Decision

The College bears the onus of proving the allegations in accordance with the standard of proof, that being the balance of probabilities based upon clear, cogent and convincing evidence.

Having considered the evidence and the onus and standard of proof, the Panel finds that the Member committed acts of professional misconduct as alleged in paragraphs #1, #2, #3 and #4 of the Notice of Hearing. As to allegation #5, the Panel finds that the Member engaged in conduct that would reasonably be considered by members to be disgraceful, dishonorable and unprofessional.

Reasons for Decision

The Panel considered the Agreed Statement of Facts and the Member's plea and finds that this evidence supports findings of professional misconduct as alleged in the Notice of Hearing.

Allegation #1 in the Notice of Hearing is supported by paragraphs 4-19 and 21 in the Agreed Statement of Facts. The Member admitted that he committed an act of professional misconduct relevant to his suitability to practice, as alleged. Upon entering a guilty plea on June 28, 2018, the Ontario Court of Justice (Sudbury) found the Member guilty of sexual interference contrary to section 151(a) of the *Criminal Code of Canada*. Specifically the Member was found guilty of having touched []'s body with his hands and mouth for a sexual purpose.

Allegation #2 in the Notice of Hearing is supported by paragraphs 4-21 in the Agreed Statement of Facts. The Member admits that he committed an act of professional misconduct as alleged. The College received an anonymous call advising that the Member was found guilty of a crime of a sexual nature. Approximately three years after the criminal trial, the Member self-reported the findings of guilt. The Member is under an obligation to report findings of guilt to the College as a condition of his certificate of registration in accordance with s. 1.5(1)1.(i) of the *Ontario Regulation 275/94 of the Nursing Act, 1991*

Allegation #3 in the Notice of Hearing is supported by paragraphs 4-21 in the Agreed Statement of Facts. The Member admits that he committed an act of professional misconduct as alleged. The Member's employer notified the College of his criminal charges. The Member was under an obligation to report criminal charges to the College as a condition of his certificate of registration pursuant to s. 1.5(1)1.(i) of the *Ontario Regulation 275/94 of the Nursing Act, 1991*

Allegation #4 in the Notice of Hearing is supported by paragraphs 4-21 in the Agreed Statement of Facts. The Member admits that he committed an act of professional misconduct as alleged. On July 16, 2019, the College received an anonymous call advising that the Member was found guilty of a crime of a sexual nature. On July 30, 2019, three years after the criminal trial the Member self-reported the findings of guilt to the College. If the Member were to testify, he would state that he was advised by his criminal counsel not to reveal his criminal convictions to the College. However the Member acknowledges that it was his professional obligation to report a finding of guilt to the College and that self-reporting obligations rest solely on the Member.

With respect to Allegation #5, the Panel finds that the Member's conduct in being charged and convicted of a sexual crime was unprofessional as it demonstrated a serious and persistent disregard for his professional obligations. The Panel also finds that the Member's conduct was dishonourable. It demonstrated an element of dishonesty and deceit through knowingly not reporting his criminal charges and findings of guilt to the College. Finally, the Panel finds that the Member's conduct was disgraceful as it shames the Member and by extension the profession. The conduct in which the Member sexually touched a minor for his own pleasure casts serious doubt on the Member's moral fitness and inherent ability to discharge the higher obligations the public expects professionals to meet. The victim was a vulnerable minor and was sleeping in her own private room at the time of the assault.

Penalty

College Counsel and the Member advised the Panel that a Joint Submission on Order had been agreed upon. The Joint Submission on Order requests that this Panel make an order as follows:

1. Requiring the Member to appear before the Panel to be reprimanded within three months of the date that this Order becomes final.
2. Directing the Executive Director to immediately revoke the Member's certificate of registration.
3. All documents delivered by the Member to the CNO, the Expert or the employer(s) will be delivered by verifiable method, the proof of which the Member will retain.

Penalty Submissions

Submissions were made by College Counsel. The aggravating factors outweigh the mitigating circumstances.

The aggravating factors in this case were:

- The serious nature of the criminal conviction;
- The victim was a minor who was in a position of vulnerability and who trusted the Member;
- The criminal finding discredits the profession and constitutes a serious breach of trust;
- The Member's failure to report both the charges and the finding of guilt, until approximately three years after the criminal trial, demonstrates a serious disregard for his professional obligations over a significant period of time.

The mitigating factors in this case were:

- The Member has no prior discipline history;
- The Member was cooperative with the College.

College Counsel submitted that the proposed penalty in the Joint Submission on Order meets the goals of general and specific deterrence, public protection, and where appropriate rehabilitation and remediation. The oral reprimand and revocation of the certificate of registration meet the requirement of general deterrence by sending a clear message to members of the profession that this conduct is serious and will not be tolerated. The Joint Submission on Order is appropriate because it gives effect to specific statutory provisions which require a mandatory revocation in these circumstances. College Counsel reviewed with the Panel s. 51(5.2) of the *Health Professions Procedural Code* which mandates revocation of a certificate of registration as a result of a finding that a member committed professional misconduct by being found guilty of an offence relevant to his suitability to practice when the offence is pursuant to s. 151 of the *Criminal Code of Canada*.

College Counsel submitted one case to the Panel to demonstrate that the proposed penalty fell within the range of similar cases from this Discipline Committee.

CNO v Daguio (Discipline Committee, 2019). In this case the member was found guilty of a criminal offence that was sexual in nature. The hearing was an uncontested hearing and an Agreed Statement of Facts and Joint Submission on Order were provided to the panel. The penalty was an oral reprimand and revocation of the member's certificate of registration. College Counsel submitted that the same statutory provisions were also in effect in this case and are in line with what is appropriate when the criminal offences are of a sexual nature. Revocation was also appropriate in the *Daguio* case even without the statutory requirements and the same applies in the current case.

No submissions were made by the Member.

Penalty Decision

The Panel accepts the Joint Submission on Order and accordingly orders:

1. The Member is required to appear before the Panel to be reprimanded within three months of the date that this Order becomes final.
2. The Executive Director is directed to immediately revoke the Member's certificate of registration.
3. All documents delivered by the Member to the CNO, the Expert or the employer(s) will be delivered by verifiable method, the proof of which the Member will retain.

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. The Panel also considered the penalty in light of the principle that joint submissions should not be interfered with lightly.

The Panel concluded that the proposed penalty is reasonable and in the public interest. The Member has co-operated with the College and, by agreeing to the facts and a proposed penalty, has accepted responsibility. The Panel finds that the penalty satisfies the principles of specific and general deterrence and public protection. As it was mandatory for the Member's certificate of registration to be revoked it was not necessary to consider rehabilitation or remediation. The penalty is in line with what has been ordered in previous cases.

I, Terry Holland sign this decision and reasons for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel.