

3. The April 2024 hearing date was adjourned by consent due to a scheduling conflict for Registrant's counsel. On March 20, 2024, the hearing date of May 7, 2024 was set by agreement.
4. At the commencement of the hearing, it was established that the Notice of Hearing dated May 5, 2023 (the "Notice"), had been properly served and the jurisdictional requirements set forth in subsections 102(3), 116(2), and 116(4) of *The Regulated Health Professions Act* (the "RHPA") had been met.
5. No objections were raised as to the composition of the Panel.
6. The Panel noted the absence of the Registrant and made inquiries of their counsel. Registrant's counsel was forthright in their answer that they were unaware the Registrant was required to personally attend the hearing and had assumed they alone would be able to appear on behalf of the Registrant. Registrant's counsel acknowledged that he had not informed counsel for the CIC, or anyone else, that the Registrant was not intending to appear at the hearing.
7. When asked if they would attend the hearing virtually by video or audio link, the Registrant, through their counsel, declined to do so. The Panel was informed that the Registrant had worked a night shift earlier on May 7th, had a subsequent appointment and "was not feeling well."
8. The Panel wishes to emphasize that it was their expectation that the Registrant would appear personally at the hearing. This is a minimum requirement for registrants at an Inquiry Committee Panel hearing. If registrants are not able to attend due to a medical reason or some other justifiable reason, the Panel requires advance notice where possible and any determination with respect to an alternate arrangement, such as a virtual appearance, is the decision of the Chair and the Chair alone.
9. The absence of the Registrant at the hearing placed the Panel in an awkward and less than satisfactory position as it had no means, other than through questioning their counsel, of ascertaining accountability or inquiring into matters relevant to the proceedings which were not matters familiar to Registrant's counsel.
10. Counsel for both parties were intent on proceeding with the hearing despite the absence of the Registrant, specifically noting that the matter had already been adjourned twice.
11. Ultimately, at the direction of the Chair, the hearing proceeded once it received email confirmation from the Registrant dated May 7, 2024, that they had instructed their counsel to enter a guilty plea to the charges, and that their plea satisfied the requirements of a plea inquiry. The Registrant's email confirmed her understanding: that by pleading guilty, they gave up the right to a hearing where the CIC would need to prove the allegations and they would have an opportunity to defend the allegations; of the meaning of a guilty plea and that they were not being influenced by anybody else and their plea was voluntary; there was to be a joint recommendation to the Panel which was not bound by its terms; and, that there is a disagreement about the appropriate amount of the contribution to costs to be ordered with the final decision being up to the Panel.

12. The Registrant, through their counsel, entered a plea of guilty to all the counts in the Notice, namely that:

- (a) On or about February 22, 1989, they were convicted of the Criminal Code offence of operating a motor vehicle having consumed alcohol in such a quantity that the concentration in their blood exceeded 80mg of alcohol in 100ml of blood.
- (b) On or about May 31, 1989, they were convicted of the Criminal Code offence of driving while disqualified.
- (c) On or about December 1, 1991, they made a false declaration, without reasonable explanation, on their application for registration with the College's predecessor, the Manitoba Association of Registered Nurses ("MARN"). When asked on the registration form whether they had been convicted of an offence under the *Criminal Code* during the past five years, they answered 'No' when they knew or ought to have known this statement was incorrect.
- (d) On or about September 10, 2002, they were convicted of the *Criminal Code* offence of operating a motor vehicle having consumed alcohol in such a quantity that the concentration in their blood exceeded 80mg of alcohol in 100ml of blood.
- (e) On or about May 29, 2006, they were convicted of the *Criminal Code* offence of operating a motor vehicle while their ability to do so was impaired by alcohol.
- (f) In 2016, the College revised its registration renewal form to include the following question:

"Have you ever been charged, convicted or found guilty (even if you have received a conditional discharge, absolute discharge or suspended sentence) of a criminal or regulatory offence." (the "Renewal Offence Question").
- (g) They were asked the Renewal Offence Question when they renewed their College registration for 2017 and on all subsequent annual registration renewals. Despite their criminal convictions in 1989, 2002 and 2006, they answered 'No' to the Renewal Offence Question for each of the renewals for the 2017, 2018, 2019, 2020, 2021 and 2022 registration years when they knew or ought to have known these answers were incorrect.
- (h) On or about December 9, 2022, they signed an undertaking with the College's registration department which provided, among other things, that:
 - (i) They have read the *Practice Direction: Self-Disclosure* (the "PD") and understand the requirement to comply with it.
 - (ii) They understand that failure to meet the terms of the undertaking may result in a referral to the [CIC].
- (i) The PD requires them to promptly notify the College, in writing, of a physical or mental condition, including an addiction, which may impair their ability to engage in the practice of registered nursing in a safe and effective manner.
- (j) Despite the provisions of their undertaking and the PD, they failed to promptly disclose to the College that they were unable to practice registered nursing due to personal health matters.

13. The Registrant, through counsel, admitted that their conduct constituted professional misconduct.

14. The Panel heard submissions from counsel for the CIC, describing the background facts giving rise to the matter raised in the Notice.

15. The Panel also heard from counsel for the Registrant who provided additional information on the Registrant's personal background and current employment and financial circumstances.

16. The parties made a partial joint recommendation as to disposition of the matter and suggested a \$10,000 fine (the "Joint Recommendation").

17. The parties made separate submissions on the issue of an appropriate contribution to costs. Counsel for the CIC requested \$5,000 and counsel for the Registrant requested \$3,000.

18. After hearing those submissions, the Panel briefly adjourned to consider the Joint Recommendation along with the separate submissions on a contribution to costs and then advised it was prepared to accept the Joint Recommendation and would reserve its decision on an appropriate contribution to costs. The Panel informed the parties that it would subsequently provide written reasons. These are those reasons.

Facts

19. The Registrant has been a Registered Nurse ("RN") since 1991 and is 64 years old.

20. The Registrant has no previous discipline history.

21. On or about February 22, 1989, they were convicted of the *Criminal Code* offence of operating a motor vehicle having consumed alcohol in such a quantity that the concentration in their blood exceeded 80mg of alcohol in 100ml of blood.

22. On or about May 31, 1989, they were convicted of the *Criminal Code* offence of driving while disqualified.

23. On or about December 1, 1991, without reasonable explanation, they made a false declaration on their application for registration with the MARN. When asked on the registration form whether they had been convicted of an offence under the *Criminal Code* during the past five years, they answered 'No' when they knew or ought to have known this statement was incorrect.

24. On or about September 10, 2002, they were convicted of the *Criminal Code* offence of operating a motor vehicle having consumed alcohol in such a quantity that the concentration in their blood exceeded 80mg of alcohol in 100ml of blood.

25. On or about May 29, 2006, they were convicted of the *Criminal Code* offence of operating a motor vehicle while their ability to do so was impaired by alcohol.

26. In 2016, the College revised its registration renewal form to include the Renewal Offence Question: "Have you ever been charged, convicted or found guilty (even if you have received a conditional discharge, absolute discharge or suspended sentence) of a criminal or regulatory offence."

27. The Registrant was asked the Renewal Offence Question when they renewed their College registration for 2017 and on all subsequent annual registration renewals. Despite their criminal convictions in 1989, 2002 and 2006, they answered 'No' to the Renewal Offence Question for each of the renewals for the 2017, 2018, 2019, 2020, 2021 and 2022 registration years when they knew or ought to have known these answers were incorrect.

28. The Registrant went on a medical leave from her employment which commenced in approximately December 2021 and continued for a period of 14 months. During this period, the Registrant was earning only 66% of her ordinary employment income.

29. As a result of the College's program which conducts spot audits for criminal record background checks, the Registrant's criminal record became apparent.

30. On November 29, 2022, the Registrant sent an email to the College's Registration Department. The email explained that the Registrant had not reported the 1989 convictions as they "occurred prior to [her] nursing career." As for the 2002 and 2006 convictions, the Registrant indicated that their failure to report was due to their belief that these were under *The Highway Traffic Act* and not the *Criminal Code*.

31. On or about December 9, 2022, they signed a Registration Undertaking with the College's Registration Department which provided, among other things, that they had read the PD, understood the requirement to comply with it, and understood that failure to meet its terms might result in a referral to the CIC.

32. The PD requires them to promptly notify the College, in writing, of a physical or mental condition, including an addiction, which may impair their ability to engage in the practice of registered nursing in a safe and effective manner.

33. Despite the provisions of their undertaking and the PD, the Registrant failed to promptly disclose to the College that they were unable to practice registered nursing due to physical health matters.

34. The Registrant was interviewed by a College investigator on December 16, 2022.

35. On February 28, 2023, the Registrant sent an email response to the Investigation Report wherein they acknowledged being mistaken about their understanding of the need to report and apologized for their failure to report. The Registrant stated that she did not intend to be dishonest or to mislead the College. The response also explained the criminal convictions occurred during a period in the Registrant's life when they [had serious traumatic experiences].

36. The Registrant is currently working approximately 55 hours every two weeks, netting about \$1,000 per week, has \$60,000 of debt and no savings.

37. The Registrant entered a plea of guilty to professional misconduct and, through their legal counsel agreed to submit the Joint Recommendation on certain aspects of the penalty with counsel for the CIC – namely, a fine of \$10,000.

Submission of the CIC

38. Counsel for the CIC characterized the Registrant’s conduct as falling into three broad categories: first, the false declarations to the MARN (paragraphs 1 to 3 of the Notice; second, the false declarations to the College on the annual registration renewals (paragraphs 4 to 6 of the Notice); and finally, the breach of their Undertaking and the PD (paragraphs 7 to 9 of the Notice).

39. Counsel directed the Panel to paragraphs 2 and 3 of the PD:

“The Council approves practice directions which are written statements to enhance, explain, add or guide RNs with respect to matters described in the College of Registered Nurses General Regulations or any other matter relevant to registered nursing practice. Compliance with practice directions are required; these expectations also serve as a legal reference to describe reasonable and prudent nursing practice.

It is the responsibility of all registered nurses or RNs in Manitoba to understand all practice expectations and be accountable to apply them to their own nursing practice, regardless of rules or practice settings. Responsibility is the duty to satisfactorily complete your obligations. Accountability means being capable to explain why you did or did not meet these expectations.”

40. At Part 2, section 2(a) of the PD, the obligation of the registrant is described and entails the registrant promptly notifying the College, in writing of a physical or mental condition, including an addiction, which may impair [their] ability to engage in the practice of registered nursing in a safe and effective manner.

41. As noted above, it was admitted that the Registrant had taken an extended leave [due to their inability to practice safely and effectively] and was on long-term disability and had not reported to the College.

42. Counsel for the CIC referred the Panel to two prior College decisions involving the failure to disclose prior criminal convictions – the *Farr* decision of the Discipline Committee dated January 7, 2019, and the *Ocran* decision of the Inquiry Committee dated November 5, 2019.

43. In *Farr*, there was a failure to disclose prior criminal convictions and pending charges and the registrant was issued a three-month suspension and costs of \$3,000.

44. The *Ocran* decision involved the submission of a false document to the College and ongoing deceitful misrepresentation. The panel in that case issued a reprimand, a fine of \$4,500, and costs of \$4,500.

45. The CIC had initially been looking for a three-month suspension in its discussions with counsel for the Registrant but had ultimately agreed to seek a combination of fine and costs which would equal the approximate earnings of the Registrant over a three-month period – namely \$15,000.

46. Counsel for the CIC, as part of the Joint Recommendation, explained that the requested fine of \$10,000 is the maximum permitted by the legislation. In addition, the CIC's position on costs, separate from the joint recommendation, was that the actual costs incurred by the prosecution approximated \$10,000 to \$12,000 and therefore the requested \$5,000 represented a reasonable percentage recovery of about 50% in line with the case law.

47. In their submission, counsel for the CIC reviewed the general principles related to sentencing with particular emphasis on specific and general deterrence. In addition, the submission covered the law on joint recommendations and the Panel's need to ensure that the joint recommendation would not be contrary to the public interest and would not bring the administration of justice into disrepute. The CIC's submission was that the Joint Recommendation would maintain the public's confidence in the College's ability to regulate its registrants in the public interest and they urged the Panel to accept it.

Submission of the Registrant

48. Counsel for the Registrant emphasized the Registrant's remorse and cooperation throughout the investigative process – they referred to the Registrant's cooperation in the spot audit, their agreement to enter into an Undertaking, and their explanation and apology of February 23, 2023. It was noted that the Registrant had admitted that their behaviour constituted professional misconduct.

49. In their submission, counsel provided additional personal information about the Registrant who is currently 64 years old with a long career and no prior discipline history. The Registrant's issues relating to her criminal convictions involved [traumatic personal history]. The Registrant has had to rely solely on their own income.

50. The Registrant was on long-term disability for a period of 14 months during which she earned only 66% of her income. They currently work approximately 55 hours every two weeks, earning a net income of approximately \$1,000 per week. The Registrant has \$60,000 of debt and no savings.

51. Counsel for the Registrant submitted that the Joint Recommendation addresses specific and general deterrence and that the proposed fine was in line with previous decisions. They noted that the fine was the statutory maximum and therefore not only would send a strong message to registrants generally but would also be very impactful for the Registrant – likely affecting their ability to retire.

52. Counsel for the Registrant suggested a contribution to costs of \$3,000 as being more in accordance with the *Farr* decision. They took issue with the prosecution's calculation of \$15,000 constituting an equivalency to a three-month suspension and the Registrant's likely loss of income during that period. They noted that costs and a fine ought not to be combined to reach a total amount as the imposition of costs is not intended to be a punitive measure.

Analysis and Decision

53. The Panel finds that the facts submitted establish that the Registrant is guilty of professional misconduct and has contravened the PD as alleged in the Notice. The Registrant acknowledged and admitted that their conduct amounted to professional misconduct. The Panel accepted the guilty plea.

54. Subsection 124(1) of the Act authorizes the Panel to make any finding permitted under subsection 124(2) which includes that an investigated member has breached the Code of Ethics or Standards or is guilty of professional misconduct.

55. The authority of a Panel to make sentencing orders, and orders related to costs are found in sections 126 and 127 of the Act.

56. In reaching its decision, the Panel acknowledges the submissions of counsel to the CIC and counsel for the Registrant and was mindful of the objectives of such orders which have been articulated by various authorities.

57. In *The Regulation of Professions in Canada*, Carswell 2021, James T. Casey describes the purpose of sentencing in professional discipline cases, citing *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 (at page 376):

[W]here the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest..

58. Citing *McKee* and a number of other authorities, Casey goes on to list the factors in determining how the public is protected including:

... specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the member, punishment of the offender, ..., the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members and ensuring that the penalty imposed is not disparate with penalties in other cases.

59. When determining an appropriate penalty, in accordance with *Jaswal v. Medical Board (Nfld.)* 1996 CanLII 11630 (NLSC), the Panel considered the following factors:

- (a) the nature and gravity of the proven allegations;
- (b) the experience of the Registrant;
- (c) the absence of any prior discipline history;
- (d) the number of times the offence was proven to have occurred;

- (e) the role of the Registrant in acknowledging what had occurred;
- (f) the presence or absence of any mitigating circumstances;
- (g) the need to promote specific and general deterrence and, thereby, to protect the public;
- (h) the need to maintain the public's confidence in the integrity of the profession; and,
- (i) the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct and the range of sentence in other similar cases.

60. Several factors may serve to mitigate the severity of an appropriate penalty in a particular case. As noted by Casey in his text, these include:

- (a) the attitude of the [Registrant] since the offence was committed, with a less severe punishment being justified where the individual genuinely recognizes that their conduct was wrong;
- (b) the age and inexperience of the [Registrant] at the time the offences were committed;
- (c) whether the misconduct was a "first offence" for the [Registrant]; and
- (d) whether the [Registrant] pleaded guilty to the charges of professional misconduct, which may be taken as demonstrating the acceptance of responsibility for their actions.

61. In this case, the Panel noted the following aggravating factors:

- (a) the number of prior criminal convictions which were not disclosed;
- (b) the breach of the Registrant's Undertaking and the PD; and
- (c) the Registrant's unjustifiable absence from attending the Inquiry Committee Panel hearing.

62. The Panel also took into consideration the following mitigating factors, noting that the Registrant:

- (a) has no previous discipline/complaints history;
- (b) is 64 years old and nearing retirement;
- (c) has a traumatic personal history;
- (d) accepted responsibility for their actions and apologized for their conduct;
- (e) cooperated with the College's investigation;
- (f) pled guilty to all charges thereby saving the time and expense of a protracted disciplinary hearing; and
- (g) has apologized for their misconduct.

63. Counsel for both parties made oral submissions at the hearing to the effect that the sanction being jointly recommended is of a magnitude consistent with those previously imposed on registered nurses. It was of course acknowledged that the Joint Recommendation did not contemplate a period of suspension.

64. In *Anthony Cook v Her Majesty the Queen*, 2016 SCC 43 (“*Anthony-Cook*”), the Supreme Court of Canada confirmed that an adjudicator may reject and depart from a joint recommendation on penalty only where the proposed disposition would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

65. At paragraph 34 of that decision, the Court described this as an “undeniably high threshold”, writing:

[A] joint submission should not be rejected lightly... Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

R v Anthony-Cook, 2016 SCC 43 at para 34

66. Though the principles in *Anthony-Cook* were articulated in the context of a criminal prosecution, the “public interest test” has been adopted by healthcare regulators and regulators of other self-governing professions in Manitoba, including by a prior Inquiry Committee Panel of this College (see for example, *Marius* – February 14, 2024).

67. The Panel is satisfied that the Joint Recommendation imposing the maximum available fine, while not identical in imposing a suspension, is in line with prior decisions in terms of acknowledging the seriousness of the misconduct and sending a message to the profession that the College’s laws, standards, regulations, and practice directions apply to all registrants who must be accountable for their conduct. The Panel is of the view that the penalty it is imposing properly addresses and protects the public interest, and achieves the purpose of:

- (a) providing general deterrence to all registered nurses that this type of conduct will be investigated, reviewed, and punished; and
- (b) reassuring the public that the College is working to maintain standards and ensure continued trust in registered nurses.

68. The Panel accepted the parties' submissions that the Registrant's need for specific deterrence was significantly lessened in light of their acknowledgment, apology, and remorse.

69. The Panel accepted the submission of the Registrant that the contribution to costs ought not to be considered a component of the punitive portion of the disposition (here represented by the fine). In terms of sentencing considerations, the Panel is of the view that a contribution to costs is qualitatively distinct and ought not to be blended with the punitive aspects of a sentence upon a registrant's guilty plea or conviction.

70. With respect to the quantum of the contribution to costs, the Panel specifically noted the Registrant's current financial situation, their age and proximity to retirement. The Panel considered these to be mitigating factors which permitted a slight reduction in the contribution to costs being sought by the CIC.

71. The Panel was mindful that, in order to preserve the public's confidence, the College must oversee the conduct of its members appropriately and consistently, and by inquiry panels imposing a serious sanction where appropriate to deter serious misconduct.

72. The Panel has therefore accepted the guilty plea and the parties' Joint Recommendation and makes the following Order:

- (a) The Registrant is hereby fined in the amount of \$10,000;
- (b) The Registrant is to pay costs to the College in the amount of \$3,750.00; and,
- (c) There will be publication of the Decision and Reasons.

DATED at Winnipeg, Manitoba, the 28th day of May 2024.

JENNIFER COLVINE, Chair of the Panel *has authorized the use of electronic signature*

DANIELLE YAFFE, Member *has authorized the use of electronic signature*

DONALD SOLAR, Public Representative *has authorized the use of electronic signature*

ANNE-MARIE BROWN, Member *has authorized the use of electronic signature*

JOSEPH LOVELACE, Public Representative *has authorized the use of electronic signature*