

**IN THE MATTER OF
THE COLLEGE OF OPTOMETRISTS OF BRITISH COLUMBIA
AND A CITATION ISSUED UNDER THE *HEALTH PROFESSIONS ACT***

BETWEEN:

The College of Optometrists of British Columbia

(the "College")

AND:

Dr. Jerry Mackenzie

(the "Respondent")

Date and Place of Hearing:

Date: Thursday, July 30, 2015

Place: 1650 – 885 West Georgia St, Vancouver, BC,

Counsel for the College:

Angela R. Westmacott, Q.C.

Counsel for the Respondent:

No attendance by Respondent or any counsel

The Discipline Committee (the "Panel"):

David MacPherson (Chair)

Dr. Mark Bourdeau

Dr. Anisa Nurani

Independent legal counsel for the Panel:

Lisa C. Fong

Court Reporter:

Day: July 30, 2015 – Barbara Neuberger

**DECISION ON PENALTY
AND ORDER OF THE
DISCIPLINE COMMITTEE**

1. After a hearing on January 28, 2015, a panel of the Discipline Committee of the College (the "Panel") decided under s. 39(1) of the *Health Professions Act* (the "Act") that the Respondent committed acts of professional misconduct, including sexual misconduct, and contravened provisions of the College's bylaws (the "Bylaws"). The Panel now makes an order on penalty, costs and public notice.

1.0 The jurisdiction of the Discipline Committee

2. Under s. 39 of the Act, if a determination is made under subsection (1), the Discipline Committee may make a penalty order under subsection (2):

39 (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:

- (a) reprimand the Respondent;
- (b) impose limits or conditions on the Respondent's practice of the designated health profession;
- (c) suspend the Respondent's registration;
- (d) subject to the bylaws, impose limits or conditions on the management of the Respondent's practice during the suspension;
- (e) cancel the Respondent's registration;
- (f) fine the Respondent in an amount not exceeding the maximum fine established under section 19 (1) (w).

3. Where the Discipline Committee has suspended or cancelled a respondent's registration, the Discipline Committee may impose conditions on the respondent's eligibility to apply for reinstatement, including setting a date for eligibility, and may impose conditions on the respondent's practice, under s. 39(8):

[39] (8) If the registration of the respondent is suspended or cancelled under subsection (2), the discipline committee may

- (a) impose conditions on the lifting of the suspension or the eligibility to apply for reinstatement of registration,
- (b) direct that the lifting of the suspension or the eligibility to apply for reinstatement of registration will occur on
 - (i) a date specified in the order, or

(ii) the date the discipline committee or the board determines that the respondent has complied with the conditions imposed under paragraph (a), and

(c) impose conditions on the respondent's practice of the designated health profession that apply after the lifting of the suspension or the reinstatement of registration.

4. As the process by which the date of this hearing was set is relevant to the penalty the Panel has set, the process occurred as follows.

5. Independent legal counsel for the Panel requested possible dates from each of the parties for May, June and July 2015 for an oral hearing, and any preference of the parties for a hearing in writing. By letter dated April 17, 2015, counsel for the College indicated she would be content to proceed by way of writing, but also provided dates in May, June and the first-half of July. By e-mail dated May 5, 2015, the Respondent advised he was available in "the last week of July," and also advised, "I believe my Lawyer is also free then." Accordingly, the Panel scheduled an oral hearing for July 30, 2015, and sent notice of the hearing date, place and time to the parties, including to the Respondent by way of electronic mail, courier, and registered mail. Under s. 54(1) of the Act, a notice sent by registered mail to a non-registrant's last known address (as the Respondent relinquished his registration effective August 13, 2014) is deemed received 7 days after the date on which it was mailed. Consequently no issue reasonably arises about the Respondent lacking notice of the hearing continuing on penalty and other issues on July 30, 2015.

6. The Respondent did not attend this hearing in person or through counsel. He also did not advise the Panel or the College he would not be attending, or that they could proceed in writing only.

2.0 Background

7. **Discipline Proceeding #1:** On August 19 and 20, 2013, this Panel held a hearing on verdict ("Hearing on Verdict #1") about matters relating to a complaint by a complainant (the "Complainant") for which the Panel made a decision on October 7, 2013 ("Decision on Verdict #1"). The Respondent committed professional misconduct, and contravened Standards of Conduct, a Consent Order dated May 9, 2010, and the Bylaws of the College. The Panel found that:

- a. On September 16, 2010, the Respondent failed to diagnose the presence of a cataract in the Complainant's left eye at the time of an eye examination, but the Panel did not find on the evidence that the Respondent failed to perform a complete or adequate eye examination.
- b. The Respondent failed to refer the Complainant to an appropriate Health Specialist, following the eye examination on September 16, 2010, as required under Part 6 of the Standards of Practice.

- c. The Respondent falsely altered Clinical Records relating to the September 16, 2010, eye examination, by adding and changing notations in the Complainant's Clinical Records, in an attempt to show that he had discussed with the Complainant the presence of a cataract in her left eye and hide his failure to make a referral to an appropriate Health Specialist. This was a breach of the Consent Order, Part 2 and 6 of the Standards of Practice and Bylaw sections 130 and 131.

8. In a further hearing (the "Hearing on Penalty #1"), for which the Panel issued its decision on April 28, 2014 (the "Decision on Penalty #1"), the Panel ordered as follows:

- a. a reprimand;
- b. a suspension of registration for three years;
- c. a condition of reinstatement or resuming practice that the Respondent complete courses on professional ethics and clinical record-keeping;
- d. a condition of reinstatement or resuming practice that the Respondent convert to an electronic record-keeping system;
- e. a condition of practice that the Respondent be supervised by a registered optometrist for at least three months, and that he cooperate with random chart audits for two years;
- f. that the Respondent reimburse the Complainant within 30 days; and
- g. a \$10,000 fine.

In making an order under s. 39(2) of the Act, the Act considered, among other things, the Respondent's significant disciplinary history (see paragraphs 11 and 12 of Decision on Penalty #1), and that the Respondent showed no remorse or insight into his actions (see paragraph 13 of Decision on Penalty #1).

9. **Interim injunction order by the court:** In May 2014, despite a suspension of his registration, the Respondent carried out eye examinations and failed to post a notice of suspension. On May 13, 2014, the College sought an interim injunction from the B.C. Supreme Court (the "Court") to enjoin the Respondent from practicing optometry. On May 27, 2014, the Respondent consented to an interim injunction order of the court. Yet as the Panel would eventually determine, the Respondent continued to practice.

10. **"Retirement" from the College:** While continuing to practice optometry despite being suspended, the Respondent resigned his registration with the College by advising the College in a letter dated July 16, 2014 that he was retiring. The Registrar cancelled the Respondent's registration effective August 13, 2014.

11. **A contempt hearing before Mr. Justice Myers:** On November 14, 2014, the College applied to the Court for a contempt, based on the Respondent contravening the

interim injunction order. On December 19, 2014, Mr. Justice Myers made findings of fact, including findings that the Respondent had engaged in activities contravening the interim injunction order.

12. **Discipline Proceeding #2:** On January 28, 2015, the Panel conducted a hearing to inquire into allegations that the Respondent engaged in professional misconduct including sexual misconduct, failed to comply with limits or conditions imposed under the Act, and failed to comply with various provisions of the Act, the *Optometrists Regulation* and the Bylaws relating to unauthorized practice (the "Hearing on Verdict #2"). The College also sought a ruling that the Respondent was "ungovernable".

13. The Hearing on Verdict #2 came to order at 9:00 a.m. The Respondent attended without counsel. The Respondent made some verbal statements, and presented the Panel with a written document listing thirteen discrepancies he felt occurred during the previous proceeding. He then departed at 9:30 a.m., and announced he was leaving to play golf.

14. On March 27, 2015, the Panel issued its Decision on Verdict ("Decision on Verdict #2"). The College established its case, partly through findings of Mr. Justice Myers, which the Panel accepted as binding the Respondent, and partly through the evidence of witnesses. The Panel determined as follows:

- a. The Respondent committed professional misconduct and contravened Bylaw 81(1)(a) by continuing to practice optometry after his suspension on four occasions.
- b. The Respondent committed professional misconduct by failing to reimburse a patient as ordered by the Discipline Committee.
- c. The Respondent committed professional misconduct by failing to pay a fine as imposed by the Discipline Committee, which fine was payable immediately.
- d. The Respondent contravened Bylaw 81(1)(b) holding himself out as an optometrist while suspended.
- e. The Respondent contravened Bylaw 81(1)(d) by making appointments for patients or prospective patients while suspended.
- f. The Respondent contravened Bylaw 81(1)(e) by contacting or communicating with patients while suspended.
- g. The Respondent contravened Bylaw 81(2)(b) by continuing to use his name at his place of business during a suspension, in relation to optometry services.

- h. The Respondent contravened Bylaw 81(2)(c) by failing to prominently display a Notice of Suspension while suspended.
- i. The Respondent contravened Bylaw 98(1) by failing to dispose of patient files containing personal information within a reasonable period of his ceasing practice when suspended on April 28, 2014.
- j. The Respondent committed professional misconduct, including sexual misconduct, by his conduct towards A.C.

15. The Panel decided to address “ungovernability” as a matter of penalty.

16. The Panel also declined to make determinations under s. 39(1) respecting the Respondent’s conduct after August 13, 2014, when the Registrar cancelled the Respondent’s registration. The Panel did, however, make findings of fact about the Respondent’s conduct as a non-registrant. Specifically, in Decision on Verdict #2, the Panel accepted findings by Mr. Justice Myers, and made other findings, about the Respondent engaging in the unauthorized practice of optometry: see paragraphs 78-79, 83, 87-91, 82 and 108 of Decision on Verdict #2.

17. Accordingly, as part of the Panel considering appropriate penalties for the objectionable conduct the Panel determined in Decision on Verdict #2, the Panel may assess ungovernability with a view to the Respondent’s disciplinary history, including Decision on Verdict #1 and Decision on Penalty #1, and the fact of the Respondent engaging in unauthorized practice after becoming a non-registrant at his own request.

3.0 Hearing process

18. Counsel for the College provided written submissions dated July 20, 2015, and made oral submissions to the Panel on penalty, costs and public notice.

19. The Respondent did not attend the penalty hearing or provide submissions.

4.0 Submissions of the College

20. After setting out purposes of sentencing and factors the Panel should consider, the College sought a ruling the Respondent is “ungovernable,” based on such factors as his discipline history, and his deliberately contravening the Panel’s order in Decision on Penalty #1.

21. The adjective “ungovernable” describes a person who is unable or unwilling to be governed. One test for ungovernability was set out in *Law Society of Upper Canada v. Shifman*, 2014 ONLSTA 21:

[25] We find it helpful to restate the principles to be considered in relation to ungovernability as a two-part analysis:

(1) Is the nature, duration and repetitive character of the licensee's present and past misconduct sufficiently serious that it suggests an unwillingness or inability to be governed by the Law Society, notwithstanding progressively increased penalties for repeated incidents of misconduct?

(2) If so, in light of all of the circumstances, is revocation appropriate? This involves balancing the nature of the misconduct and disciplinary history against mitigating factors including:

- a. any character evidence;
- b. the existence of remorse and a recognition and understanding of the seriousness of the misconduct;
- c. evidence that the licensee is willing to be governed by the Society;
- d. medical or other evidence that explains (although does not excuse) the misconduct;
- e. the likelihood of future misconduct, having regard to any treatment or other remedial efforts undertaken;
- f. the licensee's ongoing co-operation with the Society in addressing the outstanding matters that are the subject of the misconduct and other regulatory matters.

22. Factors relating to ungovernability were also set out by a discipline hearing panel of the Law Society of British Columbia in *Hall (Re)*, 2007 LSBC 26, [2007] L.S.D.D. No. 164:

[27] The foregoing cases suggest that the relevant factors upon which a finding of ungovernability might be made will include some or all of the following:

1. A consistent and repetitive failure to respond to the Law Society's inquiries.
2. An element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records.
3. Some element of misleading behaviour directed to a client and/or the Law Society.
4. A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours.

5. A discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances.
6. A history of breaches of undertaking without apparent regard for the consequences of such behaviour.
7. A record or history of practising law while under suspension.

28 It is the view of this Panel that it will not be necessary for Panels in the future to establish that all of these indicia of ungovernability are present in order to make such a finding. These indications, like the penalty guidelines found in the Law Society of *BC v. Ogilvie*, [1999] LSBC 17, will have a fact-specific impact in each separate case that is considered. It will be for the Benchers to determine the appropriate treatment of the indicia described herein, including their usefulness in the discipline process and the manner, if at all, that they will be applied. We do not foreclose the possibility that a finding of ungovernability can be made if all that was present was a repeated failure of the lawyer to respond to inquiries from the Law Society, if that failure is illustrative of a wanton disregard and disrespect of the lawyer for the regulatory processes that govern his or her conduct.

23. On the issue of ungovernability, the College submitted,
 - a. the Respondent had a lengthy discipline history prior to the Panel suspending the Respondent for three years for, among other things, his failing to refer a patient to an appropriate health specialist, and falsifying his clinical records;
 - b. the Respondent continued to practice optometry despite a suspension, which necessitated the College obtaining an interim injunction from the British Columbia Supreme Court in May 2014;
 - c. the Respondent continued to practice optometry despite a suspension and a court order;
 - d. the nature, duration and repetitiveness of the Respondent's conduct demonstrated an unwillingness or inability to be governed by the College, with no indication from the Respondent of remorse and no recognition or understanding by the Respondent of the seriousness of his conduct;
 - e. the Respondent purported to "retire" from the College in an attempt to get out from under its jurisdiction; and
 - f. the Respondent has failed to pay the fine and costs ordered against him in Decision on Penalty #1.

24. Additionally, the College submitted that the Respondent's sexual misconduct with a female patient, including sexual relations, supports a severe penalty even in the absence of other misconduct.

25. The College indicated the seriousness of sexual intercourse between health care professionals and patients by reference to Ontario law dictating automatic revocation of registration in cases of sexual abuse consisting of or including sexual intercourse under s. 51(5)(2.) of the *Health Professions Procedural Code*, which is Schedule 2 of the *Regulated Health Professions Act*, S.O. 1991, c. 18.

26. Ultimately the College sought the following sanctions under s. 39(2) of the Act:

- a. a reprimand;
- b. a determination that the Respondent is not eligible to reapply for registration for a period of at least five (5) years;
- c. the imposition of a condition that if the Respondent returns to practice following his period of ineligibility, he must practice with a chaperone present for female patients;
- d. a finding of ungovernability;
- e. the maximum fine of \$50,000;
- f. hearing costs in accordance with the College tariff [the College provided a draft bill of costs totalling \$15,879.26]; and
- g. an order that the Respondent be required to refund certain amounts that patients expended on eye exams and lenses, in accordance with s. 39(10) of the Act.

27. The College also sought that the Panel direct the Registrar to notify the public of any action taken, pursuant to s. 39.3 of the Act.

5.0 Reasons for decision

5.1 Penalty

28. As the Panel noted in Decision on Penalty #1 (at paragraph 30), the Discipline Committee may decide on an appropriate measure under HPA s. 39(2) with a view to a number of objectives, including the following:

- a. the need for specific deterrence of the respondent;
- b. education and general deterrence of other registrants who might otherwise offend;

- c. punishment as an expression of public denunciation; and
- d. the need to maintain the public's confidence in the capacity of the College to effectively regulate the conduct of its registrants.

29. As the Panel also noted in Decision on Penalty #1 (at paragraph 31), in deciding on an appropriate measure, the Discipline Committee may consider many factors bearing on penalty, including the following:

- a. the nature and gravity of the conduct proven;
- b. the age and experience of the respondent;
- c. the previous character of the respondent, including details of prior disciplinary proceedings;
- d. the impact upon the victim;
- e. the advantage gained, or to be gained, by the respondent;
- f. the number of times the offending conduct occurred;
- g. whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
- h. the possibility of remediating or rehabilitating the respondent;
- i. the impact on the respondent of criminal or other sanctions or penalties;
- j. the impact of the proposed penalty on the respondent;
- k. the need for specific and general deterrence;
- l. the need to ensure the public's confidence in the integrity of the profession; and
- m. the range of penalties in similar cases.

30. Additionally, or as an expression of these factors, the Panel may determine if the Respondent is unable or unwilling to be governed.

31. In Decision on Verdict #1, this Panel determined, as part of assessing the Respondent's credibility, that he was careless with or had a disregard for the truth (see Decision on Verdict #1 at paragraphs 117). The Panel based this finding on many factors, including the Respondent's evasiveness in his responses (at paragraph 86); his lying about his not receiving notice of a complaint or a request for his clinical records, despite proof of his signature on receipts (at paragraph 86); and his blaming all errors

on the complainant (at paragraph 89). The Respondent also fabricated a referral note (at paragraph 132), which he provided during an investigation (at paragraph 45), and he altered records to falsely show he discussed a cataract with a complainant (at paragraph 134).

32. The Respondent's attempts to deceive the Inquiry Committee, in addition to being factors that led to a three-year suspension, also serve as evidence in this proceeding of the Respondent's willingness to deceive the College, and his wanton disregard and disrespect for the College's regulatory processes.

33. As the Panel determined in Decision on Verdict #2, the Respondent essentially ignored his three-year suspension, as well as conditions for his resuming practice. He instead engaged in acts contrary to the Bylaws for an extended period, including his continuing to practice optometry, holding himself out as an optometrist, contacting or communicating with patients, continuing to use his name at his place of business, failing to prominently display a Notice of Suspension, and failing to dispose of patient files within a reasonable period of his ceasing practice when suspended.

34. The Respondent further failed to comply with other aspects of the Panel's order in Decision on Penalty #1, including an order that the Respondent reimburse a complainant, and an order that he pay a \$10,000 fine.

35. On June 16, 2014, the Respondent purported to retire from the College, and on August 13, 2014, the Registrar cancelled the Respondent's registration. The Respondent continued, however, to practice optometry. As the Panel noted in Decision on Verdict #2, Justice Myers found and the Panel accepted

- a. that as of August 13, 2014, the Respondent was advertising eye examinations and optometry services;
- b. that on September 2 and October 1, 2014, he was displaying "Optometrist" signage outside his office;
- c. that on October 1, 2014, the Respondent provided an eye examination to the patient; and
- d. that on October 9, 2014, the Respondent was advertising his services at "West Broadway Optometry".

While the Respondent's unauthorized practice after August 13, 2014 was technically not "professional misconduct", as he was no longer a registrant, his purported retirement and his post-cancellation conduct is further evidence of the Respondent's wanton disregard and disrespect for the College's role as the regulator of optometry in this province.

36. As the Panel determined in Decision on Verdict #2, the Respondent engaged, from March to June 2014, in a sexual relationship with a patient, A.C. The Respondent

committed professional misconduct and unprofessional conduct by failing to maintain professional boundaries, by engaged in behaviour of a sexual nature towards a patient – specifically by pressuring A.C. to give him a massage and telling her he wanted her to “make made, passionate love” to him – and by then engaging in a sexual relationship with A.C., despite her being a patient.

37. The Respondent has not shown any remorse for his behaviour, or any understanding that he did anything wrong.

38. Finally, the Respondent has shown significant disrespect for the College’s processes. For example, when Dr. Simpson, the Registrar of the College, attended at the Respondent’s clinic to address the Respondent continuing to practice despite a suspension, the Respondent said he would “ensure that the College was bankrupted” (as set out in Dr. Simpson’s affidavit of May 12, 2014); in Hearing on Verdict #1, the Respondent declined to admit he was even served with the citation (at paragraph 88); in an email dated September 25, 2014, the Respondent responded to a demand from Dr. Simpson that he turn over his patient records by writing, “Stop bothering me” (in Exhibit K to Dr. Simpson’s affidavit of November 4, 2014); in Hearing on Verdict #2, the Respondent attended only to assert errors in the previous proceeding, and then left to play golf; and before Hearing on Penalty #2, the Respondent delayed the proceeding by not responding to requests for dates, by requesting an oral hearing for the last week of July, and by his failing to tell anyone that neither he nor his legal counsel would be attending.

39. Given the Respondent’s conduct by his repeatedly defying a suspension, his failing to comply with other aspects of an order of the Discipline Committee, his “retiring” from the College only to further engage in unauthorized practice, and his disregard for the College’s regulatory processes, the Panel concludes the Respondent is unwilling to be governed by the College. The Panel finds the Respondent “ungovernable.”

40. In light of the Respondent’ most recent objectionable conduct, including his engaging in a sexual relationship with a patient, and the Panel’s conclusion that he is ungovernable, the Panel deems the following orders appropriate.

41. First, the Panel orders a reprimand, as the College has requested.

42. Second, had the Respondent still been a registrant, an order cancelling his registration would have been appropriate. However, given his registration is already cancelled, a further cancellation order is not available. In these circumstances, the Panel orders a fine in the maximum amount of \$50,000, payable forthwith.

43. Third, the College has requested that the Respondent be ineligible for reinstatement for at least five years, and that he be subject to a chaperone requirement upon any return to practice. Unfortunately, such an order does not appear available. While the term “Registrant” includes, for purposes of Part 3 of the Act, any former registrant, the power of the Discipline Committee under s. 39(8) – to limit the Respondent’s eligibility for reinstatement, to specify the date on which eligibility occurs, or to impose

conditions on the Respondent's practice after any reinstatement – appears limited by its wording to where registration “is suspended or cancelled under subsection (2)”. The College has not provided submissions about the Panel's jurisdiction to act under s. 39(8) where a respondent's registration is not suspended or cancelled under s. 39(2), but would have been had he not voluntarily relinquished his registration.

44. To avoid exceeding its jurisdiction, and without prejudice to any future orders the Discipline Committee may make after hearing full legal argument about its jurisdiction under s. 39(8) respecting registrants who have voluntarily relinquished their registration to avoid suspension or cancellation, the Panel does not make an order under s. 39(8). It does, however, expressly decide that if the Respondent had not voluntarily relinquished his registration, his conduct in the circumstances warranted cancellation of registration under s. 39(2)(e), as well as the following limits or conditions under s. 39(8):

- a. that the Respondent be ineligible to apply for reinstatement of registration for ten (10) years after the date of this order;
- b. that a pre-condition of the Respondent resuming practice be that he successfully complete a course on professional boundaries approved by the Registrar; and
- c. that a condition of the Respondent resuming practice be a chaperone approved by the Registrar for all female patients, for a period of not less than two years, until such time he provides a report, by a psychologist or psychiatrist approved by the Registrar, opining that the Respondent is a low-risk for sexual misconduct.

(the “Appropriate Reinstatement Conditions”)

Should the Respondent reapply for registration, this decision will be relevant to the Registration Committee's jurisdiction to act under s. 20(2.1) of the Act.

45. The Panel further orders that the Appropriate Reinstatement Conditions be entered onto the register, pursuant to s. 21(2)(g) and (5) of the Act:

[21] (2) The registrar must maintain a register setting out, for every person granted registration under this Act, the following:

...

(g) any additional information specified under subsection (5) by the registration committee, inquiry committee or discipline committee.

...

(5) Subject to subsection (6),

...

(b) the inquiry committee or discipline committee, in disposing of a matter under Part 3 respecting a person granted registration under this Act,

may specify information regarding the person that must be entered on the register referred to in subsection (2).

(6) Information required to be entered on the register in accordance with subsection (5) may be entered only after the final disposition of a matter when no further review or appeal is available under this Act.

The entry on the register will be relevant to any regulator, inside or outside of British Columbia, to which the Registrant may apply for registration.

46. Finally, the Panel has considered, as required under s. 39(10) of the Act, and has determined this matter is an appropriate case for the Respondent to refund certain amounts to patients for services: for E.L., \$118 for an eye exam; for A.C., \$49 for an eye exam and \$350 for glasses; and for C.A., \$469 for an eye exam and for glasses. However, as s. 39(10) does not appear to provide for a separate remedy, as the Panel is not acting under s. 39(8), and as the Panel is already ordering the maximum fine, the Panel directs that any monies the College receive from the Respondent against any outstanding fine amount first be applied to reimbursing the patients.

5.2 Costs

47. The College submitted a draft bill of costs setting out \$12,069 for tariff fees, and \$3,810.26 for disbursements, for a total of \$15,879.26.

48. Under s. 39(5) of the Act, the Panel awards costs of \$15,879.26 to the College, payable by the Respondent immediately.


5.3 Public notice

49. Under s. 39.3(1) of the Act, the Panel directs the Registrar to issue a public notice as set out in Schedule "A".

6.0 NOTICE

50. Under section 40(1) of the Act, a respondent or registrant aggrieved or adversely affected by an order of the Discipline Committee may appeal the order to the Supreme Court.

REASONS FOR DECISION of the Panel:

	SEIDNEY, BC	AUG 27, 2015
Name	Place	Date

Name	Place	Date

Name	Place	Date

SCHEDULE 'A'

PUBLICATION NOTICE UNDER S. 39.3 OF THE HEALTH PROFESSION ACT

DR. JERRY MACKENZIE, AUGUST 27, 2015

Penalty and Costs

On August 27, 2015, a panel of the Discipline Committee of the College of Optometrists of British Columbia released a decision on penalty.

The Discipline Committee decided that Dr. Mackenzie is “ungovernable” based on his repeated and wanton disregard and disrespect for the College’s regulatory process. The Discipline Committee based its finding of ungovernability on: (a) Dr. Mackenzie’s extensive discipline history with the College and the former Board of Examiners of Optometry; (b) Dr. Mackenzie’s disregard for the truth in an earlier discipline hearing by being evasive, lying about not receiving notice of a complaint despite proof of his signature on receipts, blaming all errors on the complainant patient and fabricating a referral note and altering records to falsely show that he discussed a cataract with the complainant when he had not; (c) Dr. Mackenzie’s attempts to deceive the Inquiry Committee during an investigation; (d) Dr. Mackenzie’s defiance in ignoring a three year suspension imposed in an earlier discipline committee penalty decision and his continued unauthorized practice which necessitated an application to BC Supreme Court for an injunction; (e) Dr. Mackenzie’s failure to dispose of patient files in accordance with the College bylaws following cancellation of his registration; (f) Dr. Mackenzie’s failure to comply with other aspects of the penalty decision including the failure to pay a \$10,000 fine and his failure to reimburse the complainant for her examination cost; (g) Dr. Mackenzie’s continuing disrespectful conduct towards the College post-cancellation of his registration; (h) Dr. Mackenzie’s failure to maintain professional boundaries by engaging in behaviour of a sexual nature towards another female patient by pressuring her into giving him a massage and engaging in a sexual relationship with her; and (i) Dr. Mackenzie’s failure to demonstrate any remorse or any understanding that he did anything wrong.

As Dr. Mackenzie voluntarily relinquished his registration with the College effective August 13, 2014 and his registration had already been cancelled, the Discipline Committee issued a reprimand, and a fine for the maximum amount of \$50,000 payable forthwith; awarded hearing costs to the College in the amount of \$15,879.26; and ordered that specific patients be reimbursed for expenses out of any fine proceeds.

The Discipline Committee decided against an order under s. 39(8) of the Act limiting eligibility for reinstatement, or setting conditions on practice after reinstatement, due to a possible lack of jurisdiction in the absence of an order under s. 39(2) suspending or cancelling registration, but decided that if Dr. Mackenzie had still been a registrant, it would have ordered that the Registrar cancel Dr. Mackenzie’s registration; that Dr. Mackenzie would not be eligible to apply for reinstatement of registration for ten years; that he not resume practice without completing a course on professional

boundaries approved by the registrar; and that a condition of his resuming practice be a chaperone approved by the Registrar for all female patients, for a period of not less than two years, and until such time he provides a report, by a psychologist or psychiatrist approved by the Registrar, opining he is a low-risk for sexual misconduct. The panel has decided on these notional measures and ordered them entered on the College's register under s. 21(2)(g) and (5) of the Act, as notice to the Registration Committee, and to any other regulator to which Dr. Mackenzie might apply for registration.

Verdict

On March 27, 2015, a Panel of the Discipline Committee found that Dr. Mackenzie contravened various provisions of the Bylaws, which conduct also constituted professional misconduct, under section 39(1) of the *Health Professions Act*. The Discipline Committee found that despite an order by the Discipline Committee released on April 28, 2014 which, among other things, suspended his registration for three years, Dr. Mackenzie continued to practice optometry on four occasions, failed to reimburse a patient as ordered by the Discipline Committee, failed to pay a fine imposed by the Discipline Committee, held himself out as an optometrist while suspended, made appointments for patients or prospective patients while suspended, contacted or communicated with patients while suspended, continued to his name at his place of business in relation to optometry services during a suspension, failed to prominently display a notice of suspension while suspended, failed to dispose of patient files containing personal information within a reasonable period of his ceasing practice while suspended, and committed sexual misconduct in relation to a female patient.