

Summary of Discipline Committee Hearing



DR. BLAINE KENNEDY

Hearing Dates: February 2, 16, 17, 23, 24; March 21; May 9, 10, 11; June 3, 17; July 11, 14, 2016

ALLEGATIONS OF PROFESSIONAL MISCONDUCT

- failed to pay costs to the College pursuant to a previous order of the College's Discipline Committee and orders of the Divisional Court and Ontario Court of Appeal
- practised veterinary medicine and held himself out as engaging in the practise of veterinary medicine while his licence was suspended
- failed to reply appropriately or within a reasonable time to a written inquiry received from the College
- an act or omission relevant to the practice of veterinary medicine that, having regards to the circumstances would be regarded by members as disgraceful, dishonourable or unprofessional
- conduct unbecoming a veterinarian

BRIEF SUMMARY

On August 7, 2008, a Discipline Panel found the member guilty of professional misconduct. The findings related primarily to the member's purchases of drugs from a person who was not authorized to sell the drugs, as well as the member's use of those drugs in his veterinary practice. The member's licence was suspended for two years and he was ordered to pay costs of \$25,000. The member unsuccessfully appealed the decision to the Divisional Court and sought leave to appeal the Divisional Court's decision to the Ontario Court of Appeal, both of which made further costs orders, resulting in total costs of \$44,000. The two-year suspension was in effect September 5, 2011 until September 4, 2013.

In October 2012, the College received information suggesting the member may have been practising veterinary medicine while suspended. This information was provided to the Ontario Provincial Police (OPP) and the Ontario Racing Commission (ORC) which were already looking into the member's behaviour. The OPP and the ORC investigated and charged the member with trafficking Schedule F drugs contrary to the federal *Food and Drugs Act*, and with the unauthorized practice of veterinary medicine under the *Veterinarians*

Act. Those charges were subsequently withdrawn, stayed or otherwise not pursued.

As part of the police investigation, certain drugs, equipment and documents were seized from the member, pursuant to search warrants, and apparently provided to the ORC. In addition, the police obtained text messages.

The Notice of Hearing was served, along with the College's Disclosure Briefs, on January 14, 2015. The Pre-hearing Conference was held and the Presiding Officer issued an order establishing a timetable for the filing of the motion materials. Those motion dates were later postponed due to the unavailability of the member's legal counsel.

The member brought a motion before a Panel of the Discipline Committee for an adjournment of this discipline hearing, pending resolution of his civil action against the ORC and to allow for the return of the materials which had been seized. The Panel dismissed the member's adjournment motion.

When the hearing began, the member again sought an adjournment to review new disclosure materials he had received from the College and to obtain and review the materials seized and/or detained by the OPP and ORC. The member also sought to exclude as inadmissible all evidence generated by the February 15, 2013 Production Order, on the basis that the evidence was obtained contrary to the guarantee against unreasonable search and seizure contained in section 8 of the Canadian Charter of Rights and Freedoms.

By the time of the member's February 2, 2016 motion, the return of the seized materials was expected to occur on February 10, 2016. Given those circumstances, the adjournment motion was resolved by the parties agreeing to briefly postpone the hearing until after the scheduled return of those materials. The Panel ordered, on consent, that the hearing be adjourned to future dates and deferred consideration of the Member's Charter motion to exclude the evidence obtained pursuant to the Production Order until the end of the hearing, to allow the Panel to hear all the evidence of both parties relevant to that issue.

Timeline Summary:

Aug. 7, 2008 - member found guilty of professional misconduct; suspended two years and ordered to pay costs of \$25,000. Member appealed decision to Divisional court.

Sept. 5, 2011 to Sept. 4, 2013 - member serves suspension.

Oct. 2012 - College was informed the member was practising while suspended and began investigation.

Feb. 15, 2013 - OPP/ORC investigation begins.

Jan. 14, 2015 - Notice of Hearing served.

Feb. 2 to July 14, 2016 - 13 days of hearings held.

Jan. 2017 - Decision issued. Member appealed decision to Divisional court.

June 5, 2018 - appeal heard at Divisional Court.

Evidence - OPP officers reported observing the member driving his truck to several equine training centres and also testified about the search of the member's truck, barn, house and office which revealed drugs, veterinary equipment and what appeared to be invoices for veterinary services on horses. The officers did not observe the member performing veterinary services on any horses. The panel also heard from several horse trainers who were questioned about the timing of services and invoices found by the OPP.

Charter Motion - The member suggested the text messages were obtained as a breach of his rights under section 8 of the Charter of Rights and Freedom which is the right to be free from unreasonable search and seizure. The Panel concluded the text messages were not obtained as a result of an unreasonable search and seizure but authorized under a Production Order.

Expert Evidence - Two expert witnesses offered their opinions regarding the practice of equine medicine and what activities constitute the practice of veterinary medicine in those circumstances. Both experts indicated that if the licensed member performed the alleged activities, he was practising veterinary

medicine. Their testimonies were based on text messages, handwritten invoices, and items identified, photographed and seized in the OPP/ORC search of the member's premises and truck.

Evidence Regarding Costs - The panel heard evidence concerning the non-payment of outstanding costs totalling \$45,194.

PLEA AND DECISION

The member denied the allegations as set out in the Notice of Hearing on February 16, 2016.

PENALTY

- Reprimand
- Revocation of the member's licence to practice
- The member will pay costs to the College of \$160,000.

PANEL'S REASONING

Failure to Pay Costs Orders

The Panel concluded there was no dispute about the amount of the costs orders in favour of the College, their enforceability, or that the member has failed or refused to honour them (with the exception of two payments totalling \$800.00). The Panel considered a previous similar case decided by the Discipline Committee of this College in which a member owed \$20,000 in costs to the College as a result of unsuccessful appeals and a Panel found that failing to pay all of the outstanding costs on a timely basis constituted professional misconduct.

The Panel felt the member's failure to pay the outstanding costs in this case on a timely basis similarly constitutes professional misconduct.

With respect to the evidence concerning the member's financial situation, the Panel will consider the issue of these financial/ personal circumstances at the penalty stage. The Panel is of the view that this evidence does not alter the finding of misconduct in the circumstances of the present case, although it may be relevant to the issue of the appropriate penalty order.

Practising Veterinary Medicine While Under Suspension

The member's license to practise veterinary medicine was suspended from September 5, 2011 until September 4, 2013. The Panel concluded the member practised veterinary medicine and held himself out as engaging in

the practice of veterinary medicine while his licence was suspended.

The invoices seized during the search of the member's truck and premises included invoices to a number of trainers or training centres that the member was observed visiting during the OPP's surveillance. The member testified the invoices were prepared to document his financial losses while suspended from his ORC accreditation, to be used to support a civil claim against the ORC. The Panel found the member's evidence on this point not to be credible. The earliest of these invoices are from 2011, whereas the member's ORC license was suspended for a number of years before that in 2005 and again in 2008. The majority of these invoices cover the time when the member was under suspension from the College. None of the trainers appearing testified that they reported the charges/invoices from other veterinarians to the member so he might document loss of income due to either an ORC or CVO suspension. One owner testified the member provided veterinary services to his horses throughout 2012 until changing trainers and that he paid the member in cash, at the member's specific request.

Naturzen/Equizen Sales

The Panel heard evidence from OPP officers concerning surveillance of the member during which time he was said to have visited various training centres. The member suggested he was visiting these training facilities to sell or deliver Naturzen/Equizen, a natural vitamin/food supplement for horses he was marketing. One owner testified that he had no recollection of Naturzen/Equizen. While there were a multitude of invoices for specific trainers and particular horses showing the provision of veterinary care and drugs, none of these invoices included charges for Naturzen/Equizen.

During the hearing, the member for the first time stated the "paid" notations on the invoices were payments for Naturzen/Equizen. There were no notations on any of the seized invoices or lists that mentioned Naturzen/Equizen.

The Panel examined several Naturzen documents. One document showed two cash payments amounting to \$190 for an invoice. A summary of charges and payments to one trainer show payments of \$90.00 and \$100.00 on the same dates as the supposed Naturzen summary. There are several other similar coincidences of this same type comparing the Naturzen summary and the Statement of Accounts from the member to a trainer.

The Panel concluded the Naturzen's documents were contrived to try and cover for bills that were for veterinary services provided while the member's licence was suspended.



Drug Purchases

The Panel received evidence of large drug purchases made in the name of the business operated by the member's spouse just prior to the member's suspension. These records showed purchases between August 22, 2011 and September 1, 2011 totalling \$12,684.24.

In the Panel's view, purchasing activity like this would suggest the member was stockpiling drugs with the plan to continue practising after his suspension, which was scheduled to begin on September 5, 2011.

Similar concerns arise when considering large quantities of controlled drugs prescribed from Walmart Pharmacy under the name of the business operated by the member's spouse, but with the veterinarian identified as the member. None of these prescriptions were for a particular patient and the vast majority were filled in a period from August 6, 2011 to September 13, 2011, shortly before and just following the beginning of his suspension. Once again, the Panel considered this to suggest the member was stockpiling product to be utilized after his suspension began on September 5, 2011.

The Panel was puzzled with such an apparent lack of concern about why a suspended member would handle drugs that are only available to licensed members, unless he was using them to practice.

The member testified that he "signed over" drugs from his practice to his spouse. However, an OPP officer testified that when executing the search warrants, the police never seized any items that the member's spouse identified as hers, and the member never contradicted this evidence.

A veterinarian is permitted to dispose of drugs by way of a prescription, a sale to another veterinarian or proper disposal of them, perhaps to a pharmacy or other appropriate facility. The member, having had previous experience with suspension due to an earlier suspension of his College licence should have known he could not "sign them over" to a non-

veterinarian. Further, the member may have been able to diagnose and treat horses owned by his spouse, but he could not be involved in practising on horses that were owned by others and were in her care for foaling or some other reason as part of her business.

The Panel's inference, given the information on drug purchases just prior to his suspension, is that the member either ordered or was responsible for ordering that medication, thus practising veterinary medicine while suspended.

Costs & Penalty

The member served two motions to the College at the beginning of the hearing regarding Order and Costs. The first motion sought a stay of proceedings due to a break of the laws of evidence and the Deemed Undertaking Rule. The second motion sought the reopening of the hearing process to hear fresh evidence. The Panel deliberated on and decided to dismiss both of the Member's motions.

The Panel concluded the College proved its case on the balance of probabilities. The evidence provided by the ORC/OPP investigation relating to the materials found at the member's home, barn, home office and truck would indicate he was indeed prepared to offer the services of someone licensed to practise veterinary medicine in Ontario.

Included in this material were the apparent invoices that matched almost exactly the summary of same, including what appeared to be cash payments, that were recorded in Statements of Accounts.

The Panel gave very little weight to the financial statements and tax returns provided by the member and found them to be of little assistance in determining his financial status.

The Panel looked at the following in determining whether the member was ungovernable, for purposes of assessing the appropriate penalty:

- a. the nature, duration and repetitive character of the misconduct;
- b. any prior history;

The Panel considered the member has been in continual conflict with the ORC and the CVO since 1996, with the nature of his professional misconduct continually escalating. The member's current misconduct of practising while his licence was suspended is evidence of his lack of recognition of the responsibility

he must carry, when allowed the privilege of working in the public's best interest through veterinary medicine and licensure. His actions seem to follow the path of his previous misconduct in believing he can do whatever is in his own best interests.

c. any character evidence;

The Panel reviewed the three letters of character reference, but concluded they should be given little if any weight in this matter. There was nothing in the letters to suggest the individuals who provided them had any understanding or real knowledge of the member's behaviour. The letters appeared to be written in a manner that would be more relevant to someone applying for a position rather than attesting to a member's character in a professional discipline proceeding, in circumstances where findings of misconduct have been made.

d. the existence or lack of remorse. Remorse includes a recognition and understanding of the seriousness of the misconduct;

The Panel found little, if any, evidence of remorse either in this hearing or in the previous hearing regarding the misconduct allegations. The Panel felt that the decisions made by the member during his suspension would lead one to believe he has little recognition or understanding of the seriousness of his misconduct.

e. the degree of willingness to be governed by the College;

Once again, the Panel found no real evidence in this matter of willingness for this member to be governed by the College given the lengthy history of misconduct.

f. the likelihood of future misconduct having regard to any treatment being undertaken or other remedial efforts;

g. the member's ongoing cooperation with the College in addressing the outstanding matters that are subject of the misconduct.

The Panel had major concerns over what appears to be, not only a lack of cooperation, but an ongoing attempt to avoid taking responsibility for his actions in these matters. While it is true the member paid his annual renewal fee and has participated in these discipline proceedings, it is the opinion of the Panel that the member never made any serious attempt to modify or correct his behaviour that would avoid continual conflict with the College and their mandate to protect the public. It

appears that in every case, his response is to justify his actions regardless of their consequences to his clients, patients and the public.

Given the continuing unprofessional behaviour of this individual, the Panel considers this member to be currently ungovernable.

The Panel is of the view that in light of the member's ungovernability, coupled with the serious nature of the misconduct, revocation is the appropriate penalty.

Revocation of the member's licence serves the purpose of specific deterrence in the case of the member, and is also aimed at deterring other members from engaging in this type of serious misconduct.

In this particular case, there are numerous aggravating factors, including: the lengthy history of the member's previous misconduct, the fact that he is not a junior/inexperienced member of the profession and the evidence indicating that he continued to practise without a licence for personal gain and then attempted to evade the consequences of doing so.

The member's misconduct in this matter was very likely to have occurred over a long period of time and involved a number of patients/clients. The conduct was planned/deliberate, with efforts to cover up the misconduct, such as the manner of acquiring drugs that are only allowed to licensed members of the veterinary profession.

Mitigating factors considered by the Panel in this case include the member's admission that he had not paid costs.

Reasons for Costs Decision

Under the Veterinarian's Act, the Discipline Committee may, in an appropriate case, make an order requiring a member who is found guilty of professional misconduct to pay all or part of the following costs and expenses: the College's legal costs and expenses, the College's expense in investigating this matter and the College's costs and expenses incurred during the hearing.

As part of the deliberations, the Panel was tasked with determining whether or not this was an appropriate case for costs and, if it was, the proper quantum of costs. To be considered were the nature of findings of





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professional misconduct against the Member, the relative success of the College in its proof of the allegations against the Member, the conduct of the defence, the length of the hearing and any failure by the Member to comply with College requirements.

The College successfully established that, among other matters, the Member practised veterinary medicine without a licence during the time of his suspension. The serious nature of this finding cannot be overstated as it strikes at the core principles of self-regulation and governability. The allegation that the member failed to pay various costs awarded amounting to \$44,000 resulting from previous matters before the College were proven and the Panel found that this constituted professional misconduct as well.

During the costs phase of the hearing, College counsel asserted that awarding two-thirds of the total costs falls within the range of costs awarded in other professional discipline cases and upheld on appeal by the Divisional Court. The College's legal costs and expenses on this matter totaled \$261,504.55, not including the additional costs associated with the penalty hearing.

In conclusion, the Panel determined that this is an appropriate case in which to award costs against the Member, in favour of the College, fixed at \$160,000, with payments to be made over a period of no more than two years. In the Panel's view, this costs award is justified based on the serious nature of findings of professional misconduct against the Member, the relative success of the College in proving the allegations against the Member, the length of the hearing and the costs awards made by other Discipline Committee panels (and upheld by the courts) in comparable discipline hearings.

Appeal to Divisional Court

The member appealed the decision of the Discipline Committee. The appeal was heard by the Superior Court of Justice Divisional Court on June 5, 2018. The Court dismissed the appeal.

The Court awarded the College \$20,000 related to the costs of the appeal.