

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF EARLY CHILDHOOD EDUCATORS**

Citation: College of Early Childhood Educators vs. Sophia McKenzie
2017 ONCECE 9
Date: 2017-11-01

IN THE MATTER OF the *Early Childhood Educators Act, 2007*, S.O. 2007, c. 7, Sched. 8 (the
“ECE Act”) and the Regulation (Ontario Regulation 223/08) thereunder;

AND IN THE MATTER OF discipline proceedings against SOPHIA MCKENZIE, a current
member of the College of Early Childhood Educators.

Panel: Nici Cole, RECE – Chair
Larry O’Connor
Diane Laframboise, RECE

BETWEEN:)	
COLLEGE OF EARLY CHILDHOOD	)	Lara Kinkartz,
EDUCATORS	)	WeirFoulds LLP,
	)	for the College of Early Childhood Educators
- and -)	
)	
SOPHIA MCKENZIE	)	Christopher Horkins,
REGISTRATION # 15780	)	Cassels Brock & Blackwell LLP,
	)	for the Member
)	
)	
	)	Elyse Sunshine,
	)	Rosen Sunshine LLP,
	)	Independent Legal Counsel
)	
	)	Heard: August 9-10, 2017

DECISION AND REASONS ON CONSTITUTIONAL MOTION

and

PENALTY DECISION AND REASONS

By decision dated May 29, 2017, following a contested hearing held on November 7-10 and 22, 2016, a Panel of the Discipline Committee found that the Member, Sophia McKenzie (the “Member” or “Ms. McKenzie”) was guilty of acts of professional misconduct in that she:

- a) failed to supervise adequately a person who was under her professional supervision, contrary to s. 2(2) of Ontario Regulation 223/08 (the “Regulation”);
- b) failed to maintain the standards of the profession, contrary to s. 2(8) of the Regulation;
- c) acted or failed to act in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to the s. 2(10) of the Regulation;
- d) failed to comply with the Act, the regulations or by-laws, contrary to s 2(19) of the Regulation;
- e) contravened a law, which contravention caused a child or children under her professional supervision to be put at or remain at risk, contrary to s. 2(21) of the Regulation;
- f) failed to maintain a safe and healthy learning environment, contrary to s. 2(8) of the Regulation and Standard III.A.1 of the College’s Code of Ethics and Standards of Practice (the “Standards of Practice”);
- g) failed to know, understand and abide by the legislation, policies and procedures that are relevant to her professional practice and to the care and learning of children under her professional supervision, contrary to s. 2(8) of the Regulation and Standard IV. A. 2 of the Standards of Practice;
- h) failed to abide by her obligation to comply with the College’s Code of Ethics and the Standard of Practice in the event of a conflict between the College’s Code of Ethics and Standard of Practice and her work environment and/or the Policies and Procedures of her employer contrary to s. 2(8) of the Regulation and Standard IV.A.3 of the Standards of Practice;
- i) failed to observe and monitor the learning environment and anticipate when support or intervention was required, contrary to s. 2(8) of the Regulation and Standard IV.B.3 of the Standards of Practice;
- j) failed to work collaboratively with colleagues in the workplace in order to provide a safe, secure, healthy and inviting environment for children and families,

contrary to s. 2(8) of the Regulation and Standard IV.C.1 of the Standards of Practice;

- k) conducted herself in a manner that is unbecoming a member, contrary to s. 2(22) of the Regulation; and
- l) conducted herself in a manner that could reasonably be perceived as reflecting negatively on the profession of early childhood education contrary to s. 2(8) of the Regulation 223/08 and Standard IV.E.2 of the Standards of Practice.

On August 9 and 10, 2017, the Panel heard evidence and submissions on penalty and costs. The Member also brought a constitutional challenge regarding section 33(5).4 of the *Early Childhood Educators Act, 2007* (the “Act”), as well as Rules 16.03 and 16.05(3) and Tariff A of the Rules of Procedure of the Discipline Committee of the College of Early Childhood Educators (the “Rules”). The Panel reserved its decisions on penalty and on the constitutional challenge.

CONSTITUTIONAL CHALLENGE

In advance of the hearing and the penalty hearing, the College made several offers to the Member to settle the matter. As was her right, Ms. McKenzie decided to proceed to a contested hearing and penalty hearing. The College informed the Member that it would therefore be seeking costs in the amount of \$58,625.32 (44% of the actual costs it incurred).

At the outset of the penalty hearing, the Member brought a motion arguing that section 33(5).4 of the Act (s. 33(5).4” or section 33(5).4”), which grants the Discipline Committee the discretion to award costs against a member found guilty of professional misconduct, is an unconstitutional infringement of section 96 of the *Constitution Act, 1867* (“section 96” or “s. 96”) and of the unwritten constitutional principle of the rule of law. The Member also challenged the constitutionality of the Rules that allow the College to seek \$10,000 per day in costs without evidence that those costs were incurred.

Jurisdiction

The Panel accepts that, as is the case with other administrative tribunals, it has the authority and duty to decide questions of law, including constitutional issues.

Position of the Member on the Constitutional Challenge

In response to the request for costs, Ms. McKenzie argued that the provision of the Act that grants the Discipline Committee the discretion to award costs against a member found guilty of professional misconduct, is an unconstitutional infringement of s. 96 and the unwritten constitutional principle of the rule of law. She also challenged the constitutionality of the Rules that allow the College to seek \$10,000 per day in costs without evidence that those costs were incurred.

In this regard, the Member sought to challenge the constitutionality of section 33(5).4, which states:

If the Discipline Committee finds a member guilty of professional misconduct, it may, in addition to exercising its powers under subsection (4), make an order doing one or more of the following:

4. Fixing costs to be paid by the member.

The Member also sought to challenge Rules 16.03 and 16.05(3) and Tariff A of the Rules. These Rules state:

Rule 16.03 Costs Against the Member

Where the College seeks costs against the member pursuant to subsection 33(5) of the Act, the Discipline Committee may direct that the issue be dealt with by a motion conducted separately from the hearing under rule 5 with any necessary modifications

Rule 16.05 Procedure for Requesting Costs

16.05(3) Where the request for costs includes the cost or expense to the College of conducting a day of hearing, no evidence of the cost or expense of a day of hearing is

needed if the request is equal to or less than the amount set out in Tariff A. This subrule applies only to hearings before the Discipline Committee.

TARIFF A

COSTS AND EXPENSES FOR THE COLLEGE TO CONDUCT A DAY OF HEARING

Fee of College counsel, fee of independent legal counsel and fee of court reporter.	\$10,000
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The Member's position was that the Discipline Committee's unfettered jurisdiction, pursuant to section 33(5).4 and Rules 16.03 and 16.05(3) and Tariff A of the Rules (collectively, the "Provisions"), to make substantial costs awards against a member found guilty of professional misconduct, regardless of the member's financial circumstances and ability to pay, prevents access to justice in a manner that is inconsistent with section 96 and the underlying constitutional principle of the rule of law. The Member argued that the Provisions fall outside of the Province's jurisdiction under sections 92(13) and (14) of the *Constitution Act, 1867* (the "Constitution Act") regarding the administration of justice and regulation of professions by, in effect, denying access to justice to many members of the College who would be unable to pay a substantial costs award of the magnitude sought by the College.

The Member relied on the case of *Trial Lawyers' Assn. of British Columbia v. British Columbia*,¹ a decision where the Supreme Court of Canada considered the constitutionality of mandatory hearing fees that were being imposed before a litigant could come to court. The Member argued that like the hearing fees in *Trial Lawyers'*, the costs being sought by the College impeded access to justice because, for example, they would deter members of the College from defending themselves due to the prospect of a substantial adverse costs award.

Position of the College on the Constitutional Challenge

The position of the College was that the Provisions are constitutional and do not impede access to justice. The College argued that section 96 does not apply to tribunals such as the Discipline Committee and does not protect "access to justice" in tribunals like the Discipline Committee; it protects access to justice in (and the core jurisdiction of) the superior courts. The College

¹ 2014 SCC 59 [2014] 3 SCR 31

argued that the *Trial Lawyers'* case was distinguishable for a number of reasons, including that discretionary cost awards are fundamentally different than hearing fees that govern access to a court. The College submitted that the Panel's broad discretion to order costs does not prevent access to justice in Discipline Committee proceedings, and indeed, it did not prevent the Member from having a hearing. She had a full contested hearing and free legal representation throughout. The College further submitted that the ability of a regulator to seek costs is an important aspect of professional discipline. The College also argued that the costs being sought were reasonable in the circumstances.

Position of the Attorney General on the Constitutional Challenge

The Attorney General of Ontario (the "AG") intervened in this matter to argue that the Provisions were constitutional. The AG submitted that virtually all self-regulating professions' discipline committees have the discretion to award costs against a member found guilty of professional misconduct. Those found guilty of violating a profession's norms should bear a reasonable portion of the costs of discipline, rather than leaving the entire cost to fall on the shoulders of non-offending members whose membership fees fund self-regulation. The AG argued that the discretion granted to the Discipline Committee, allows it to fashion a penalty order, including a costs order, which is just in all the circumstances of an individual member's misconduct. The AG further submitted that members have the opportunity to bring their financial circumstances to the Discipline Committee's attention and, should it make an order which a member believes impedes their access to justice, they may challenge that order on a statutory appeal to the Divisional Court. Because the Discipline Committee can consider access to justice concerns when crafting its orders and the courts on appeal may consider the constitutionality of any particular order, the AG submitted that the Provisions, which grant the Discipline Committee a general discretion to award costs, are constitutional.

Decision on Constitutional Challenge

The Panel finds that the Member's constitutional rights were not violated by application of the Provisions.

Reasons for Decision on Constitutional Challenge

Once a panel of the Discipline Committee finds a member guilty of professional misconduct, section 33(5).4 permits the Discipline Committee to fix costs to be paid by the member. Similar costs provisions exist in the governing legislation of virtually every self-regulated profession in Ontario and in the legislation of numerous regulated professions throughout Canada.

The Supreme Court has repeatedly held that where a statute confers a broad discretion, the fact that the discretion could be exercised improperly does not mean that the statute itself is unconstitutional. The Panel accepts that it is the exercise of that discretion that could or should be challenged, and not the legislation itself. There is nothing in the Act that restricts our discretion to determine whether costs are appropriate and, if so, what the appropriate amount of costs should be. As such, we do not accept that the argument that the Provisions are unconstitutional.

Further, the Rules similarly do not restrict our discretion. The Rules simply permit the College to seek costs of up to \$10,000 for each day of a hearing without having to go through the effort of calling evidence of the actual costs incurred. As such, this is an evidentiary provision. We still retain the discretion to determine whether to order the member to pay none, some, or all of the costs that the College has claimed.

Given the broad discretion granted to the Discipline Committee to determine whether and how costs should be awarded and the fact that neither the Act or the Rules requires any particular outcome, we find no basis upon which to find the Provisions to be unconstitutional.

Further, the Panel accepted the arguments made by the College and the Attorney General that the Supreme Court of Canada decision of *Trial Lawyers'*, relied on by the Member, and the accompanying principles from that case, are distinguishable from this matter and that section 96 does not apply to administrative tribunals, such as this Discipline Panel.

The *Trial Lawyers'* decision dealt with the issue of whether provinces could impose mandatory hearing fees on litigants in the superior courts, despite that some litigants could not afford them. The Supreme Court of Canada ultimately held that provinces could impose such hearing fees, but had to have an exemption that allowed judges to waive the fees for people who could not afford them.

We find it important that the Supreme Court did not ban hearing fees outright but required the expansion of the grounds on which the court could grant a discretionary exemption to litigants who could not afford them. However, we also accept that these mandatory hearing fees, which had to be paid before a litigant could even come to court, are distinct from a discretionary award of costs against an unsuccessful party (which is the norm in professional discipline proceedings, as well as in civil litigation).

In addition, the *Trial Lawyers'* case was decided under section 96. As indicated, section 96 provides that the federal Governor General shall appoint the judges of the provincial superior, district, and county courts. Section 96 has been interpreted to give constitutional protection to the "core jurisdiction" of the provincial superior courts. Parliament and the provincial legislatures can create inferior courts and administrative tribunals but, in doing so, cannot remove the core jurisdiction of the superior courts. Part of the superior courts' core jurisdiction is to have full control over its own process. However, we accept that proceedings before the Discipline Committee are not subject to the same constitutional protections as proceedings in the superior courts. As s. 96 only applies to the "superior, district, and county courts," with their constitutionally protected jurisdiction, we accept that it has no application to an administrative tribunal, like a Discipline Committee.

It was also noted that under s. 92(14) of the Constitution Act, the provincial governments have exclusive power over the administration of justice, which includes the constitution, maintenance, and organization of provincial courts as well as the procedure used in civil courts. The provinces can exercise their authority over those matters, provided that they do so in a way that does not infringe the core jurisdiction of superior courts under section 96.

Section 92(13) of the Constitution Act gives the provinces jurisdiction over "property and civil rights". We accept that this has been interpreted to include regulating the professions (including the various health professions, the legal profession and, by analogy, the profession of early childhood education). The Ontario government has power to enact laws like the Act, which establish professional regulatory bodies and give them authority to regulate the various professions and including the discretion to order costs in a professional discipline matter.

The Act grants us significant discretion to craft a fair and reasonable costs order, taking into account all of the relevant circumstances. Therefore, we find that the concerns raised by the

Supreme Court in *Trial Lawyers'*, about mandatory hearing fees precluding access to the constitutionally-protected s. 96 courts, do not arise here.

The Member also argued that the costs provisions of the Act are unconstitutional in that they infringe on her constitutional right of access to justice because of the possibility that we may order a large costs award. However, there is no free-standing constitutional guarantee of "access to justice." As discussed above, s. 96 only protects and guarantees the jurisdiction of (and access to) the superior courts. The Discipline Committee of this College (and, in fact, any tribunal created under provincial legislation) is not a superior court and is not protected by section 96. Section 96 does not protect "access to justice" in tribunals like the Discipline Committee; it protects access to justice in (and the core jurisdiction of) the superior courts. Our broad discretion to order costs does not prevent access to justice in Discipline Committee proceedings. It did not prevent the Member from having a hearing. Indeed, she had a full contested hearing and legal representation throughout.

Further, section 7 of the *Charter* is not engaged in professional discipline proceedings as there is no constitutional right to practice a profession (*Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1 (CA)).

Although the Panel accepts that "access to justice" is an aspect of the unwritten constitutional principle of the rule of law, unwritten constitutional principles can only be used as an aid in interpreting the text of the written constitution or ambiguous statutes. They cannot be used to strike down a clear, unambiguous statutory provision like the cost provisions of the Act.

As we have found that the Member's constitutional rights have not been infringed by the existence of the costs provisions of the Act and the Rules, we will consider the College's request for a costs order on its merits and will determine the appropriate amount, if any, and will address these considerations in our penalty decision below.

PENALTY AND COSTS DECISION

Evidence and Submissions on Penalty and Costs

In arriving at its decision on penalty and costs, the Panel considered the evidence filed by the parties, as well as submissions from counsel for the College and counsel for the Member.

The Panel also took into account its findings in its Decision and Reasons for Decision in this matter dated May 29, 2017. On May 29, 2017, we found Ms. McKenzie, guilty of a number of counts of professional misconduct arising from an incident where a number of toddlers escaped from a playground.

The College noted that the Member was, at the time of the penalty hearing, suspended from the College for non-payment of her annual dues. The College proposed a penalty consisting of an in person reprimand, a five (5) month suspension of the Member's certificate of registration (to take effect if and when she becomes registered with the College again) and an order requiring the Member to complete an educational course in professional supervision at her own expense before she returns to practice. The College also sought an order requiring the Member to pay costs to the College in the amount of \$58,625.33 (which amounted to 44% of the College's actual costs).

The College submitted that the proposed penalty was appropriate and took into account relevant factors including: the Member's individual circumstances, the nature of the misconduct, the need to rehabilitate the Member and the need to deter other members from engaging in similar misconduct. The College also submitted that the Panel should also be guided by the need to maintain the public's confidence in the College and to ensure the public knows that there are meaningful consequences for Registered Early Childhood Educators (RECEs) whose actions put toddlers at "serious risk." The College further submitted that the proposed penalty should be considered in light of the penalties imposed by the Discipline Committee in other similar cases. However, the Panel is also entitled to consider whether the misconduct at issue reflects a persistent or growing problem in the profession that requires a significant sanction to deter other members of the profession from engaging in similar conduct. The College argued that the amount of costs sought, which amounts to 44% of the College's actual costs, was warranted for a number of reasons, including that it was unfair to expect the membership to bear the costs of discipline hearings for members found guilty of misconduct.

Counsel for the Member did not dispute that an appropriate penalty would include a reprimand, but argued that the proposed course was not warranted because the Member had already taken

a course as required by the Ministry of Education. He further submitted that a suspension of the Member's certificate of registration should be less than the five (5) months proposed (i.e. in the zero (0) to three (3) month range). Counsel also submitted that if costs were to be awarded, the costs being sought by the College were excessive and they should be significantly reduced from the amounts being claimed. Counsel for the Member further argued that the Member's financial circumstances, as an out of work single mother, would suggest that costs should not be awarded, but if they were awarded, they should take into account the Member's financial circumstances and be reasonable and minimal.

Decision on Penalty and Costs

This Panel has jurisdiction to impose a penalty and to order costs, pursuant to s.18(3) of the Act, despite the fact that the Member has stopped paying her membership fees and is administratively suspended until she does so.

For the reasons that follow, the Panel orders that:

1. The Member is required to appear in person to be reprimanded by the Discipline Panel as outlined in s. 33.5(1) of the Act.
2. The Registrar is to impose a term and conditions or limitation on the Member's certificate of registration, requiring her to successfully complete an educational course in Professional Supervision that has been pre-approved by the College, at her own expenses, before she may return to practice.
3. The Registrar is directed to suspend the Member's Certificate of Registration, for five (5) months, which suspension would commence following the Member's reinstatement to the College of Early Childhood Educators as a member in good standing pursuant to section 33.4(2) of the Act.
4. The Member is required to pay costs to the College in the amount of \$33,333 (which amounts to 2/3 of the College's Tariff costs based on five hearing days at a rate of \$10,000 per day), under s. 33(5).4 of the Act as well the Rules of 16.05

(3). The College is to work with the Member to devise an appropriate payment plan that takes into consideration the Member's financial situation.

In accordance with the Act and the College's by-laws, the results of this hearing will be recorded on the College's Public Register. The Discipline Panel's Decision and Order is required to be published in full, including the Member's name, on the College's website and in summary in the College's publication, *Connexions*.

Reasons for Decision on Penalty and Costs

The principles which guide the imposition of a penalty in disciplinary proceedings are well established. The Panel is aware that protection of the public is the paramount consideration. Other considerations include: maintenance of public confidence in the integrity of the profession and in the College's ability to govern the profession in the public interest, specific deterrence as it applies to the Member, general deterrence as it applies to the membership as a whole, and, where appropriate, rehabilitation of the Member. The Panel must weigh these principles in light of the specific facts and circumstances of the case, including both aggravating and mitigating factors, in order to arrive at a penalty which is just and appropriate. The penalty should also be proportionate to the findings of misconduct committed, and should be reasonably consistent with previous disciplinary decisions in similar cases.

The Panel concluded that the proposed penalty is fair and serves to protect the public interest. The reprimand delivered publicly, by the Member's peers, acts as a specific deterrent to the Member and gives the Panel members an opportunity to express their distress over the Member's unprofessional behaviour.

The term, condition or limitation placed on the Member's Certificate of Registration also protects the public interest by requiring the Member to take steps to improve her practice. A course of study in "Professional Supervision in Early Learning and Care" will reinforce the importance of being vigilant while supervising children and will facilitate the Member's rehabilitation as an early childhood educator.

A five (5) month suspension of the Member's certificate of registration is also warranted. This is an appropriate suspension in light of the fact that children were left unsupervised, left the Centre

and their lives were put at severe risk. While the College did provide us with a line of cases where children had wandered off while in the care of an RECE, we also decided this case on its own unique factors. Some of the factors that were relevant to our determination of penalty in this case included:

- a) Ms. McKenzie knew that the playground gate was faulty and as the RECE responsible for the care and supervision of the children, she therefore was required to take steps to "doubly ensure" the children's safety.
- b) Ms. McKenzie's supervisory failure was of an extremely serious nature, in that this Panel found that she was not positioned where she was supposed to be at the time of the incident when several children left the playground.
- c) Ms. McKenzie's unprofessional conduct allowed three unsupervised toddlers to make their way to a busy four lane road then nearly caused a two-year old child to be hit by cars when he ran across the road during rush hour traffic.
- d) This Panel found that Ms. McKenzie's testimony about where she was positioned in the playground at the time of the incident was not credible, plausible or possible.

The Panel has recognized that it has an obligation to its members to obtain costs from members who are found guilty of professional misconduct. The Member was informed well in advance of the hearing, and had it reiterated repeated, that the costs sought by the College would be higher after a contested hearing if the Member was found guilty.

The award of costs is not a punishment to the Member. However, it is unfair to have the dues of all members of the College pay for the cost of a hearing when a member is found to be guilty of professional misconduct. While it was her right to do so, the Member contested all allegations and this resulted in significant hearing expenses for the College. The Member, however, has not incurred any expenses in defending herself because she was provided with a pro bono lawyer through the College's Legal Assistance Program. The Member knew of the potential costs exposure and nonetheless chose to proceed with a lengthy and expensive contested hearing, a hearing that was paid for entirely by the rest of the College's members. The Member has also since stopped paying her membership fees and as a result, she no longer contributes to the funds that the College uses to pay for these hearings. Therefore, the Panel feels it is important for the Member to be assigned a portion of the hearing costs.

The Panel has determined that the Member should be required to pay costs in the amount of \$33,333. This amount is approximately the equivalent of 2/3 of the Tariff of the College of Early Childhood Educators of \$10,000 a day for this five day hearing, which is an amount the Panel considers fair and reasonable. In arriving at this figure and in reducing the costs award from that sought by the College, the Panel has taken into consideration the financial situation of the Member as presented.

The Panel also recognises that RECE's generally do not have incomes as great as those of some other regulated professionals. As such, the Panel finds that the Tariff is an appropriate guideline and is of great assistance in the determination of an appropriate costs award because it is transparent (i.e. members know in advance what the potential costs will be) and reflective of the principle that cost awards are not a punishment but are simply a means by which the College can recoup some of the costs incurred in these expensive discipline proceedings.

While the Panel reviewed and considered other cases where cost orders were imposed on other members, the Panel decided this case on the facts and evidence before it.

Finally, publication of the Panel's findings and order with the Member's name promotes transparency and acts as both a specific deterrent to the Member and a general deterrent to members of the College.

In conclusion, the Panel is confident that the penalty serves the interest of the public and the profession.

Dated: November 1, 2017



Nici Cole, RECE
Chair, Discipline Panel