

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

Citation: College of Early Childhood Educators vs Sophia McKenzie,  
2017 ONCECE 5  
Date: 2017-05-29

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: November 7-11, 2016

## **REASONS FOR DECISION, DECISION AND ORDER(S)**

### **INTRODUCTION**

1. A panel of the Discipline Committee (the “Committee”) of the College of Early Childhood Educators (the “College”) heard this matter at Toronto on November 7, 8, 9, 10 and 11, 2016.
2. A Notice of Hearing, dated February 19, 2016 (Exhibit 1), was served on Sophia McKenzie (“Ms. McKenzie” or the “Member”).
3. Counsel for the College also submitted a Registrar’s Certificate, signed on October 20, 2016 by Beth Deazeley, Registrar and CEO of the College, outlining the Member’s registration status and history with the College. At the time the Registrar’s Certificate was signed, the Member’s certificate of registration was in good standing.

### **THE ALLEGATIONS**

4. The Notice of Hearing alleged that the Member is guilty of professional misconduct as defined in subsection 33(2) of the ECE Act, in that:
  - 1) she failed to supervise adequately a person who was under her professional supervision, contrary to Ontario Regulation 223/08, subsection 2(2);
  - 2) she failed to maintain the standards of the profession, contrary to Ontario Regulation 223/08, subsection 2(8);
  - 3) she 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 Ontario Regulation 223/08, subsection 2(10);

- 4) she failed to comply with the ECE Act and the professional misconduct regulation made under the Act (being Ontario Regulation 223/08), contrary to Ontario Regulation 223/08, subsection 2(19);
- 5) she contravened a law, which contravention caused a child or children under her professional supervision to be put at or remain at risk, contrary to Ontario regulations 223/08, subsection 2(21);
- 6) she failed to maintain a safe and healthy learning environment, contrary to Ontario Regulation 223/08, subsection 2(8), and Standard III.A.1 of the College's *Code of Ethics and Standards of Practice* (the "Standards of Practice");
- 7) she 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 Ontario regulation 223/08 subsection 2(8) and Standard IV. A. 2 of the College Standards of Practice;
- 8) she failed to abide by her obligation to comply with the College's Code of Ethics and 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 Ontario Regulations 223/08, subsection 2(8) and Standard IV.A.3 of the College's Standard of Practice;
- 9) she failed to observe and monitor the learning environment and anticipate when support or intervention was required, contrary to Ontario Regulation 223/08, subsection 2(8) and Standard IV.B.3 of the College's Standards of Practice;

- 10) she 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 Ontario Regulation 223/08, subsection 2(8) and Standard IV.C.1 of the College's Standards of Practice;
- 11) she conducted herself in a manner that is unbecoming a member, contrary to the Ontario Regulation 223/08, subsection 2(22); and
- 12) she conducted herself in a manner that could reasonably be perceived as reflecting negatively on the profession of early childhood education contrary to Ontario Regulation 223/08, subsection 2(8) and Standard IV.E.2 of the College's Standard and Practice.

## **MEMBER'S PLEA**

5. The Member denied the allegations of professional misconduct as set out in the Notice of Hearing dated February 19, 2016.

## **OVERVIEW**

6. On June 15, 2015, between 4:00 and 4:30 p.m., a group of children from the toddler class of the Salvation Army Erin Mills Childcare Centre (the "Centre"), who were under the care of Ms. McKenzie, left the outdoor playground of the Centre. Three children went down to Glen Erin Drive, one of whom crossed the road. The children were ultimately returned to the Centre by members of the public. The issues to be determined by the Committee were whether this set of facts constituted acts of professional misconduct on the part of the member as alleged.

## **SUMMARY OF THE EVIDENCE**

### **(Partial) Agreed Statement of Facts**

7. Counsel for the College advised the Panel that an agreement had been reached on some of the facts and submitted into evidence an Agreed Statement of Facts, signed November 4, 2016 (Exhibit 3). The Agreed Statement of Facts provides as follows:
  - 1) Ms. McKenzie has been a registered early childhood educator (“RECE”) and a member of the College since July 2, 2009. Ms. McKenzie was a member of the College in good standing at all times that are material to this proceeding.
  - 2) At all relevant times, the Member was the RECE employed at the Centre. Ms. McKenzie’s responsibilities are set out in the Centre’s RECE Job Description.
  - 3) The Centre’s toddler program primarily included children ranging from 18-30 months. In addition, the Centre had mixed age approval that permitted a limited number of children as young as 15 months to be enrolled in the toddler program.
  - 4) On April 17 and 25, 2015, an inspection of the Centre was conducted by Jackie Bramhill, of the Ontario Ministry of Education, Child Care Quality Assurance and Licensing division.
  - 5) On the morning of June 15, 2015, an annual third party inspection of the Centre’s toddler playground was conducted by Jeff Elliot Playground Inspection (“Elliott”), pursuant to Centre policy.
  - 6) On June 15, 2015, between 4:00 and 4:30 p.m., the Member was responsible for supervising a group of ten (10) toddlers from the toddler class in the Centre’s

outdoor toddler playground, along with a second staff member, Ms. Amita Mathias, an early childhood assistant (“Ms. Mathias”). At the relevant time, Ms. McKenzie and Ms. Mathias were maintaining the staff/child ratio required by the Centre’s licence and by the relevant legislation and regulations.

- 7) On June 15, 2015, the latch to the playground gate was broken, and had been broken since at least April 2015. As a result, the gate was held shut with a bungee cord. The broken gate had been discussed at a staff meeting prior to June 15, 2015 and the Member was in attendance.
- 8) As of June 15, 2015, the Centre had not arranged for the gate to be repaired, and the Member was aware of this fact.
- 9) Between approximately 4:00 p.m. and 4:20 p.m. on June 15, 2015, a certain number of toddlers left the playground through the gate. Three children went down to Glen Erin Drive, one of whom crossed the road. The children were ultimately returned to the Centre by members of the public.
- 10) The Member’s recollection is that on June 15, 2015 there was only one bungee cord securing the gate.
- 11) The photographs that were taken after the incident in June 2015 and accurately depict the Centre’s toddler playground and surrounding area at the time they were taken. The photographs taken in June 2016 accurately depict the Centre’s toddler playground at that time. The Google Street View image accurately reflects the Centre’s location and the surrounding area.

12) The Centre's supervisor filed a Serious Occurrence Report with the Ministry of Education (the "Ministry"), and the Ministry Program Advisors visited the Centre on June 16 and 17, 2015, to follow up on the report.

13) On June 18, 2015, Sue Ewen, the Manager of Licensing and Compliance at the Ministry, issued a Notice of Direction suspending the Centre's Licensing and Compliance at the Ministry, issued a Notice of Direction suspending the Centre's licence as a result of the incident and sent a Notice to Parents informing them of the Centre's closure.

#### **Evidence of Lucas Kusiak**

8. Lucas Kusiak is a commercial insurance broker with three children who was driving home from work on Glen Erin Drive on June 15, 2015. Mr. Kusiak testified that Glen Erin Drive is a busy, four lane highway and that he took this route often. As Mr. Kusiak was driving north, he saw a child crossing Glen Erin Drive and signaling two other children to cross as well. Mr. Kusiak stopped his car in the middle of the road and signalled to another motorist to help get the child who crossed the street. Mr. Kusiak then ran to the two unsupervised children on the side of the Glen Erin Drive to get them before they crossed and took them up the hill to the gate of the Centre's playground.
  
9. Mr. Kusiak indicated that when he arrived at the gate of the Centre's playground with the two children, he saw the playground gate loosely secured with a stretched out bungee cord and two children outside the gate helping a third child to squeeze through the gate gap. He did not see any adults in the playground area, so he yelled until two staff members came around the corner of the building into the playground area – Ms. McKenzie being one of the

staff. Mr. Kusiak indicated that Ms. McKenzie was quite upset and she told him that she was aware of the broken gate latch and had been trying to get the Centre to fix it.

10. During Cross Examination, Mr. Kusiak's statement was reinforced that no staff were present on the playground when he arrived at the gate of the Centre with the children in his care. Mr. Kusiak was consistent in his recollection of the surrounding the details of the incident.
11. Mr. Kusiak stated that, after he returned the children to the Centre, he called 9-1-1 and reported the incident to the Ministry of Education (the "Ministry") the following day.
12. The Panel found that Mr. Kusiak was a credible witness. He had no vested interest in the Centre or outcome of the hearing. He presented himself with a clear recollection of the events and details of his statements were consistent throughout the hearing. He appeared to have genuine concern that was evident with the passion in which he testified.
13. Mr. Kusiak observed a child running across a busy four lane street and observed two other children at the side of the same busy four lane street about to cross. He stopped his vehicle mid-street to block traffic. He proceeded to return the two children to the Centre as he instructed another motorist to take charge of the child who ran across the street. He also observed that other children were trying to leave the playground through an improperly secured gate as he was returning the two children. The Committee agreed he was able to recollect with absolute clarity the events of the incident. He described that the child he observed in the process of squeezing through the gate was wearing a white t-shirt and had a "bit of a belly," which was making it difficult for him to get through the gap in the gate. These are not details a person is likely to invent. Mr. Kusiak was also the only person who

actually saw how the children were possibly able to squeeze through the gate. All parties were in agreement with the fact that three children left the playground and Mr. Kusiak returned the three children to the playground. Mr. Kusiak has never been to the Centre before and did not know the playground layout. Yet his description of where the staff came from is consistent with how the staff and children would typically enter the playground. The Committee finds that Mr. Kusiak's evidence was both internally consistent and consistent with other evidence in the hearing and the Committee places considerable weight on Mr. Kusiak's evidence.

#### **Evidence of Robin Salmon**

14. Robin Salmon is a nurse and the parent of two children who, at the time of the events at issue, attended the Centre. On June 15, 2015, she was driving to the Centre to pick up her children, when, while stopped at a red light, she saw children she recognized from the Centre heading towards the sidewalk on Glen Erin Drive. Ms. Salmon also saw a man (Mr. Kusiak) stop his truck in the middle of the street and attempt to stop two children on the sidewalk from crossing. At that time, Ms. Salmon was trying to get the attention of Mary Kennaley (the Supervisor of the Centre) who was standing on the corner of The College Way and Glen Erin Drive, near the Centre.
15. When Ms. Salmon arrived at the Centre, she saw the man returning the children from the sidewalk to the Centre and heard Ms. McKenzie say, "oh my God." Ms. McKenzie did not explain to Ms. Salmon how her son [Child 1] managed to leave the Centre, but did indicate that he had a history of leaving rooms.
16. Ms. Salmon reported the incident to the Ministry and withdrew her children from the Centre.

17. Ms. Salmon indicated that, prior to the incident of June 15, 2015, she had no concerns with Ms. McKenzie.

#### **Evidence of Nadia Ollivierre, RECE**

18. Nadia Ollivierre, RECE is a Program Advisor for Toronto West Region and part-time early childhood education professor at Sheridan College. As a Program Advisor, her duties include onsite centre visits for licence renewals and following up with Serious Occurrence Reports and complaints.
19. Ms. Ollivierre testified that on June 16, 2015, she attended at the Centre to follow-up on a Serious Occurrence Report related to children leaving the playground unnoticed. As part of her attendance, she spoke with Ms. McKenzie who told Ms. Ollivierre that she was not sure how the children left the playground. As Ms. Ollivierre was not at the Centre on June 15, 2015, her understanding of the incident was based on the reports of the people she interviewed.
20. Ms. Ollivierre testified that the Ministry found there was a high risk to the safety of the children and issued a notice of direction on the June 18, 2015. She explained that the notice of direction informed the licensee (the Centre) that its licence was being suspended because there was an immediate threat to the health, safety or welfare of the children who received those services of the Centre.

21. Ms. Ollivierre indicated that the Summary of Day Nursery Licencing inspection did not mention a broken gate latch and the annual playground inspection report dated June 15, 2015 also did not mention an issue with the gate's safety.

**Evidence of Karen Chandler, RECE – Expert Witness**

22. Karen Chandler, RECE had been a professor at George Brown College for almost 30 years and had worked in the field of early childhood education for over 40 years. Ms. Chandler had contributed to the development of the College's Code of Ethics and Standards of Practice as well as the Early Childhood Education Program Standard development by Ontario Colleges of Applied Arts and Technology, Ministry of Training, Colleges and Universities.
23. The College called Ms. Chandler as an expert witness. Ms. Chandler was qualified as an expert in the supervision of children by RECEs and in the application of College standards of practice and legislation to the supervision of children.
24. Ms. Chandler maintained that it is the role of an early childhood educator to ensure the children are safe and healthy and that RECEs must demonstrate a clear understanding of their role in supervising the children. When a child needs more individual attention, the RECE needs to recognize this pattern of behaviour and may need to ask for additional support.
25. Ms. Chandler testified that RECEs are to inspect indoor and outdoor environments and take appropriate action to prevent injury. Any hazard needs to be dealt with promptly to promote a safe environment and a condition, such as a faulty gate, must be reported and dealt with immediately.

26. Ms. Chandler stated that, as an RECE, Ms. McKenzie had an obligation to ensure the safety of the playground. If the gate to the playground was broken, at the very least, Ms. McKenzie should have taken responsive action to prevent injury and ensure the children do not leave the playground unaccompanied. It was her opinion that Ms. McKenzie should have ensured the gate was securely fastened and determined where she was most needed on the playground, by being aware of her positioning and scanning the playground continuously. For this reason, although there was a younger, crying child, Ms. McKenzie should have continued to supervise the broken gate as it was a safety hazard.
27. With respect to the evidence that the Ministry's and the *Jeff Elliot Play Ground Inspection Annual Playground Inspection Reports* concluded that the gate did not indicate a safety issue, Ms. Chandler testified that, as an early childhood educator, Ms. McKenzie should have questioned that decision if she felt that it was incorrect.
28. The Panel found Ms. Chandler to be a credible expert witness on professionalism in Early Childhood Education. Her extensive experience relating to professional standards of supervision contributed to what is expected of Early Childhood Educators to supervise children.

#### **Evidence of Sophia McKenzie, RECE**

29. On June 15, 2015, Ms. McKenzie was working at the Centre as an early childhood educator. Ms. McKenzie had been an employee at the Centre since November 15, 2010, working in the capacity as early childhood educator. Ms. McKenzie has been a registered member of the College since July 2, 2009. Ms. McKenzie indicated that on the afternoon of June 15, 2015, she was outside in the playground with a group of children. While she was

attending to a younger child who was crying for approximately 30 seconds, she heard a car screech. She looked across the street and saw a boy crossing the street. Shortly thereafter, she heard a man, which she later learned was Mr. Kusiak, yelling for a staff member and observed that he had two children from the Centre with him. By this point, Ms. McKenzie realized that the gate to the playground was open and she yelled to Amita Mathias, the assistant teacher, that children had gotten out of the playground. After Mr. Kusiak had brought back the two children to the Centre, Ms. Salmon arrived and advised Ms. McKenzie that she had seen her son across the street. Ms. McKenzie testified that prior to the incident, Ms. Mathias had left the playground to get something that a child had thrown over the gate, but Ms. McKenzie did not double check to ensure that the gate was secure upon Ms. Mathias' return to the playground.

30. Ms. McKenzie indicated that the gate to the playground had been broken for months and that Centre staff had mentioned the issue at a staff meeting prior to the incident, as was supported by the evidence of notes from the staff meeting of April 2015. In response to the staff's concerns about the gate, Mary Kennaley, the Centre Supervisor, put bungee cords on the gate to secure it. Ms. Kennaley was the only staff member at the Centre to deal with repairs and had a history of waiting a long time to address broken items. Ms. McKenzie had also raised concerns about the younger children in the class with Ms. Kennaley and the amount of support they required. However, Ms. Kennaley wanted the spaces in the class filled, so the younger children remained in the class.

31. Ms. McKenzie testified that she was always told that the gate, in the state it was in on June 15, 2015, was safe. She was never advised to not use the playground, even after a Ministry inspection, a playground inspection conducted by a professional and a health and safety inspection conducted by the Salvation Army a week prior. Ms. McKenzie testified that she

performed daily playground safety checks, as required and did so that morning. No written evidence of logs of the daily safety checks of the playground and equipment was provided at the hearing. Ms. McKenzie indicated that staff were assigned positions in the playground by the Centre and she was near her designated position, sitting at a picnic table, at the time of the incident.

32. Ms. McKenzie explained that this incident had been very difficult on her emotionally and that even at the time of the hearing, she continued to regularly think about what happened. She loved working with children and when she was terminated from the Centre following the incident. This was very upsetting to her and has caused her financial difficulties as a single mother.

#### **Evidence of Amita Mathias**

33. On June 15, 2015, Ms. Mathias was working as an assistant teacher at the Centre. She was with Ms. McKenzie on the playground during the events at issue. When the class was on the playground that afternoon between 4:00 and 4:30 p.m., she saw a hat belonging to one of the children on the other side of the playground fence. She went to get the hat, while still holding the gate closed so that no children could go through the gate. After she retrieved the hat, she closed the gate with the bungee cord and conducted a head count to ensure all 10 children remained in the playground. While she was attending to a crying child, she heard Ms. McKenzie yelling from the gate. When she looked over from the sand box, she saw a man, who was later identified as Mr. Kusiak, and a woman with two children from the Centre. Ms. Mathias does not know how the children managed to leave the playground unnoticed.

34. Ms. Matthias testified that the gate had been broken for 6-7 months before the incident of June 15, 2015 and that Ms. Kennaley promised to fix it.

### **Evidence of Mary Kennaley**

35. Mary Kennaley was called by the defence as a witness. She was declared to be a hostile witness. On June 15, 2015, Ms. Kennaley was working as the Centre Supervisor. As Centre Supervisor, her responsibilities included handling the Centre's finances, authorizing repairs and conducting employee performance reviews. Ms. Kennaley was aware that the gate latch was broken, but wanted to wait until more things required repair so she could call the repair person in to fix everything at once. In her opinion, the bungee cord she used to secure the gate closed was safe, especially since the Ministry and the playground inspector never mentioned issues with securing the gate in this manner.
36. Following the incident on June 15, 2015, Ms. Kennaley closed the playground until the gate was repaired on June 17, 2015.
37. Ms. Kennaley stated that it is the responsibility of Centre staff to perform a visual inspection of the playground before bringing children out and it is ultimately up to the staff using the area to determine whether it is safe. She further stated that it was Ms. McKenzie's and Ms. Mathias' job to supervise the children, regardless of the state of the gate.

### **FINDINGS**

38. The College bears the onus of proving the allegations set out in the Notice of Hearing on a balance of probabilities (more likely than not), based on clear, convincing and cogent evidence, in accordance with the Supreme Court of Canada's decision in *F.H. vs McDougall*, [2008] 3 S. C. R. 41.

39. Having considered the Exhibits filed, the testimony of each of the witnesses and the submissions made by College counsel and counsel for the Member, the Discipline Committee finds that the facts support a finding of professional misconduct as alleged in the Notice of Hearing. Specifically, the Panel finds that Ms. McKenzie is guilty of professional misconduct as defined in subsection 33(2) of the ECE Act in that:

- 1) she failed to supervise adequately a person who was under her professional supervision, contrary to Ontario Regulation 223/08, subsection 2(2);
- 2) she failed to maintain the standards of the profession, contrary to Ontario Regulation 223/08, subsection 2(8);
- 3) she 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 Ontario Regulation 223/08, subsection 2(10);
- 4) she failed to comply with the ECE Act and the professional misconduct regulation made under the Act (being Ontario Regulation 223/08), contrary to Ontario Regulation 223/08, subsection 2(19);
- 5) she contravened a law, which contravention caused a child or children under her professional supervision to be put at or remain at risk, contrary to Ontario regulations 223/08, subsection 2(21);

- 6) she failed to maintain a safe and healthy learning environment, contrary to Ontario Regulation 223/08, subsection 2(8), and Standard III.A.1 of the Standards of Practice;
- 7) she 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 Ontario regulation 223/08 subsection 2(8) and Standard IV. A. 2 of the Standards of Practice;
- 8) she failed to abide by her obligation to comply with the College's *Code of Ethics and Standards of Practice* in the event of a conflict between the College's *Code of Ethics and Standards of Practice* and her work environment and/or the Policies and Procedures of her employer contrary to Ontario Regulations 223/08, subsection 2(8) and Standard IV.A.3 of the Standards of Practice;
- 9) she failed to observe and monitor the learning environment and anticipate when support or intervention was required, contrary to Ontario Regulation 223/08, subsection 2(8) and Standard IV.B.3 of the Standards of Practice;
- 10) she 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 Ontario Regulation 223/08, subsection 2(8) and Standard IV.C.1 of the Standards of Practice;
- 11) she conducted herself in a manner that is unbecoming a member, contrary to the Ontario Regulation 223/08, subsection 2(22); and

12) she conducted herself in a manner that could reasonably be perceived as reflecting negatively on the profession of early childhood education contrary to Ontario Regulation 223/08, subsection 2(8) and Standard IV.E.2 of the Standards and Practice.

## **REASONS FOR FINDINGS**

40. It was uncontested that Ms. McKenzie was responsible for the children on June 15, 2015. It was also uncontested that on June 15, 2015, the latch to the playground gate was broken and had been broken since at least April 2015 and held shut with a bungee cord. The broken gate had been discussed at a staff meeting prior to June 15, 2015 and Ms. McKenzie was aware of the broken gate and the fact it was held shut with a bungee cord. This indicates that staff needed to doubly ensure the children's safety with the toddler gate.
41. Ms. McKenzie's position was that she was on the playground sitting several feet from the gate at the time that the children left the playground yet she was not aware of the children leaving through the gate. The Panel found that this was not plausible. If Ms. McKenzie and Ms. Mathias had positioned themselves within the playground where they testified they were standing, they should and would reasonably have been aware of children leaving the playground. The Committee does not find it credible or possible that both Ms. McKenzie and Ms. Mathias could have been in those positions and yet not noticed children leaving the playground.
42. The Committee accepts Mr. Kusiak's version of events in terms of the children being outside the playground and on the street. He was the only witness who actually observed

how the children were able to leave the playground. The issue before the Committee was whether the Member lived up to her professional obligations. The Member allowed several toddlers to leave the playground unnoticed/unsupervised and this constitutes a failure to meet her professional standards which is an act of professional misconduct.

43. The expert evidence of Ms. Chandler indicated what was required as an Early Childhood Educator. She was unequivocal that an RECE has an obligation to continuously scan the environment and supervise to ensure the safety of the children under her care, regardless of the state of the gate, whether it has passed inspection, whether the Centre had failed to repair the gate, whether there were younger children who may have required additional attention or whether there were concerns about the RECE's staffing partner. Ms. McKenzie did not do this.
44. The Member failed to adequately supervise the children in her care, exposing them to physical risk. Her behaviour, which falls short of meeting the professional standards required of her, has caused members of the public to question the professionalism of early childhood educators.
45. Ms. McKenzie was responsible for supervising the toddlers in the playground and she did not keep track of the children in her care. This constitutes misconduct in that the Member:
  - o Failed to supervise adequately a person under the Member's professional supervision (s. (08)2(2), of O. Reg. 223/08); and,
  - o Conducted herself in a manner that is unbecoming a member, contrary to the Ontario Regulation 223/08, subsection 2(22).

46. Ms. McKenzie did not see the toddler leave the playground, which may have taken some time to do so. In this regard, she:
- Failed to comply with the ECE Act and the professional misconduct regulation made under the Act (being Ontario Regulation 223/08), contrary to Ontario Regulation 223/08, subsection 2(19).
47. The public trust and integrity of the profession was called into question with the loss of several children under the care of Ms. McKenzie, which reflects negatively on the profession. In this regard, Ms. McKenzie conducted herself in a manner that could reasonably be perceived as reflecting negatively on the profession of early childhood education contrary to Ontario Regulation 223/08, subsection 2(8) and Standard IV.E.2 of the College's *Code of Ethics and Standards and Practice*.
48. Although Ms. McKenzie knew the gate was unsafe, she continued to take the children out into the playground without reporting it to the owner or Ministry. In this regard, she failed to abide by her obligation to comply with the College's *Code of Ethics and 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, the College's *Code of Ethics and Standards of Practice* takes precedence. Thus, Ms. McKenzie acted contrary to Ontario Regulations 223/08, subsection 2(8) and Standard IV.A.3 of the College's *Code of Ethics and Standard of Practice*.
49. Ms. McKenzie did not notice that the children were missing. The Committee believes that if Ms. McKenzie was where she and Ms. Mathias said they were positioned within the playground, then Ms. McKenzie should have been able to see the children attempting to leave the playground and immediately intervene. The safety of the children was put at

serious risk with two children standing unsupervised beside a busy four lane road and one child having crossed the busy four lane road. As a result, Ms. McKenzie:

- Acted/failed to act in a manner that, having regard for the circumstances, would reasonably be regarded by Members as disgraceful, dishonourable or unprofessional (s. 2(10) of O. Reg. 223/08);
- Contravened a law, which contravention caused a child or children under the member's professional supervision to be put at or remain at risk, contrary to Ontario regulations 223/08, subsection 2(21);
- Failed to observe and monitor the learning environment and anticipate when support or intervention was required, contrary to Ontario Regulation 223/08, subsection 2(8) and Standards IV.B.3, A. 2 of the College's Code of *Ethics and Standards of Practice*; and,
- 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 Ontario Regulation 223/08, subsection 2(8) and Standard IV.C.1 of the College's *Code of Ethics and Standards of Practice*.

50. Given the evidence presented, the Panel found that the Member was not positioned where she claimed to have been during the time of the event. On the Member's evidence, she was just feet away from the gate and yet children were able to leave the playground unsupervised. As such, M, McKenzie:

- Failed to supervise adequately a person under the Member's professional supervision (s. 2(2) of O. Reg.223/08).

51. The children were completely unsupervised while they were out of the playground. In this regard, Ms. McKenzie:

- Contravened a law, which contravention caused a child/children under the Member's professional supervision to be put at or remain at risk (s. 2(21) of O. Reg. 223/08); and
- Failed to maintain a safe and healthy learning environment, contrary to Ontario Regulation 223/08, subsection 2(8), and Standard III.A.1 of the College's *Code of Ethics and Standards of Practice*.

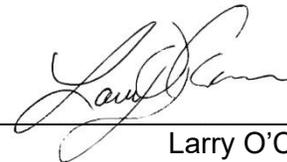
52. In view of our findings, the Panel requests that the Hearings Office schedule a penalty hearing at the earliest opportunity.

Date: May 29, 2017



---

Nici Cole, RECE  
Chair, Discipline Panel



---

Larry O'Connor  
Member, Discipline Panel



---

Diane Laframboise, RECE  
Member, Discipline Panel

**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
---	----------

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*,<sup>1</sup> 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

---

<sup>1</sup> 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