



Ontario College of
Social Workers and
Social Service Workers

Ordre des travailleurs
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**DISCIPLINE COMMITTEE OF THE
ONTARIO COLLEGE OF SOCIAL WORKERS AND SOCIAL SERVICE WORKERS**

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ONCSWSSW 4

Decision date: 20190415

BETWEEN:

THE ONTARIO COLLEGE OF SOCIAL WORKERS
AND SOCIAL SERVICE WORKERS

- and -

Kelley Jean Denham

PANEL: Charlene Crews Professional Member

Appearances: M. Jill Dougherty and Ada Keon, counsel for the College
Kelley Jean Denham, self-represented
Andrea Gonsalves, Independent Legal Counsel to the Panel

Heard: February 28, 2019

DECISION AND REASONS FOR DECISION ON MOTION

[1] This motion came on for a hearing before a single-member panel of the Discipline Committee (the “**Panel**”) on February 28, 2019, at the Ontario College of Social Workers and Social Service Workers (the “**College**”). It arises in the context of a Notice of Hearing dated June 15, 2018, issued by the Ontario College of Social Workers and Social Service Workers (the “**College**”) regarding allegations of professional misconduct against the Member, Kelly Jean Denham (the “**Member**” or “**Ms. Denham**”).

[2] An initial prehearing conference in this matter took place before me on January 31, 2019. Following the prehearing conference, the Member filed a notice of motion, dated February 12,

2019, for a stay of the discipline proceedings currently pending before this Discipline Committee “until the completion of [her] criminal trial which will occur in June and August 2019.” The College opposed the motion. The motion was made returnable on February 28, 2019, which had been reserved for the continuation of the prehearing conference. The parties agreed that I would hear and decide the motion in my capacity as Presiding Officer at the prehearing conference, pursuant to rule 6.04 of the Discipline Committee’s *Rules of Procedure*.

The Allegations in the Notice of Hearing

[3] For the purposes of this motion, I am not called upon to determine the merits of the case. The allegations set out in the Notice of Hearing are only allegations at this stage. However, the allegations contained in the Notice of Hearing frame the issues to be determined in this procedural motion. For that reason, it is useful to reproduce those allegations in these reasons for decision.

[4] The allegations set out in the Notice of Hearing and the particulars of those allegations are as follows:

...TAKE NOTICE that you are alleged to be guilty of professional misconduct within the meaning of section 26(2) of the [*Social Work and Social Service Work Act, 1998*, SO 1998, c 31 (the “**Act**”)] in that you are alleged to have engaged in conduct that contravenes the Act, Ontario Regulation 384/00 (the “**Professional Misconduct Regulation**”), Schedule “A” to By-law No. 66 of the Ontario College of Social Workers and Social Service Workers, being the Ontario College of Social Workers and Social Service Workers Code of Ethics (the “**Code of Ethics**”), and Schedule “B” to By-law No. 66 of the Ontario College of Social Workers and Social Service Workers, being the Ontario College of Social Workers and Social Service Workers Standards of Practice Handbook (the “**Handbook**”).¹

I. The following are particulars of the said allegations:

1. At all relevant times, you were registered as a social service work member with the Ontario College of Social Workers and Social Service Workers (the “**College**”);
2. Commencing on or about February 2016 you accessed the Family and Children’s Services of Lanark, Leeds and Grenville (“**FCSLLG**”) Board of Directors web portal approximately 378 times and successfully viewed and/or downloaded approximately 171 files, including files that contained confidential information about clients of FCSLLG. You were not involved in providing care for those clients, nor did you have consent or authorization to access their information.
3. On or about April 18, 2016 you posted a link to one of the confidential documents obtained from the FCSLLG Board of Directors web portal to a

¹ By-law 24, as amended by By-law Nos. 32 and 48 and revoked effective July 1, 2008 by By-law 66, continues to apply to conduct which occurred prior to July 1, 2008.

Facebook group called “Smith Falls Swap Shop.” This document contained the names of 285 families involved with the FCSLLG.

4. On or about February 17, 2017 you posted a two hour video which you took of a February 3, 2016 meeting between yourself and [XX] (for Director of Services) and [XX] (Intake Manager) on the internet. The video contained confidential FCSLLG Board of Directors documents that you obtained from the FCSLLG Board of Directors web portal.
5. The posting of some or all of the information referred to in paragraphs 3 and/or 4, above had the effect of identifying one or more children who were witnesses at, or participants in, or subjects of hearings and/ or proceedings under the *Child and Family Services Act*, RSO 1990, c C.11, and/or the parents or foster parents or family members of such child(ren), or any of them.
6. You were charged under sections 430(1.1)(c), 430(5), and 342.1(1)(c)(i) of the *Criminal Code*, RSC 1985, c. C-46 and under sections 75(11), 45(8) and 85(3) of the *Child and Family Services Act*, RSO 1990, c C.11 with respect to the conduct outlined in paragraphs 1 to 5, above.

II. It is alleged that by reason of engaging in some or all of the conduct outlined above, you are guilty of professional misconduct as set out in section 26(2)(a) and (c) of the Act:

- (a) In that you violated **Section 2.2 of the Professional Misconduct Regulation** and **Principle V of the Handbook (commented on in Interpretation 5.1)** by failing to comply with applicable privacy and other legislation;
- (b) In that you violated **Section 2.29 of the Professional Misconduct Regulation** by contravening a federal, provincial or territorial law or a municipal by-law (namely, the *Child and Family Services Act of Ontario*) where;
 - (i) the contravention is relevant to the member’s suitability to practice; and/or
- (c) In that you violated **Section 2.36 of the Professional Misconduct Regulation** by engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

The Evidence

[5] The evidence filed in this motion indicates that the Member is currently facing charges under the *Criminal Code* and the *Provincial Offences Act*, RSO 1990, c P.33 (“**POA**”) arising from the same alleged events that gave rise to these discipline proceedings.

[6] The Member filed her own affidavit in support of the relief she is seeking in this motion: a stay of the College's proceedings pending the completion of the criminal/POA proceedings against her, which according to her affidavit are set to conclude on August 15, 2019. The Member's affidavit asserts that if the College's proceeding is not stayed it will result in irreparable harm to her in both the College and the criminal/POA matters, and therefore the balance of convenience favours a stay of the College proceedings. The Member's affidavit consists mostly of her legal argument, which she repeated at the oral hearing of this morning, and not evidence. I do not say this to be critical of the Member, as she is not a lawyer. However, in the interests of avoiding repetition, I have set out her argument, including where it is contained in her affidavit, in the "Submissions" section below and not in this "Evidence" section.

[7] The College filed an affidavit of Richelle Samuel, Director of Complaints and Discipline at the College. The affidavit sets out the background to the College's discipline proceedings in this matter.

[8] In February 2017 the College was informed that the Member had been charged under the *Criminal Code* and the POA as a result of the same alleged events that gave rise to the Notice of Hearing in these discipline proceedings. The Member had also been named as a defendant, along with FCSLLG, in a class action proceeding brought by the individuals affected by the alleged privacy breach.

[9] Ms. Samuel's affidavit states that the College conducted an initial review and investigation into the information it had received and the College Registrar appointed an investigator to look into the Member's alleged conduct. On December 6, 2017 the College notified the Member of the allegations against her, provided disclosure regarding the College's investigation, and invited the Member to respond.

[10] The Member responded to the allegations in writing and submitted an affidavit she had sworn for the purpose of the civil proceeding. The Member's response explained that she was limited in her ability to disclose information to the College due to the pending criminal/POA proceedings. Ms. Samuel noted that the Member did not request a stay or postponement of the College proceedings at that time. At the request of the Member's lawyer, the College investigator interviewed the Member in February 2018. The matter was referred to the Discipline Committee and the Notice of Hearing was issued in June 2018.

[11] According to Ms. Samuel's affidavit, the Member's criminal/POA proceedings have been adjourned on three occasions to date. The College matter has been outstanding for more than two years since the matter was first reported to the College in February 2017. The allegations relate to conduct alleged to have occurred roughly three years ago (in February and April 2016).

[12] Ms. Samuel asserts that any further delay in prosecuting the allegations would be prejudicial to the College and to the public interest, and may serve to undermine the public's confidence in the College's ability to protect the public interest and process discipline matters efficiently and expeditiously, given the seriousness of the allegations and the significant publicity surrounding the matter.

The Parties' Submissions

The Member

[13] The Member submitted that if the College's discipline proceedings are not stayed, she will suffer irreparable harm in both the discipline and criminal/POA proceedings. There would be a risk of inconsistent findings between the two matters, both of which will require a determination of whether her conduct amounts to an offence, and both of which will set a precedent for how people find and use information online. The Member submitted that in contrast, the College would suffer no prejudice if the matter is adjourned pending the outcome of the criminal/POA trial and that jeopardizing a member's fair trial rights would erode public trust exponentially more than a delay in prosecuting the allegations of professional misconduct.

[14] The Member argued that the outcome of the parallel criminal/POA matter would significantly narrow the issues for the Discipline Committee to decide in the College proceedings, as the question of whether she contravened the *Child and Family Services Act*, RSO 1990, c C.11 ("CFSA"), which is central to the discipline proceedings, would already be determined by a court. The Member argued that the court in the criminal/POA proceedings is best suited to determine whether she breached the legislation and that only with a finding of guilt or in absence of any finding of contravention by a court, should the College be entitled to make such a determination.

[15] The Member further submitted that she is bound by an undertaking that prevents her from sharing any evidence and disclosure she received in the criminal/POA proceeding. This inability to use relevant evidence will cause her prejudice and irreparably harm her ability to defend herself in the College discipline proceeding.

[16] The Member also argued that she would be further prejudiced in the event that any new evidence is produced in the criminal/POA trial, as she understood there is no forum to appeal a decision of the Discipline Committee. However, Independent Legal Counsel ("ILC") clarified on the record (without commenting on the specific scenario that Ms. Denham raised) that under the Act, s. 31(1) a party to a discipline proceeding has a right to appeal a decision of the Discipline Committee to the Divisional Court.

[17] The Member challenged the College's submission that her rights under the *Canadian Charter of Rights and Freedoms* not to incriminate herself would protect her in the criminal/POA proceedings and expressed concern that she cannot use evidence from the criminal disclosure, which supports her assertion that she did not violate the CFSA, in the discipline proceeding if her motion for a stay is not granted.

[18] The Member argued that at least two of the witnesses in the College's proceedings are also witnesses who will be called by the prosecution in the criminal/POA trial and that there is a high risk that the testimony of those witnesses will be coloured by the evidence at the College hearing if it is held prior to the criminal trial. That may harm the outcome of the criminal trial and prejudice her fair trial rights. The Member also submitted that she would be forced to reveal her defence in the College proceeding and will have to question witnesses from the criminal trial for the first time without legal counsel, noting that she is not in a financial position to retain counsel in both parallel proceedings at the same time. However, once the criminal matter is completed she would be in a position to be represented by counsel in the College proceedings.

[19] The Member submitted that parallel disciplinary and criminal proceedings on the same facts prejudice her fair trial interests, as the disciplinary proceedings rely, in large part, on the allegations of a contravention of legislation (namely, the CFSA) that is not governed or initiated by the College and for which there is an absence of finding of contravention by a court. The Member stated that because the College investigation arose directly from the criminal and POA charges, the court, which has jurisdiction to make a finding of guilt in the criminal proceeding, is best suited to determine whether there has been a breach of the CFSA. Only with a finding of guilt or an absence of finding of contravention by a court should the College be entitled to make such as determination when the conduct falls outside of the Member's scope of practice.

[20] The Member argued that the College's proceedings are exceptional and extraordinary in that they are running parallel to two other proceedings, and all of the related proceedings were initiated by a service provider of which she was a client. These various proceedings did not result from her conduct in a professional capacity as a social service worker. She noted that there are no other cases in which allegations of professional misconduct are based on a member's conduct as a client.

[21] The Member asserted that she has been cooperative with both the College and the criminal/POA proceedings. She disputed the College's submission that she contributed to any delay in either proceeding to date, and argued that any delays were beyond her control. The Member submitted that the College's materials are misleading and that irreparable harm has already occurred as a result of the College's objection to the stay of proceedings.

[22] The Member asserted that if a stay is not granted she would suffer prejudice in both the College and criminal proceedings which would outweigh any prejudice the College may suffer and that jeopardizing a member's fair trial rights would erode public trust substantially more than a delay in prosecuting the allegations of misconduct against her.

[23] In response to questions from the panel, the Member clarified that she is seeking an indefinite stay of the College proceedings until the criminal proceeding is concluded; that is, she does not want a date to be set for the discipline hearing even if the date is after August 15, 2019, when her criminal trial is currently scheduled to conclude.

The College

[24] College counsel argued that the test that applies on a stay motion is that set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 as follows.

- a. At the first stage, the moving party must demonstrate a serious issue to be tried.
- b. At the second stage, the moving party must persuade the court that she will suffer irreparable harm if the stay is not granted.
- c. The third branch of the test requires an assessment of the balance of convenience.

[25] The College argued that, accepting the first branch of the test is satisfied, the Member has not established either irreparable harm or that the balance of convenience favours a stay. Although it is clear that this is a serious matter, the Member's assertions of harm are only speculative, and there is no supporting evidence to indicate that there would be irreparable harm

to the Member if the discipline matter proceeds. Moreover, the balance of convenience favours the public interest which “goes beyond that of public safety and also includes public confidence in the administration of justice, and in cases such as this, confidence in the disciplinary process of the College” (*Sazant v The College of Physicians and Surgeons of Ontario* (March 11, 2011), in M39678 and M39751, endorsement of LaForme JA at para 15. See also *Ontario (College of Pharmacists) v Hanif*, 2012 ONCPDC 6).

[26] The College relied on case law holding that a stay of civil proceedings pending the outcome of related criminal proceedings should not be granted absent “extraordinary and exceptional” circumstances (see, e.g., *Stickney v Trusz* (1974), 2 OR (2d) 469 (Hcj), aff’d (1974), 3 OR (2d) 538 (Div Ct), aff’d (1974), 3 OR (3d) 539 (CA); *Nash v Ontario* (1996) 27 OR (3d) 1 (CA); *Schreiber v Canada (Attorney General)* (2001), 57 OR (3d) 316 (CA); *Law Society of Upper Canada v James*, 2014 ONLSTH 89).

[27] The College argued that the Member has failed to demonstrate exceptional circumstances and has not established any specific grounds of prejudice to meet the test for a stay of the disciplinary proceedings. Counsel further submitted that the Member’s fair trial interests would not be prejudiced because s. 13 of the *Charter* protects her from the subsequent use of any incriminating testimony she might give in the discipline proceedings.

[28] Counsel for the College asserted that there is a strong public interest in the College being able to discharge its obligation to regulate its members and proceed with discipline matters in a timely manner, particularly given the seriousness of the allegations and the significant publicity surrounding this matter. Counsel noted that in the criminal/POA proceedings the Member has waived her rights under s. 11(b) of the *Charter* to be tried within a reasonable time. As such, the court is under no obligation to expedite those proceedings. There have been three adjournments of the criminal/POA trial to date, and even if the trial proceeds as scheduled, there must be consideration of the time it may take for the court to release its decision and reasons, and for any subsequent sentencing proceedings and appeal. Therefore a stay of the discipline proceedings would be of indefinite duration and would undermine the College’s mandate and the public’s confidence in the College’s ability to protect the public interest and process discipline matters efficiently and expeditiously.

[29] College counsel further argued that even if the court acquitted the Member of the charges using the higher criminal standard of proof beyond a reasonable doubt, the Discipline Committee may still find that the Member engaged in professional misconduct as defined by the Act using the lower civil standard of proof on a balance of probabilities. Therefore, any delay in the discipline proceedings would not be warranted.

[30] College counsel referred to s. 2.29 of the College’s Professional Misconduct Regulation which makes it an act of professional misconduct for a member to “Contraven[e] a federal, provincial or territorial law or municipal by-law if, ... the contravention is relevant to the member’s suitability to practise”. That wording does not require that a member first be convicted or found guilty of such an offence by a court. As such, the Discipline Committee is entitled to determine whether the Member has contravened the CFSA, and to make findings of misconduct on that basis, even absent any finding by a court of contravention. College counsel referred to the 2017 decision *Ontario College of Social Workers and Social Service Workers v Cullain*, in

which this Discipline Committee determined that the member had contravened the CFSA and thereby engaged in professional misconduct.

[31] The College submitted that although the College's discipline proceedings arise from the same set of facts as the criminal/POA charges, that is not a specific ground of prejudice warranting a stay of the Member's disciplinary proceedings. The purpose of the criminal/POA proceedings is to ensure compliance with the CFSA, whereas the purpose of the College's discipline proceeding is to regulate the profession and govern its members in order to serve the public and protect the public interest. Given these different purposes, that it is appropriate to proceed with the discipline hearing and not to await the result of the criminal/POA prosecution.

Independent Legal Advice

[32] ILC noted that a stay of proceedings is a significant order as it prevents a matter from moving forward and/or an order from taking effect until a future date or, potentially, permanently. Granting a stay would prevent the College from carrying out its mandate for a period of time. The College has a responsibility to deal with discipline matters in a timely and open fashion and the Discipline Committee has a responsibility to proceed without undue delay while ensuring fairness to the Member.

[33] It was ILC's advice that the case law relating to stays of parallel criminal and civil proceedings should be considered and that those orders are not ordinary course.

[34] ILC advised that the appropriate test on this motion is set out in the *RJR MacDonald* case. ILC noted that the first branch of the test is not in dispute and that there appears to be a serious issue to be tried in respect of both the criminal/POA and the discipline matters.

[35] To determine irreparable harm, the Panel must consider the nature and magnitude of harm, with the most significant harm asserted by the Member being the potential loss of her fair trial rights in the criminal proceedings. According to ILC's advice, the Panel must assess whether there is sufficient evidence to conclude that harm would be suffered in that the Member would lose her right to a fair trial. ILC referred to *Hanif* in which the discipline committee of the College of Pharmacists cited a passage from *Sazant* stating that "irreparable harm must be clear and not speculative, and it must be supported by evidence that demonstrates that he would suffer it".

[36] ILC advised that to determine the balance of convenience the Panel must consider the competing interests of the Member's fair trial rights and ability to defend herself in the discipline proceedings, against the public interest in the discipline matter proceeding in a timely manner. In weighing whether the balance of convenience favours granting or denying a stay, relevant factors include the overall timeframe from the date of the events to an eventual discipline hearing, the potential deterioration of evidence over time, the degree of overlap between the criminal/POA and discipline proceedings and the potential for inconsistent findings, the degree to which the Member may be prejudiced in either proceeding, and the impact on the public interest of delaying the hearing. In addition, if the Panel found that the Member's *Charter* rights would be in jeopardy if the discipline proceedings were not stayed, the balance of convenience would favour granting the stay.

[37] ILC advised that although there is overlap in the discipline and the criminal/POA matters, which are based on the same underlying events, there are differences in the legal issues and the standard of proof in the proceedings. The Member's submission that she would be prejudiced in the criminal/POA trial due to (a) having to cross-examine witnesses common to both prosecutions as a self-represented party in the discipline proceeding, and (b) having to reveal her defence prior to the criminal/POA trial, relate to potential prejudice in the *conduct* of the criminal/POA trial but not to *outcome* of the criminal process. As such, those concerns would be eliminated after the trial is over, without awaiting the court's decision or any appeal.

[38] ILC advised the Panel to consider the possibility of inconsistent findings. The Member could be acquitted in the criminal/POA matter and be found by the Discipline Committee to have committed misconduct based on the same underlying events. While it is possible and acceptable for criminal proceedings and discipline proceedings to reach different results, if the acquittal were based on the court's interpretation of the CFSA (rather than, for example, its findings of fact on the standard of beyond a reasonable doubt) there might be concerns about inconsistent findings. If a stay were not granted and the Discipline Committee found that the Member contravened the CFSA based its interpretation of that statute, but a court later reaches a different interpretation and concludes as matter of law that the Member has not contravened the CFSA, it could call into question the Discipline Committee's finding.

[39] ILC encouraged the Panel to consider the context of underlying events, specifically: that the complaint was not related to the Member's scope of practice or delivery of client care; that conduct outside of the scope of practice may be relevant to and may be a factor in public protection; and that the scope of the College's public interest mandate is broader than public protection.

[40] ILC advised that if the test for a stay is not met there may be other options within the Panel's discretion to balance the competing interests, such as setting the discipline hearing on a date after August 15, 2019 when the criminal/POA trial is expected to conclude. In evaluating that or other options, the Panel should consider the stage of these proceedings. Unlike other cases, such as *Stickney*, where the stay was sought at an early stage in a civil proceeding (and was refused), or the LeSage Report² relied on by the College which raises concerns about a "hiatus" in an investigation, the College's investigation has already concluded and would not be affected by a stay. A delay of the hearing date for a few months, until after the criminal trial has concluded, would engage different considerations than an indefinite stay and would be an option for the Panel to consider.

Decision

[41] Having considered the evidence and submissions of both parties, and reviewing relevant case law, the Member's motion is dismissed and the parties are directed to proceed with scheduling of the hearing.

² The Honourable Patrick LeSage, *Review of the Ontario College of Teachers Intake, Investigation and Discipline Procedures and Outcomes, and the Dispute Resolution Program* (May 31, 2012) at 28

Reasons for Decision

[42] In *RJR-MacDonald* the Supreme Court of Canada confirmed the following three-part test for a stay of proceedings: (1) there is a serious issue to be tried; (2) the moving party will suffer irreparable harm absent a stay; and (3) the balance of convenience favours a stay. The burden rests on the party seeking the stay. I accept that this test must govern the determination on this motion.

[43] In addition, I must be guided by the case law (*Stickney, Nash, Schreiber, James*) establishing that absent “extraordinary and exceptional” circumstances civil proceedings should not be stayed pending the outcome of related criminal proceedings.

[44] The College does not challenge that the Member has met her burden on the first part of the test – there is a serious issue to be tried in both the criminal and discipline proceedings. However, before the Discipline Committee can grant a stay of a discipline proceeding, it must be satisfied on the evidence that the Member will suffer irreparable harm in absence of a stay. As I explain below, I find that the Member has failed to lead sufficient evidence demonstrating that she will suffer “irreparable harm” sufficient to justify a stay if the discipline proceeding is allowed to continue. I also find that the balance of convenience does not favour a stay. This is not one of the “extraordinary and exceptional” cases in which disciplinary proceedings should be stayed pending the outcome of related criminal proceedings.

[45] Although the Member’s notice of motion seeks a stay of the discipline proceedings “until the completion of [her] criminal trial which will occur in June and August 2019” (my underlining), at the oral hearing of the motion the Member confirmed that she is seeking an stay until the conclusion of the criminal/POA proceeding, not just the trial itself. She stated that she was opposed to ILC’s suggestion of scheduling the discipline hearing for a date after August 15, 2019. Accordingly, I have applied the test for a stay to that broader request.

Irreparable Harm

[46] The Member argued that by proceeding with the discipline matter in advance of resolution of the criminal/POA matter, her fair trial rights would be prejudiced and she would suffer irreparable harm in the criminal/POA proceeding. Specifically, she asserts that she will suffer harm because she would be required to cross-examine common witnesses for the first time in the discipline proceedings without legal counsel (due to her financial position), that she would have to reveal her defence to the criminal/POA charges in the discipline proceeding *before* the criminal/POA trial, and that she would not be in a position to defend herself adequately in the discipline proceeding as she is bound by an undertaking not to use the information she received by way of disclosure in the criminal/POA proceedings outside of those proceedings.

[47] The Member’s concerns regarding potential harm are, in my view, merely speculative. The law requires that evidence of irreparable harm must be clear: *Hanif*, para 12; *Sazant*, para 11.

[48] In considering the overlap between the discipline and the criminal/POA matters, I accept that although both matters rely on the same underlying events, they differ in the evidence that may be relevant and tendered at the hearing, the legal issues in play, and the standard of proof. Importantly, they each have a different focus and purpose. The primary objective of the

College's discipline proceedings is public protection (Act, s. 3(1) and 3(2)) whereas the objective in the criminal/POA matter is to determine whether the Member contravened the CFSA and whether that contravention should be sanctioned. In light of those different purposes, the area of overlap between the two proceedings is limited and I do not agree with the Member's position that dealing with the criminal/POA matters first would narrow the issues to be dealt with in the College proceedings.

[49] Further, even if the Member is acquitted in the criminal/POA matter, the Discipline Committee, applying a lower standard of proof and dealing with the distinct objective of public protection, may find the Member guilty of misconduct based on the same underlying facts.

[50] I agree with the College's submission that there are protections available to safeguard the Member's fair trial interests in the criminal/POA proceeding, including by s. 13 of the *Charter*, which will protect her from the subsequent use of any incriminating testimony she might give in the discipline proceedings.

[51] Regarding the Member's concern about witnesses who may testify in both the discipline and the criminal/POA matters, it may be that she will need to cross-examine them in the College discipline proceeding before her lawyer cross-examines them in the criminal/POA matters. That in itself does not constitute irreparable harm.

[52] The Member also raised a concern about revealing her defence strategy in the discipline proceeding and colouring witness testimony prior to the criminal trial. That risk is mitigated somewhat by the fact that witness testimony in the discipline proceedings will focus on allegations of misconduct, which differs from the focus of the criminal/POA proceeding. As such, the nature of testimony and defences will likely be different and will not impede the Member's fair trial rights. To the extent there might be common areas of evidence or defence strategy, I note that the Member can ask the Discipline Committee panel to make an order excluding witnesses from the discipline hearing except when they are testifying.

Balance of Convenience

[53] Even if the Member had tendered sufficient evidence to prove irreparable harm, I must consider the third branch of the *RJR-MacDonald* test: the balance of convenience. Will greater harm result from granting or refusing a stay pending a decision on the merits?

[54] In addressing the third branch of the test for a stay, the Member submitted that in the absence of a stay her fair trial rights and her ability to defend herself in the discipline proceedings would be jeopardized whereas the College would suffer no prejudice if a stay were to be granted. She argued that jeopardizing a member's fair trial rights would erode the public interest exponentially more than a delay in the professional misconduct proceedings. The Member submitted that for these reasons the balance of convenience favours granting the stay.

[55] The College argued that a delay in these proceedings would be prejudicial to the College and to the public interest. The College's submissions highlighted the fact that the allegations outlined in the Notice of Hearing occurred more than three years ago. Due to the nature and magnitude of the allegations, and the publicity that has shadowed these proceedings, the delay caused by a stay of the proceedings would undermine the public's confidence in the College's ability to regulate its members and to discharge its mandate in addressing allegations of

professional misconduct effectively and expeditiously. The College submitted that the balance of convenience favours the public interest and public confidence in administrative justice.

[56] The College also argued that, since the Member has already waived her rights to be tried in a reasonable time under s. 11(b) of the *Charter*, the courts are under no obligation to proceed with the criminal/POA trial in June and August 2019, as scheduled. There have been three prior adjournments and even if the criminal/POA trial proceeds as scheduled, it will likely take some time for the court to release its decision, and for any subsequent sentencing hearing and/or appeals to be completed. As such, delaying these discipline proceedings for an indefinite duration until the criminal/POA proceeding has concluded would undermine the College's mandate and the public's confidence.

[57] I agree with the College's submissions and on that basis I find that, even if the Member had satisfied the second branch of the stay test by proving irreparable harm, the balance of convenience favours refusing the stay.

[58] In addition, I note that the Member has sought a stay of the discipline proceedings at a late stage, just before the scheduling of the hearing. As noted in the affidavit of Richelle Samuel, the Member did not request a stay at an earlier stage, either during the College's investigation or upon the referral of the allegations to the Discipline Committee, when she became aware that she would be facing parallel proceedings in the criminal/POA and discipline matters. While the timing of this motion might be attributable to the fact the Member is unrepresented in these discipline proceedings, rather than a calculated tactical decision, in my view the timing of the request is a consideration weighing against the stay and in favour of proceeding with the hearing.

[59] Addressing allegations of professional misconduct in a timely and efficient manner is paramount to ensuring public confidence in administrative justice. As such, delaying the hearing and determination of a matter that involves allegations of serious conduct including the disclosure of personal and identifying information of a vulnerable client group, including children, would be detrimental to the public interest and would undermine public confidence. These considerations persuade me that the balance of convenience favours dismissing the Member's request for a stay.

Conclusion

[60] In conclusion, I find that the Member has failed to demonstrate exceptional circumstances sufficient to meet the test for a stay of the disciplinary proceedings. The evidence does not establish that the Member will suffer irreparable harm if the stay is not granted, and even if there were evidence of irreparable harm, I find that the balance of convenience favours denying the stay and allowing the discipline matter to proceed.

[61] Accordingly, the motion is dismissed and the parties are directed to schedule the discipline hearing.

Date: _____

Signed: _____
Charlene Crews