

IN THE MATTER OF THE DENTAL DISCIPLINES ACT, 1997 and AMENDED FORMAL COMPLAINT dated January 17, 2018 and AMENDED September 21, 2018 regarding Dr. Hoda Hosseini formerly of Saskatoon, Saskatchewan, RAISING PROFESSIONAL ISSUES

BETWEEN:

The College of Dental Surgeons of Saskatchewan

-and-

Dr. Hoda Hosseini

**SENTENCING DECISION OF THE HEARING PANEL OF THE DISCIPLINE COMMITTEE**

THE DISCIPLINE COMMITTEE HEARING PANEL:

Mr. Bruce Gibson, Chair of the Hearing

Dr. Hilary Stevens, Discipline Committee Chair

Dr. Raj Bhargava, Member of the College

Dr. Alan Heinrichs, Member of the College

Ms. Nancy Croll, Appointee of the College Council

APPEARANCES: For the Professional Conduct Committee: Mr. Sean Sinclair and Mr. Dustin Gillanders

On Behalf of Dr. Hoda Hosseini: Mr. Scott Hopley

DATE OF SENTENCING HEARING: March 28, 2019

DATE OF DECISION: May 2, 2019

## A. INTRODUCTION

1. This case involves the conduct of Dr. Hoda Hosseini (Dr. H). Specifically, the charges in the AMENDED Formal Complaint (Ex P1) address matters of alleged professional incompetence and breaching the bylaws of the College.
2. The Professional Conduct Committee (PCC) recommended the Discipline Committee (DC) hear the Formal Complaint to determine whether Dr. H is guilty of professional incompetence involving the provision of dental treatment to ██████████ between approximately July 7, 2014 and January 9, 2015. It is alleged Dr. H displayed a lack of knowledge, skill or judgment, and/or disregarded the welfare of ██████████. The Formal Complaint stipulates on or about July 7, 2014 Dr. H, being a qualified specialist in periodontics, placed a dental implant in the # 36 area. The same was removed on January 9, 2015 and a new implant was inserted. The body of the implant transected the inferior alveolar nerve canal and resulted in trigeminal nerve, third branch injury to ██████████. The Formal Complaint alleged: the intrusion of the implant into the inferior alveolar nerve canal was avoidable with proper planning; a competent specialist dentist would have recognized the intrusion when the implant was placed, and the implant ought to have been removed at that time. These allegations are alleged to be contrary to s. 26 of *The Dental Disciplines Act* and paragraph 9.2(2)(x) of the College Bylaws.
3. In the Substantive Decision dated November 26, 2018, this DC did not find Dr. H was unfit to continue in the practice of her profession or provide one or more services ordinarily provided as part of the practice of her profession. Nevertheless, as detailed in the Substantive Decision, we did find professional incompetence had been demonstrated by Dr. H in relation to her treatment of ██████████.
4. This DC found the intrusion of the second implant into the inferior alveolar canal was avoidable with proper planning. Following the first implant, Dr. H's failure to take into account the evident bone loss when measuring the bone available for the second implant, and choosing a 13 mm implant where there was insufficient space for the same, displayed a lack of knowledge, skill or judgment and was professional incompetence within the meaning of *The Dental Disciplines Act* and contrary to 9.2(2)(x) of the *Bylaws*.
5. With respect to the treatment of ██████████, we found Dr. H's failure to undertake further exploration to determine whether there had been implant intrusion into the nerve canal, where increased bleeding was noted and the panoramic image, at the very least, showed a possibility of intrusion into the nerve canal, displayed a lack of knowledge, skill or judgment and was professional incompetence within the meaning of *The Dental Disciplines Act* and contrary to 9.2(2)(x) of the *Bylaws*. We found a competent specialist dentist would have recognized the intrusion when ██████████'s implant was replaced, and failure to remove the

implant also displayed a lack of knowledge, skill or judgment and was professional incompetence within the meaning of *The Dental Disciplines Act* and contrary to 9.2(2)(x) of the *Bylaws*.

## B. THE PENALTY HEARING

6. The parties had previously agreed to bifurcate the Hearing and address the issue of penalty at a later date. The Hearing addressing the substantive issues was held October 3-5, 2018. Counsel for the Professional Conduct Committee (PCC) and Dr. H were both present at the Penalty Hearing. A court reporter was also in attendance.

## C. PENALTY SUBMISSION ON BEHALF OF THE PCC

7. The PCC argues that Dr. H's conduct indicates a significant failure to adhere to her professional obligations. Consequently, it wishes the DC to impose a sentence reflecting the nature and severity of the offense. It asserts because Dr. H failed to take any responsibility for her conduct during the PCC's investigation, a full Hearing was required to be held and she did not acknowledge fault until under oath at the Hearing.
8. Pursuant to the provisions of *The Dental Disciplines Act*, the PCC requests the following Orders be made in relation to Dr. H:
  - a) A formal reprimand;
  - b) The DC's decision be published in the College of Dental Surgeons of Saskatchewan (CDSS) newsletter and on the CDSS website;
  - c) Reimbursement to █████ by Dr. H in the amount of \$7,695.00 in relation to the faulty work performed by Dr. H and \$518.00 for the costs incurred by █████ attending the hearing in October for a total of \$8,213.00;
  - d) Notification of the DC's decision be given to other jurisdictions where Dr. H practices;
  - e) Dr. H reimburse the College's costs, including legal expenses, in the amount of \$90,038.96 representing approximately 75% of the total cost with the College being amenable to discussing a lengthy period of time for Dr. H to pay such costs.
9. The PCC points out the broad disciplinary powers of the DC in section 34 of *The Dental Disciplines Act* ("Act"). The DC may make any order it considers just (ss.34(1)(f)), including an order that the member pay the cost of the investigation and Hearing, including the expenses of the PCC and the DC and costs of legal services and witnesses. (ss.34(2)(a)(ii).
10. The PCC refers to the decision in *Law Society of Saskatchewan v. Hesje*, 2013 SKLSS 13 evidencing the factors to be considered in sentencing for professional misconduct. One "should consider not only the specific circumstances surrounding the commission and impact of an instance of professional misconduct, but the likely effect of such misconduct on the credibility and reputation of the profession, its message to the other members of the

profession, and its gravity in comparison to other situations in which penalties have been imposed."

11. The PCC argues a letter of reprimand can be imposed by this committee pursuant to ss. 34(1)(e) of the *Act*. Its position is such a letter of reprimand is standard and an expected outcome where professional misconduct or incompetence has been substantiated and appropriate in the present case.
12. The PCC argues because it is accountable to the public to ensure the integrity of the profession is maintained, it is important the public know the outcome of disciplinary proceedings against a member. It relies upon a previous decision of this committee in *Dr. Raymond Abouabdallah* where the DC ordered a summary of the charges and penalties imposed be published in the College newspaper and in a newspaper where the member practised. Further, a copy of the decision was to be delivered to the registrar of the College in Québec, where that member was then practising. Reference was also made to a previous decision of this committee in *Dr. Cameron Croll* where a similar order was granted.
13. The PCC provided documentation indicating that its costs with respect to the investigation and prosecution of these matters including payment to █████ totalled \$113,264.95. Further, at the sentencing hearing, additional costs related to the hearing were estimated at \$15,000. A breakdown of these costs is found in Appendix 1. The exhibits for sentencing on behalf of the PCC were filed as Exhibit P-8.
14. Cost awards in a professional disciplinary case are "not to indemnify the opposing party but for the sanctioned member to bear the cost of the disciplinary proceedings as an aspect of the burden of being a member... and not to visit those expenses on the collective membership." (at para. 44). (*Abrametz v. The Law Society of Saskatchewan*, 2018 SKCA 37.)
15. At paragraph 47 of *Abrametz* the court adopted the list of factors set out by the court in *Hills v. Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13. A professional disciplinary body should consider:
  - a) the effect of the cost award on the member and the need for the regulatory body to be able to effectively administer the disciplinary process;
  - b) the respective degrees of success of the parties;
  - c) cost awards ought not to be punitive;
  - d) other sanctions imposed and associated expenses, and
  - e) the relative time and expense of the investigation and hearing associated with each charge and in particular where guilt was entered and where guilt was not found.
16. In light of the foregoing considerations:
  - a) a substantial majority of the proceeding costs ought to be born by the member as opposed to the membership;
  - b) The PCC was wholly successful in its prosecution;
  - c) Costs are not intended to be punitive, but the member should bear the costs so as to avoid transferring the burden to the membership;

- d) The PCC is aware of the financial burden a substantial cost award can impose but suggests a member be provided a reasonable time to pay the costs;
  - e) The PCC is not seeking full indemnity of costs even though the PCC was fully successful in its prosecution;
  - f) The investigation and corresponding legal costs were significant due to the complexity of issues raised in the course of the proceedings and the member did not admit the charges and denied wrongdoing until the date of the hearing.
17. The PCC referred to a number of decisions where the court upheld significant cost awards in connection with an investigation and hearing. In *Osif v. College of Physicians and Surgeons of Nova Scotia* 2009 NSCA 28 the court upheld an award of \$200,000 of the \$265,000 total. In *Fadelle v. Nova Scotia College of Pharmacists* 2013 NSCA 26 the court approved an award of 100,000 representing 65% of the full costs of the proceedings when 6.5 of the 10 charges brought were proven. In *Dr. Croll, supra* the DC awarded 100% of the costs associated with his failure to appear for part of the scheduled hearing and a further 50% of \$107,504.90 being \$53,752.45. In *Dr. Abouabdallah, supra* the member paid 65% of the total costs incurred in relation to the investigation, the hearing and related costs including the expenses of the PCC and the DC and legal services and witnesses.
18. Consequently, the PCC submits the total costs claimed of \$90,038.96 falls within the reasonable range awarded in other jurisdictions and in line with previous decisions of this committee. Dr. H should be responsible for 75% of the cost of the investigation and Hearing.
19. In addition to the referenced 75% cost of the investigation and hearing, the PCC seeks reimbursement to [REDACTED] by Dr. H in the amount of \$7,695.00 relating to the faulty work performed by Dr. H and \$518.00 for the costs incurred by [REDACTED] attending the hearing in October for a total of \$8,213.00. It argues the DC has authority to make the full order pursuant to ss. 34(1)(f) and ss.34(3) of *Act*. Based upon the remedial purposes of the *Act*, the PCC submits the word restitution should be interpreted to include not only the monies paid to a member (or the clinic under which they operate) for faulty work, but also to include all sums the complainant had to pay to remedy the injury resulting from the member's faulty work. (*Dr. Abouabdallah, supra* and *Dorman v. Ophthalmic Dispensers of Manitoba Inc.* 94 Man. R. (2d) 182 (MB QB)).

#### D. PENALTY SUBMISSION ON BEHALF OF DR. H

20. Dr. H submits just because the PCC is not asking for a fine does not mean the amount of costs sought are not punitive. In distinguishing *Abrametz, supra*, she argues it was a "property flip case" and the lawyer in a few months profited \$70,000 at the expense of one of his clients. Reimbursement was ordered to that client in those circumstances. Consequently, that case does not support reimbursement here. Dr. H submits paragraphs 44 – 46 of *Abrametz* are key as they describe the general approach to costs. One does not start from the premise the member provides a full reimbursement of costs. It's more of a balancing act. Costs are not a factor in protecting the public.

21. A Discipline Hearing is forward looking and is not designed to promote compensation for a member of the public. Dr. H questions whether it is fair she bears █████'s costs. █████ is left under-compensated because █████ did not pursue litigation. If Dr. H had been sued by █████ her insurance would pay for a lawyer, any damages and court costs. By proceeding with the Discipline Hearing, Dr. H is left paying substantial fees. She disagrees this process should be used to recover money for █████.
22. Dr. H submits ss.34(3) of the Act speaks to restitution and the DC cannot order remediation. She questions if it is appropriate she should be responsible for the expenses related to the crown placement following █████'s implant. Dr. H submits the City View Clinic (City View) should have been at the Hearing. It was City View that gave the guarantee to █████. She agrees, however, whether City View was present at the Hearing was not a decision of the DC. The DC, however, is left with assessing costs and the DC cannot order City View disgorge itself of its profit.
23. Dr. H, however, does not oppose aspects of the order sought by the PCC. At the Sentencing Hearing she consented and agreed to:
- a) a formal reprimand;
  - b) the professional governing body in Manitoba being provided with the DC's Decision;
  - c) a publication of the DC's Decision, and
  - d) reimbursement to █████ in the amount of \$8,213.00.
24. Dr. H references paragraph 46 in *Abrametz* outlining the factors guiding whether costs are reasonable, including:
- a) Whether the costs are so large as to be punitive;
  - b) Whether the costs are so large they are likely to deter a member from raising a legitimate defence;
  - c) The member's financial status;
  - d) The member has an obligation to provide financial information to support a contention a cost award will impose an undue hardship;
  - e) The regulatory body should provide supporting material for the amount of costs claimed;
  - f) The regulatory body should provide the member an opportunity to respond to the total quantum of costs which may be ordered before costs are imposed;
  - g) The regulatory body should provide reasons for reaching the decision it made;
25. Dr. H argues the penalty hearing phase is not an adequate process to challenge the amount of costs. She could have the legal fees for the prosecution taxed pursuant to *The Legal Professions Act*. There is, however, no mechanism to have the DC hearing panel costs taxed. She submits the legal expenses of the PCC and the Discipline Hearing Chair costs are not out of line with what lawyers charge but asserts these costs are simply too much in this forum: the spectre of a large costs order would discourage members from conducting a vigorous

defence. Dr. H, however, argues she had no choice but to defend this matter as she was never told in advance of the Hearing her license was not at stake. She agrees the PCC cannot make the licencing decision and because her income and profession were on the line, she had to defend the matter.

26. Dr. H did not file a financial statement and is not claiming impecuniosity. Nevertheless, the DC was encouraged to take into account counsel's submissions concerning her circumstances, including the fact her business overhead accounted for 70% of her income and she supports her family. Counsel submits a six-figure cost-award would be crippling and the committee should take into account her circumstances and the impact a cost award would have on her.

#### E. NEGOTIATIONS ON COSTS AND IMPACT ON PENALTY

27. During the course of argument an issue arose with respect to certain discussions and the impact the same had on how the prosecution and defence was managed leading up to the Substantive Hearing on October 3-5, 2018 and the Sentencing Hearing on March 28, 2019. Documents involving correspondence between counsel for the parties were marked for identification only as D-10. This consists of a series of correspondence and e-mails between February 12 and March 25, 2019 leading up to the Sentencing Hearing. Documents identified as Exhibit D-11 and D-12 were also marked for identification only. D-11 is a March 27, 2018 letter from counsel for Dr. H to counsel for the PCC. D-12 is a "Will Say" statement of Dr. Wagner created after the referenced letter (D-11). The issue is whether these documents should be made full Exhibits for the purpose of sentencing and the imposition of costs by this DC.
28. The panel has reviewed all of the documents referenced by both counsel and the arguments related to the same for the purpose of whether there has been a waiver of settlement privilege and whether the correspondence between the parties can be considered by the DC when arriving at a decision on costs.

##### *i) Submissions on behalf of Dr. H*

29. Dr. H submits costs are not about protecting the public interest but are to determine a fair distribution of the self-regulation expense between the convicted member and the membership at large.
30. Costs are not to be punitive to a convicted member. She argues that bad faith in negotiations can be found where the object is to punish a convicted member by seeking increased costs when a member refuses to abandon legal arguments concerning a fair hearing and an appeal. Counsel argues bad faith negotiations in labour relations are analogous here. (George W. Adams, *Reinforcing Recognition of Bargaining Agent* Cdn Lab. L 2 ed 10.11(iv); *Moose Jaw Firefighters Association Local 553 v. The City of Moose Jaw*, 2016 CanLii 36502 (SK LRB); *Canadian Union of Public Employees, Local 1881 v. The Town of Kamsack* 2011 CanLII 81864 (SK LRB))

31. Dr. H submits the PCC acted in bad faith leading up to the Sentencing Hearing. The PCC sought increased costs following Dr. H's refusal to abandon her argument before this DC and on appeal that she had been denied a fair hearing. She argues such actions are punitive and exhibit bad faith in negotiations and consequently the PCC should not be awarded any costs.
32. Parties in conflict are unlikely to negotiate openly if admissions or positions taken during negotiations could be disclosed during a hearing on the merits. Such negotiation privilege or without prejudice privilege exists to encourage settlement and where found it prevents disclosure of such discussions. In contrast, bad faith negotiations, punitive or retaliatory actions do not encourage settlement and settlement privilege is lost.
33. In an effort to reduce a potential cost award in a civil proceeding, a settlement offer prior to trial is often used when speaking to costs following the trial's conclusion. Reasonable efforts to settle the dispute in advance of the hearing do not remain privileged after a decision on the merits has been made. Evidence of "concluded" settlement discussions can be introduced at the hearing of the matter at the merits stage. (*Cozart v. Cozart* 20017 SKQB 110), Dr. H argues efforts to conclude the penalty dispute prior to the Sentencing Hearing are not privileged and the DC should take such efforts into consideration when addressing penalty.
34. Dr. H submits she did accept an offer from the PCC to settle costs. Because PCC counsel immediately repudiated any agreement had been reached as outlined above, she accepted the repudiation. She now argues, in the circumstances, the PCC should not be entitled to any costs because of their bad faith conduct.
35. Dr. H takes issue with the statement by the PCC that she did not admit she had made a mistake in the treatment of [REDACTED] until she took the stand at the Substantive Hearing. Because the PCC submits the DC should take that into account in assessing penalty, she wishes to have us factor into our deliberations exhibit D-11. This is to show during attempts to reach a resolution leading up to the Substantive Hearing, Dr. H admitted making a mistake on the implant placement. She submits where there is correspondence containing an offer that is not intended and not interpreted to be privileged no settlement privilege arises. (*Judith May v. Saskatchewan Power Corporation* QBG 917 of 2016)
36. Dr. H further argues because the correspondence of March 27, 2018 (D-11) resulted in a substantially revised "Will Say" statement from the PCC's expert (Dr. Wagner), Exhibit D-12 should be considered by the panel when assessing costs. She submits this "Will Say" increased the overall costs of the Hearing for her because it suggested the PCC would be advancing opinion evidence postulating the work performed by Dr. H disclosed deficiencies in her education, knowledge skill and judgment. She argues this turned out to not be Dr. Wagner's evidence at the Substantive Hearing. The "Will Say," however, necessitated her calling expert evidence thus increasing the overall costs of the hearing that could ultimately be borne by her.

*ii) Submissions on Behalf of the PCC*

37. The PCC submits it is only with very rare exception, communications designed to settle legal disputes can be disclosed to the court unless both parties agree. This is to encourage such discussions as a means of avoiding trial. (*Tucker-Lester v. Lester* 2012 SKQB 443 at para. 1) Where no agreement is reached privilege remains in place.
38. The use of the phrase "without prejudice" is not required in order for privilege to arise. It is the substance of the communication in determining whether privilege attaches to correspondence. (*Dyck v. Dyck* 2014 SKQB 211 at para. 9)
39. The PCC encourages the DC to examine exhibit D-10 closely as there are back and forth negotiations concerning the issue of costs and the amount of \$60,234.96. In particular, it references counsel for Dr. H's March 14, 2019 email indicating his offered agreement "presumes this remains the amount the PCC is seeking." Later in the day on March 14, Dr. H's counsel served the PCC with a Notice indicating they wished to argue before the DC on March 28 the Substantive Decision of November 26, 2018 was made in circumstances that give rise to a reasonable apprehension of bias.
40. In the subsequent correspondence, the PCC assumes Dr. H would drop her appeal to the Court of Queen's Bench and not pursue the bias application before the DC. Dr. H made it clear she was not abandoning legal arguments. The PCC submits in light of the foregoing, there was never an agreement on all essential terms and consequently no binding agreement arose. (John D. McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at p. 92)
41. The PCC further argues the doctrine of mutual mistake. There was a mistake concerning a fundamental assumption on which an agreement was based. (*Mojuly v. Wong*, [1996] B.C.W.L.D. 1159 at para. 13)
42. The PCC submits resolving the matter was based upon the reasonable apprehension of bias argument and appeal not proceeding and this was critical for any costs agreement to occur. The PCC was under no obligation to compromise on the requested costs amount. The PCC would only do so if it felt it was receiving something in return from Dr. H such as a guarantee she would proceed no further on the bias application or appeal. Such a guarantee would benefit the College, and the members who fund it, by providing certainty the College would not be forced to incur more fees. The PCC submits the correspondence illustrates the PCC had always premised its offer on a global discontinuance. It argues service upon the PCC of the bias application altered the landscape against which the PCC's offer was made and consequently the pre-March 14 offer was no longer open for acceptance after March 14.
43. The bias application introduced a new costly and time-consuming proceeding the PCC would have to respond to. This, it is argued, required the PCC to consider and adjust settlement

terms before a final agreement could be reached on costs. Because no settlement was reached, it argues the communications between counsel remain privileged.

44. The PCC submits their conduct, where no agreement was reached, does not demonstrate bad faith. They assert there was:

- a) No withholding information in an attempt to trick Dr. H;
  - b) No misrepresentations;
  - c) No bargaining by the PCC without an intention to reach an agreement;
  - d) No misleading Dr. H with regard to the PCC's intentions, and
  - e) No breaking off negotiations with Dr. H, to accept an offer from a third party.
- (*The Law of Contracts, supra* at p. 140)

*iii) DC Analysis on Admissibility of Negotiations on Costs*

45. The documents marked for identification (D-10, D-11 and D-12) allow the DC to determine whether the parties have agreed to waive settlement privilege and whether there has been an agreement to settle costs. Dr. Wagner's revised Will-Say (Exhibit D-12) was filed for identification as it allegedly arose as a result of the March 27, 2018 correspondence (Exhibit D-11). Dr. H argues this revised Will-Say increased her preparation costs. Whether to call rebuttal witnesses is a question of litigation strategy. In the circumstances, it is not something we find appropriate to consider in our assessment of costs.

46. In *Tucker-Lester, supra* the court found a party is entitled to waive some types of privilege including solicitor-client and litigation privilege. However, settlement privilege is jointly held and cannot be waived by one party. In reviewing the correspondence found at D-10 and D-11 for identification, we have determined at no time was settlement privilege waived or intended to be waived by the PCC. Initially, there was discussion of a mediated resolution. None was reached. There was subsequent correspondence concerning moving forward with a joint costs agreement to place before the DC at the Sentencing Hearing but no such agreement was ever reached. Such dialogue is privileged. The offer discussed in the correspondence found in D-10 never came to fruition as there was no agreement. The PCC wanted to save the legal expense that it would incur preparing for and arguing the bias application and appeal, but Dr. H wanted the same argued. This panel sees the overall benefit in counsel engaging in open and frank discussions to try to reach a compromised position that can be jointly brought forward to the panel before a substantive hearing or at the time of sentencing. We find such discussions remain confidential until both parties agree to bring the same forward at the time of sentencing.

47. As the PCC did not waive settlement privilege and whether to call rebuttal witnesses is a question of litigation strategy, we find D-10, D-11 and D-12 to be inadmissible and we will not consider them.

## E. PRINCIPLES WHEN DETERMINING PENALTY

48. This DC is guided by the approach enunciated by the Royal College of Dental Surgeons of Ontario, which were approved by previous Discipline Committees (*Dr. Abouabdallah*, August 13, 2012; *Dr. Croll*, March 25, 2013 and *Dr. Etman*, November 13, 2015). These principles were succinctly stated in the *Dr. Abouabdallah* case as follows:

### Considerations in assessing a penalty

The three major considerations in assessing a penalty are:

- (i) the effect on, and appropriateness for, the dentist (reformation, rehabilitation and deterrence);
- (ii) the effect on future conduct of the other dentists (deterrence); and
- (iii) the expression of regard and concern on behalf of the public interest about the conduct in issue (punishment).

In assessing the appropriate penalty in any particular case, the panel may consider any relevant evidence or submissions including the following:

- (i) the seriousness of the misconduct including the effect on the patient (where applicable);
- (ii) the wilfulness and persistence of the misconduct;
- (iii) the previous disciplinary record of the dentist;
- (iv) the character of the dentist;
- (v) the effect of the proposed penalty upon the dentist; and
- (vi) the deterrent effect of the penalty upon other dentists.

The panel should **not** be influenced by the following factors:

- (i) the attitude if [sic] the dentist or his or her counsel during the hearing as it relates to the “likable-ness” of his/her-personality (i.e. whether s/he has a cavalier attitude towards witnesses and counsel, etc.); and
- (ii) any conduct other than that alleged in the Notice of Hearing.

49. We are aware Hearing costs can be significant in professional discipline matters. The DC pursuant to *The Dental Disciplines Act*, is granted the authority and a broad mandate with respect to the costs associated in conducting a Hearing. The *Act*, reads in part:

S. 34(2) In addition to an order made pursuant to subsection (1), the discipline committee may order:

- (a) that the member pay to the Association within a fixed period:

...

- ii) the costs of the investigation and hearing into the member’s conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and costs of legal services and witnesses.

50. It is well-established at law that the assessment of costs is of a compensatory nature and is not to be used as punishment. This committee has consistently applied this principle. We

have been guided in the past, and continue to be guided, by the views of the court expressed in *Barik v. College of Physicians and Surgeons* (1992), 100 Sask. R. 26 (C.A.): members of a profession should not be prevented from defending themselves in regulatory proceedings because of “the chill” of excessive costs.

51. In light of our mandate and the aforementioned guiding principles, this Committee has consistently exercised its discretion when determining the appropriate percentage of costs to be paid in each case. In the *Dr. Ho* case, he was ordered to pay approximately 50% of the costs (p. 2 at para. 5 and p.15 at para. 6). In contrast, in the *Dr. Abouabdallah* case, 65% of costs were ordered to be paid due to delays and incomplete responses for requested information, coupled with a general lack of cooperation in the overall process (para. 24). In the *Dr. Croll* case, he was ordered to pay 100% of the costs for a scheduled Hearing that he failed to attend and 50% of the subsequent substantive and sentencing Hearing costs (para. 11). In the *Dr. Etman* case, the Committee determined it was appropriate he pay 100% of the costs due to his conduct during the investigation and Hearing processes which “delay[ed] or dr[e]w out the determination of issues where there [was] no legitimate defence or justification to be advanced (para. 31).
52. We have taken into account these considerations and counsels’ submissions in the following analysis.

#### F. ANALYSIS ON SENTENCING

53. As referenced, this Committee is afforded a broad mandate when making orders pursuant to s. 34 of *The Dental Disciplines Act*:

##### **Disciplinary Powers**

34(1) where a discipline committee finds a member guilty of professional misconduct or professional incompetence, it may make one or more of the following orders:

- (a) an order that the member be expelled from the association and that the member’s name be struck from the register;
- (b) an order that the member be suspended from the association for a specified period;
- (c) an order that the member be suspended pending the satisfaction and completion of any conditions specified in the order;
- (d) an order that the member may continue to practice only under conditions specified in the order, which may include but are not restricted to, an order that the member:
  - (i) not do specified types of work;
  - (ii) successfully complete specified classes or courses of instruction;
  - (iii) obtain medical treatment, counselling or both;
- (e) an order reprimanding the member;
- (f) any other order that the discipline committee considers just.

*Section 34(2) of the Act* addresses our jurisdiction to order a fine, costs, and to make other orders we consider just. It provides:

34(2) in addition to an order made pursuant to subsection (1), the discipline committee may order:

- (a) that the member pay to the association within a fixed period of time;
  - (i) a fine in a specified amount not exceeding \$5,000; and
  - (ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and costs of legal services and witnesses; and
- (b) where a member fails to make payment in accordance with an order pursuant to clause (a), that the member be suspended from the association.

34(3) in addition to an order made pursuant to subsection (1), the discipline committee may order the member to provide restitution for the cost of a faulty dental prosthesis, periodontal or orthodontal dental appliance, in the case of:

...

- (b) a dentist;

54. It should be noted we find the PCC was entirely successful in its prosecution and Dr. H was found guilty by this committee on all counts. We do not agree with Dr. H's argument this case was a divided success case because it did not result in suspension or re-education. Those are matters related to penalty (s.34).
55. Dr. H has agreed to an order reimbursing [REDACTED] for the costs and expenses [REDACTED] has incurred including [REDACTED] travel expenses for attending the Hearing on October 3, 2018. We find pursuant to ss 34 (1), (2) and (3) of the Act this DC has the authority to make such an order.
56. Although not sought by the PCC, we wish to make it clear there will be no order relating to a fine (ss.34(2)(i)). There will be no order the member be expelled or suspended from the association or complete any specified conditions or continue their practice under specified conditions (ss. 34(1)(a), (b), (c) and (d)). Such orders are not appropriate in the circumstances.
57. As outlined above, Dr. H has agreed to all aspects of the order sought by the PCC except as they relate to costs of the investigation and hearing (ss. 34(2)(a)(ii)).
58. The factors to be considered by this committee, when determining a costs order, are referenced above. We will now apply those principles to the specific circumstances of this case.
59. Dr. H took the stand at the Substantive Hearing and was honest and forthright in her testimony. It was evident she felt remorse over the treatment outcome for [REDACTED]. She agreed at the Sentencing Hearing to reimburse [REDACTED] for all of [REDACTED] expenses.
60. We find the effect of our Substantive Decision on Dr. H is significant. She continues in her position as an Assistant Professor in the graduate periodontal program at the University of Manitoba. Although our findings are related to very narrow treatment circumstances, there will be an impact upon her professional reputation.

61. Since her treatment of █████, Dr. H continues to improve her training. She is involved in treatment planning seminars and clinical supervision of students. She helps residents place surgical implants. She testified this work helps her remain current in her practice. She takes continuing education and filed in these proceedings her Manitoba Dental Continuing Education Report (D-6). It demonstrates she has taken numerous courses and has also taught courses on dental implants and other related areas.
62. The expense involved in running a discipline hearing is significant and requiring Dr. H to pay a portion of these expenses serves as a deterrent to other members of the profession.
63. The treatment ramifications experienced by █████ are serious and █████ has been left with a permanent injury. This, however, was not a situation involving repetitive conduct by the member both in relation to the treatment of █████ or other patients. It was an isolated matter involving a relatively short time span. We find no wilfulness or persistence on the part of Dr. H in the circumstances. We are aware of no other disciplinary matters involving Dr. H. Since her undergraduate training, she estimates she has successfully placed 400 to 500 dental implants. She testified on how to avoid this mistake from happening again. Presently in her clinic, they have a Cone Beam Computed Tomography (CBCT) machine, providing 3-D images, and any implant surgery done on the mandible would involve taking a CBCT image before she begins to plan her approach. We do not find there is any ongoing public interest concern regarding Dr. H's practice of dentistry.
64. It is our understanding Dr. H cooperated in the investigation and the lead up to the Hearings. She cooperated at the Hearings and raised a number of defences that increased the duration and expense related to the Hearings. It was fully her right to do so. The legal issues raised and addressed will, to an extent, be of future benefit to the profession.
65. Although, *The Dental Disciplines Act* provides us with jurisdiction to order payment of costs relating to the investigation and hearing panel, as referenced above, this committee has consistently exercised its discretion when determining the appropriate percentage of costs to be paid in each case.
66. The PCC is seeking an order of roughly 75% of the estimated \$120,000.00 for the Hearing expenses incurred (excluding the restitution sought for █████). Previous cases have sought percentage recovery ranging from approximately 50% to 100%. Each case must be determined on its own facts. Although this case became more complicated, as a result of some of the issues raised, that is reflected in the total estimated cost. Dr. H was entitled to put forth her best defence and did so. We are to apply the principles previously outlined when considering the appropriate penalty.
67. Each case is fact specific. In arriving at our decision on costs payable by Dr. H, we have factored in her cooperation in these proceedings. In addition, we are cognizant of the narrow circumstances that led to the Formal Complaint. Unlike some of the other discipline cases, we are not dealing with a prolonged series of errors. The additional training

undertaken by Dr. H since her treatment of [REDACTED] should also be taken into account. Our specific considerations concerning Dr. H are found in paragraphs 59-64 above. In light of the foregoing, we have decided to set the costs payable by Dr. H for the investigation and hearing at \$50,000.00 (excluding the amount payable to the College as restitution for [REDACTED]). In all the circumstances we consider this to be fair and reasonable.

68. Regarding the matter of the financial ramifications of the overall Order sought, the PCC and the College are prepared to be reasonable regarding the duration of time for payment. This could be a matter of negotiation and if that occurs, this DC retains jurisdiction to address any issues that may arise.

#### G. CONCLUSION AND ORDER

69. Based upon the foregoing, our findings of fact and conclusions contained in the Decision on the substantive issues dated November 26, 2018, we hereby order:
- a) The College of Dental Surgeons of Saskatchewan (CDSS) shall provide Dr. Hosseini with a formal reprimand;
  - b) A summary of the charges against Dr. Hosseini, together with the penalties imposed, and such additional findings or comments in the Decisions of the Hearing Panel the CDSS Registrar or Professional Conduct Committee (PCC) deem appropriate, be published in the CDSS newsletter and on the CDSS website;
  - c) Dr. Hosseini shall reimburse [REDACTED] in the amount of \$7,695.00 in relation to the faulty work performed by Dr. H and \$518.00 for the costs incurred by [REDACTED] attending the hearing in October for a total of \$8,213.00. Such payment shall be made to the CDSS and the CDSS shall provide these monies to [REDACTED];
  - d) Dr. Hosseini shall reimburse the College's costs pertaining to the investigation and hearing and related costs, including the expenses of the PCC and the Discipline Committee and the costs of legal services and witnesses, in the amount of \$50,000.00 with the College being amenable to discussing a period of time for Dr. Hosseini to pay such costs up to a period of 3 years from the date of this Decision;
  - e) The CDSS Registrar shall deliver to the governing body of dentists for the Province of Manitoba a copy of the Substantive Decision of November 26, 2018 and a copy of this Sentencing Decision.

DATED at Saskatoon, this 2<sup>nd</sup> day of May, 2019

THE COLLEGE OF DENTAL SURGEONS OF SASKATCHEWAN DISCIPLINE COMMITTEE per:

"Bruce Gibson"

Bruce Gibson---Chair of the Discipline Hearing Panel

"Hilary Stevens"

Dr. Hilary Stevens---Chair of the Discipline Committee and Member of Discipline Hearing Panel

"Raj Bhargava"

Dr. Raj Bhargava---Member of Discipline Hearing Panel

"Alan Heinrichs"

Dr. Alan Heinrichs---Member of the Discipline Hearing Panel

"Nancy Croll"

Ms. Nancy Croll---Member of the Discipline Hearing Panel and Lay Member of Council

**APPENDIX 1:**

-Dr. Raj Bhargava DC Member- \$2,381.50

-Bruce Gibson DC Hearing Chair- \$43,000.00

-Inland Audio Visual- \$7,125.86

-Ramada- \$3,241.16

-Royal Reporting- \$625.01

-Dr. Hilary Stevens DC Chair and Member-\$2,350.50

-Robertson Stromberg LLP- \$48,709.42

-██████ expenses Incurred- \$7,695.00

-██████ attendance at Hearing- \$518.00

TOTAL= \$113,264.95

FURTHER-The PCC estimates the additional costs related completion of the Hearing at an additional \$15,000.00

Full Cost Estimate—TOTAL= \$128,264.95