

College of Chiropodists v. Bahir Vivekanand

Summary of the Decision of the Panel of the Discipline Committee

On May 9, 2003, the Discipline committee of The College of Chiropodists of Ontario rendered its decision in relation to Mr. Bahir Vivekanand. The hearing was heard on November 6,7,12,13 and 14, 2002 and February 3, 2003 by the Discipline Committee. The discipline committee found:

1. Mr. Vivekanand guilty of professional misconduct as defined in paragraphs 14, 17, 18, 20, 33 of section 1 of Ontario Regulation 750/93 (Professional Misconduct Regulation) made under the *Chiropody Act, 1991* as follows:
 - s. 14 – Providing treatment to a patient where the member knows or ought to know that the provision of the treatment is ineffective, unnecessary or deleterious to the patient or is inappropriate to meet the needs of the patient
 - s. 17 – Failing to keep records as required by the regulations
 - s. 18 – Falsifying a record relating to the member's practice
 - s. 20 – Signing or issuing, in the member's professional capacity, a document that contains a false or misleading statement.
 - s. 30 – Contravening the Act, the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts
 - s. 33 – Engaging in conduct or performing an act, in the course of practising the profession, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.
2. The Discipline Committee ordered that Mr. Vivekanand's certificate of registration be revoked.
3. The Discipline Committee ordered Mr. Vivekanand to pay the costs of the College in the amount of \$75,000.00.

**DECISION AND REASONS FOR THE DECISION
of the Panel of the Discipline Committee**

IN THE MATTER of a Hearing before the a panel of the Discipline Committee of the College of Chiropodists of Ontario held under the authority of the Health Professions Procedural Code of the Regulated Health Professions Act, 1991, Statutes of Ontario, 1991, Chapter 18, as amended and the Chiropody Act, 1991, Statutes of Ontario, 1991, Chapter 20, as amended.

B E T W E E N:

**COLLEGE OF CHIROPODISTS OF ONTARIO
("College")**

- and -

**BAHIR VIVEKANAND
("Mr. Vivekanand")**

Panel Members:	Helga Elie [Chair] Norman Baker David Kerbl Sarah Kerwin Siva Sivaramalingam	Public Member Public Member Chiropodist Chiropodist Public Member
Counsel Present:	Counsel for the College: Counsel for Mr. Vivekanand: Counsel for the panel of the Discipline Committee:	Beth Symes Morris Cooper Alan L. Bromstein
Hearing Dates:	November 6, 7, 8, 12, 13 and 14, 2002 and February 3, 2003	

**DECISION AND REASONS FOR THE DECISION
of the Panel of the Discipline Committee**

A Hearing of a panel of the Discipline Committee of the College of Chiropodists of Ontario (“Panel”) commenced on November 6, 2002 and continued on November 7, 8, 12, 13 and 14, 2002 and February 3, 2003.

ALLEGATIONS:

A Notice of Hearing and an Amended Notice of Hearing with proof of service were marked as Exhibit Nos. 1 and 2, respectively. The Amended Notice of Hearing contained nine separate Allegations of professional misconduct as follows:

- “1. In the year 2000, contrary to section 7(1) (g) of O.Reg. 203/94, as amended; section 23 of the *Code of Ethics* of the profession; and section 33 of O. Reg. 750/93 as amended, Bahir Vivekanand to promote his services, gave his patients gift certificates to Sporting Life, Running Free and the Running Room. This conduct promotes or is likely to promote the excessive or unnecessary use of services.
2. In the year 2000, contrary to section 14 of O. Reg. 750/93, as amended, Bahir Vivekanand prescribed orthotics and/or customized orthopedic shoes to patients when he knew or ought to have known that the treatment prescribed was ineffective, unnecessary or deleterious to the patient, or was inappropriate to meet the needs of the patient. The patients include, but are not limited to:
 - i) LP
 - ii) TW
 - iii) SP
 - iv) W C
 - v) SH
 - vi) GM
 - vii) MM
 - viii) HP
 - ix) JK
 - x) DR
 - xi) MD
 - xii) MF
 - xiii) CS
 - xiv) SD
 - xv) FO
 - xvi) PR
3. In the year 2000, contrary to sections 18, 20, 21, 22 and 23 of O. Reg. 750/93, as amended, and section 23 of the *Code of Ethic* of the profession, Bahir Vivekanand, acting in his professional capacity, signed or issued to Clarica Life Insurance Company, documents that contained false or misleading statements. These false or misleading statements included:
 - i) claims that Birkenstock sandals were either orthotics or customized orthopedic shoes, when they were neither; and
 - ii) upon filing the said claims, falsely representing to Clarica that all

accounts for the prescribed services had been paid in full, when they had not.

4. In the year 2000, contrary to section 7 of O. Reg. 750/93, as amended, and sections 13, 14, 16 and 17 of O. Reg. 203/94, as amended, Bahir Vivekanand failed to maintain patient health records to the standards of the profession, in that he consistently failed to:
 - i) record the medical history of the patient.
 - ii) record reasonable information about every examination he performed and reasonable information about every clinical finding, diagnosis and assessment he made;
 - iii) record reasonable information about every order he made for examination, tests, consultations or treatments to be performed by other persons;
 - iv) record reasonable information about all significant advice given by him to his patient;
 - v) record every written consent and/or reasonable information that an informed consent was obtained;
 - vi) record the treatment plan for the patient;
 - vii) include copies of laboratory evaluations in the file;
 - viii) record the observations and results of any follow-up visits;
 - ix) include in the file a financial record for the patient including:
 - a) fees charged to and received from or on behalf of patient;
 - b) daily appointment record or day sheet giving names and financial details for each day;
 - x) maintain legible records
 - xi) maintain a record of the orthotics or other devices prescribed.

5. In the year 2000, contrary to section 33 of O. Reg. 750/93 as amended, Bahir Vivekanand engaged in conduct unbecoming a member of the profession, in that he:
 - i) contrary to section 7.2 of O. Reg. 830/93 as amended, in 2000 and 2001 practiced out of Henley Gardens Health Group Inc. without advising the College of Chiropodists of Ontario;
 - ii) contrary to section 28 of O. Reg. 750/93, as amended, in 2000 practiced in association with a commercial business, Henley Gardens Health Group Inc., an Ontario corporation of which he was an officer and a director;
 - iii) contrary to section 27 of O. Reg. 750/93, as amended, in 2000 shared a portion of his fees with Henley Gardens Health Group Inc., from whom he received referrals of patients;
 - iv) during an investigation by the College into his practice, misled or misrepresented the facts to the College and its investigators in that he advised that:
 - a) his patients had paid in full before the insurance forms were submitted to Clarica;
 - b) 'g.c.' in his patient records referred to 'gait cycles';
 - c) his 2000 Appointment Book had been disposed of without his knowledge;
 - d) his patient financial records were with his accountant; and
 - e) he failed to advise the College that he was practicing out of Henley

- f) Gardens Health Group during the year 2000; he told the College that in 2000 he was practicing one day a week at the Henley Gardens Health Group.
- v) altered patient records and his 2000 Daily Journal.

Bahir Vivekanand engaged in such conduct or performed such acts, in the course of practicing the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional and is contrary to O. Reg. 750/93, as amended, s.33 and s.23 of the *Code of Ethics* of the profession.

6. Contrary to section 22 of O. Reg. 750/93, as amended, in the year 2000, Bahir Vivekanand engaged in billing practices that were excessive, in that he:
 - i) billed the same fees for a second pair of orthotics as he billed for the first; and
 - ii) billed for a custom made product when it was not ordered or manufactured.
7. Contrary to section 2 of O. Reg. 750/93, as amended, in the year 2000, Bahir Vivekanand failed to maintain the standards of practice of the profession, in that he:
 - i) consistently failed to perform an assessment for each patient seen in his clinic practice;
 - ii) consistently failed to establish a treatment or management plan based on that assessment;
 - iii) consistently failed to follow-up any treatment prescribed; and
 - iv) wrote identical or similar letters regarding different patients with different problems to Clarica to justify payment sought.
8. Contrary to section 3 of O. Reg. 750/93, as amended, in the year 2000 Bahir Vivekanand consistently failed to obtain informed consent for the treatment provided.
9. In the year 2000, contrary to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18, as amended, s.33; O. Reg. 750/93, as amended, s.20; and O. Reg. 302/94, as amended, s. 9(a), Bahir Vivekanand used the title *Doctor* or *Dr.* as in *Dr. Bahir Vivekanand* on his professional cards, in pamphlets setting out his services and on prescriptions.”

PLEA:

Mr. Vivekanand [sometimes referred to herein as the “Member”] pleaded not guilty to each of the Allegations contained in the Amended Notice of Hearing.

THE EVIDENCE:

Evidence was presented to the Panel by the Solicitor for the College on November 6, 7, 8, 12, 13 and 14, 2002. The witnesses called included two expert witnesses, one, namely, Mr. M B, who was qualified as an expert in chiropody and one, namely, Mr. BL, an expert in forensic document examination. A total of thirty-one (31) Exhibits were filed. Amongst those Exhibits were included the reports of the above two experts. When the Hearing was adjourned on November 14, 2002, the College's Solicitor had completed its testimony-in-chief of Mr. Bradley who was to be the last of the College's witnesses. The Panel understood that when the Hearing reconvened, the Solicitor for the Member would be cross-examining Mr. Bradley. The Hearing resumed on February 3, 2003, however, Counsel for the Member advised that the Member had instructed him not to proceed to cross-examine Mr. Bradley nor to call any evidence by way of defence. Mr. Vivekanand was not present at the Hearing on that date although he had been present on all other Hearing days. The Hearing continued with Counsel for the College and Counsel for the Member presenting closing submissions with respect to the finding of professional misconduct, submissions on penalty and submissions on the awarding of costs. In addition to providing oral submissions, Ms. Symes presented a written submission to the Panel in respect of each of these issues.

FINDINGS OF PROFESSIONAL MISCONDUCT:

ALLEGATION NO. 1

DM an insurance consultant of Clarica Insurance, gave evidence before the Panel. She advised that Clarica Insurance had investigated the high billing patterns of the Member for the year 2000. The investigation included the sending of Questionnaires to patients. Question No. 3 in that Questionnaire was "What were your symptoms before getting orthotics?" In many cases, claimants responded that they had no prior symptoms. Also, a number of responses to this Questionnaire indicated that the patients had not been previously treated for these symptoms. In addition, two of the Member's patients testified, namely, Mr. R, a policeman, and Mr.T, a hairdresser. The evidence of Mr. R established that he had never been previously treated for any symptoms of foot pain and further, that he had been induced to see Mr. Vivekanand when he heard that he could obtain two pairs of orthotics and a pair of orthotic shoes as well as two \$150.00 gift certificates without any cost to him. Mr. R testified that the orthotics were very uncomfortable and because of this not used by him.

The evidence of Mr. T was similar in nature but he had previously been treated by another chiropodist for the past three or four years. Although he was satisfied by her treatment, he went to see Mr. Vivekanand because he had heard that Mr. Vivekanand was giving out gift certificates for running shoes.

The evidence established that Mr. Vivekanand purchased gift certificates from the Running Room and Sporting Life as well as from Running Free. In Exhibit Nos. 13 and 14, the

Member admitted that the redeemed value of the gift certificates for the year 2000 was in excess of \$323,000.00. The evidence further established that Mr. Vivekanand offered these gift certificates for the express purpose of inducing patients to use his services. This conduct, in the opinion of the Panel, constituted professional misconduct in that it violated paragraph 33 of section 1 of Ontario Regulation 706/93 which defines professional misconduct as “engaging in conduct or performing an act, in the course of practising the profession, that, having regard to all the circumstances, would be regarded by members as disgraceful, dishonourable or unprofessional”.

The Member's conduct in relation to this Allegation also included advertising the provision of gift certificates with regard to his practice. This advertising was in violation of s. 7(1)(g) of Ontario Regulation 203/94 which prohibits a member from advertising with respect to his or her practice “(g) anything that promotes or is likely to promote the excessive or unnecessary use of services” The advertising of the gift certificates in the opinion of the Panel clearly promoted the excessive or unnecessary use of services. Advertising in violation of this section is professional misconduct pursuant to paragraph 30 of section 1 of Ontario Regulation 705/93 which defines professional misconduct to include contravening the Chiropractic Act Regulations.

For the reasons set out above, the Panel found that the Member had committed professional misconduct as set out in Allegation No. 1.

ALLEGATION NO. 2:

Pursuant to the College's Professional Misconduct Regulation, professional misconduct is defined by paragraph 14 of section 1 of that Regulation to include:

- “14. Providing treatment to a patient where the member knows or ought to know that the provisions of the treatment is ineffective, unnecessary or deleterious to the patient or is inappropriate to meet the needs of the patient.”

The Panel considered the evidence presented in connection with this Allegation and specifically considered the following evidence and testimony:

- Exhibit 10: Patient Records;
- Exhibit 25: Clarica Questionnaire for patient Mr.R;
- Exhibit 30: Report by MB;
- testimony of Mr. R; and
- the testimony of MB.

The Panel heard extensive testimony from MB, a person qualified by the Panel as an expert in chiropractic, relating to patient records contained in Exhibits 9 and 10. The Panel found

his testimony to be credible. The defence chose not to examine MB nor did it provide expert testimony to refute MB's testimony.

In his evidence, MB commented on the appropriateness of orthotic and orthopaedic shoe prescriptions when compared to clinical data contained in the aforementioned patient charts. His opinion was that the orthotic and/or orthopaedic shoe prescriptions were ineffective, inappropriate or deleterious to the patient involved with respect to patients, LP, TW, SP, CK, VC, WC, MH, GM, MM, HP, JK, MMcK and MF. Examples of some of the evidence which MB provided in respect of some of the above-named patients are as follows:

LP

The patient charting of 7/18/00 has the exact opposite assessment as the orthopaedic shoe form to support the provision of shoes. Either the orthoses or the shoes prescribed were inappropriate for the patient's needs.

CK

The orthoses prescribed would cause increased pain to the patient.

WC

This patient was examined on two occasions – 3/22/00 and 12/18/01. The results of each assessment were very different. In either cases the orthotic prescribed in 2000 was said to be ineffective and possibly uncomfortable.

MMcK

This patient's initial complaint was an ingrown toenail. The patient was prescribed foot orthoses that M B suggests would be uncomfortable. There is no mention of treatment to the ingrown toenail.

GR

The orthotic prescription and orthopaedic shoe prescription show opposite diagnoses. Therefore, either the shoes or orthotics [or both] were inappropriate, unnecessary or deleterious.

The Panel also noted that in respect of Mr. R , the Clarica Questionnaire [Exhibit 25] disclosed Mr. R had no symptoms when he went to Mr. Vivekanand for his consultation.

Having regard for the evidence, the Panel was satisfied that the Member had provided treatment to fourteen (14) patients [their names can be found in Exhibit 10, Tabs 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 15, 18 and 20] in circumstances where the Member either knew or ought to have known that the provisions of treatment were ineffective, unnecessary or deleterious to that patient, or alternatively, were inappropriate to meet the needs of the patient. As a result, the Panel found the Member guilty of professional misconduct in

respect of this Allegation.

ALLEGATION NO. 3:

Professional misconduct is defined by paragraphs 18, 20, 21, 22 and 23 of section 1 of the College's Professional Misconduct Regulation to include:

- “18. Falsifying a record relating to the member's practice.”;
- “20. Signing or issuing, in the member's professional capacity, a document that contains a false or misleading statement.”;
- “21. Submitting an account or charge for services that the member knows is false or misleading.”;
- “22. Charging a fee that is excessive in relation to the services or devices charged for.”; and
- “23. Failing to notify the patient of the fees charged for the member's services prior to rendering the services to the patient.”.

The Panel considered the evidence presented in connection with this Allegation and specifically considered the following evidence and testimony:

Exhibits 3, 4, 10 and 17;
testimony of Mr.R;
testimony of DM; and
testimony of Mr.T

As confirmed by the patient records which were tendered into evidence, the Member prescribed orthopaedic shoes for a great many of his patients. These orthopaedic shoes were in fact Birkenstock sandals, however, the claims which were submitted by Mr. Vivekanand on behalf of his patients to Clarica described them as custom shoes. It was clear from the testimony of JR and DM that Birkenstock sandals are not orthopaedic shoes. They have no heel counter and in fact are not shoes at all, but rather, sandals. Mr. Vivekanand completed numerous claim forms on behalf of his patients claiming that he had provided prescription shoes. Also included in most of the charts where that claim is made is a shoe prescription form which was sent to Clarica in support of the claim. The Member did not identify to Clarica that the proposed “shoe” was a Birkenstock sandal. Furthermore, in the shoe prescription form sent to Clarica, the Member stated

“It is recommended that she starts wearing prescription Orthopaedic shoes

with ample room in the toe region, which support her arches, yet fit her orthotics and splaying forefoot. The shoe recommended has good shock absorption, built in arch support, and stability in the heel counter." [*Emphasis added*]

This form of letter can be found in Exhibit 10, Tabs 1, 2 and 4 through 23, inclusive. In each case, the evidence established that the so called orthopaedic shoes were Birkenstocks which, as previously indicated, had no heel counter.

The Panel was satisfied that the Member, in submitting claims to Clarica on behalf of his patients and related shoe prescription forms contravened both paragraphs 18 and 20 of subsection 1 of the Professional Misconduct Regulation respecting numerous of his patients including those referred to by the above Exhibit and Tab numbers. The same conduct took place in respect of Mr. R whose record was admitted into evidence as Exhibit 9, Tab 10.

Specified Allegation No. 3 also includes an allegation that Mr. Vivekanand falsely represented to Clarica that all accounts for the prescribed services had been paid in full when in fact they had not.

It is clear from the evidence of DM and the information provided from the Clarica survey that a significant number of respondents did not pay for their orthotics before the claim was submitted to Clarica. This was specifically confirmed by the testimony of Mr. R and Mr. T.

In the Panel's view, there was not sufficient evidence to support a finding of professional misconduct under either paragraph 22 or 23 of section 1 of the College's Professional Misconduct Regulation in respect of the conduct described in Allegation No. 3.

ALLEGATION NO. 4:

Allegation No. 4 deals with the Member's failure to maintain patient health records to the standards of the profession required of him. The College's Professional Misconduct Regulation, and specifically paragraph 17 of section 1, includes in the definition of professional misconduct:

“17. Failing to keep records as required by the regulations.”

The College's Regulation dealing with the maintenance of records can be found in Ontario Regulation 203/94 and more specifically, Part III, sections 13 to 24, inclusive. In particular, subsection 13(1) requires:

“13(1) A member shall, in relation to his or her practice, take all reasonable steps necessary to ensure that records are kept in accordance with this

Part.”

Section 14 requires:

“14. A daily appointment record shall be kept that sets out the name of each patient whom the member examines or treats or to whom the member renders any service.”

Subsection 16(1) requires:

“16.(1) If a patient is charged a fee, a financial record shall be kept for the patient.”

Subsection 17(1) requires:

“17.(1) A patient health record shall be kept for each patient.”

The Panel considered the evidence presented in connection with this Allegation and specifically considered the following evidence and testimony:

Exhibits 9 & 10: patient records;
Exhibit 30: report of MB; and
testimony of MB.

The Panel heard a significant amount of testimony from MB relating to the patient records contained in Exhibits 9 and 10. MB commented, in respect of each record, on whether the Member had maintained the standards as set out in Part III of Ontario Regulation 203/94 in respect of the Member's recordkeeping. MB's testimony was found to be credible and accepted by the Panel. He testified that all of the files in Exhibits 9 and 10 failed in some way to meet the regulated standards provided for by Part III of Ontario Regulation 203/94. Examples of the Member's failure included:

- (a) A failure to record an adequate or, in some case, any medical history in respect of the patient. [see Exhibit 9, Tabs 2, 4, 12 and 17]
- (b) A failure to record reasonable information about every examination which he performed and reasonable information about every clinical finding, diagnosis and assessment which he made. [see Exhibit 9, Tabs 2, 5, 6, 8 and 10]
- (c) A failure to record information regarding a patient's ingrown toenail. [see Exhibit 10, Tab 20]
- (d) Many of the records were illegible [as admitted by the Member's legal counsel] and as testified to by Mr. Bradley.

The evidence established to the Panel's satisfaction that the Member had not taken all

reasonable steps necessary to ensure that the records required to be kept pursuant to Part III of the College's Regulation 203/94 were in fact kept and in particular, he had failed to meet the required standards respecting recordkeeping relative to:

- (a) the recording of medical history of patients;
- (b) the recording of reasonable information about every examination he performed and reasonable information about every clinical finding, diagnosis and assessment which he made;
- (c) the recording of reasonable information about all significant advice given by him to his patient; and
- (d) the maintaining of legible records.

The Member's failure in this regard was professional misconduct as defined by paragraph 17 of section 1 of the College's Professional Misconduct Regulation.

ALLEGATION NO. 5:

This Allegation relates to conduct which the College asserts contravened paragraph 33 of section 1 of the College's Professional Misconduct Regulation. As previously indicated in these Reasons, that section defines professional misconduct to include:

- “33. Engaging in conduct or performing an act, in the course of practising the profession, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.”

This specified Allegation is subdivided into five specific and distinct sub-Allegations. With regard to the first three, the College asserts that the conduct also contravened other provisions of Regulations passed under the Chiropractic Act which, by definition, would be professional misconduct pursuant to paragraph 30 of section 1 of the College's Professional Misconduct Regulation which defines professional misconduct to include:

- “30. Contravening the Act, the *Regulated Health Professions act, 1991* or the regulations under either of those Acts.”

The Panel considered the evidence presented in connection with this Allegation and specifically considered the following evidence and testimony:

- Exhibits 3, 4, 14, 15, 16 21, 23 and 28;
- testimony of Marilyn Bartlett, an investigator for the College;

testimony of Mr. R;
testimony of DM; and
testimony of BL, an expert in forensic document examination.

The sub-Allegation set out in 5(i) asserts that in the year 2000, the Member “practised out of Henley Gardens Health Group Inc. without advising the College of Chiropractors of Ontario” of that fact. The evidence clearly established that this did in fact take place. This constitutes professional misconduct under either or both of paragraph 33 and 30 of section 1 of the College's Professional Misconduct Regulation.

In respect of sub-Allegation 5(ii), it was asserted that in the year 2000, the Member “practised in association with a commercial business, Henley Gardens Health Group Inc., an Ontario corporation of which he was an officer and a director” In the Panel's view, there was no evidence to establish that Henley Gardens Health Group Inc. was anything other than a management corporation. As a result, the Panel was not satisfied that the Member had practised “in association with a commercial business” *[emphasis added]* and, therefore, found the Member not guilty of this sub-Allegation.

Respecting sub-Allegation 5(iii), the College alleged that in the year 2000, the Member “shared a portion of his fees with Henley Gardens Health Group Inc., from whom he received referrals of patients”. Exhibit 23 showed that a portion of the billings for each patient goes to the Henley Gardens, which portion is approximately forty percent of the net billings [after orthotic or shoe cost]. Based on the evidence, the Panel was not satisfied that these payments were made in conjunction with or in relation to the referral of patients. The payment could have been equally consistent with the payment to a management company of a portion of the fees of the Member as a means to pay for overhead costs. As a result, the Panel was not satisfied that the Member had committed professional misconduct as alleged in sub-Allegation 5(iii).

In respect of sub-Allegation 5(iv), the College asserted that the Member, during an investigation by the College into the Member's practice, mislead or misrepresented the facts to the College and its investigators. Six specific examples of how he did this were included in the specified sub-Allegation. Based on the evidence, the Panel was satisfied that the Member attempted to mislead the College,

- (a) into believing that patients had paid in full for their orthotics and prescription shoes before the insurance forms were submitted to Clarica;
- (b) that the initials “g.c.” as used in the Member's records stood for “gait cycles” as opposed to the words “gift certificates” [see Exhibit #4 - pg.7];
- (c) that his 2000 appointment book had been disposed of without his knowledge;

- (d) that his patient and financial records were with his accountant; and
- (e) that he was practising only one day a week at the Henley Gardens Health Group Inc. in the year 2000 [see Exhibit #3 - pg. 3].

Each of those stated facts was untrue and the Member's assertions were clearly an effort on his part to mislead or misrepresent facts to the College. The evidence established and the Panel found that

- (a) "g.c." referenced the provision of gift certificates and not "Gait Cycles" as asserted by the Member in Exhibit #4;
- (b) the 2000 appointment book had not been disposed of as he asserted to the College Investigator [in fact the book was produced at the Hearing and marked as Exhibit 21];
- (c) the patient records were not with Mr. Vivekanand's accountant [that fact having been established by the evidence of Marilyn Bartlett]; and
- (d) for most weeks of the 2000 year, patients were seen by Mr. Vivekanand more than one day per week at the Henley Gardens Health Group Inc. [which fact was established by Exhibit 23] contrary to Mr. Vivekanand's statement in Exhibit #3;

The Panel found that the Member, in making these statements, conducted himself in a manner that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional and, therefore, found the Member guilty of professional misconduct for violating paragraph 33 of section 1 of the College's Professional Misconduct Regulation.

In respect of sub-Allegation 5(v), the College asserted that the Member had altered his patient records and his 2000 daily journal. Exhibit 21 is the journal itself and a great many portions of the journal are blacked out. There are also many occurrences of overwriting contained in the journal. Exhibit 28 and the testimony of BL revealed that the overwriting was done with two different inks and that the blacked out portions of the journal contained information that would not be favourable to Mr. Vivekanand. The evidence established to the satisfaction of the Panel that these actions were those of Mr. Vivekanand.

The Panel found that the Member's conduct in blocking out and overwriting aspects of his records was conduct that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional and, therefore, found the Member guilty of professional misconduct for violating paragraph 33 of section 1 of the College's Professional Misconduct Regulation.

ALLEGATION NOS. 6, 7 and 8:

In the submissions of the College, the Solicitor for the College asserted that there was not sufficient evidence established by the College to find the Member guilty of professional misconduct in respect of any of Allegations 6, 7 or 8. The Panel considered the evidence and agreed with the College's submission in this regard.

ALLEGATION NO. 9:

Allegation No. 9 in the Notice of Hearing asserts that in the year 2000, the Member used the title "Doctor or Dr." on his professional cards, in pamphlets setting out his services and on prescriptions. The College asserted that this conduct, if proven, would be contrary to the Regulated Health Professions Act, 1991 and specifically, section 33 which limits a person's right to use that title in the course of providing or offering to provide in Ontario health care to individuals [with exceptions which do not include members of the College of Chiropodists]. The Panel agreed that this conduct, if proven, would have been professional misconduct on the part of the Member. The Panel carefully reviewed the evidence presented to it in connection with this Allegation. In particular, it reviewed Exhibit 19 which the College's Solicitor had specifically referenced in her submission. Exhibit 19 contains "documents relating to the testimony of WW from Running Free and includes the referrals, business cards and prescriptions written by the Member that were presented to Running Free for the years 2000 and 2001. While the Panel was able to find some evidence that the Member used the title "Dr." in respect of his practice, that evidence related solely to the year 2001, whereas the specified Allegation asserts that the Member had conducted himself in this manner "in the year 2000". Given the specific Allegation in connection with this matter, the Panel found that there was no evidence to establish that Mr. Vivekanand had used the title "Dr." in respect of his practice during the year 2000 and for this reason, this Allegation as against Mr. Vivekanand, was found not to have been supported by the evidence.

PENALTY

The solicitors for both parties acknowledge that in determining the appropriate penalty, the Panel should consider the following factors:

- "i) nature and gravity of offences,
- ii) protection of the public,
- iii) the importance of maintaining public confidence in the profession
- iv) mitigating factors or circumstances,
- v) specific deterrence (send a message to the Member),
- vi) general deterrence (send a message to the profession),
- vii) rehabilitation of the Member,
- viii) age of the Member, and
- ix) any previous record (good or bad)."

Counsel for the College has suggested that in the absence of a dramatic change in the practice of Mr. Vivekanand, this would be an appropriate case for revocation. As the Panel understands it, a revocation involves a minimum of one year suspension of the member's Certificate of Registration with the right given to the member to apply to a panel of the Discipline Committee for reinstatement. There is, of course, no assurance that the member will be reinstated and the onus to satisfy the [next] panel that he deserves to be reinstated would be on Mr. Vivekanand. Counsel for Mr. Vivekanand submitted that the Panel must take into account that his client was just starting his professional career and that his client was not in a position to acknowledge any wrong doing since it was not until shortly before the last day of the Hearing [February 3, 2003] that the College would consider a penalty short of revocation. As a result, he submitted that his client was not in a position to plead to any of the Allegations. Counsel for the Member submitted that the facts would, if proven, support a reprimand and might support a suspension but not a revocation.

The acts of professional misconduct which this Panel has found Mr. Vivekanand to have committed are of the most serious variety. He put in place a scheme to promote excessive or unnecessary use of his services through gift certificates. He submitted documents to an insurance manager which were false or misleading resulting in payments being made which ought not to have been made. He deliberately attempted to mislead the College in respect of its investigation and to cover up his actions by changing his records. In addition to those most serious Allegations, he has also been found guilty of allegations relating to failure to maintain patient health records to the standards required of the profession.

In attempting to determine what the appropriate penalty would be in respect of this case, the Panel attempted to take into account all of the above factors including the mitigating circumstances. The Panel accepts the fact that Mr. Vivekanand was early in his career as a chiropodist when he committed these acts of professional misconduct. There was, however, no evidence of other factors which, in the Panel's view, could be used to mitigate the penalty. On the other hand, certain of the actions of Mr. Vivekanand were not only extremely serious but were deliberate. The subsequent attempts to cover up and mislead the College left the Panel with serious concerns as to whether Mr. Vivekanand was governable. Had the Panel heard some explanation from Mr. Vivekanand or had there been evidence of other mitigating circumstances presented to the Panel, the Panel may have concluded that a specified period of suspension along with a reprimand and terms, conditions and limitations imposed upon the Member's Certificate would have been adequate. Unfortunately, there was nothing presented to the Panel which satisfied it that Mr. Vivekanand was [on February 3, 2003 when the Hearing concluded] a governable member.

The Panel was of the view that the length of the suspension to be imposed in connection with this matter would be a minimum of twelve months and further was of the view that Mr. Vivekanand should not be permitted to continue to be a member of the College of Chiropodists of Ontario unless he satisfied a panel of the Discipline Committee that he understood what it meant to be a member of a self-governing profession, i.e. a member

who is prepared to comply with the rules and regulations which govern that profession. In reaching this decision, the Panel was aware that the public, including third party insurance providers, rely upon the honesty and integrity of members of the College of Chiropodists. This is particularly so when insurers and employers pay out money based on claim forms signed by this College's members. If this College's members are to continue to deserve respect, then the Panel must make it clear that there will be significant consequences where a member deliberately acts in a manner which puts in question that trust and the integrity of the profession at large.

As a result, the Panel was unanimously of the view that the appropriate penalty to be imposed in connection with this Hearing was a revocation and it, therefore, makes an order directing the Registrar to revoke the Member's Certificate of Registration.

If Mr. Vivekanand wishes to return to the profession of chiropody in Ontario, he will need to apply for reinstatement, which application goes before a panel of the Discipline Committee. This Panel would hope that any [further] panel considering such an application would only reinstate Mr. Vivekanand if he satisfied the panel that he indeed would be governable [in the future]. This Panel would also hope that any [future] panel would consider the imposition of appropriate terms, conditions and limitations on any reinstated Certificate of Registration so that assurance provided by Mr. Vivekanand would be objectively verified. In addition, this Panel wishes any [future] panel which might consider the reinstatement of Mr. Vivekanand to understand that had it considered this an appropriate case for a suspension [as opposed to a revocation], it would have imposed terms, conditions and limitations on Mr. Vivekanand's Certificate of Registration including conditions respecting monitoring of his practice, requiring him to work for a period of time under the supervision or direction of another chiropodist and requiring him to do remedial training respecting his recordkeeping. Furthermore, it is this Panel's view that reinstatement should not be considered unless and until Mr. Vivekanand has reimbursed the College with respect to the costs and expenses incurred in accordance with the order of this Panel [which follows immediately hereafter].

COSTS

In an appropriate case, a panel has the authority to make an order requiring a member who the panel finds has committed an act of professional misconduct to pay all or part of

- The College's legal costs and expenses.
- The College's costs and expenses incurred in investigating the matter.
- The College's costs and expenses incurred in conducting the Hearing.

This authority is provided to the Panel pursuant to section 53.1 of the Health Professions Procedural Code of the Regulated Health Professions Act, 1991.

Counsel for the College submitted that if the Member is found guilty of professional misconduct, the College wished to recover costs and expenses in the amount of \$100,000.00 and evidence was presented that the total costs and expenses incurred or to be incurred in respect of the Hearing would be in excess of \$150,000.00.

Counsel for Mr. Vivekanand submitted that Mr. Vivekanand had no choice but to defend himself and that a significant award of costs would be tantamount to a revocation. He suggested that the College should not be in the business of cost recovery.

Having regard for the Divisional Court Decisions in *Freedman vs Royal College of Dental Surgeons of Ontario* and *Pavelic vs Royal College of Dental Surgeons of Ontario* [both authorities having been given to the Panel], the Panel is satisfied that this is an appropriate case to award recovery of costs and expenses to the College. The Panel relied upon the following factors in coming to this conclusion, namely:

1. Mr. Vivekanand's actions were intended to financially benefit Mr. Vivekanand.
2. No expert evidence was called by the Member to refute the expert testimony given by MB despite assurances being given to the Panel that an expert would be called by Mr. Vivekanand.
3. The Member called no evidence by way of explanation instead relying upon the College to prove, with limited exceptions, the facts.
4. The investigation was made more difficult by Mr. Vivekanand's deliberate attempt to mislead the investigators.
5. The Member's conduct in attempting to alter or make certain evidence unuseable caused additional expenses being incurred including the need to call a forensic expert.
6. In addition to making the investigation more difficult, the Member's deliberate conduct in attempting to mislead and cover up his activities caused the Hearing itself to be more complicated and to take more time than it would otherwise have.

The Panel then had to determine how much of the costs and expenses it would award the College. As a general principle, the Panel did not believe that a recovery of the costs and expenses associated with the professional Panel members being in attendance was appropriate. [This would reduce the estimated costs by \$4,744.00 for Mr. Kerbl and \$4,340.00 for Ms. Kerwin, respectively.] In addition, the Panel was of the view that a reduction from the balance of the costs ought to be made to take into account the fact that three of the Allegations of professional misconduct were ultimately withdrawn [on the basis that there was no evidence to support the Allegations] [Allegations 6, 7 and 8]. In

addition, a further reduction was appropriate as a result of the costs and expenses incurred in investigating and ultimately conducting the Hearing relative to Allegation 9, which the Member was found not guilty of. There were also certain other particulars of the balance of the Allegations which the Panel did not find to be professional misconduct. In addition, the Panel felt that there should be a further reduction in the overall amount of reimbursement to be made to the College on the basis that the Allegations were extremely broadly framed and as a result, gave rise to a somewhat inefficient prosecution.

Bearing in mind all of the above factors, the Panel orders that Mr. Vivekanand pay to the College on account of the College's legal costs and expenses, the College's costs and expenses incurred in investigating the matter, and the College's costs and expenses incurred in conducting the Hearing, the amount of \$75,000.00. In the Panel's view, a generous reduction from the total costs was applied considering that the majority of the time spent at the Hearing did relate to the allegations that Mr. Vivekanand was found guilty of. Counsel for the College submitted that Mr. Vivekanand be given a payment schedule in respect of the costs. In her submission, the \$100,000.00 which she asked the Panel to award was to be paid \$40,000.00 forthwith, and \$20,000.00 on or before December 31, 2003, December 31, 2004 and June 30, 2005. The Panel does not believe that Counsel for Mr. Vivekanand made any submissions in regard to a time frame over which Mr. Vivekanand should be required to pay any costs ordered. This Panel received no evidence in respect of Mr. Vivekanand's ability to reimburse the College. If Mr. Vivekanand wishes to request time to pay, he should make that request to the Executive Committee of the College. Since, pursuant to this Decision, Mr Vivekanand is no longer a member of the College, the decision to provide him with additional time to pay would be one which the Executive Committee will be able to make on behalf of the College.

Dated: May 9, 2003.

Helga Elie
Chair of the Panel of the Discipline Committee