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VIA COURIER

March 28, 2002

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File 10052

Dear Mrs. Shore:

**Re: CNO and Doerksen/Soriano**

Please find attached a copy of the Reply Submissions of the College of Nurses of Ontario re: Shore Motion to Access Exhibits served upon you pursuant to the Rules of Civil Procedure.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

*Karen Jones*  
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cc: Karen McGovern (w/enclosure)  
cc: Prudence Morton (w/enclosure)

Enc.

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**To:**           **DISCIPLINE COMMITTEE OF THE COLLEGE OF NURSES OF  
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**AND TO:**   **Sharon Shore**  
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**AND TO:**   **Elizabeth McIntyre**  
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**IN THE MATTER OF A HEARING BEFORE THE DISCIPLINE COMMITTEE OF  
THE COLLEGE OF NURSES OF ONTARIO**

**BETWEEN**

**COLLEGE OF NURSES OF ONTARIO**

**-and-**

**RUTH DOERKSEN and ANAGAILE SORIANO**

**REPLY SUBMISSIONS OF THE COLLEGE OF NURSES OF  
ONTARIO**

**RE: SHORE MOTION TO ACCESS EXHIBITS**

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ONTARIO**

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**RE: MOTION TO ACCESS EXHIBITS**

***Overview***

1. On December 4, 2001, Ms Doerksen and Ms Soriano ("Members") brought a motion before a panel of the Discipline Committee for an adjournment of their discipline hearing.
2. The hearing of that motion was open to the public. It was attended by, amongst others, Mrs. Shore, who now is bringing a motion to access exhibits. A reporter was also in attendance.
3. There was no request that the hearing of the adjournment motion be closed to the public. There was no concern expressed at that hearing that any material before the panel of the Discipline Committee was in any way

confidential, or that the Members had any privacy interest in the material.

There was no request for an order preventing the public disclosure of matters disclosed at the hearing.

4. Mrs. Shore now brings a motion to obtain a copy of Exhibits 3 and 4 to the adjournment motion, each of which contains:

- a. A Notice of Motion requesting the adjournment; and
- b. An affidavit sworn by Kate Hughes, counsel to the Members.

5. The affidavits of Ms Hughes outline:

- a. who complained about/reported the Members to the College of Nurses;
- b. that allegations of professional misconduct were referred to the Discipline Committee;
- c. the timing of certain events (i.e., the pre-hearing, notification by the police that criminal charges would be laid, court appearances, etc.);
- d. the reasons for the adjournment request. Those reasons are essentially repeated in the Notice of Motion.

6. During the course of the hearing of the adjournment motion, Ms McIntyre, counsel for the Members, referred to the information in the affidavits.

***Principles of Access and Openness in College Discipline Hearings***

7. Pursuant to section 45(1) of the *Regulated Health Professions Procedural Code* ("Code"), discipline hearings are open to the public. Public access to a discipline hearing can be restricted where one or more of the grounds set out in section 45(2) of the *Code* are met (i.e., a person involved in a criminal proceeding or a civil suit or proceeding may be prejudiced) **AND** the panel of the discipline committee determines that the privacy interest outweighs the public interest in an open hearing.

R. Steinecke, *A Complete Guide to the Regulated Health Professions Act* (Aurora: Canada Law Book, 2001) at 6-38 to 6-39

8. The Discipline Committee, as part of controlling its process, has the right to control access to exhibits. That control ought to be exercised on the same considerations as those used in determining whether a hearing should be closed to the public or whether there should be a publication ban.

Steinecke, *supra*

*French Estate v. Ontario (Attorney General)*, [1998] O.J. No. 752 (Ont. C.A.)

9. The Supreme Court of Canada has set out guidelines that will assist the Discipline Committee in deciding whether to limit public access to its hearing, including limiting access to the exhibits:

a) An Order limiting access to exhibits should only be made where:

1. It is necessary to prevent a real and serious risk to the proper administration of justice or the fairness of the trial because a reasonable alternative measure will not suffice;
2. The salutary effects of the ban or limitation outweigh the deleterious effects on the rights of the parties and the public, including the right to free expression, the right to a fair and public trial and the efficacy of the justice system.

b) Before making any Order limiting access to exhibits, the panel must:

1. Consider the available options and consider whether there are any other reasonable and effective alternatives available;
2. Consider whether the Order is as limited as possible;

3. Weigh the importance of the objectives of the particular order and its probable effect against the importance or openness and the particular expression that will be limited so that the positive and negative effects of the Order are proportionate.

*R. v. Mentuk*, [2001] S.C.J. No. 73

*French Estate v. Ontario (Attorney General)*, *supra*

#### **Should Mrs. Shore's Motion be Denied?**

10. The Discipline Committee has developed Guidelines that include factors the Discipline panel may consider when deciding a motion for access to exhibits. All of those factors should be considered in light of the Supreme Court of Canada guidelines.

#### ***Hearings Ought To be Open to the Public***

11. As noted earlier, the December 4, 2001 hearing of the motion to adjourn was open to the public. Mrs. Shore was in attendance as were other members of the public. The Members did not request on December 4, 2001 that the public be excluded from all or part of the motion. They did not request that the panel prevent the public disclosure of any matter disclosed at the hearing.

12. If the Members had a legitimate concern that their right to a fair trial or hearing would be prejudiced by publicity about the hearing, they could and should have raised that concern at the hearing. They did not do so. The fact that the hearing was open to the public favours the grant of access to the exhibits.

### **The Intended Use of The Exhibits**

13. The Members state at paragraph 29 of their factum that as Ms Shore did not provide an explanation for her intended use of the exhibits, the panel can draw an inference that she intends to publicize them.

14. Ms Shore has indicated on a number of occasions that she has a personal interest in the hearing. Her daughter died while under the care of the Members. She is the person who complained to the College about the Members. It is difficult to imagine circumstances where a person could have a greater personal interest in a College hearing.

15. The Members allege that Ms Shore intends to publicize the exhibits. The evidence does not support this allegation. Specifically, there is nothing in their material to indicate that Ms Shore has publicized anything in relation to her

daughter since May 5, 2001. Had Ms Shore intended to use the College's hearing as a platform for publicity, there has been ample opportunity since May 5, 2001 to do so, including after the December 4, 2001 motion. There is no evidence that she has done so.

### **Proprietary and Privacy Interests in the Exhibits**

16. Exhibits 3 and 4 to the December 4, 2001 motion for adjournment do not contain any proprietary or private information. The bulk of the information in Ms Hughes' affidavits is either contained in the Notice of Motion, which is available to the public, or has already been published by others. For example, the fact that the Members have been charged with criminal negligence causing death has been widely reported in both broadcast and print media.

17. Had the Members been concerned that there was some private information in their Motion Record, they could and should have requested either that the public be excluded from the hearing or that there be a publication ban. There was no issue raised at the adjournment motion or in the Members' Response concerning privacy. There is no basis for denying access to the exhibits on the basis of privacy/proprietary concerns.

### **The Timing of the Request**

18. The fact that the request for access to the exhibits was made after the hearing favours the grant of access. The information contained in the Exhibits has already been made available to the public because the hearing was open to the public and there was no publication ban. The information from the exhibits would be available to Ms Shore, or any other member of the public, from the transcript of the hearing. Anyone can obtain a copy of the transcript, because the hearing was not subject to a publication ban.

### **Interference with the Proper Conduct of the Hearing and Right to a Fair Hearing**

19. The Members allege that Ms Shore is "immoderate" and "aggressive" and displays antipathy towards them. They further allege that she may bring the Committee's process into disrepute by misusing its record to discredit and defame them. They rely on an affidavit from a Dr. Goldbloom and Ms Shore's own web site as support for their allegations.

20. Dr. Goldbloom apparently swore an affidavit in response to Ms Shore's motion to obtain standing at the Sanchia Bulgin inquest. This affidavit is improperly before the Discipline Committee and should not be admitted as

evidence because it offends the implied undertaking rule, is hearsay information, and is irrelevant to Ms Shore's motion.

21. It is improper to use an affidavit from one proceeding in an unrelated proceeding (the "implied undertaking rule"). Dr. Goldbloom's affidavit was sworn for a particular purpose. This is evident by paragraph 21 of the affidavit, which states:

I make this affidavit in response to Mrs. Shore's application for standing [at the Sanchia Bulgin inquest] and for no other or improper purpose.

22. In addition, there is no confirmation in the Member's Response that Dr. Goldbloom knows or consents to his affidavit being used in this proceeding.

23. Dr. Goldbloom's affidavit is hearsay evidence, as it is an out of court statement. No one has had the opportunity to test his statements by cross-examination. The document is therefore unreliable and should not be admitted.

24. Dr. Goldbloom's affidavit should not be admitted because it is irrelevant. It simply does not matter for the purpose of Ms Shore's motion at the College that Dr. Goldbloom thought Ms Shore should not have standing at the Sanchia Bulgin inquest or his rationale for that view.

25. With respect to Ms Shore's web site, the Members do not allege that she has publicized any information about the College's proceedings. In addition, it appears from their material that the most recent entry on the web site was May 5, 2001, almost one year ago. In any event, they admit at paragraph 13 of their Response that the web site is now unavailable.

25. As noted above, the guidelines provided by the Supreme Court of Canada regarding limiting access to public hearings also apply to limiting access to exhibits. According to those guidelines, public access should be limited only where the limitation is necessary to prevent a **real and substantial risk** to the fairness of the trial or the administration of justice.

26. In this case, there is no real and substantial risk that the Members will not receive a fair trial or hearing if Ms Shore has access to the exhibits. First, there is nothing in Exhibits 3 and 4 that, if published, would affect either a trial or a hearing. Second, neither the criminal trial or the College proceeding has been scheduled. There can be no real and substantial risk that publication of Exhibits 3 and 4 would affect a proceeding that has been scheduled. Third, the Members state that because Ms Shore has published information in the past on her web site, she will do so again. This again is speculative. There is no evidence before the panel that Ms Shore has published anything about the College proceedings. For example, Ms Shore could have published information about the December 5,

2001 adjournment motion. She attended that motion and there was no publication ban of any sort prohibiting her from broadcasting information about the motion. She did not do so.

27. Similarly, there is no evidence that permitting Ms Shore to have access to Exhibits 3 and 4 will cause a real and substantial risk to the Committee's process.

#### **Summary**

28. It is the College's position that in this case, the public interest in an open hearing heavily outweighs any remote and speculative risk that access to Exhibits 3 and 4 could interfere with the orderly conduct of the hearing or the Members' right to a fair hearing, especially when the hearing in question has not even been scheduled.
29. The College therefore supports Ms Shore's motion to access Exhibits 3 and 4 from the December 4, 2001 motion for adjournment.

March 27, 2002



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**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**