



2021 TAHP 02

Decision issued: June 24, 2021

Citation issued: May 13, 2020 File

N° [REDACTED]

IN THE MATTER OF THE *TEACHERS ACT*, SBC 2011, c. 19

AND

A HEARING CONCERNING

**Danion Shemar Barker**

(A Formerly Authorized Person under the *Teachers Act*)

### **REASONS FOR DECISION ON FINDINGS AND DETERMINATION**

Date(s) and location(s): December 1-4, and 8 2020 and January 26, 2021, (virtual)

Panel: Sarah Levine, Chair, Carolyn Broady, Alice Kedves

Counsel for the Commissioner: Maureen Boyd, Ministry of Attorney General

Counsel for the Respondent: Carolyn Janusz, Victory Square Law Office

### **INTRODUCTION**

- [1] A panel was appointed by the Commissioner for Teacher Regulation (the “Commissioner”) to conduct a hearing into a citation issued by the Commissioner under section 56(1) of the *Teachers Act*, S.B.C. 2011, c. 19 (the “Act”) on May 13, 2020 (respectively, the “Panel” and the “Citation”).
- [2] The allegations concern Danion Shemar Barker (the “Respondent”) who taught a grade 5 class at [REDACTED] [REDACTED] in District No. 37 (Delta).
- [3] At the time that the alleged conduct set out in the Citation took place, the Respondent was an authorized person under the Act, as he was issued a Conditional Certificate of

Qualification on June 3, 2019. He is no longer an authorized person, as that certificate was cancelled on November 1, 2020 under section 37(4) of the *Teachers Act* for non-payment of fees.

- [4] This Panel has jurisdiction to proceed with this hearing under section 43(2) of the *Teachers Act*. Section 43(2) extends the disciplinary process under Part 6 of the *Teachers Act* to apply to a “former authorized person”, such as the Respondent.
- [5] The Citation was properly served on the Respondent in accordance with section 56(3) of the *Teachers Act*.
- [6] The Citation alleges as follows:
- a. On two or more occasions, the Respondent brought a kitchen knife with a four inch blade (the “Knife”) into the classroom for his personal use, and left it in the classroom in sight of students.
  - b. ...
  - c. On June 14, 2019, while the Respondent was seated with a small group of students at the “rainbow table”, a student [the “Student”] saw the Knife and asked the Respondent why the Knife was in the classroom. The Respondent picked up the Knife and then held the blade against the backs of this student’s fingers for one or two seconds, leaving a mark or scratch.
- [7] The Citation alleges that this conduct is contrary to one or more of Standards 1, 2, 3 and 5 of the *Standards for the Education, Competence and Professional Conduct of Educators in British Columbia*, 4<sup>th</sup> Edition, January 2012 (the “Standards”).
- [8] This Panel was constituted for an oral hearing (the “Hearing”), which took place virtually, due to public health orders relating to the COVID-19 pandemic on December 1, 2, 3, 4, and 8, 2020 and January 26, 2021.
- [9] The Commissioner did not proceed on allegation in subparagraph (b) of the Citation and as a result the allegation in subparagraph (b) of the Citation was not considered by the Panel.

## ISSUE

- [10] The issues before the Panel at this stage of the hearing are:
- (a) whether the Respondent engaged in the conduct alleged in para. 1(a) and (c) of the Citation, and in particular, whether the Respondent’s conduct in allegation 1(c) left a mark or scratch (the “mark or scratch”); and
  - (b) if so, whether the conduct is a marked departure from the *Standards* such that it constitutes professional misconduct.

## ONUS AND STANDARD OF PROOF

- [11] The onus is on the Commissioner to prove that the conduct took place and that it constitutes professional misconduct as set out under s. 63(1) of the *Teachers Act*.
- [12] The applicable standard of proof is the civil standard, which is proof on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53. In that case, the Supreme Court of Canada wrote that the trier of fact must “scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.”
- [13] That Court also indicated that the evidence must be “sufficiently clear, convincing and cogent to satisfy the balance of probabilities test”.

## REVIEW OF EVIDENCE AND PANEL’S FINDINGS OF FACT

- [14] The parties did not file an agreed statement of facts. However, on December 3, 2020 (during the Hearing), the Respondent provided a document signed by him, which admitted the conduct set out in Allegations 1(a) and (c) of the Citation but for the mark or scratch.
- [15] The Commissioner submitted that most of the evidence supporting the allegations in the Citation are not in dispute. Indeed, despite there not being a filed agreed statement of facts, the Respondent did admit many of the relevant facts during the hearing.
- [16] In its argument, the Commissioner sets out a thorough and useful account of what it asserts are the facts that have been agreed to or admitted by the Respondent, either before or during the course of the hearing.
- [17] The Commissioner says that the Respondent agreed that:
- a. The Respondent held a Conditional Certificate of Qualification (a “Conditional Certificate”), which was issued June 3, 2019. Prior to that date, he was not authorized under the *Teachers Act*.
  - b. The Respondent is no longer a certificate holder, as his conditional certificate was cancelled for non-payment of fees on November 1, 2020 under section 37(4) of the *Teachers Act*.
  - c. A Conditional Certificate is a temporary certificate which is valid for up to 5 years. A Conditional Certificate may be issued when an applicant has not completed all the academic course work required to be issued a Professional Certificate of Qualification (a “Professional Certificate”). A teacher is permitted to work as a teacher while holding a Conditional Certificate and completing outstanding required coursework. The Respondent was required to complete a total of nine credit/semester hours of study in order to meet the requirements for qualification for a Professional Certificate.

- d. The Respondent completed his teacher training in Jamaica and had approximately seven years of teaching experience before he came to Canada.
- e. When the Respondent came to Canada, he completed a graduate certificate in educational leadership at McGill University.
- f. The Respondent had teaching experience in British Columbia from September 2018 to April 2019 at [REDACTED] in Dawson Creek.
- g. The Respondent was hired in May 2019 by School District No. 37 (Delta) on a 0.8 FTE basis to teach a grade 5 class at [REDACTED] (the "School"), starting May 14, 2019. At this time, the Respondent described himself as having "over eight years teaching experience".
- h. While he was teaching at [REDACTED], the Respondent learned that it is expected that teachers do not touch students. He testified that he learned "there should be no physical contact between a teacher and a student". In cross-examination, he agreed that he knew by April 2019 that teachers are not supposed to touch students, either with hands, or with objects.
- i. Further, the Respondent had also "often times explained to kids that they should not touch each other".
- j. The Respondent had a kitchen knife in the classroom. This knife is approximately 8 inches long, with a blade that is just under four inches long (the "Knife" as defined in the Citation).
- k. The Respondent admitted that he had the Knife in the classroom at least twice; it could have been more times.
- l. The Respondent did not usually leave the Knife in the classroom because he knew that it did not belong there.
- m. On June 14, 2019, the Knife was on the "rainbow table", where he put it behind some books to hide it from students. The Respondent hid it from students, as he knew that it should not be there.
- n. The Respondent "realized before this incident that a knife in a classroom is a sharp object that can inflict bodily harm".
- o. The Respondent explained what happened on June 14, 2019 in his direct evidence, by saying that after he had been working with a small group of students at the rainbow table:

...[the student] and I were just talking and he asked me what is the knife doing on the table. Initially I was surprised that he saw the knife because I thought I stuffed it behind the books, but I – the time that I was

interacting with them, giving them work to do, I would have shifted the book and the knife became exposed. I told him I used the knife to peel oranges. During the discourse, he said no, we do not use our knives to peel oranges, we use our hands.

And so from the conversation, slowly, the different cultures in – versus here in Canada using their hands to peel oranges and I using a knife, and so we got into a discussion very lively, frank discussion with other students. And during the discussion, unfortunately, I picked up the knife and rest it on his hand and move it.

During that discussion as well with the students, two other students were sitting beside us who were there. They were playing a game good cop, bad cop. It was pretty close to lunchtime, so there was no need for me to give them extra work. I just continued bonding with them.

So I was paying attention to what they [students playing game] were doing to make sure that even though we had this small window of time, they were not doing anything to disrupt to disturb anybody.

And that – during that time,

The conversation with [the student] was still going on and the Class and I unfortunately did something that should not have happened, where I put the knife on his hand.

- p. The day of the incident, the Respondent sent an email to the student's mother, describing his use of the Knife this way:

... we then started to chic chat [sic] and played when the discussion of a knife being used to peel an orange came into play. The discussion started after the students saw a knife on my table. The [sic] took the knife, and put it on [the student]'s hand (not with an intention of hurting him) but being playful.

- q. The Respondent agreed in cross-examination that he put the Knife on the Student's hand in the context of the discussion about different cultures using hands or knives to peel oranges.
- r. The Respondent testified that at lunch on June 14, 2019, he "immediately" took the Knife to the staffroom because he knew that it was wrong to have had it in the classroom.
- s. The principal of the School (the "Principal") testified that at lunch, four girls from the Respondent's class came to see the Principal and told him that something had happened with the Student. The Principal found the Student on the playground and asked him if anything happened that the Principal needed to know, and the Student

- said “no”. After lunch, a noon-hour supervisor whose son was also in the Respondent’s class came to see the Principal and told him that he should go and find out what happened, as she heard that there was an incident with a knife in the classroom.
- t. After lunch on June 14, 2019, the Principal testified that he went to the Respondent’s classroom, and called the Respondent out into the hallway. The Principal testified that he asked the Respondent if he could tell him about “something to do with a knife that happened earlier that day”. The Respondent did not explain anything about the Knife; his “first reaction was to pull [the Student] out”. The Student came out to the hallway where he “really briefly, he said [the Respondent] grabbed my hand, put the Knife to my hand, and I was scared”.
- u. After that exchange, the following events happened:
- (i) The Respondent apologized to the Student and to the class.
  - (ii) The Respondent asked the Student if he got hurt and the Student said he got a scratch.
  - (iii) The Respondent took the class outside and then emailed the Student’s mother.
  - (iv) The Respondent sent a text message to the Student’s mother.
  - (v) The Respondent looked at the Student’s hand while the class was outside and saw the mark or scratch.
  - (vi) The Respondent met with the Student’s mother after school.

[18] In his argument, the Respondent does not dispute the Commissioner’s account of these facts.

[19] In addition to the facts on the Commissioner’s list, the Commissioner also submitted that the Panel could find that the Respondent admitted that he held the Knife on the Student’s hand for a second or two seconds. In testimony at the hearing, the Respondent was asked to verify that he had said that he held the Knife on the Student’s hand for one or two seconds in interviews following the incident. The Respondent agreed that he had said that, but that on reflection he may have held the Knife on the Student’s hand for a half-second to one second. The Panel determined that nothing turned on whether the duration of the incident was one-half second or two seconds. The Panel therefore determined that it was sufficient to find that the Respondent held the Knife on the Student’s hand for a duration of between one-half second and two seconds.

[20] While the Respondent’s admissions are evidence before the Panel, they do not usurp the Panel’s duty to make findings on those issues. Having regard to all of the evidence, the

Panel finds that the summary of the facts set out in paragraphs 17 to 29 set out an accurate account of the events that are at issue in the Citation.

### **THE CAUSE OF THE MARK OR SCRATCH ON THE STUDENT'S HAND**

- [21] The Commissioner submitted that the evidence put before the Panel and the hearing proves on a balance of probabilities that the Respondent's actions in holding the Knife against the Student's finger caused the mark or scratch. The Respondent submitted that there was insufficient evidence before the Panel to determine, on a balance of probabilities, that the Respondent's action in holding the Knife against the Student's hand caused the mark or scratch.
- [22] The Commissioner made the following submissions regarding the evidence about the mark or scratch.
- a. First, the Respondent's evidence about the mark or scratch is not hearsay, but an admission. Admissions have inherent reliability because people do not generally make false statements against their own interest; and
  - b. The evidence given by the Student's mother and the Principal are corroborated by the Respondent's admissions and are therefore admissible.
- [23] In regard to the Respondent's evidence about the mark or scratch on the Student's finger, the Respondent gave the following evidence in cross-examination at the hearing:

Counsel for the Commissioner: "You knew that [the Student] connected the scratch to your action with the Knife?"

Respondent: "Well, he said he got a scratch, so I took it to be the Knife."

Q: "And you saw the cut on [the Student]'s finger on the afternoon?"

A: "I saw the scratch on his finger."

Q: "Sorry, I didn't hear your answer."

A. "I saw the scratch on his finger."

Q. "And that was Friday afternoon?"

A. "Yes."

Q. "And you thought it was from the Knife?"

A. "I assume it was a Knife since he said – that was what was happening at the time, so I assume it was the Knife."

Q. "And you don't have any knowledge to the contrary, do you?"

A. "No, but a part of me taking responsibility was also to accept that if he says he got scratched, I accept it."

[24] The Respondent's main submission is that the evidence at the hearing is not sufficient for the Panel to make a determination that the mark or scratch on the Student's hand following the incident with the Knife (the "mark or scratch") was caused by the Respondent's placement of the Knife on the Student's hand. In fact, the Respondent spent much of the time at the five-day hearing focussed on this issue.

[25] The Respondent made extensive submissions on the legal tests relating to the admissibility of evidence surrounding the mark or scratch and the standard of proof that the Panel is required to meet in order to make a finding about whether the mark or scratch was caused by the Respondent's placement of a Knife on the Student's hand in the place where the mark or scratch was found.

[26] The legal test for all determinations of fact at the hearing are the same. Both parties agree that the civil standard of proof applies, and that the standard is that facts must be proven on a balance of probabilities. The parties agree that *F.H. v. MacDougall* sets out the civil standard of proof on a balance of probabilities. In that case, the Supreme Court of Canada wrote at paragraph 49:

There is only one standard of proof in civil cases and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[27] The Respondent has cited many cases that apply the balance of probabilities test, but none of the cases cited add or detract from the proposition stated above. For all findings of fact herein, the Panel must determine whether it is more likely than not that the event occurred.

[28] The summary of the evidence relating to the mark or scratch is as follows:

- a. The mark or scratch was akin to a paper cut, that is, very small. Medical attention was not sought, nor was there suggestion that it was required;
- b. No one took a picture of the mark or scratch or of the Student's hand in relation to the incident;
- c. The Student's mother gave evidence at the hearing that on June 14, 2019, when she met the Student at the end of the school day, the Student was upset. When she asked the Student what happened, the Student indicated to her that Mr. Barker held his hand and [the Student] motioned to the action of the Knife sitting on his fingers and then pointed to the scratch on his finger; the mother did not seek first aid for the mark or scratch.



- d. The Principal gave evidence at the hearing that on Monday, June 17, 2019, the Student “showed [him] the place where there was a – like a clear little scrape kind of mark indication” and “[the student] told me that it was from the Knife”. His notes from the interview with the student on that date indicate that the Student said “He grabbed my hand put Knife on my fingers – pressed down a little (a little bit – enough that felt like the skin was cut”. In the Principal’s testimony, he said that when he saw the mark or scratch, on Monday, June 17, “it would (sic) look like a papercut healing”.
- e. The Respondent’s evidence was the following:
- (i) The Respondent wrote in a text message to the Student’s mother on the afternoon of June 14, 2019 that:
    - (A) “I asked [the Student] when I was apologizing to him if he got hurt and he said he got a scratch”
    - (B) The Respondent agreed in his testimony at the hearing that the content of the text message was true;
    - (C) The Respondent testified that when he was explaining the incident to the other students that “[the Student] said that he got a scratch” and he “invited [the Student] to show him, but the other students started saying [the Student] was a liar and tried to bully him”
    - (D) At the hearing, the Respondent testified that he saw the scratch on the Student’s finger on June 14, 2019, and said that “he took it to be the Knife”.

[29] At the hearing, the Respondent agreed that at the time of the incident with the Knife and the interviews immediately following, he assumed that the Student’s assertion that the mark or scratch had been caused by his placement of the Knife on the student’s finger was correct. However, at the time of the hearing, the Respondent asserted that he had agreed with the Student’s account because it felt important to the Respondent to accept responsibility for the incident at the time. The Respondent said that he felt at the time that questioning or denying the Student’s account of the mark or scratch would be failing to take responsibility for the incident.

[30] The Respondent’s position at the hearing was simply that he did not know whether he had caused the mark or scratch on the Student’s hand. This statement about his evidence does not accord with the details of his evidence.

[31] The Respondent devoted much time to arguments that: (1) evidence about the Student’s statements about the mark or scratch were hearsay; and, (2) the Panel cannot find that the Respondent caused the mark or scratch because the Student was not called as a witness.

[32] In response to the Respondent’s submissions, the Commissioner submitted that:

It is disingenuous and self-serving for the Respondent to say that he cannot determine that his action with the knife resulted in a cut to the Student's finger, because he did not see broken skin or bleeding ... or because the Respondent believes the Student did not tell his parents and principal that he got the scratch from the Respondent's action with the knife. ...

The Respondent acknowledged the Student told him on Friday June 14 that he got scratched by the knife and the Respondent saw that scratch. The Respondent knew that "a knife is a sharp object that can inflict bodily harm" and that he created a risk of physical harm by holding the knife to the Student's fingers. In these circumstances, the Respondent cannot reasonably dispute causation, particularly long after the fact and when he never disputed causation in the District investigation.

- [33] It is clear that the Student made a statement in the immediate aftermath of the incident that that the Respondent's actions caused the injury on his finger. He told his mother, the school principal, and the Respondent that he had a mark or scratch on his finger and that it was caused by the Knife having been put on his finger. The fact that the statement was made by the Student is not hearsay; there is direct evidence before the Panel of the statement having been made to each of these people, who testified to this.
- [34] To the extent that the Respondent argues that the Panel should not infer from those statements that the student did sustain the mark or scratch from the Respondent's actions, the Respondent is arguing that the Student's statements were hearsay and therefore should not be accepted for the truth of their contents, because use for that purpose would be inadmissible hearsay.
- [35] The Panel only needs to consider whether the Student's statements are admissible or not if the Panel is relying on the statements for the truth of their contents. The fact that the Student made the statements in question to witnesses who gave evidence at the hearing is not hearsay.
- [36] It is useful to determine whether there is enough evidence before the Panel to determine on a balance of probabilities whether the Respondent's actions in holding the Knife to the student's hand caused the mark or scratch without relying on evidence of the Student's belief that the Respondent's Knife caused the mark or scratch on his hand.
- [37] The Respondent stated immediately after the incident that he believed that the Knife had caused a mark or scratch. Other witnesses corroborated that testimony of the Respondent's at the time immediately after the incident, including the Principal, the Student's mother, the District Human Resources Administrator who interviewed the Respondent at the time of the incident and in the days and weeks following the incident.
- [38] None of the witnesses who saw the mark or scratch – the Respondent, the Student's mother, and the Principal – noted that anything about the nature of the mark or scratch

was inconsistent with it having been caused by the Respondent's holding the Knife against the Student's hand; for example, the severity, age, or location of the mark or scratch.

- [39] At the hearing, the Respondent testified that he was no longer certain that the Knife had caused the mark or scratch, but he did not have any reason to believe that his Knife had not caused it.
- [40] The Respondent submits that other causes of the mark or scratch are "equally likely", and "because other sources for the scratch are equally likely to be true" that the Commissioner has not met the onus of establishing that the Respondent's Knife caused the Student's mark or scratch.
- [41] With respect, there are not two explanations for the mark or scratch that are "equally likely to be true". This is speculation on the Respondent's part and not an accurate statement relating to any evidence before the Panel. The Respondent made an unsupported assertion that the mark or scratch could have a different cause. That unsupported assertion does not constitute an "equally likely" explanation.
- [42] The Panel finds that at the time that the event occurred that the Respondent believed that his placement of the Knife had caused the Student to have a mark or scratch, and that this evidence of the Respondent's belief, along with corroborating facts and testimony, is sufficient to find that on a balance of probabilities the Respondent's actions caused the mark or scratch. The corroborating facts relate to the surrounding circumstances. The Respondent was aware of the degree of force that he had used in placing the Knife on the Student's hand. He was aware of the position on the Student's hand he had placed the Knife. The Respondent did take responsibility for the incident in the immediate aftermath of the incident. At the hearing, the Respondent did not have any additional factors that suggested that the mark or scratch could not or was not caused by his having placed the Knife on the Student's hand. He simply suggested that he did not know.
- [43] The Panel prefers the earlier version of the Respondent's evidence, given in the immediate aftermath of the event, to the version that the Respondent gave at the hearing, which is that he did not know how the mark or scratch got on the Student's hand, but that he had said that he had caused it because that was part of him taking responsibility for his conduct.
- [44] The Respondent submits that there are "equally plausible alternative explanations" for the scratch or cut. He speculates that the Student may have incurred the scratch from working with paper or engaging in sports. With respect, entirely speculative scenarios without any evidence are not "equally plausible". The Respondent himself laid the Knife on the Student's hand in the position and with the force that would have caused the scratch on the Student's hand. In the immediate aftermath of the incident, the Respondent stated that he believed that his actions caused the mark or scratch. Two other witnesses testified that they saw the cut or scratch, and that the Student told them that he believed it was caused by the Respondent's conduct. All of that evidence taken

together creates a strong basis to draw an inference that the Respondent's conduct in holding the Knife against the Student's finger caused the mark or scratch. There is no "equally plausible alternative explanation" for the Panel to consider.

- [45] The Panel finds that in placing the Knife on the Student's finger, the Respondent inflicted a mark or scratch on the Student's finger. The mark or scratch was described as being a minor injury "in the nature of a paper cut". This injury did not require any medical attention.
- [46] In conclusion, the Panel finds that the Respondent engaged in the conduct set out in paragraphs 1(a) and (c) of the citation.

*Explanations for the Respondent's Conduct*

- [47] The Respondent offered various explanations for his conduct. He testified that in Jamaica, where he was born, grew up, and began his teaching career, there is a more casual attitude toward knives than in Canada. He noted that children in Jamaica are more accustomed to using knives at a younger age. The evidence was that the Knife incident at issue in this hearing began with a discussion between the Respondent and the students in the class about differences in approaches to peeling fruit in Jamaica and in Canada. The Respondent did admit that he never put a knife on a student's skin when he was a teacher in Jamaica.
- [48] The Commissioner asserted that the Panel could not find cultural differences between Jamaica and Canada without expert evidence on the subject. The Panel accepts that the Respondent's belief about knives at the time of the incident is not dependent on it being established that that belief is held widely in Jamaican culture. However, it was not clear that the differences in Jamaican and Canadian culture in respect of attitudes towards children and knives were relevant in relation to the conduct at issue in the Citation.
- [49] The Respondent admitted that he attempted to hide the Knife in the classroom on the days that he did not return it to the staffroom before class started, and that he hid it from the students because he knew that it was potentially dangerous to have a knife present with students in the classroom.
- [50] The Respondent agreed that despite his background with a different attitude toward knives, he knew that it was wrong to have a knife in the classroom (which explains why he attempted to hide the Knife from the students). He also testified that, while the attitude toward knives that he grew up with in Jamaica is more casual, if a knife was used in a way to hurt, or cause harm, it would be perceived as dangerous. He admitted that it is not a usual or ordinary action to hold a knife to the skin of somebody's hand. He also never put a knife on a student's skin in Jamaica, the way he did with the Student.
- [51] As a result, the Panel did not find the evidence about cultural differences toward knives in Jamaica and Canada helpful to explain the Respondent's conduct, or its determination

of whether the Respondent's cultural attitude toward knives affected whether his conduct breached the Standards.

[52] When the Respondent was asked in his Branch interview why he held the blade of the Knife against the Student's fingers, he answered that

"There was not any particular reason."

[53] In the Respondent's email to the Student's mother, he said "I was being playful". In his District interviews, the Respondent said "it was a 'playful gesture'"; "what was happening was just friendly discussion and goofing around"; he was "trying to bond and build a relationship" but took it too far; and "he just got caught up in the heat of the moment".

[54] The Respondent also explained that the classroom was quite busy and high-energy in the moments before the lunch hour. He was having a meeting with a small number of children, and in the short time before lunch, some other children began playing a game of "good cop/bad cop". His discussion with the Student and other students about culturally different approaches to peeling oranges caused him to be "too occupied with both things at the same time that I forgot that touching is not allowed or permitted".

[55] The Commissioner submits that the Respondent's statement that his conduct toward the Student was "friendly" is not credible. However, the Commissioner does not allege that the Respondent's attitude toward the student was "unfriendly". Although the Commissioner submits that the placing of the Knife on the Student's skin was frightening and traumatic for the Student, the Commissioner does not take the position that the Respondent's intention or attitude in doing so was malevolent, angry, or intentionally threatening.

[56] The Commissioner and Respondent do not take vastly different positions about the Respondent's intent. The Commissioner does not allege that the Respondent used the Knife angrily, or in an otherwise threatening way toward the Student, or with an intention to harm the Student, or for any self-serving purpose. The Respondent has no real explanation for why he placed the Knife on the Student's hand, except that it was a playful gesture that "went too far" and "got caught up in the heat of the moment". The Respondent submits that he knew that he was wrong to touch a Student's hand with the Knife almost immediately. All of his communications following the conduct support that submission.

[57] The Panel accepts the Respondent's submissions that the incident with the Knife was misguided, in the moment, that the Respondent "got caught up in the heat of the moment" and took it too far. The Panel does not find that the Respondent's actions had any *additional* angry, threatening, or intimidating aspect to them, beyond the considerable inherent intimidation and fear that comes from placing a knife against another person's skin.

## ANALYSIS AND DECISION

### Statutory Framework

[58] Section 63(1) of the Act provides:

A panel, after a hearing, may make any of the following findings:

...

determine that an authorized person has been or is guilty of professional misconduct or conduct unbecoming a teacher; ...

#### *Professional Misconduct*

[59] At the time the conduct at issue in this matter took place, the standards in effect were the *Standards for the Education, Competence and Professional Conduct of Educators in British Columbia* (the “Standards”).

[60] The Act does not define “professional misconduct”; however, there is a large body of jurisprudence arising in the teaching context and other professional regulatory contexts, which guide the application of that test. Other cases considered under the *Teachers Act* have adopted the test for professional misconduct set out in the Law Society of British Columbia’s decision in *Re Martin*<sup>1</sup> (“Martin”), namely whether the conduct at issue represents a “marked departure” from the norms expected of the professional. See, for example, *In the Matter of the Teacher Act and Hankey*,<sup>2</sup> (“Hankey”). In that case, the Panel observed:

The Act does not define professional misconduct and, as noted by the Commissioner in his submissions, a breach of the Standards does not necessarily result in a finding of professional misconduct. The panel finds that the test for whether a breach of the Standards amounts to professional misconduct under the Act is whether the Respondent’s conduct was a “marked departure” from the norms expected of a teacher in this province. This test was adopted by the Law Society of British Columbia in disciplinary proceedings in *Martin* ...

#### The Standards

[61] The norms expected of a teacher in this province must be considered in reference to the Standards. All certificate holders in British Columbia are required to adhere to the Standards. The Standards are described at pp. 2-3 as:

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<sup>1</sup> *Re Martin*, 2005 LSBC 16

<sup>2</sup> 2016 TAHP 03

... the knowledge, skills and attitudes that educators shall possess as well as the responsibilities that accrue to them as certified educators who hold the public trust.

and

... a way of communicating to certificate holders and the public the description of the work of educators – what they know, what they are able to do, and how they comport themselves as they serve the public.

- [62] The Commissioner submits that the Respondent has breached Standards 1, 2, 3 and 5. However, in its submissions the Commissioner only referred to Standards 1 and 2 and as such the Panel has focussed on those Standards. The Respondent admits that his conduct breached Standard 1 but submits that his conduct did not breach Standard 2. For convenience, the Standards are reproduced here:

*#1. Educators value and care for all students and act in their best interests.*

Educators are responsible for fostering the emotional, esthetic, intellectual, physical, social and vocational development of students. They are responsible for the emotional and physical safety of students. Educators treat students with respect and dignity. Educators respect the diversity in their classrooms, schools and communities. Educators have a privileged position of power and trust. They respect confidentiality unless disclosure is required by law. Educators do not abuse or exploit students or minors for personal, sexual, ideological, material or other advantage.

*#2. Educators are role models who act ethically and honestly.*

Educators act with integrity, maintaining the dignity and credibility of the profession. They understand that their individual conduct contributes to the perception of the profession as a whole. Educators are accountable for their conduct while on duty, as well as off duty, where that conduct has an effect on the education system. Educators have an understanding of the education system in BC and the law as it relates to their duties.

- [63] Standard #1 captures principles set out in the key decisions of the Supreme Court of Canada in *R. v. Audet* [1996] 2 S.C.R. 171 (“*Audet*”) and *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 (“*Ross*”). In *Audet*, the Supreme Court of Canada determined that a school teacher is a person of “position of trust and authority” toward a student, except in exceptional circumstances. This relationship of trust and influence gives rise to the obligation of teachers in Standard #1 to act in students’ best interests, and for maintaining responsibility for their physical and emotional safety. This carries the duty to protect students from physical, emotional and other forms of harm.

- [64] The Respondent admitted the conduct described in paragraph 1(a) and part of the conduct in paragraph 1(c) of the Citation, and that that conduct was a breach of Standard #1. The only conduct that was not admitted prior to the hearing was that the Respondent's conduct had caused the mark or scratch on the Student's hand.
- [65] Notwithstanding the admission of the violation of Standard #1 by the Respondent, the Panel is still required to decide whether the Respondent's conduct constituted a violation of Standard #1. The Commissioner submitted that the Respondent's conduct in having a knife in the classroom and holding the Knife against the Student's hand was a violation of Standard #1. Because the Respondent admitted that the conduct violated Standard #1, he did not make submissions in relation to that Standard.
- [66] The Commissioner noted that there are no cases or consent resolution agreements that involve substantially similar conduct, but cited cases and consent orders previously before the Board and the Commissioner that have considered conduct toward students that is threatening or intimidating and which created an unsafe environment for students. The cases cited include *In the Matter of the Teachers act – and – Kiteley*, June 9, 2014 ("*Kiteley*") the *In the Matter of the Teachers Act – and Misiak* ("*Misiak*") and cases, and consent resolutions in *Mallinson*, July 3, 2014 ("*Mallinson*") and *Payne*, March 28, 2018 ("*Payne*").
- [67] In *Kitely*, the teacher was found by the panel to have breached the Standards as the result of a pattern behaviour in a wide variety of interactions with students. In a repeated pattern of conduct, he physically intimidated students by making physical contact with them, by making gestures of violence such as mimicking the loading and shooting of a shotgun, as well as by punching one fist into another while making comments to students. This conduct was repeated, intimidating, and accompanied by derogatory and discriminatory comments toward students.
- [68] In *Niven*, a consent resolution admitting misconduct was accepted where a teacher angrily ripped up story books of students, cursed under her breath, and pretended to "shoot" students by pointing her fingers like a "gun" at a student. These actions were repeated and took place over a period of time.
- [69] In *Misiak*, the panel found misconduct where a teacher repeatedly told students they were "dumb asses" or "dumb idiots", used a racial slur, disclosed a student's confidential information, and threatened students by angrily dropping objects and kicking a door.
- [70] In two cases involving knives, the presence of the knives in the classrooms were accompanied by other threatening and derogatory conduct toward students (*Mallinson*, *MacIntosh*).
- [71] It is important to note some differences in the cases cited by the Commissioner and the conduct at issue in this case. In citing these cases, the Commissioner submits that the nature of the misconduct in this case is the creation of a risk of harm to a student, and a threat or intimidation that created an unsafe environment for students. The



Commissioner stressed that the misconduct was the creation of the risk of harm, and that would have been misconduct whether or not the Panel had determined that the risk had caused actual harm.

- [72] The Panel agrees that the nature of the breach of Standard #1 was in the Respondent's creation of the situation that caused a risk of harm to the Student and to other students in the classroom. It did not depend on the actualization of the risk itself. The Panel's finding of the breach of Standard #1 is based on the totality of the conduct, including both the keeping of the sharp Knife in the classroom and the bringing of the Knife into contact with the student's skin. In this case, it was the *combination* of the Respondent's having had an object in a classroom that has the potential to seriously harm a child *and* having touched a child with that object in a way that frightened him constitutes misconduct.
- [73] However, it is important to note that the Commissioner did not take the position that the stand-alone act of having a knife in a classroom was misconduct. Because the Panel was not asked to consider whether having a knife in a classroom, apart from the other circumstances, constituted misconduct, the Panel did not consider the issue.
- [74] The present case differs from the other cases cited in the severity of the misconduct in the other cases. In each of the cases cited, the misconduct consisted of two additional elements. The misconduct in the other cases constituted repeated acts, and the misconduct in the other cases consisted of using the object (whether real or pretend) in an intentionally threatening, angry or intimidating way toward a student or students.
- [75] In the present case, the Respondent's conduct in momentarily holding the Knife against the Student's hand was *in fact* experienced by the Student as threatening, and caused actual harm to the Student. In the aftermath of the incident, evidence was led that indicated that the Student suffered emotional harm as a result of the combination of the incident and the events that followed.
- [76] However, the Commissioner and Respondent agreed that the actual holding of the Student's hand and the Knife took place over a timeframe of between  $\frac{1}{2}$  and 2 seconds, and that the resulting physical injury to the Student was minimal. There was no suggestion that the Respondent had behaved aggressively, with intent to intimidate, angrily, or in a threatening way before or after that almost instantaneous period of time. Every account of the incident and of the Respondent's behaviour indicated that the Respondent and the students were engaged in a friendly, playful discussion immediately prior to the incident, and that the Respondent took responsibility for making a serious mistake immediately after it occurred. The nature of the incident was described as "having got out of hand". The Panel accepted that description.
- [77] The Respondent's actions, therefore, fall into the category of a serious but brief lapse of judgment that created a risk of real harm. They do not fall into the category of intimidating, threatening, demeaning or insulting students. This difference is important. Where an action that creates a threat of harm also creates an atmosphere that is

intimidating, threatening, demeaning or insulting to students, the nature of the misconduct is more serious than where it does not. In this case, it did not.

[78] Therefore, the Panel finds that while the misconduct was a breach of Standard #1, it was a less severe breach of the Standard than in the cases cited that have previously been decided or led to consent resolutions.

[79] The Panel found that the Respondent had a serious lapse of judgment in having the Knife in the classroom and in holding it to a Student's hand. However, it was a single incident, it was extremely brief, and there was no intent to injure, insult, threaten, or demean the student. The Respondent's breach was not dishonest, unethical, malicious or ongoing. The Respondent made a mistake, and immediately after admitted the mistake and tried to repair it. Making a single, momentary mistake of the nature of the conduct herein, without intent to harm, malice, or exploitation, and followed by immediate remorse and accountability does not bring the reputation of the profession into disrepute. As a result, the Respondent's conduct does not constitute a breach of Standard #2.

### **SUMMARY AND CONCLUSION**

[80] The Panel has found that the Respondent's conduct constituted marked departures from Standard #1 and constituted professional misconduct.

[81] The Panel expects that there will be a consequences portion of this matter.

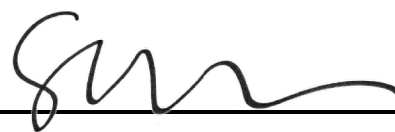
### **CONSEQUENCES & COSTS**

[82] Having found that the Respondent's conduct resulted in professional misconduct under section 63(1)(b) of the Act, this Panel is empowered to impose a penalty on the Respondent. The Panel asks that counsel for the Commissioner and the Respondent advise the Hearing Coordinator of the Professional Conduct Unit whether submissions on appropriate penalty should be submitted in writing or through an oral hearing. The Panel directs that any submissions on costs be submitted in writing. The Hearing Coordinator of the Professional Conduct Unit shall set the deadlines for submissions.

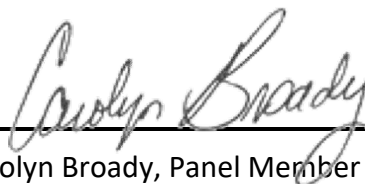
### **PUBLICATION**

[83] This Panel questions whether section 66(4) of the *Teachers Act* would cause significant hardship to a person who was harmed, abused or exploited by the certificate holder. In light of this concern, the Panel invites counsel to make submissions on whether these reasons ought to be published in full on the Ministry of Education website, or whether this Panel ought to make an order under section 66(4) for non-publication or publication of a summary. Counsel should provide this panel with their submissions by July 9, 2021.

Date: June 24, 2021

A handwritten signature in black ink, appearing to read 'S. Levine', written above a horizontal line.

Sarah Levine, Panel Chair

A handwritten signature in black ink, appearing to read 'Carolyn Broady', written above a horizontal line.

Carolyn Broady, Panel Member

A handwritten signature in black ink, appearing to read 'Alice Kedves', written above a horizontal line.

Alice Kedves, Panel Member