

IN THE MATTER OF
THE COLLEGE OF MASSAGE THERAPISTS OF BRITISH COLUMBIA
AND A CITATION ISSUED UNDER THE *HEALTH PROFESSIONS ACT*

BETWEEN:

The College of Massage Therapists of British Columbia

(the “College”)

AND:

Reynard Laird Graham

(the “Former Registrant”)

REASONS FOR DECISION
(Determination and Order made pursuant to sections
39(1) and 39(2) of the Health Professions Act)

Date and Place of Hearing:

May 29, 2015

Charest Reporting Inc.
1650 – 885 West Georgia Street,
Vancouver, BC, V6C 0B5

Counsel for the College:

Kate Parisotto
Lisa C. Fong

Counsel for the Respondent:

The Former Registrant did not appear.

Reasons for Decision of the Discipline Committee (the “Panel”):

Catherine Ryan, RMT (Chair)
Perminder Tung, Lawyer
Wendy Sanders, RMT

Independent Counsel for the Panel:

Anu K. Sandhu

Court Reporter:

Charest Reporting Inc. (Alyssa Fontaine)

INTRODUCTION

A Sub-Committee of the Discipline Committee of the College, the Panel met on May 29, 2015 at 1650 – 885 West Georgia Street, Vancouver, British Columbia to inquire into allegations that the Former Registrant, while still registered with the College, engaged in conduct amounting to professional misconduct or unprofessional conduct within the meaning of Part 3 of the *Health Professions Act* (the “Act”), and/or failed to comply with section 75 of the College’s Bylaws and standards, section 1(2) and 2(a) of the *Code of Ethical Conduct*.

The hearing came to order at 9:00 a.m. on May 29, 2015 at which time the court reporter, Alyssa Fontaine, was sworn in.

The Former Registrant was not in attendance.

BACKGROUND

The Former Registrant was issued a certificate of Registration on October 20, 1997. He practiced in and around Victoria, British Columbia.

The Respondent surrendered his certificate to the College on or about June 9, 2010 and his certificate was cancelled on or about February 15, 2011 for non-payment of registration fees.

On or about July 23, 2010, the Former Registrant was convicted of sexual assault, contrary to section 271 of the Criminal Code for an incident of sexual assault against a sixteen-year-old female that occurred on or about March 30, 2010. The female did not make a complaint directly to the College but her parents did do so. On or about October 15, 2010, the Former Registrant was sentenced to *inter alia* a conditional sentence, and a period of probation.

PRELIMINARY ISSUES/APPLICATIONS

Issue under 38(4.1) of the Act Re Outline of Witness' Anticipated Evidence

The College advised the Panel at the start of the hearing, that the College is required, further to section 38(4.1) of the Act, to provide the name of the witness and an outline of the witness' anticipated evidence to the other party at least 14 days prior to the start of the hearing. The College further advised, that it had not provided the name of their sole witness, Ms. Joelle Berry and her anticipated evidence to the Former Registrant within that timeline. The College had sent this information to the Former Registrant on about May 25, 2015 but it wished to proceed with the hearing.

Under subsection 38(5) of the Act, if the respondent does not attend, the discipline committee may proceed with the hearing in the respondent's absence on proof of receipt of the citation by the respondent, and without further notice to the respondent, take any action that it is authorized to take under the Act.

Section 54 of the Act states that documents are deemed to be received by a person, seven days after the date on which it was mailed if it is sent by registered mail, to the last address for the registrant recorded in the register.

The Panel directed that it was satisfied to proceed with the hearing and would allow for Ms. Berry's testimony given that the Former Registrant was not in attendance at the hearing to offer any objections nor appeared to have contacted the College concerning the hearing.

Application to hold portions of hearing in private

The College advised that it was applying for directions from the Panel under 38(4.2) of the Act for the following:

- (a) To exclude the public during certain portions of the hearing;
- (b) That the victim be referred to by initials during the hearing, except for a portion of Ms. Berry's testimony where she is expected to give evidence as to the victim's identity; and
- (c) That if transcripts or exhibits of these proceedings are ordered by members of the public (excepting parties), they be redacted to comply with the existing publication ban.

The College submitted that in the criminal proceedings, a publication ban was ordered pursuant to subsection 486.4(1) of the *Criminal Code*, which prohibits any publication, broadcast, or transmission of information that could identify the complainant or witness.

The College stated that while a Discipline Committee does not have the power to order a publication ban, it does have the power under section 38(3) of the Act, to order that a

hearing be held in private. The Panel has the power to control its own procedures subject to compliance with the rules of natural justice and fairness: *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at para. 16.

The College submitted that there is some disagreement in the law on whether the extent of the publication ban is limited to the participation of the complainant in the criminal trial. However, it argued that it would be necessary in this case to refer to the victim's identity during testimony and exhibits which would violate the existing publication ban.

The Panel notes that the victim is not a party to the proceeding but that there is a public interest in protecting the anonymity of victims and complainants. The mitigating effect of a private hearing, is to allow that the public may have access to the transcripts of the hearing further to CMTBC Bylaw 69(4) which states: "All discipline hearings must be recorded and any person may obtain, at his or her expense, a transcript of any part of the hearing which he or she was entitled to attend."

The Panel ordered and directed that: the public be excluded during portions of the evidence of Ms. Berry during which she identifies the name of the victim pursuant to section 38(3) of the Act; the victim be referred to by initials during the hearing except for the portion of Ms. Berry's testimony referred to earlier; and if transcripts or exhibits of the proceedings are ordered by members of the public (excepting parties), they be redacted to comply with the existing publication ban.

ISSUES

The issue before the Panel is whether the Former Registrant's conviction on or about July 23, 2010, on one count of sexual assault contrary to section 271 of the *Criminal Code*, constitutes unprofessional conduct or professional misconduct and/or constitutes a failure to comply with section 75 of the College Bylaws and failure to comply with provisions in the College's *Code of Ethical Conduct* (Schedule "C") including:

General duty to patients

1(2) A Registrant shall not take advantage of a patient's vulnerabilities for the Registrant's sexual, emotional, social, political or financial interest or benefit.

Sexual conduct prohibited

2 A Registrant shall not

(a) engage in sexual conduct with a patient

The Citation sets out the particulars of the allegations with respect to the assault committed by the Former Registrant with respect to the victim. Due to the fact that the Former Registrant was convicted of assault, the Panel does not consider it necessary in these reasons to particularize the specific allegations against the Former Registrant.

FACTS AND EVIDENCE

The only witness called for the College was Ms. Joelle Berry, Director of Compliance at the College.

Ms. Berry testified that upon assuming employment with the College she undertook a review of College files. One such file concerned a complaint the College received about the Former Registrant including the RCMP file. Ms. Berry reviewed the police file as well as well as the College's records. Her review of the documents prompted Ms. Berry to take additional steps. The Inquiry Committee directed the Registrar to issue a Citation against the Former Registrant based upon the facts surrounding the incident, which occurred on or about March 30, 2010 and based upon the fact that the Former Registrant was convicted of sexual assault on or about July 23, 2010.

Ms. Berry further testified that the Citation was delivered to the Former Registrant in accordance with the Act, in particular section 54 of the Act. She testified that the Citation was sent by registered mail to the Former Registrant at his last known personal address on December 16, 2014. Ms. Berry also testified that the Citation was sent by registered mail to the Former Registrant at his last known address recorded in the register on February 11, 2015.

She testified that she instructed College counsel to obtain certified copies of the conviction documents.

In addition, Ms. Berry testified that the person referred to as ██████ in in the certified copies is the same person as the person referred to as Ms. M. in the Citation.

Counsel for the College adduced documentary evidence introduced through Ms. Berry consisting of the following:

- (a) The Letter addressed to the Former Registrant dated February 11, 2015 enclosing the Citation and customer receipts (**Exhibit 2**);
- (b) The Certificate of the Registrar dated May 19, 2015 signed by Ms. Susan Addario enclosing: an email from a College staff member to the Chair of the College's Inquiry Committee dated May 19, 2010, a letter from the Former Registrant dated May 17, 2010, a client history intake form, treatment notes, a signed Informed Consent Release and a letter from P.A. Insley to the College dated May 27, 2010 enclosing copies of the Information and report to crown counsel narrative (collectively marked and filed as **Exhibit 3**); and
- (c) Certified copies of the conviction documents including the: Conditional Sentence Order dated October 15, 2010, Warrant of Committal after Breach of Conditional Sentence Order dated February 23, 2011, Probation Order dated October 15, 2010, Information dated May 12, 2010, Breach of Conditional Sentence Order Record of Proceedings and Endorsement of Information or Indictment (various

dates), and Provincial Court Record of Proceedings and Endorsement (various dates) (collectively marked and filed as **Exhibit 4**).

As the Former Registrant was not in attendance, Ms. Berry was not cross-examined.

The College closed its evidential case following Ms. Berry's testimony.

ANALYSIS, FINDINGS, AND SECTION 39(1) DETERMINATION

The Panel accepts Ms. Berry's evidence in general and in particular that the Citation was delivered to the Former Registrant in accordance with section 54 of the Act.

The College submitted that in a professional disciplinary hearing, the College bears the burden of proof meaning, it must show the facts from which the Panel may conclude that the Respondent or Former Registrant engaged in professional misconduct or a breach of a standard or a bylaw.

The College cited the case of *F.H. v. McDougall*, 2008 SCC 53 (S.C.C.) to submit that the appropriate standard of proof in disciplinary cases is the civil standard of proof on a balance of probabilities. This standard was confirmed to apply to discipline hearings in *Kaminski v. Association of Professional Engineers and Geoscientists of BC*, 2010 BCSC 468.

The Panel accepted the College's submissions with respect to the standard of proof required.

The College cited section 71 of the *Evidence Act*, R.S.B.C. 1996, c. 124 (the "Evidence Act") to submit that a conviction that is not subject to appeal or from which no appeal is taken, may be admitted as evidence in a civil proceeding as proof that the convicted person committed the offence (section 71(2)).

The requirements for admissibility are outlined as follows in section 71(5) of the Evidence Act:

- (5) A certificate containing the substance and effect of the charge and of the conviction or finding of guilt, as the case may be, purporting to be signed by
 - (a) the officer having custody of the records of the court in which the offender was convicted or found guilty, or
 - (b) a person authorized to act for the officer,
 is, on proof of the identity of a person named in the certificate as the offender, sufficient evidence of the conviction of that person or the finding of guilt against that person, without proof of the signature or of the official position of the person purporting to have signed the certificate.

The Panel found that the Former Registrant's conviction has been proved through the admission of **Exhibit 4** containing the Conditional Sentence Order and other documents. Therefore the Former Registrant did commit the offence.

Additionally, the Panel refers to the Former Registrant's correspondence dated May 17, 2010 (**Exhibit 3**) wherein he admits to the sexual assault and cooperating with the police authorities.

The Panel then considered the College's submissions of whether the conviction constitutes professional misconduct.

College counsel referred to section 51(1)(a) of the *Health Professions Procedural Code*, schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18:

51(1) A panel shall find that a member has committed an act of professional misconduct if,

(a) the member has been found guilty of an offence that is relevant to the member's suitability to practice...

The College submits that a conviction for sexual assault in and of itself constitutes professional misconduct, which includes conduct unbecoming a member of the health profession, pursuant to section 26 of the Act.

Section 26 of the Act states:

“professional misconduct includes sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession;
...
unprofessional conduct includes professional misconduct.”

The courts have developed a common law test for professional misconduct, which encompasses conduct that would reasonably be considered by members of the profession as dishonourable, disgraceful, or unprofessional.

R. Steinecke, *A Complete Guide to the Regulated Health Professions Act* (Toronto: Thomson Reuters Canada Limited, 2014) at page 6-85.

College counsel submits that the test may be stated as follows:

“If it is shewn that a member of the college, in the pursuit of his profession, has done something with respect to it which would be reasonably regarded as improper by his professional brethren, of good repute and competency, then it is

open to the board of directors of the college to decide that he has been guilty of ‘improper conduct in professional respect’.”

J T Casey, QC, *The Regulation of Professions* (Toronto: Carswell, 2014) at page 13-3, citing from *Davidson v. Royal College of Dental Surgeons* (Ontario) (1925), 57 O.L.R. 222 (C.A.)

The College states that in determining whether a conviction for sexual assault constitutes professional misconduct, the Panel may draw upon court decisions that have interpreted the meaning of “sexual assault” under the Criminal Code.

One such decision is *R. v. Ewanchuk*, [1999] 1 SCR 330 at paras. 25-26 where it was stated that the requisite physical act is established by proof of three elements: touching, the sexual nature of the contact (determined objectively), and absence of consent. Further, the requisite mental element is only the intention to commit the assault. The criminal offence of sexual assault is comprised of an assault committed in circumstances of a sexual nature, such that the victim is violated.

The Panel accepts the evidence from the Report to Crown Counsel that the victim was “sexually touched”, that she did not consent, and that the Former Registrant cupped the victim’s breasts and referred to them as “beautiful” (Exhibit 3). The Panel further accepts the Former Registrant’s letter dated May 17, 2010, wherein he admitted to making a “mistake” in cupping the victim’s breasts for several seconds and stating that she had “nice breasts.” Whether the Former Registrant referred to the victim’s breasts as “beautiful” or “nice” is immaterial in the present case, his comments and behavior were inappropriate.

Patients receiving a professional massage service are placed in a vulnerable position in relation to the therapist, however, in this case, the victim’s vulnerability ought to have been even more apparent to the Former Registrant due to her age which he did reference in his letter to the Inquiry Committee. In the Panel’s view, the Former Registrant’s actions would reasonably be considered by members of the profession as “dishonourable, disgraceful, and unprofessional.” His actions clearly fell below any reasonable standard of professional conduct.

The Panel unanimously finds that the Respondent has committed professional misconduct.

The Panel also finds that the Former Registrant failed to comply with section 75 of the Bylaws, specifically section 1(2) and 2(a) of the *Code of Ethical Conduct* which prohibits any sexual conduct with a patient.

Pursuant to section 39(1) of the Act, the Panel determines that the Former Registrant did not comply with a bylaw imposed under the Act, did not comply with a standard imposed under the Act, and committed professional misconduct. The Panel communicated its

decision orally to the parties at the hearing, with written reasons to follow. College counsel was then invited to make submissions on penalty, publication and cost.

PENALTY, PUBLICATION AND COSTS

College counsel outlined the principles governing the determination of penalties in relation to professional misconduct.

The fundamental purpose of professional discipline is to ensure the protection of the public: *McKee v. College of Psychologists (BC)*, [1994] 9 W.W.R. 374 (BCCA). The public dimension is of critical significance to the mandate of professional disciplinary bodies.

“A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual’s misconduct on both the individual client and generally on the profession in question.”

Adams v. Law Society of Alberta, 2000 ABCA 240 at para. 6

The College outlined a number of factors to be taken into account in determining how the public should best be protected:

- (a) the nature and gravity of the proven allegations;
- (b) the age and experience of the offending therapist;
- (c) the previous character of the therapist and in particular the presence or absence of an prior complaints or convictions;
- (d) the age and mental condition of the offended patient;
- (e) the number of times the offence was proven to have occurred;
- (f) the role of the therapist in acknowledging what had occurred;
- (g) whether the offending therapist had already suffered other serious financial or other penalties as a result of the allegations having been made;
- (h) the impact of the incident on the offended patient;
- (i) the presence or absence of any mitigating circumstances;
- (j) the need to promote specific deterrence and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of massage therapy;
- (k) the need to maintain the public’s confidence in the integrity of the profession of massage therapy;
- (l) the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct; and
- (m) the range of sentence in other similar cases.

Jaswal v. Newfoundland Medical Board (1996), 42 Admin L.R. (2d) 233 (Nfld SC) (revised to reference massage therapy)

The nature and gravity of the proven allegations, or conviction, against the Former Registrant is of a serious nature. While it is an isolated incident, it was not an inadvertent violation and is criminal in nature. The Former Registrant's conduct involved a breach of a patient's trust. Registered massage therapists' work is unique to other health professions as it requires therapists to work in direct contact with a patient for the duration of a patient's visit. Patients lie in a receptive state and are therefore very vulnerable. A sexual transgression on a patient is a serious violation, particularly so on a young patient as in the present case. There can be no doubt that the Former's Registrant's behavior places public safety at risk.

The mitigating circumstances in the present case include that the Former Registrant does not have a history of offences or discipline history with the College, he acknowledged his actions, and that he has already incurred criminal sanctions.

However, the Panel is of the view that general deterrence and maintenance of the public's confidence in the integrity of the profession are significant factors to be considered. There is a need to ensure that Registered Massage Therapists do not commit the offence of sexual assault during a massage therapy session and that it is clear that the sexual assault of a patient is unacceptable. Further, the Panel wishes to emphasize that where a former registrant has been sentenced criminally and does not participate in the hearing process, he or she cannot avoid disciplinary consequences by either deciding to resign registration or allowing it to lapse prior to a hearing.

Should the Former Registrant re-enter the profession, specific deterrence from engaging in future misconduct is also of concern.

College counsel have outlined in their submissions the range of sentences in similar cases but note that in most cases, the respondents are current registrants and therefore revocation of license is often the most appropriate sanction.

The Panel notes that had the Former Registrant been an active registrant, the Panel would very likely have decided to cancel his license under section 39(8) of the Act due to the seriousness of his misconduct. Further, the Panel would have considered not permitting him to apply for reinstatement of registration for a period of two years from the date of the order. The Panel may have also imposed a condition that he not be eligible to apply for reinstatement of registration until he provides a psychological or psychiatric assessment report demonstrating his fitness to practice and/or other requirements. It is difficult to state definitively without the benefit of hearing submissions to this effect.

The College submits that the penalties available to the Panel in a hearing involving a former registrant are a reprimand pursuant to section 39(2)(a) of the Act and a fine

pursuant to section 39(2)(f) of the Act. Under section 71 of the College's Bylaws, the maximum fine that may be imposed is \$50,000.00

College counsel submits that the Panel should order a penalty of a reprimand and a fine of \$8,000.00 against the Former Registrant.

With regard to the appropriate range of fine, the College provided the case of *Kit Wong (Re)* (Discipline Committee of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of B.C., September 4, 2014), where the panel held that the registrant engaged in professional misconduct and contravened practice standards by "touching one female patient's breast and genitalia in a sexual nature and kissing the same female patient on the cheek, by touching a third female patient's genitalia in a sexual nature and by brushing a fourth female patient's genitalia in a sexual nature." The Discipline Committee ordered a reprimand, cancellation of registration with an order under section 39(8) of the Act, and a fine in the amount of \$10,000.00.

The Panel accepts the College's submission that although *Kit Wong* involved sexual misconduct with more than one patient and therefore is distinguished from the present set of facts, the Former Registrant's conduct was severe due to the vulnerability of the sixteen-year old patient.

In examining the aggravating and mitigating factors, the Panel concludes that specific and general deterrence is necessary in a case involving sexual misconduct of a sixteen year old patient but that the Former Registrant having readily admitted to his mistake and having served his criminal sentence, a reprimand and a fine of \$8,000.00 is appropriate in the circumstances. As the penalty of cancellation of registration - the most serious penalty that may be imposed in a disciplinary hearing - is not available to the Panel in the circumstances, the fine imposed on the Former Registrant must reflect the gravity of the offence.

Public notification will take place in the ordinary course pursuant to section 39.3 of the Act.

The College did not seek costs. Accordingly, no order as to costs will be made.

Pursuant to section 39(3)(d) of the Act, the Former Registrant is hereby advised of his right to appeal this Order to the Supreme Court of British Columbia within 30 days of its date.

REASONS FOR JUDGMENT of the Panel:

	Telkwa, BC	June 26, 2015
Catherine Ryan, RMT (Chair)	Place	Date

	Langley, BC	June 26, 2015
Perminder Tung, Lawyer	Place	Date

	Vancouver, BC	June 26, 2015
Wendy Sanders, RMT	Place	Date