

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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Donald Martin, RMT

(the "Registrant" and "Former Registrant")

REASONS FOR DECISION, ORDER AND DIRECTIONS
(Order made pursuant to section 39(2) and Directions made pursuant to
section 39.3 and sections 21(2) and (5) of the *Health Professions Act*)

Dates and Place of Hearing:

February 17, 19, 20, 24-27; and March 2, 3 and 6, 2015

Charest Reporting Inc.
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Vancouver, BC

Counsel for the College:

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Counsel for the Registrant:

John M. Green

Hearing Sub-Committee of the Discipline Committee (the "Panel"):

Lynne Harris (Chair)
Wendy Sanders, RMT
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Independent Counsel for the Panel:

Eric Wredenhagen

Court Reporter:

Charest Reporting Inc. (Patricia Bentley)

INTRODUCTION

The Panel convened for a hearing on the above-noted dates between February 17 and March 6, 2015 at 1650 – 885 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, to inquire into allegations that the Registrant (as he then was) committed professional misconduct and contravened certain of the College's Bylaws, and in particular, certain provisions of the *Code of Ethical Conduct* and the *Standards of Practice*.

Determination pursuant to section 39(1) of the *Health Professions Act* (the “Act”)

Following the hearing, the Panel’s Reasons for Decision were released on June 5, 2015 (the “June 5 Reasons”). The Panel made the following determination pursuant to section 39(1) of the Act:

For the reasons and on the basis of the findings set out above, the Panel finds that the Registrant has committed professional misconduct in respect of all allegations set out in paragraphs 5, 9, 14 and 19 of the Citation [at that point, the Second Further Amended Citation].

The Panel also finds that the Registrant’s conduct was a breach of both section 1(2) and section 2(a) of the *Code of Ethical Conduct*. The complainants were vulnerable to the Registrant’s conduct. The Registrant’s conduct, viewed objectively, was of a sexual nature.

For the reasons set out above, the Panel determines, pursuant to sections 39(1)(a), (b) and (c) of the Act, that:

1. The Registrant has failed to comply with the College’s Bylaw 75, which requires each registrant to adhere to the College’s *Code of Ethical Conduct*;
2. The Registrant has failed to comply with the professional standards set out in the *Code of Ethical Conduct*, specifically sections 1(2) and 2(a).
3. The Registrant has committed professional misconduct.

The “conduct” of the Registrant (as he then was) referred to in the above Determination is summarized by the findings of fact made by the Panel with respect to the allegations in the Citation. The Panel found that all allegations in the Citation had been proved. Because both the specifics and the timing of the conduct are important, the Panel’s findings of fact, as summarized in the June 5 Reasons, are reproduced below in relation to each of the four complainants:

For the reasons set out above, the Panel has made the following findings of fact:

In relation to L.T.:

- That on October 11, 2013, the Registrant touched L.T. sexually and without therapeutic purpose by pressing his erect or semi-erect penis, through his clothing, against L.T.'s bare upper arm for between five and ten minutes during the provision of massage therapy services;
- That on October 11, 2013, the Registrant touched L.T. sexually and without therapeutic purpose by pressing his erect penis, through his clothing, against the top of L.T.'s head for between five and ten minutes during the provision of massage therapy services;
- That on October 11, 2013, the Registrant, after lifting the sheet so that L.T. could turn over, intentionally raised or "wafted" the sheet covering L.T. so he could view her breasts, which he did sexually and without therapeutic purpose;

In relation to D.K.:

- That the Registrant, in administering the sacrum maneuver on one occasion on February 1, 2013 and on two occasions on February 12, 2013, during the provision of massage therapy services, on each such occasion touched D.K. sexually and without therapeutic purpose by brushing his hand against her anal and genital region while withdrawing his hand from her sacrum;
- That the Registrant acted intentionally to view D.K.'s breasts sexually and without therapeutic purpose during seven massage therapy sessions in January and February 2013 by holding the sheet covering her away from her body after she had turned over on the massage table;

In relation to V.S.

- That the Registrant, in administering the sacrum maneuver on October 17, 2012, during the provision of massage therapy services, touched V.S. sexually and without therapeutic purpose by brushing his hand against her anal and genital region while withdrawing his hand from her sacrum;
- That the Registrant, while providing massage therapy services on October 17, 2012, touched V.S. sexually and without therapeutic purpose while massaging her hip, but reaching underneath her and touching her adjacent to her groin area;

In relation to A.W.

- That the Registrant acted intentionally to view A.W.'s breasts for a sexual purpose while providing massage therapy services during a massage therapy session on January 24, 2013 by raising the sheet covering A.W. three to four times after she had turned over on the table, and holding the sheet away from her body for three to five seconds each time.

PARTIES' SUBMISSIONS REGARDING PENALTY, PUBLICATION AND COSTS

Process and scheduling/College Submission

Following the release of the June 5 Decision, the parties agreed to proceed by way of written submissions to the Panel on penalty, publication and costs. The College proposed the following schedule for the exchange of submissions:

- College's submissions to be delivered by July 24, 2015
- The submissions of the Registrant (as he then was) to be delivered by August 14, 2015
- Reply submissions (if any) to be delivered by August 28, 2015

The Registrant (as he then was) took no position on the dates proposed by the College. Accordingly, on July 21, 2015, a letter was sent to the parties by the Panel's independent legal counsel ("ILC") confirming the exchange of written submissions by the dates set out above. The College's Submission on Penalty, Publication and Costs ("College Submission") was subsequently received on July 23, 2015.

Resignation of Registrant/College's Supplementary Submission

On August 11, 2015 the Panel was advised (through a letter from College counsel to the Panel's ILC, copied both to the College and the Registrant) that the Registrant had resigned his registration with the College the previous week, on August 7, 2015 (the Registrant will therefore be hereinafter referred to as the "Former Registrant"). College counsel learned of this resignation from the College: the Former Registrant had not advised her directly.

Because the resignation of the Former Registrant has the effect of restricting both the orders that the Panel may make under section 39(2) of the *Health Professions Act* (the "Act") and the conditions it may impose under section 39(8) of the Act, as further discussed below, College counsel made additional and revised submissions in a letter dated August 11, 2015 (the "Supplementary Submission") as to what orders could and should be made by the Panel in light of the Former Registrant's resignation. In the Supplementary Submission, the College also asked the Panel to address in these reasons what penalty the Panel would have imposed had the Former Registrant not resigned. The Panel will address this issue below.

Former Registrant's Responding Submission

The Former Registrant subsequently sought an extension to August 28, 2015 to deliver his responding written submission on penalty, publication and costs. The College advised, through counsel, that it would consent to an extension to August 21, 2015, but opposed an extension to

August 28 on the grounds that (1) the Former Registrant had not advised College counsel of his resignation; (2) it appeared that he had received legal advice in respect of his resignation; and (3) the change in the College's position related only to the amount of the fine sought and certain details regarding publication. The Panel accepted the College's argument and issued a letter (through its ILC) dated August 13, 2015 advising that the Former Registrant's written submission was due August 21, 2015, and that any reply of the College continued to be due on August 28, 2015.

On August 21, 2015, the Former Registrant delivered a written submission on penalty, publication and costs dated August 20, 2015 (the "Responding Submission"). College counsel subsequently advised that there would be no reply submission.

The Panel proceeded to deliberate and has issued the following reasons, order and directions.

PENALTY, PUBLICATION AND COSTS

Preliminary issue: jurisdiction of Panel to impose penalty despite resignation

In the Supplementary Submission, the College addressed the jurisdiction of the Panel to impose a penalty notwithstanding the resignation of the Former Registrant, as follows:

The College's position is that Mr. Martin's resignation does not eliminate the Discipline Committee's jurisdiction to order penalty, publication, and costs. In summary, for the purposes of inquiry and discipline, the definitions "registrant" and "respondent" under the *Health Professions Act* (the "Act") include a former registrant. **This prevents registrants who resign in the midst of an investigation or a discipline hearing from escaping the consequences of their actions and from frustrating the public interest in setting standards for the profession.**

Specifically, Part III (sections 26-40) of the *Health Professions Act* (the "Act") governs the inquiry and discipline processes of the College. **Section 26 of the Act provides that a "registrant" under Part III includes a former registrant. Section 37(1) provides that the affected registrant is named as a "respondent" in a citation for a discipline hearing. Section 39(2)-(8) provides that a discipline committee may order penalties and costs against a respondent. Section 39.3 provides that publication may be directed against a registrant.**

(Emphasis added)

The Panel agrees with the College's submission. Part III of the Act is entitled "Inspections, Inquiries and Discipline", and section 26, which defines a "registrant" as "includ[ing] a former registrant", is the first section in that Part. Plainly, the legislative intent of the inclusion of "former registrant" into the definition of "registrant" was, as the College submits, to prevent registrants from "escaping the consequences of their actions and from frustrating the public interest in setting standards for the profession." The Panel therefore finds that it does have the authority – an authority also exercised in a recent decision entitled *College of Massage Therapists of British*

Columbia and Matthew Romyn (Former Registrant) (May 29, 2015) (“*Romyn*”) – to make an order respecting penalty, publication and costs in relation to the Former Registrant.

In the Responding Submission, the Former Registrant submits that he “had no anticipation of ‘ousting’ or circumventing the process of this disciplinary hearing”, though he admits that he “erred in not making that clear” in his letter of resignation. The Former Registrant does not challenge the jurisdiction of this Panel on the basis of his resignation.

REASONS

College Submission prior to Former Registrant’s resignation

As stated above, the College Submission was delivered on July 23, 2015. On that date, the Former Registrant still held registration in the College, and the College Submission was, accordingly, delivered on that basis. The College submitted that the following sanctions were warranted under ss. 39(2) and 39(8) of the Act:

- a. a reprimand;
- b. cancellation of the Respondent’s registration with the College, with a condition that he not be eligible to reapply for reinstatement of registration until two years have passed;
- c. a condition that the Respondent not be eligible for reinstatement of registration unless he provides a medical opinion from a registered psychologist or psychiatrist, pre-approved by the College’s Registrar, that the Respondent is at low-risk to re-offend; and
- d. a fine of \$10,000.

However, apart from penalty, the College Submission also contains detailed submissions on the purpose for and application of penalties in the regulatory context in general and in the health professions in particular that the Panel believes it is appropriate to address. Further, as stated above, the College has asked the Panel to address the penalty it would have imposed had the Former Registrant not resigned. The Panel will therefore address these issues first, and will then proceed to address its reasons for the penalty actually ordered given the circumstance of the Former Registrant’s resignation on August 7, 2015.

Factors relating to the determination of penalty (general)

The overriding statutory duty of the College, as set out in section 16(1) of the Act is, “to serve and protect the public” and to “exercise its powers and discharge its responsibilities ... in the public interest”. This duty gives rise to the objects expressed in subsection (2), which include

“superintend[ing] the practice of the profession”, “establish[ing], monitor[ing] and enforc[ing] standards of practice ... and reduc[ing] ... unethical practice amongst registrants”, and “establish[ing], monitor[ing] and enforc[ing] standards of professional ethics amongst registrants”.

The College submitted that the fundamental purpose of professional discipline is to protect the public interest: *McKee v. College of Psychologists (BC)*, [1994] 9 W.W.R. 374 (BCCA). In that regard, the College emphasized the following passage from a decision entitled *Adams v. Law Society of Alberta*, 2000 ABCA 240 (at para. 6):

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. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

(Emphasis in College submission)

The Panel adopts the above principles from the *McKee* and *Adams* decisions, and notes that it is this “public” aspect of professional discipline that makes it particularly important to proceed in cases such as this one, where the person who committed the misconduct has resigned from the profession. It must be clear that, where serious misconduct has been found to have been committed by a registrant who subsequently resigns his or her registration, it would in most cases be an insufficient discharge of the College’s public duty merely to accept such resignation without further consequence to the former registrant.

With respect to the factors to be considered in determining an appropriate penalty, the College cited *Jaswal v. Newfoundland Medical Board* (1996), 42 Admin L.R. (2d) 233, a decision of the Newfoundland Supreme Court. While some of the factors in *Jaswal* were considered by the Panel not to be relevant to this case, the Panel did consider a number of them to be applicable. These are set out below (with the substitution of the words “massage therapist” for “physician” and “massage therapy” for “medicine”):

- the nature and gravity of the proven allegations;
- the number of times the offence was proven to have occurred;
- the role of the massage therapist in acknowledging what had occurred;
- whether the offending massage therapist had already suffered other serious financial or other penalties as a result of the allegations having been made;
- the impact of the incident on the offended patient;
- the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of massage therapy;

- the need to maintain the public's confidence in the integrity of the massage therapy profession;
- 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
- the range of penalty imposed in other similar cases.

The College cited a text by Richard Steineke entitled *A Complete Guide to the Regulated Health Professions Act* (the Ontario equivalent of the Act), in which the author states that the nature and gravity of the proven allegations as “probably the most important factor in determining an appropriate order”. He then went on to comment that:

...any order should reflect the seriousness of the conduct. Conduct that is intentional is more serious than an inadvertent violation. Conduct carried on over a period of time is more serious than an isolated incident. Behaviour that is immoral, dishonest or criminal in nature is considered to be a serious matter. So is behaviour involving a breach of trust (e.g., sexual abuse)...

In this case, the conduct of the Former Registrant – the sexual touching and/or viewing of the complainants – was found to be intentional, not inadvertent. The conduct took place on a number of occasions over a period of time (approximately one year), with four different complainants. While there was no evidence of any criminal charge or proceeding involving the Former Registrant, the conduct found by the Panel is at least as serious as that found in *Romyn*, a case in which the massage therapist’s conduct had led to criminal convictions for sexual assault. Lastly, there is no question that the conduct of the Former Registrant involved a number of significant breaches of trust. The College cited *Sazant v. College of Physicians and Surgeons*, a 2011 decision of the Ontario Divisional Court (2011 ONSC 323), for the proposition that the “[d]eliberate and repeated sexual touching of patients where a practitioner is in a position of trust and authority constitutes the most serious kind of sexual misconduct”. The Panel agrees, and also cites the *dicta* of the hearing panel of in *Romyn*, which stated that:

Conduct of this nature demands the imposition of a significant penalty that will convey both to the profession and to the public that there can be and will be no tolerance for intentional, non-consensual sexual touching of patients by a massage therapist, even where such touching is disguised as inadvertent or accidental contact that occurs during the course of massage therapy.

The Panel notes that in the cases cited by the College involving similar sexual conduct and similar breaches of trust by a health professional, a revocation or cancellation of license formed part of the penalty imposed: see *Sazant, supra*; *McKee, supra*; see also *Im (Re)* [2009] OCPSD No 28; *Kit Wong (Re)* (Discipline Committee of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of B.C., September 4, 2014); *Zhi Li (Re)* (Discipline Committee of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of B.C., February 9, 2012); *Sood v. Council of the College of Physicians and Surgeons of*

Saskatchewan, [1996] 2 W.W.R. 668 (Sask. Q.B.); and *Li (Re)*, 2002 OCPD No 45.

The Panel is also mindful of its obligation to consider the specific and general deterrence, protection of the public, and maintenance of public confidence in the integrity of the massage therapy profession. As stated by James Casey, QC, in his text *The Regulation of Professions in Canada*: “The penalty imposed in cases of sexual misconduct must be sufficient to act as a **deterrent to the particular professional and to others faced with a comparable situation**” (emphasis added). The importance of general deterrence in particular was underscored by the B.C. Court of Appeal in *McGuire v. Law Society of British Columbia*, a case in which the court, in upholding the disbarment of a lawyer, commented that,

Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, “Don't even think about it”. And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards.

In the Panel’s view, the case for general deterrence and denunciation of the type of conduct engaged in by the Former Registrant is perhaps even stronger in the context of massage therapy than in any other health profession. While some other health professions may incorporate touch to a greater or lesser degree either directly, or as incidental to the diagnosis or treatment of a patient, none does so to a greater degree than massage therapy, in which physical touch is the primary treatment modality. Members of the massage therapy profession must understand that there will be no tolerance for sexual touching, whether such touching is overt and clearly sexual in nature, or of the “disguised” kind referred to in *Romyn*, and found by the Panel in this case, that masquerades as therapeutic contact. Likewise, members of the public must feel confident that any treatment provided by a massage therapist is provided *solely* in the best interests of the patient, and for no other purpose. For any patient to feel during and after massage therapy as the complainants did in this case – fearful, anxious, apprehensive, and violated – is a wrong that this Panel must denounce in the strongest terms as a matter of justice to the complainants, protection of the public, denunciation of the conduct, and the upholding of the integrity of the entire profession.

For the reasons set out above, the Panel declares that, had the Former Registrant not resigned prior the issuance of this Order, it would have been prepared to impose the sanctions originally sought by the College, including cancellation of the Former Registrant’s registration, and the following conditions: (1) that he be ineligible to apply for reinstatement of registration until at least two years have passed, and (2) that he provide, in the event of a reinstatement application, “a medical opinion from a registered psychologist or psychiatrist, pre-approved by the College’s Registrar, that the Respondent is at low-risk to re-offend”. The Panel considers that these sanctions, as well as the proposed reprimand and \$10,000 fine, would have been reasonable in light of the decided case law and its public interest obligations under the Act. In particular, the Panel wishes to highlight that it views the two conditions sought by the College – a two-year period of ineligibility to re-apply for reinstatement, and the provision of a medical opinion – as being both related to each other, and something that would, had the Panel been in a position to

order them (which it would have done if it could have), have provided an essential element of public protection.

Additional factors related to the imposition of penalty, as well as the issue of costs, will be discussed further below.

Determination of penalty post-resignation

As stated above, following the resignation of the Former Registrant on August 7, 2015, it was no longer open to the Panel to cancel the Former Registrant's registration or to impose the conditions sought by the College on any future application that the Former Registrant might make for reinstatement of registration. Section 39(8) of the Act only allows the Panel to impose such conditions "[i]f the registration of the respondent is suspended or cancelled under subsection (2)" (i.e. by a disciplinary order following a hearing), a possibility eliminated by the Former Registrant's resignation. The wording of subsection (8) is worth considering in detail:

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(8) If the registration of the respondent is suspended or cancelled under subsection (2), the discipline committee may

(a) impose conditions on the lifting of the suspension or the eligibility to apply for reinstatement of registration,

(b) direct that the lifting of the suspension or the eligibility to apply for reinstatement of registration will occur on

(i) a date specified in the order, or

(ii) the date the discipline committee or the board determines that the respondent has complied with the conditions imposed under paragraph

(a) ...

In *Romyn*, a panel of the Discipline Committee of the College observed that there is:

... a significant discrepancy between the penalties that can be ordered in respect of a current as opposed to a former registrant, even if the conduct at issue is equally serious in both cases ... had the Former Registrant been a registrant at the time of this hearing, the Panel could not only have revoked his registration, but could also have imposed conditions on his eligibility to apply for reinstatement (and enforced those conditions), and could have imposed continuing conditions on practice even in the event that reinstatement should occur at some future date. While the likelihood of reinstatement appears low – and the Former Registrant testified that he had no intention of ever reapplying to be a registered massage therapist – **the provisions of subparagraph (8) provide an additional degree of public protection that is unavailable where, as in this case, a registrant has allowed his or her registration to lapse prior to a hearing. There would appear to be no principled reason for this discrepancy.**

(Emphasis added)

In *Romyn*, the former registrant’s registration had lapsed well before the hearing, due to his non-payment of fees. He had been criminally convicted of sexual assault prior to his College hearing, a factor which may have factored into his decision to allow his registration to lapse. He did not – as the College submits the Former Registrant did in this case – resign with the specific intention of defeating the College’s disciplinary jurisdiction.

In that regard, the College submitted in the Supplementary Submission that the Former Registrant’s “recent resignation is designed to escape the consequences of his reprehensible misconduct.” The Panel notes that on August 7, 2015, the Former Registrant sent the following e-mail to Deanne Gaffar, a College investigator seeking to interview the Former Registrant on another matter:

I am writing to confirm that you have received a copy of my letter of resignation from the College of Massage Therapists of BC effective immediately (August 07 2015). **I have received legal advice that as I am no longer a member of the College of Massage Therapists of BC I am no longer under the jurisdiction of the CMT BC** and therefore will not be required to attend the interview scheduled for this coming Tuesday August 11th.

(Emphasis added)

In the Responding Submission, the Former Registrant submits that he “sought legal advice as to the College’s initial submission (July 23rd 2015) as well as the College’s revised submission in response to my resignation from the College of Massage Therapists of B.C,” but asserts that he did not receive any “substantive advice”. However, this assertion seems inconsistent with the text of his e-mail to Ms. Gaffar.

The Former Registrant has also submitted that he has no intention of ever applying for reinstatement of his registration, or of returning to registered massage therapy practice in any jurisdiction, or of providing “body work” services in any form. However, as discussed above, the Former Registrant’s resignation has had the effect of limiting the sanctions that may be imposed by this Panel. (In its deliberations, the Panel considered whether this resignation was a “voluntary relinquishment” of the type described in section 20(2.1)(b.1) of the Act, and whether that section of the Act might give a future Registration Committee additional jurisdiction to impose limits or conditions, or to refuse to grant registration, in the event of a future reinstatement application by the Former Registrant. The Panel concluded, however, that it would be outside its jurisdiction to address this point in these Reasons.)

This Panel is therefore in the same position as the disciplinary panel in *Romyn*: it must assess and impose sanctions in light of the Former Registrant’s resignation, having regard both to the factors to be considered in the determination of penalty, the conduct at issue in relation to the decided cases, and the penalties that remain available under the Act.

In the Supplementary Submission, College counsel submitted as follows:

The College initially sought a penalty which included revocation of Mr. Martin's registration with conditions on his eligibility to apply for reinstatement with the College. The College also sought a reprimand, a fine of \$10,000, and costs.

On the face of section 39(2)(e) and (8) of the Act, Mr. Martin's recent resignation of his license prevents the Discipline Committee from ordering a revocation of his registration and setting conditions for reinstatement. In the College's view, Mr. Martin's recent resignation is designed to escape the consequences of his reprehensible misconduct.

The College submits that this is an appropriate case for the Discipline Committee to state in its reasons pursuant to s. 39(3) of the Act that if Mr. Martin had not resigned his registration, it would have ordered the penalties sought by the College in its submissions dated July 23, 2015, i.e., cancellation of his registration, conditions for eligibility for reinstatement, and conditions on practice if readmitted.

The Panel has already addressed what it would have done had the Former Registrant not resigned his registration. The Panel cannot know with certainty what the Former Registrant's intention was in resigning in relation to this proceeding, but his inconsistent characterization of the legal advice he received (in his e-mail to Ms. Gaffar the legal advice given appears both to be clear and something on which the Former Registrant places reliance, while in the Responding Submission he states he has "not received any substantive advice") lends some credence to the College's submission that he was attempting to circumvent the disciplinary process.

Ultimately, the Panel's task is to determine what penalty is appropriate in light of the Former Registrant's resignation. The College's position with respect to penalty in the Supplementary Submission is as follows:

Given Mr. Martin's recent resignation, the College submits that the appropriate order under ss. 39(2), 39.3, 21(2) and (5) of the Act is as follows:

1. Written reprimand.
2. Fine in the maximum amount of \$50,000.
 - a. A maximum fine is an amount appropriate given the reprehensible nature of the misconduct, combined with Mr. Martin's resignation to avoid the consequences of his misconduct. By resigning his registration so that it cannot be cancelled or suspended, Mr. Martin has essentially acted to limit the Discipline Committee to substantially expressing its censure *only* through a fine.
 - b. In a recent decision by the Discipline Committee in the matter of the former registrant, Mathew Romyn, this Committee ordered a fine of \$25,000. But Mr. Romyn's case, despite

involving a conviction for sexual misconduct, did not involve an attempt to escape of responsibility by resigning after a full discipline hearing and before a penalty could be ordered.

- c. In this case, Mr. Martin deliberately chose to resign after a three week discipline hearing and after he was found to have committed 18 instances of sexual misconduct against four complainants. As Mr. Martin has no registration to renew, he need not pay any fine, or any costs award, as a condition of renewal. He will not suffer the consequences of any fine or costs award unless the College incurs additional expense of pursuing court proceedings. He has, in effect, acted to obstruct any penalty and costs award against him.
3. Publication under s. 39.3 of the Act with text setting out,
 - a. the reasons for a maximum fine being Mr. Martin's reprehensible behaviour and his attempt to escape the consequences of his misconduct by resigning his registration; and
 - b. had Mr. Martin maintained his registration, the Discipline Committee would have cancelled his registration, and imposed the conditions sought by the College in its submissions dated July 23, 2015.
 4. Pursuant to s. 21(2)(g) and (5) of the Act, notation in the register of the fine and the notional cancellation and conditions.
 5. Costs in the amount originally sought (i.e., \$81,216.31).

The Panel has addressed, above, the orders it would have made regarding the cancellation of registration and the imposition of the conditions sought by the College had the Former Registrant not resigned. Those sanctions being unavailable, the Panel will now provide reasons for decision in relation to the College's revised submission on the fine, as well as in relation to costs and directions to the College's Registrar

Fine

The Panel accepts that, in the circumstances of the Former Registrant's resignation, the imposition of a significant fine is the only means by which it can accomplish the objectives of specific and general deterrence, maintenance of public confidence, and denunciation of the Former Registrant's serious misconduct. The Panel has declared above that it would have cancelled the Former Registrant's registration had that been an option open to it. The College cited a number of cases involving similar conduct, but only one – the *Kit Wong (Re)* decision of the Discipline Committee of the College of Traditional Chinese Medicine Practitioners and

Acupuncturists of B.C. – appears to have involved the imposition of a significant fine (\$10,000), in addition to a reprimand and revocation of registration. In *Kit Wong (Re)*, the registrant had 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 second female patient’s breast in a sexual nature, 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”.

An even closer parallel is provided by this College’s decision in *Romyn*, a case involving a massage therapist who was found during his criminal trial for sexual assault to have engaged in the following conduct:

... touching a patient’s breasts while massaging her neck, and then continuing, even after the patient had crossed her arms to cover her breasts, to touch the patient’s breasts on the sides and under her arms; repeatedly touching the labia of four patients while massaging either their abdomen or their legs; touching one patient’s pubic bone, and another’s *mons pubis*; touching a patient’s pubic hair; lifting the covering sheet and looking at another patient’s body.

The above conduct led to five criminal convictions for sexual assault, one in respect of each of the complainants in the criminal matter (four of whom had also complained to the College). One of the convictions was in respect of conduct that occurred in February 2011; the remaining four related to conduct that took place on a single day in December 2011. One of the complainants was 16 years of age.

The hearing panel of the Discipline Committee in *Romyn* concluded that the former registrant’s conduct in that case justified the imposition of a “substantially greater fine” than the \$10,000 fine imposed in *Kit Wong (Re)* for the following reasons:

- (1) the unavailability of cancellation of registration as a penalty and the consequent necessity for a fine that reflected the seriousness of the former registrant’s conduct;
- (2) the need to convey to any member of the massage therapy profession facing similar charges in the future that resigning one’s registration, or allowing it to lapse, “is not a means by which a serious disciplinary consequence can be avoided”;
- (3) the larger number of victims (five rather than four) and the fact that one victim was 16 years of age at the time of the assault.

The *Romyn* hearing panel concluded as follows:

Weighing the aggravating and mitigating factors against each other, and having regard to the purposes for which the penalty would be imposed as well as to the penalties available in this case, the Panel concluded that the appropriate penalty was (1) a

reprimand, and (2) a fine in the amount of \$25,000.

In comparison to *Romyn*, two factors that could be seen as weighing in mitigation of penalty in this case are the fact that there were four victims rather than five, and the fact that none of the Former Registrant's victims was a minor. However, considering the Former Registrant's conduct in its totality, as well as the circumstances and timing of his resignation, the Panel was of the view that the Former Registrant's conduct warranted a somewhat more severe penalty than that imposed in *Romyn*, for the following reasons.

First, the behaviour of the former registrant in *Romyn* appeared to be more opportunistic and less calculated than the behaviour of the Former Registrant. The bulk of the conduct took place on a single day in December 2011. None of the conduct in *Romyn* occurred for more than one session with one complainant – in fact, each of the complainants saw the therapist only once. In this case, by contrast, there was a repetition of the same conduct by the Former Registrant with two of the four complainants both within the same session (the sexual touching of V.S.) and in successive visits (the sexual viewing of the body of D.K.). This repetition suggests a degree of deliberateness and intent that aggravates, in the Panel's view, the seriousness of the Former Registrant's conduct.

Second, in *Romyn*, the former registrant's registration had lapsed (for non-payment of fees) over two years prior to the discipline hearing. For that reason, it is difficult to conclude that the former registrant in that case sought, by resigning, to avoid the more severe sanctions (cancellation of registration, and the imposition of limits and conditions on reinstatement) that the hearing panel would have imposed had he been registered at the time of the hearing. In this case, by contrast, the Former Registrant waited until *after* the findings of professional misconduct and breaches of ethical duties made in the June 5 Decision to resign his membership. While he submits that his resignation was not for the purpose of ousting the Discipline Committee's jurisdiction, both the timing of the resignation and the wording of his August 7, 2015 e-mail to Deanne Gaffar (see above) suggest otherwise. In the Panel's view, this is a significant aggravating factor. While a registrant has the right to resign at any time, it strains credulity to suggest, as the Former Registrant has, that a resignation following serious findings of sexual misconduct is entirely unconnected with those findings. Where a respondent, in effect, waits until the writing is on the wall in order to resign, and a real prospect of cancellation of registration would exist but for the resignation, then any fine imposed must take that circumstance into account.

Third, the Panel found the timing and apparent escalation of the Former Registrant's conduct to be troubling. In this case, the Former Registrant's conduct with three of the four complainants occurred between October 2012 and February 2013. His conduct with the fourth complainant, L.T., occurred in October 2013, at a time when he knew he was already under investigation by the College for the complaints of the first three complainants. Not only did this knowledge not prevent his conduct with L.T., that conduct, in particular the pressing (through clothing) his semi-erect or erect penis against her arm and the top of her head for a number of minutes, was

the most egregious conduct he had committed (as complained of) to date. That the Former Registrant would be prepared to undertake such conduct at all, let alone in full knowledge of investigations in progress, suggested to the Panel a sense of either recklessness or invulnerability that the Panel found alarming. Again, this conduct calls for very strong denunciation by the Panel, which can only be achieved in this case by the quantum of the fine imposed.

Finally, because the findings in *Romyn* were the findings that had already been made at a criminal trial, which were subsequently adopted by the hearing panel, the hearing panel in that case did not have the benefit of evidence as to the impact of the therapist's behaviour on his victims. The complainant witnesses in this case, however, did give such evidence, and testified convincingly to feeling "frozen", "alarmed" and "afraid" in response to the Former Registrant's conduct. L.T. in particular said she was "disgusted", "really upset" and gave testimony as to reliving the incident. Three of the four complainants testified as to discussing their experience with a therapist or counsellor. Bearing in mind that one of the penalty factors listed in the *Jaswal* decision is "the impact of the incident on the offended patient", the Panel considered that the fear and apprehension caused by the Former Registrant's conduct was an aggravating factor with respect to penalty.

The College submitted that the Panel should impose the maximum available fine under the Act and the College's Bylaws, namely, \$50,000. The Panel considered this submission seriously, and observed that there was some logic in substituting the maximum available financial penalty for the most serious sanction that could otherwise have been imposed (i.e. cancellation of registration). However, on further consideration, the Panel decided that while the conduct of the Former Registrant was extremely serious, it could not say that that conduct was twice as serious as the conduct found in *Romyn*, in which a \$25,000 fine was imposed. The Panel also saw merit in taking a more gradual and incremental approach to increasing the largest fine imposed under the Act, which the Panel understands was previously the \$25,000 fine imposed in *Romyn*. Considering these factors, together with all the factors set out above, the Panel decided to order that a fine of \$35,000 be payable by the Former Registrant. In the Panel's view, this fine is sufficient to signal its strong disapprobation of the Former Registrant's conduct, and to provide a level of deterrence to any future registrant who might be tempted to engage in such conduct. Likewise, the Panel has made it clear that resignation of registration, especially when such resignation follows the initial phase of a hearing, is not a means by which a serious disciplinary consequence can be avoided.

With respect to the fine sought by the College, the Former Registrant essentially made two submissions: (1) that the fine sought by the College (\$50,000) was double his current annual income, given his restricted practice; and (2) that unlike the respondent in *Romyn*, he has not been convicted of a criminal offence. He did not argue, however, that no fine should be payable, nor did he take a position on the quantum of fine that would be warranted. Further, the Former Registrant provided no evidence presented as to his income, or as to his inability to pay the fine (the Panel cannot assume that he does not have the ability to pay the fine, even if his

current income may be restricted). Even had such evidence been presented, the Former Registrant was, through his own conduct, responsible for the amount of the fine imposed by the Panel. Had he not resigned, the fine imposed would have been substantially smaller. Also, the Panel considered that in any event the primary criterion to be considered in determining the fine to be imposed was the seriousness of the conduct found, not the Former Registrant's ability to pay. Finally, the Panel was not persuaded that the criminal convictions in *Romyn* were a significant distinguishing factor, especially as there was no evidence that a criminal complaint had been made in this case, and also as the conduct found by the Panel in this case was at least as serious, if not more serious, than the conduct found in *Romyn*.

Proposed order/direction to Registrar regarding notation in the register

The College has requested that this Panel order the College's Registrar to make, pursuant to s. 21(2)(g) and (5) of the Act, a "notation in the register of the fine and the notional cancellation and conditions".

Section 21(2) of the Act states as follows:

21 ...

(2) The registrar must maintain a register setting out, for every person granted registration under this Act, the following:

- (a) the person's name, whether the person is a registrant or a former registrant, and, if the person is a registrant, the person's business address and business telephone number;
- (b) the class of registrants in which the person is or was registered;
- (b) if the person is a registrant, any limits or conditions imposed under this Act on the practice of the designated health profession by the registrant;
- (d) a notation of each cancellation or suspension of the person's registration, including any cancellation or suspension that
 - (i) occurred or was recorded before the coming into force of this subsection, or
 - (ii) was imposed by the governing body for a health profession under a former enactment regulating the health profession;
- (e) any additional information required under the regulations of the minister;
- (f) any additional information required under the bylaws of the college;
- (g) any additional information specified under subsection (5) by the registration committee, inquiry committee or discipline committee.

The College's submission appears to be based on the premise that the Panel's "notional" cancellation of the Former Registrant's registration, and imposition of the conditions sought by the College, would constitute "additional information" within the meaning of subsection (g). The phrase "additional information" is qualified by the words that follow it, namely, "specified under subsection (5)". Subsection (5) states that the "discipline committee, in disposing of a matter under Part 3 respecting a person granted registration under this Act, may specify information regarding the person that must be entered on the register referred to in subsection (2)". This "additional information" is not, in the Panel's view, restricted to the information specifically described in the various subparagraphs of subsection (2), since that were the case, the words "additional" and indeed subsection 2(g) itself would both be redundant. The Panel understands the public protection rationale for the College's request and has, therefore, in effect made the order sought. However, since this "order" would be directed at the Registrar rather than at the Former Registrant, the Panel has, for consistency with the language used in section 39.3 of the Act, chosen to characterize its action in this regard as a direction rather than an order.

Costs

The College sought costs in the amount of \$81,216.31. The Panel is satisfied based on the College Submission, supported by the affidavit of the College's Director of Compliance, Joëlle Berry, that the costs sought were properly incurred and properly calculated by the College in accordance with its applicable Bylaws and costs tariff. The Panel agrees with the submission that the College membership should not have to bear the costs incurred as a result of the Former Registrant's conduct, while the costs tariff, as applied, reflects the principle that a member should not have to bear the full cost of defending him- or herself. The Panel also notes that, in contrast to *Romyn*, the Former Registrant in this case at no point made any acknowledgement or admission regarding his conduct, and in fact took steps in preliminary proceedings (the College's application to consolidate the complaints before it) opposing the College's attempt to have the cases heard together at least in part on the grounds of greater efficiency and reduced costs. While he was entirely entitled to do so, and to require the College to prove its full case against him, he is not now in a position to ask the Panel to exercise its discretion regarding costs in his favour after the College has been successful in proving all of the conduct alleged.

While the amount of costs sought and awarded is substantial, it should be remembered that the amount awarded also covers disbursements for the College's investigation costs and the expenses involved in bringing witnesses to the hearing, as well as legal fees for a three-week hearing involving four separate complaints and complainants. The Panel further notes that the Former Registrant did not, in the Responding Submission, challenge the costs sought by the College on the merits; rather, he submitted that the amount sought would be "more than three times [his] current annual income and will represent a continued and increased severe hardship on [his] family". No evidence was presented to support that submission. In any event, the costs sought by the College and awarded by the Panel arise both as a consequence of the Former Registrant's conduct, and as a result of the approach taken by him to this proceeding.

ORDER OF THE PANEL

Following its consideration of the College Submission, the Supplementary Submission and the Responding Submission, and for the reasons set out above, the Panel orders that:

1. the Former Registrant be and hereby is reprimanded pursuant to section 39(2)(a) of the Act;
2. the Former Registrant be and hereby is fined in the amount of \$35,000.00 pursuant to section 39(2)(f) of the Act;
3. the College is hereby awarded, pursuant to section 39(5) of the Act, costs payable by the Former Registrant to the College in the amount of \$81,216.31.

(the “Order”)

As required by section 39(3)(d) of the Act, the Former Registrant is hereby advised of his right to appeal this Order to Supreme Court of British Columbia within 30 days of the date of delivery of this Order, pursuant section 40 of the Act.

DIRECTIONS TO REGISTRAR

In addition to the Order, the Panel hereby directs that:

1. pursuant to sections 39.3(1)(d) and (e) of the Act, the College’s Registrar notify the public of the June 5 Decision, and of the Reasons for Decision and Order made herein;
2. pursuant to section 39.3(3)(a) of the Act, the College’s Registrar withhold from public notification any information that could reasonably be expected to identify any of the complainants in this matter;
3. pursuant to section 21(5) of the Act, the Registrar shall note in the register referred to in section 21(2) of the Act, in relation to the Former Registrant, both the fine imposed pursuant to the Order, above, and the Panel’s notional cancellation of the Former Registrant’s registration and the conditions it would have imposed had the Former Registrant not resigned his registration.

(the “Directions”)

REASONS FOR DECISION, ORDER AND DIRECTIONS of the Panel:



Abbotsford, BC

September 15, 2015

Lynne Harris (Chair)

Place

Date



North Vancouver, BC

September 15, 2015

Wendy Sanders, RMT

Place

Date



Vancouver, BC

September 15, 2015

Rachel Shiu, RMT

Place

Date