

IN THE MATTER OF A HEARING BY
THE DISCIPLINE COMMITTEE OF THE COLLEGE OF MASSAGE THERAPISTS
OF BRITISH COLUMBIA CONVENED PURSUANT TO THE PROVISIONS OF
THE *HEALTH PROFESSIONS ACT* RSBC 1996, c.183

BETWEEN:

The College of Massage Therapists of British Columbia
(the "College")

AND:

Robert Morgan
(the "Respondent")

REASONS FOR DECISION

Date and Place of Hearing: December 14 and 15, 2020
by video conference

Panel of the Discipline Committee (the "Panel") Arnold Abramson, Chair
Evan Jeary, RMT
Jennifer Lie, RMT

Counsel for the College: Jean Whittow, QC
Maya Ollek

Counsel for the Respondent: Scott Nicoll (not appearing)
Gurleen Randhawa (not appearing)

Introduction

1. A panel of the Discipline Committee (the “Panel”) of the College of Massage Therapists of British Columbia (the “College” or “CMTBC”) conducted a hearing to determine, pursuant to section 39 of the *Health Professions Act*, R.S.B.C. 1996 c.183 (the “Act” or “HPA”), whether Robert Morgan failed to comply with the Act or a bylaw, failed to comply with a standard imposed under the Act, that is the College’s Code of Ethical Conduct or Code of Ethics, committed professional misconduct or unprofessional conduct, or in the alternative, incompetently practiced massage therapy.
2. For the reasons set out below, the Panel finds that the allegations set out in the amended citation dated March 31, 2020 (the “Citation”) are proven to the requisite standard. The Panel did not find it necessary to make findings with respect to informed consent. The Panel has determined that the Respondent breached the College’s bylaws, breached a standard imposed under the Act and committed professional misconduct in relation to the allegations which were proven.

Background

3. The particulars of the allegations against the Respondent are set out in the Citation as follows:
 1. On or about September 18, 2015, in the course of providing massage therapy services to [REDACTED]:
 - a. you massaged or otherwise touched the patient’s breasts for a non-therapeutic and/or sexual purpose;
 - b. you massaged the patient’s breasts without obtaining her informed consent; and further, or in the alternative,
 - c. you failed to provide appropriate draping, by lifting the drape and exposing the patient’s breasts as the patient turned from a prone to an upward facing position.
 2. On or about April 20, 2017, in the course of providing massage therapy services to [REDACTED]:
 - a. in your communications with the patient prior to treatment, you
 - i. failed to describe appropriate disrobing and/or draping options, and/or
 - ii. stated words to the effect that “it is a full body massage so clothes will get in the way”;

- b. you massaged or otherwise touched the patient's buttocks for a non-therapeutic and/or sexual purpose;
 - c. you massaged or otherwise touched the patient's breasts for a non-therapeutic and/or sexual purpose;
 - d. you touched the patient's nipples;
 - e. you massaged the patient's breasts, buttocks and/or abdominal area without obtaining her informed consent; and further, or in the alternative,
 - f. you failed to provide appropriate draping, by leaving the patient's breasts and/or buttocks exposed when you were not treating that area of her body.
3. On or about February 3, 2017, in the course of providing massage therapy services to [REDACTED]:
- a. you told the patient that it was necessary to expose her breast to provide treatment, when this was untrue;
 - b. you massaged or otherwise touched the patient's breast for a non-therapeutic and/or sexual purpose; and further, or in the alternative,
 - c. you failed to provide appropriate draping, by exposing the patient's breast when there was no therapeutic reason to do so and/or for a sexual purpose.

4. By letter dated October 8, 2020, the Respondent notified the Panel that:

Mr. Morgan will not contest the Amended Citation of March 31, 2020 (the "Amended Citation"). Mr. Morgan does not admit the allegations contained therein, however, and will be making no admissions respecting the same. Mr. Morgan is taking this position expressly to reduce the costs of these proceedings for all parties involved.

...Mr. Morgan, does, however, reserve his right to make submissions on the appropriate penalty and Costs if a finding is made against him under s.39(1) of the Health Professions Act ("HPA").

5. Further to the Panel's orders of December 16, 2019, July 23, 2020, and October 27, 2020, the discipline hearing was held in private, was conducted by video conference on the Zoom platform, hosted by Charest Reporting, and the College was permitted to adduce its evidence via affidavit.
6. No issues were raised with respect to service of the Citation. The Panel accepts that the Respondent was properly served.

Legal Framework

7. The College bears the burden of proof and must prove its case on a "balance of probabilities" according to the Supreme Court of Canada's decision of *F.H. v. McDougall*, 2008 SCC 53. While there is only one civil standard of proof, the Panel

notes the Supreme Court of Canada's language that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

8. According to *Re Xu*, 2019 CanLII 131132 (CDSBC), the Respondent's decision not to attend the discipline hearing cannot be used as an "inference of guilt", however it is also not necessary to infer what defences or explanations the Respondent might have offered had he attended. It remains the College's burden to prove its case to the requisite standard whether or not the Respondent attends the discipline hearing.
9. The Panel appreciates that the assessment of credibility is informed by a number of factors including the ability and opportunity to observe events, the firmness of a witness' memory, the ability to resist the influence of interest to modify recollection, whether a witness' evidence is consistent with independent evidence that has been accepted, whether a witness changes their testimony during direct and cross-examination, whether a witness' testimony seems unreasonable, impossible, or unlikely, a witness' motivation, interest or bias, and the demeanour of a witness.
10. The Panel also appreciates that special considerations apply in cases involving sexual allegations. As the Panel in *CMTBC v. Martin*, 2015 CMTBC 01 (June 26, 2015) stated:

[223] The College submitted that in addition to the above considerations (concerning credibility), there are also "special factors" that should be considered in cases of alleged sexual misconduct. The first is that, in light of the degree of trust that a patient places in a health-care provider, an initial reaction to a perceived improper sexual touch may be, and is likely to be, confusion or shock: *Li (Re)*, [2002] O.C.P.S.D. No.45. Second, the College submits, it should not be considered unusual for a female patient not to object immediately to inappropriate touching. Third, patients may try to convince themselves that they have misinterpreted the health professional's conduct, and may even return to the professional after such conduct has occurred, and that doing so should not be seen as diminishing their credibility if the patient provides a reasonable explanation for returning: *Noriega (Re)*, [2014] O.C.P.S.D. 27. Fourth, evidence in sexual misconduct cases may involve perception based on senses other than vision. For example, in *Li*, the hearing panel accepted the evidence of a patient who described feeling Dr. Li's body pressed against her buttocks, and that what she felt was not a reflex hammer, a pen or a stethoscope, but was his erect penis pressing through both their clothing....

11. Section 39(1) of the HPA provides:

39 (1) On completion of a hearing, the discipline committee may, by order, dismiss the matter or determine that the respondent

(a) has not complied with this Act, a regulation or a bylaw,

(b) has not complied with a standard, limit or condition imposed under this Act,

(c) has committed professional misconduct or unprofessional conduct,

(d) has incompetently practised the designated health profession, or

(e) suffers from a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs their ability to practise the designated health profession.

12. Section 75 of the College's Bylaws requires, amongst others, that registrants comply with the Code of Ethical Conduct (now the Code of Ethics) and the Standards of Practice. The College's Bylaws were enacted pursuant to section 19(1)(k) of the HPA. In 2016, the Code of Ethical Conduct was replaced by the Code of Ethics.
13. The Code of Ethical Conduct, which was in force in 2015, contained the following provision regarding sexual conduct:

Sexual Conduct Prohibited

2. A Registrant shall not

(a) engage in sexual conduct with a patient,

(b) engage in sexual conduct with a former patient within one year of termination of massage therapy, or

(c) make any inquiry into a patient's sexual history, unless such an inquiry is directly related to the assessment or treatment of a patient's condition.

14. The Code of Ethics, which was in force in 2017, contained the following provision regarding sexual misconduct:

"sexual misconduct" means:

(a) sexual intercourse or other forms of physical sexual relations between a massage therapist and a patient,

(b) touching, of a sexual nature, of a patient by a massage therapist,

(c) behaviour or remarks of a sexual nature by a massage therapist towards a patient, or

(d) sexualizing the treatment environment,

but does not include touching, behaviour and remarks by a massage therapist to a patient that are of a clinical nature appropriate to the massage therapy service being provided.

[...]

21. Massage therapists must not engage in sexual misconduct with a patient.

15. The Standards of Practice contained the following provisions on informed consent and draping during the material times:

Informed consent

3 A Registrant must

- (a) ensure the patient is fully informed regarding assessment and treatment, and provides consent,
- (b) discontinue treatment if the patient withdraws consent, and
- (c) monitor and work within the patient's pain threshold relative to efficacy of treatment.

[...]

Patient privacy

11 A Registrant must

- (a) recognize and respect differing cultural and personal attitudes toward disrobing,
- (b) inform the patient in advance of disrobing and draping options with respect to assessment and treatment, and establish agreement,
- (c) respect the patient's right to decline the removal of certain or any clothing,
- (d) ensure privacy while the patient disrobes or dresses,
- (e) provide non-transparent draping materials, and arrange draping so that only the part of the patient's body that is being assessed or treated is exposed,
- (f) instruct the patient on how to cover himself or herself at the commencement of treatment,
- (g) discontinue assessment or treatment if, at any time and in any manner, the patient withdraws consent to the agreed draping,
- (h) assist the patient to remove or replace clothing if the patient is unable to do so, provided that the patient has consented to assistance, and
- (i) in any public setting where massage therapy is to be provided, respect the patient's need for privacy, as the situation permits.

16. Section 26 of the HPA contains the following definitions:

"professional misconduct" includes sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession;

"unprofessional conduct" includes professional misconduct.

17. The College submits and the Panel agrees that the concept of unprofessional conduct is generally understood to be broader and less egregious than professional misconduct.
18. The College referred to the frequently cited case of *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 in which professional misconduct is defined as “conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession.”
19. The Panel in *Re Martin* referred to the *Pearlman* definition above, adding that the meaning of professional misconduct and the definition of a professional standard of practice do not need to be expressly set out in writing. Citing *Walsh v. Council for Licensed Practical Nurses*, (2010) 317 D.L.R. (4th) 152 (N.L.C.A.) and *Yazdanfar v. College of Physicians and Surgeons of Ontario*, 2013 ONSC 6420, the Panel in *Re Martin* found that where those are not set out in writing, a departure can be determined “by reference to evidence of a common understanding within the profession as to expected behaviour of a reasonable professional, or by deducing it from the profession’s fundamental values.”
20. The College referred to several prior CMTBC Discipline Committee cases in which findings were made of unprofessional conduct and professional misconduct. In *CMTBC v. Gill*, 2019 CMTBC 01, the respondent was found to have engaged in unprofessional conduct for failing to have responded to College communications. In *CMTBC v. Matthew Romyn*, 2015 CMTBC 02, the respondent had been criminally convicted of five counts of sexual assault and was found to have engaged in professional misconduct. That panel emphasized the non-consensual sexual touching of a patient by a massage therapist during the course of providing massage therapy services. In *Re Martin*, the respondent was found to have, amongst others, sexually touched patients during the provision of massage therapy services, and was found to have committed professional misconduct.

Allegations at paragraph 1 -

Evidence

21. The evidence of [REDACTED] (“[REDACTED]”) is set out in her Affidavit #1, which was affirmed on November 23, 2020. In particular, her evidence is found in the interview transcript at Exhibit “A”. [REDACTED] adopts the contents of her interview transcript with the College’s investigator, with clarification, in paragraph 5 of her Affidavit.
22. [REDACTED] attended two appointments with the Respondent at Kelowna Medical Massage (the “Clinic”). She could not recall the exact dates during her interview. The clinical records show the appointment dates as September 4, 2015, and September 18, 2015. [REDACTED] sought massage therapy in relation to neck and back injuries from a motor vehicle accident that took place on October 15, 2014. [REDACTED] confirmed at paragraph 5(b) of her Affidavit that she reviewed her receipt for service and copies of her Clinic records and the treatment which is the subject of her complaint took place on September 18, 2015.
23. [REDACTED] described the first appointment as an initial assessment. She completed a form, which she reviewed with the Respondent. The Respondent reviewed a treatment plan with [REDACTED], though he did not review how the actual treatment would unfold or what the treatment would look like. The Respondent did review the areas he would be treating – [REDACTED] neck and back.
24. [REDACTED] stated that during the second appointment, the Respondent did not review any paperwork from the first appointment but asked her how she was feeling. She told the Respondent that she was really sore in certain areas of her back and neck. The Respondent told her he would work on those areas, told her to remove her clothes and that he would return to the treatment room in a moment. There was no discussion about what [REDACTED] should wear, other than “just undress.” There was no discussion of how the treatment would unfold during the second appointment or what the Respondent planned to do to address [REDACTED] pain.

25. When the Respondent entered the treatment room, ■ was laying face down on the massage therapy treatment table. She stated that the Respondent then proceeded as follows:

And then he started, I noticed, massaging the sides of my between, like, the armpit area and like, my like, breasts. And – and I didn't really – obviously I know there's a muscle there and there can be tension, so I didn't really question it. And then I started noticing that overtime slowly and slowly he kept going lower and lower and really focussing on massaging the sides of my breasts.

And I had, like a strange feeling about it. I thought, Is this quite right? But then I – I decided, you know, Just wait it out a bit. He's probably going to move on to the next part of my body. Whatever. And then he just kind of kept – he just kept massaging the sides of my –this is so awkward to say, sorry – but the sides of my breasts. And I noticed he kind of – he kept massaging further and further closer, like, to the front. But I'm laying down, like – like --, I'm laying down flat on my stomach; right?

Q Okay.

A And this is like 20 – probably, like – I know – so I keep thinking he's going to move on to the next, and I was kind of even wiggling a bit thinking he might get the hint.

And then after, it must have been 25 minutes, 30, most of the session working on the sides of my breasts, I finally said something. And I asked him, Are you going to start massaging my back and my neck injuries? Because that's where I'm sore.

Q And do you recall his response?

A He said, You're very tight in this area. And I told him, I do not experience pain there. Like, I want you to massage another area. And I remember he asked me – and I believe this was at the very end, after that –after that point, he told me to move over to the –to lay on my back now.

26. ■ stated that when she turned over to lay on her back, the Respondent was holding the sheets up “very high” with both hands, and she recalled putting her arms up to cover her breasts while seeing the Responding looking down at her. ■ stated that she then “instantly” covered her breasts.
27. During her interview with the College's investigator, ■ indicated with a pen on diagrams of female figures where the Respondent's hands touched her body. On the front facing figure, ■ made pen marks on both outer sides of the breasts. At paragraph 5 (a) of her Affidavit, ■ states “As stated in my interview, Mr. Morgan massaged the sides of my breasts when I was face down on the massage table. To be clear, he used both hands at the same time, using his right hand on the side of my right breast and his left hand on the side of my left breast.” In her interview, ■ described that the Respondent reached “lower to the front”, by which she meant

“almost” to her nipples. The investigator also obtained a photograph of ■ depicting with her own hands, where the Respondent touched her body.

28. Immediately after she changed, ■ complained to the receptionist that she had an “uncomfortable massage” from the Respondent, that she had a “really bad experience”, and she requested to speak to a manager about it. She was informed the manager was not in at that time. ■ said that the manager asked the receptionist to call ■ back and inform her they would not reimburse the massage, but she could have a credit. ■ did not provide the receptionist with the specific description from her interview of the events in question and did not speak with the Clinic manager.
29. ■ stated that she “never thought” to complain to the College until after she spoke to a friend about her experience with the Respondent. ■ friend told her to “look up” the Respondent. ■ searched the internet and found an article about a complaint regarding the Respondent which she found to be very similar to her own experience. On September 8, 2017, ■ filed a complaint against the Respondent with the College.
30. Jennifer O’Sullivan, RMT was called as a witness. At the discipline hearing, the Panel qualified Ms. O’Sullivan as an expert to provide evidence about standards for draping, obtaining patient consent, and massage therapy techniques. Ms. O’Sullivan prepared a report dated November 10, 2019. The Panel decided to admit the report and allow Ms. O’Sullivan’s evidence on the basis that it considered it to be relevant, necessary and appropriate.
31. Ms. O’Sullivan stated the following in her report about the Respondent’s treatment of ■:

In my opinion, based on the notes provided, appropriate treatment for ■ would have included work to both upper back, anterior thorax and neck. The goals would be reducing pain through the reduction of excess tone in the musculature and increase the pain free range of motion of the cervical spine. The focus of treatment would be on the joints of the cervical spine and upper thorax (sterno-clavicular, costo-chondral, costo-vertebral) utilizing myofascial and joint mobilization techniques. Muscles to focus on would include trapezius, sternocleidomastoid, suboccipitals, rhomboids, subclavius, intercostals, scalenes and pectorals. A combination of Swedish and myofascial techniques would be utilized. Passive cervical ROM and stretching would be indicated to increase range of motion.

32. Ms. O’Sullivan testified that the pectorals are treated while the patient is supine and not from the back. She also noted that there is no description in the clinical records of the pectoral treatment.
33. Ms. O’Sullivan’s report reviewed the requirement to obtain informed consent prior to the commencement of treatment, that it was necessary to discontinue treatment if consent was withdrawn, and that if treatment in “areas of sensitivity of potentially sexualized areas were part of the treatment plan for the day, that they should have been addressed in order for true consent to be obtained.”
34. Ms. O’Sullivan also gave evidence that at the material times, RMTs were required to first inform patients in advance of disrobing and draping options and to obtain consent for this. The draping materials provided were to be non-transparent. Draping was to be arranged in a way that only exposed the areas of the body that were being treated or assessed. In Ms. O’Sullivan’s opinion, at the material times, it was also reasonable that an RMT would communicate to the patient what their options were for disrobing and draping prior to beginning assessment and treatment, and obtain verbal consent.

Findings and Analysis

35. The Panel accepts [REDACTED] evidence with respect to the Respondent massaging her breasts and lifting the draping and exposing her breasts.
36. [REDACTED] evidence was clear, precise, and specific. She did not exaggerate. She readily stated when she could not recall or was unsure of a point. Her account was internally consistent with respect to all the key aspects of her testimony, including as between her interview, her drawings, and the photograph of [REDACTED] placement of her hands on her breasts.
37. The College submits that [REDACTED] explanation on the timing of filing her complaint is reasonable, and the Panel agrees. The Panel notes that immediately after her treatment ended, [REDACTED] approached the Clinic receptionist and attempted to approach the Clinic manager about what she described as a “really bad experience” during her September 18, 2015 appointment with the Respondent. [REDACTED] explanation for

pursuing the College complaint after a discussion with her friend about the Respondent is reasonable.

38. The Panel finds there is no evidence of improper motivation, bias or of anything ■ had to gain by participating in the College's process.
39. The Panel finds the Respondent massaged the sides of ■ breasts with both hands, almost to her nipples. The Panel finds that the touching was prolonged and took up a significant portion of the appointment.
40. The Panel accepts Ms. O'Sullivan's evidence about the appropriate treatment for ■ in the circumstances. The Panel agrees that the pectorals are not treated from the back with the hands placed on both sides of the body. The Panel finds there was no therapeutic reason to touch ■ breasts in that manner on September 18, 2015. The Panel agrees with Ms. O'Sullivan that the pectoral treatment is not recorded in the clinical record, and the Panel finds that omission to be significant. The Panel finds the touching was not accidental.
41. The Panel also accepts Ms. O'Sullivan's evidence that at the material times, RMTs were required to first inform patients in advance of disrobing and draping options and to obtain consent. The Panel finds that ■ was not provided with draping options but was told to undress, which she did. The Panel finds that the Respondent held the draping very high while ■ turned over from prone to supine, and that, while she did, ■ breasts were exposed, and ■ saw the Respondent looking at her breasts.
42. The Respondent chose to provide no defence or evidence in response to ■ evidence.
43. The Panel finds that on September 18, 2015, in the course of providing massage therapy services to ■:
 - a. the Respondent massaged the patient's breasts for a non-therapeutic purpose; and
 - c. the Respondent failed to provide appropriate draping, by lifting the drape and exposing ■ breasts as she turned from a prone to an upward facing position.

44. The College submitted that paragraph 1 (b) of the Citation was an alternate pleading and therefore if a finding in 1 (a) is made, a finding in 1 (b) is unnecessary. The Panel considers a finding on paragraph 1 (b) is unnecessary given its finding on paragraph 1 (a).
45. Pursuant to section 39(1)(a) of the HPA, the Panel finds that the Respondent breached section 75 of the College's Bylaws by failing to comply with section 2 of the Code of Ethical Conduct and section 11 of the Standards of Practice.
46. The Respondent failed to comply with section 2(a) of the Code of Ethical Conduct because he engaged in sexual conduct with ■■■, who was a patient. "Sexual conduct" is not defined. The Panel agrees with the College's submissions that it is not necessary to prove the Respondent's motivation in order to determine that the conduct is sexual. The Panel also agrees with the reasoning in *Re Martin* that there is no "*mens rea*" or mental element required. Rather the conduct is assessed in the following manner:

[197] The same principle applies in the regulatory context. The two key questions to determining whether intentional conduct of a sexual nature occurred are (1) was the conduct that took place, viewed objectively, of a sexual nature? and (2) did the person who is alleged to have committed the conduct in fact intend that conduct? This test may be particularly difficult to apply in the massage therapy context, as the practice of the profession inherently involves physical contact. Therefore, in order to determine whether conduct is "objectively" of a sexual nature, a Panel must scrutinize with care all evidence about the conduct at issue, including whether or not any touch alleged to be sexual in nature may have had a therapeutic rationale, or may have been accidental.

47. The Panel finds the touching constitutes sexual conduct because there was no therapeutic rationale, the touching was prolonged, the touching was to both breasts almost at the nipples, with both of the Respondent's hands, the touching was not accidental, and the touching was to a sexualized area of the body – the breasts.
48. Pursuant to section 39(1)(b) of the HPA, the Panel finds that the Respondent breached a standard imposed under the HPA, specifically, section 2 of the Code of Ethical Conduct and section 11 of the Standards of Practice. Section 11 of the Standards of Practice requires that registrants arrange non transparent draping materials so that only the part of the patient's body is being assessed or treated is

exposed. In this case, the Respondent held the draping very high, ■■■■■ breasts were not being assessed or treated at the time, and ■■■■■ breasts were exposed.

49. Finally, pursuant to section 39(1)(c) of the HPA, the Panel finds that the Respondent's conduct amounts to professional misconduct as a member of the profession would consider it to be "dishonourable, disgraceful and unprofessional" and to fall well below any reasonable minimum standard of the profession.

Allegations at paragraph 2 - ■■■■■

Evidence

50. The evidence of ■■■■■ (■■■■■) is set out in her Affidavit #1, which was affirmed on November 25, 2020. In particular, her evidence is found in the interview transcript at Exhibit "A". ■■■■■ adopts the contents of her interview transcript with the College's investigator in paragraph 5 of her Affidavit.
51. ■■■■■ evidence is that she attended an appointment with the Respondent on April 20, 2017. She booked a relaxation massage and the Respondent was the first available therapist. ■■■■■ says that she waited in the waiting room until the Respondent brought her into the treatment room. In the treatment room, the Respondent explained to ■■■■■ that "he worked in quarters" and that he would start with ■■■■■ laying face down on the table. The Respondent told ■■■■■ "because it was a full body massage, clothes would get in the way." The Respondent asked if specific areas were bothering ■■■■■ and she mentioned her lower back.
52. The Respondent left the room. ■■■■■ undressed to her underwear, no bra and lay face down on the table waiting for the Respondent to return. He knocked and entered the room. He undraped the left side of ■■■■■ body first and rubbed lotion on her full body starting at her feet and working his way up. ■■■■■ stated that the Respondent spent "extra time kind of around my butt area." He then treated her back, covered ■■■■■ up with the draping again, and proceeded on the right side, with the same course of treatment – including, spending extra time in the gluteal area.
53. ■■■■■ stated that the Respondent then covered her right side with the draping and explained to ■■■■■ that she would be flipping over. ■■■■■ stated that the Respondent

“held the sheet up, kind of, like over his face...” As [REDACTED] flipped over, the Respondent laid the sheet back down. He then uncovered her right side first. [REDACTED] stated that she held the sheet down with her right arm at first because she did not want her breast to be exposed. [REDACTED] stated:

From there, he started at my foot again, working his way up. Did my full leg, my stomach area, and then around my breast and my arm. At this time, he never actually touched the nipple or anything like that, it was just around the breast area. But again, spending more time around the breast area than any other part of my body that he was massaging.

54. [REDACTED] stated that the Respondent proceeded to do the same thing on her left side, including spending more time around her breast area.
55. [REDACTED] stated the Respondent then “undraped me from the waist up so that my full breasts were exposed, and he was kind of massaging my stomach area in kind of like a U motion, kind of casually slipping his fingers down the front of my underwear about an inch.” [REDACTED] used the tips of his three middle fingers to go below her underwear. She said that it lasted 5 to 7 minutes. When the Respondent put his fingers below [REDACTED] underwear, he possibly touched the top of her pubic hair.
56. The Respondent then moved up to [REDACTED] breasts again and massaged around her breasts. He adjusted the draping so that her stomach was covered and only her breasts were exposed. At this time, [REDACTED] stated that the Respondent made “little W motions over my actual nipple on both sides” using a kneading motion on her breasts.
57. The Respondent then massaged [REDACTED] shoulders, her collar bone, up to her face, around her jaw line, forehead, and underneath her eyes. He then touched [REDACTED] scalp and “[ran] his fingers through [her] hair all the way to the end.”
58. After the massage was over, the Respondent attempted to book another appointment, but [REDACTED] told him her benefits would be ending and she wouldn’t have time.
59. [REDACTED] completed several diagrams indicating where she said the Respondent touched her.

60. ■ stated that after the appointment ended, she went to her car in the parking lot and performed internet searches about what is appropriate during a massage. A friend texted her about meeting for lunch, which ■ agreed to do. ■ told her friend that the massage made her feel uncomfortable.
61. The investigator asked ■ to provide her browser history of the search. The history was unavailable, but when ■ typed in the same search criteria, the page loaded with links that were visible in purple which showed links which had previously been clicked on.
62. ■ stated that the next day she went to work and talked to her colleague ■ on interoffice messaging. ■ then communicated with ■, her HR manager, about the events. ■ provided the screen shots of her communications with ■ and ■.
63. ■ told ■ that she was possibly sexually assaulted, and a massage therapist had touched her breasts. The HR manager asked if ■ wanted to make a statement to the police and then took ■ to the police station. ■ was given the opportunity to wait at the station to make a statement or return home and receive a phone call. ■ chose to go home. She started preparing a draft of her statement.
64. ■ disclosed the events to her boyfriend at that time, though not in detail.
65. ■ made a complaint to the College on May 2, 2017.
66. Ms. O'Sullivan's evidence in her expert report and oral testimony referred to the Standards of Practice for communications and draping. Her evidence was that:
 - a. Draping and disrobing should be properly described at the outset of the treatment session;
 - b. The drape should only expose the area being worked on, and not the breast,
 - c. Only the exposed area is treated; and
 - d. Nipples are never massaged.
67. ■ provided evidence via her Affidavit #1 which was affirmed on November 24, 2020. She described being close friends with ■ through their work

at a restaurant and later at a [REDACTED] firm. On April 21, 2017, [REDACTED] contacted [REDACTED] via interoffice messaging. They exchanged a series of messages over a period of two hours. A printout of that exchange was attached as an exhibit to [REDACTED] affidavit. In those messages, [REDACTED] indicated to [REDACTED] that she believed she had been sexually assaulted during her massage the previous day. [REDACTED] asked if [REDACTED] thought she should speak with [REDACTED]. [REDACTED] encouraged her to do so.

68. [REDACTED] provided evidence via her Affidavit #1 which was affirmed on November 24, 2020. As noted above, [REDACTED] works in human resources management. On April 21, 2017, [REDACTED] received a message from [REDACTED] on April 21, 2017, asking to speak immediately. [REDACTED] told [REDACTED] to come to her office. [REDACTED] described [REDACTED] as “visibly upset during my interactions with her on that day.” [REDACTED] described that she had seen a new massage therapist who she felt had touched her inappropriately. [REDACTED] told [REDACTED] that the massage therapist touched her nipples and emphasized the massage in that area. [REDACTED] reviewed [REDACTED] options with her (do nothing or report the incident). [REDACTED] indicated that she wanted to report the matter as she did not want it to happen to anyone else. [REDACTED] accompanied [REDACTED] to the RCMP station. After, [REDACTED] provided information about available resources.
69. The Panel is mindful that the evidence of [REDACTED] and [REDACTED] does not prove the truth of [REDACTED] evidence. However, their evidence is relevant to the narrative.

Findings and Analysis

70. The Panel accepts the evidence of [REDACTED]. Her evidence was clear, specific, and without exaggeration. It was detailed. It was internally consistent. The sequence of events, disclosures to third parties and filing of a College complaint are reasonable.
71. The Respondent chose to provide no defence or evidence in response to [REDACTED] evidence.

72. The Panel also accepts the expert evidence of Ms. O'Sullivan on the points set out above.
73. The Panel finds that on April 20, 2017, in the course of providing massage therapy services to ■■■:
- a. in the Respondent's communications with the patient prior to treatment, he failed to describe appropriate disrobing and/or draping options and stated words to the effect that "it is a full body massage so clothes will get in the way";
 - b. the Respondent massaged or otherwise touched ■■■ buttocks for a non-therapeutic purpose;
 - c. the Respondent massaged or otherwise touched ■■■ breasts for a non-therapeutic purpose;
 - d. the Respondent touched the patient's nipples;
 - f. the Respondent failed to provide appropriate draping, by leaving ■■■ breasts and buttocks exposed when he was not treating that area of her body.
74. The Panel did not find it necessary to deal with allegation 2 (e) because of the other findings in paragraph 2.
75. Pursuant to section 39(1)(a) of the HPA, the Panel finds that the Respondent breached section 75 of the College's Bylaws by failing to comply with the Code of Ethics and section 11 of the Standards of Practice.
76. The Respondent failed to comply with the Code of Ethics by engaging in "sexual misconduct". In particular, the Respondent engaged in "touching, of a sexual nature, of a patient by an RMT." There was no therapeutic reason for touching ■■■ buttocks or breasts, particularly her nipples. The touching was not accidental. It was objectively of a sexual nature, considering all of the circumstances set out above.
77. With respect to draping, the Respondent did not inform ■■■ in advance of disrobing and draping options with respect to assessment and treatment and establish agreement. Rather, the Respondent informed ■■■ that "clothes get in the way."

Likewise, he did not arrange the draping so that only the part of [REDACTED] body that was being assessed or treated was exposed. Rather, he exposed [REDACTED] buttocks and breasts in a manner not aligned with assessment or treatment.

78. Pursuant to section 39(1)(b) of the HPA, the Panel finds that the Respondent breached a standard imposed under the HPA, specifically, the Code of Ethics and section 11 of the Standards of Practice.
79. Finally, pursuant to section 39(1)(c) of the HPA, the Panel finds that the Respondent's conduct amounts to professional misconduct as a member of the profession would consider it to be "dishonourable, disgraceful and unprofessional" and to fall well below any reasonable minimum standard of the profession.

Allegations at paragraph 3 - [REDACTED]

Evidence

80. The evidence of [REDACTED] ("[REDACTED]") is set out in her Affidavit #1, which was affirmed on November 23, 2020. [REDACTED] adopts the contents of her interview transcript with the College's investigator, with clarification, in paragraph 6 of her Affidavit.
81. [REDACTED] had appointments with the Respondent on December 1, 2016, December 14, 2016, January 6, 2017, January 20, 2017, and February 3, 2017. [REDACTED] saw the Respondent in relation to her injuries from a September 21, 2015 motor vehicle accident. [REDACTED] stated that the first four appointments were unremarkable. Her allegations arise from her last appointment on February 3, 2017.
82. [REDACTED] stated that on February 3, 2017, the Respondent said "the only way he could kind of – like, the best way to approach that injury, because we had had a couple of appointments and it hadn't really resolved the injury – was that he would have to do, like a more in depth approach—I guess, to the injury. And so he said that that would require to be uncovered." [REDACTED] described being "caught off guard" as the appointment was already underway, she "was already naked on the table" ([REDACTED] was wearing no bra but was wearing underwear), and she felt pressure to do what the Respondent wanted to do. [REDACTED] does not think that she provided a verbal response to the Respondent. [REDACTED] stated that no alternative options to having her breast uncovered

were discussed with her. While the Respondent made this statement, the drape was to her shoulders.

83. The Respondent then moved the drape, exposing her breast. One side was covered, and one was exposed. The Respondent touched her body with two hands. ■ described the massage to be “the same way he would have worked on my –my trap or my—my neck. It –I just remember that it went, like, that it did touch the top of my breast, and that it was like a kneading, kind of.” ■ said that it lasted a “couple of minutes.” The Respondent did not touch her nipple.
84. ■ indicated where the draping was placed and where she was touched by the Respondent on diagrams which were provided during the interview.
85. ■ did not recall the rest of the massage or how it ended. She recalled feeling “really uncomfortable” when she left the appointment.
86. ■ stated that at the time, despite feeling uncomfortable, she did not know the boundaries of an RMT treatment. When she saw media articles about the Respondent, she decided to make a complaint. ■ made a complaint to the College on December 17, 2019.
87. Ms. O’Sullivan’s evidence about draping and communications is set out above.

Findings

88. The Panel accepts ■ evidence. ■ evidence is narrow, specific and precise.
89. ■ was forthcoming where she should not recall certain points, and in describing the timing of her complaint to the College. ■ explanation is reasonable. ■ evidence is internally consistent.
90. The Respondent chose to provide no defence or evidence in response to ■ evidence.
91. The Panel finds that on February 3, 2017, in the course of providing massage therapy services to ■:
 - a. the Respondent told ■ that it was necessary to expose her breast to provide treatment, when this was untrue.

- b. the Respondent massaged or otherwise touched the patient's breast for a non-therapeutic purpose.
- c. the Respondent failed to provide appropriate draping, by exposing [REDACTED] breast when there was no therapeutic reason to do so.

92. Pursuant to section 39(1)(a) of the HPA, the Panel finds that the Respondent breached section 75 of the College's Bylaws by failing to comply with the Code of Ethics and section 11 of the Standards of Practice.

93. The Respondent failed to comply with the Code of Ethics by engaging in "sexual misconduct". In particular, the Respondent engaged in "touching, of a sexual nature, of a patient by an RMT." There was no therapeutic reason for touching [REDACTED] breast or exposing her breast. The touching was not accidental. It was objectively of a sexual nature, considering all of the circumstances set out above.

94. With respect to draping, the Respondent did not inform [REDACTED] in advance of disrobing and draping options with respect to assessment and treatment and establish agreement. Likewise, he did not arrange the draping so that only the part of [REDACTED] body that was being assessed or treated was exposed. Rather, he unnecessarily exposed [REDACTED] breast.

95. Pursuant to section 39(1)(b) of the HPA, the Panel finds that the Respondent breached a standard imposed under the HPA, specifically, the Code of Ethics and section 11 of the Standards of Practice.

96. Finally, pursuant to section 39(1)(c) of the HPA, the Panel finds that the Respondent's conduct amounts to professional misconduct as a member of the profession would consider it to be "dishonourable, disgraceful and unprofessional" and to fall well below any reasonable minimum standard of the profession. In this regard, the Panel notes that the Respondent used his position of power and authority as a professional to make it seem that it was therapeutically necessary to uncover [REDACTED] breast when it was not required.

Order

97. In summary, the Panel finds that the College has proven the allegations in paragraphs 1, 2, and 3 in the Citation to the requisite standard. As noted above, the Panel did not find it necessary to make the informed consent findings in paragraphs 1(b) and 2 (e) due to the other findings made.
98. The Panel has made the following determinations pursuant to section 39 of the HPA:
- a. In relation to paragraph 1 of the Citation:
 - i. the Respondent has breached section 75 of the College’s Bylaws by engaging in “sexual conduct” contrary to section 2 of the Code of Ethical Conduct and by violating section 11 of the Standards of Practice;
 - ii. the Respondent has breached a standard imposed under the Act; specifically, section 2 of the Code of Ethical Conduct and section 11 of the Standards of Practice; and
 - iii. the Respondent has committed professional misconduct.
 - b. In relation to paragraph 2 of the Citation:
 - i. the Respondent has breached section 75 of the College’s Bylaws by engaging in “sexual misconduct” contrary to the Code of Ethics and by violating section 11 of the Standards of Practice;
 - ii. the Respondent has breached a standard imposed under the Act; specifically, section 21 of the Code of Ethics and section 11 of the Standards of Practice; and
 - iii. the Respondent has committed professional misconduct.
 - c. In relation to paragraph 3 of the Citation:
 - i. the Respondent has breached section 75 of the College’s Bylaws by engaging in “sexual misconduct” contrary to the Code of Ethics and by violating section 11 of the Standards of Practice;

- ii. the Respondent has breached a standard imposed under the Act; specifically, section 21 of the Code of Ethics and section 11 of the Standards of Practice; and
- iii. the Respondent has committed professional misconduct.

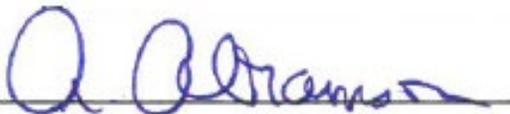
Schedule for Submissions on Penalty and Costs

99. The Panel requests that the parties provide written submissions regarding the appropriate penalty and costs.
100. The Panel requests that the parties provide the written submissions in accordance with the following schedule:
- a. Submissions must be delivered by counsel for the College to the Respondent and the Panel no later than 3 weeks from the date of this decision;
 - b. Submissions must be delivered by the Respondent to counsel for the College and the Panel no later than 3 weeks from the receipt of the College's submissions in paragraph (b); and
 - c. Reply submissions may be delivered by counsel for the College to the Respondent and the Panel no later than 1 week from the receipt of the Respondent's submissions in (b).
101. Submissions for the Panel should be delivered to Susan Precious, counsel for the Panel and may be delivered electronically.

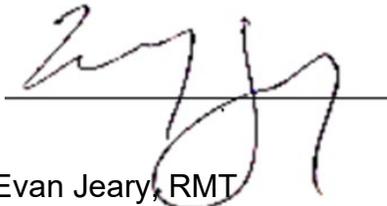
Notice of Right to Appeal

102. The Respondent is advised that under section 40(1) of the Act, a respondent aggrieved or adversely affected by an order of the Discipline Committee under section 39 of the Act may appeal the decision to the Supreme Court. Under section 40(2), an appeal must be commenced within 30 days after the date on which this order is delivered.

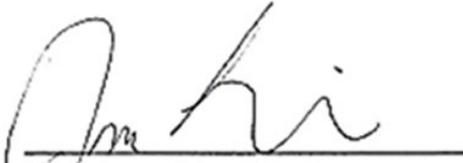
Dated: June 8, 2021



Arnold Abramson, Chair



Evan Jeary, RMT



Jennifer Lie, RMT