

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:	In writing
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 Gurleen Randhawa

Introduction

1. On June 8, 2021, this panel of the Discipline Committee (the “Panel”) of the College of Massage Therapists of British Columbia (the “College” or “CMTBC”) rendered its Reasons for Decision pursuant to section 39 of the *Health Professions Act*, R.S.B.C. 1996 c.183 (the “Act” or “HPA”) that the Respondent breached the College’s bylaws, breached a standard imposed under the Act and committed professional misconduct in relation to the allegations set out in in the amended citation dated March 31, 2020 (the “Citation”) which were proven to the requisite standard (“Conduct Decision”).
2. In the Conduct Decision, the Panel requested written submissions on the appropriate penalty and whether costs should be imposed. The College delivered its written submissions on June 29, 2021. On July 19, 2021, the Respondent’s legal counsel’s office advised the Panel that the Respondent would not be making any submissions.
3. The College seeks the following orders:
 - a. the Respondent’s registration be cancelled commencing from the date that he is made aware of the Panel’s order, pursuant to s. 39(2)(e) of the HPA;
 - b. a direction that the Respondent be prohibited from being eligible to apply for reinstatement for a period of five years from the date of the order made by this Panel, pursuant to s. 39(8)(b)(i);
 - c. imposition of a condition on the Respondent’s eligibility to apply for reinstatement of registration that he is required to complete remedial education at his own expense, pursuant to s. 39(8)(b)(ii) of the HPA, which requirements are further particularized below;
 - d. the Respondent shall be prohibited from seeking reinstatement of his registration with the College until the later date of the completion of the period for applying for re-instatement or completion of the remedial education, pursuant to s. 39(8) of the HPA;

- e. the Respondent pay a fine in the amount of \$5,000, pursuant to s. 39(2)(f) of the HPA, which must be paid prior to reinstatement of the Respondent's registration, pursuant to s. 54 of the College's Bylaws;
- f. an award of costs in the sum of \$20,000, payable by the Respondent to the College, pursuant to s. 39(5) of the HPA, which costs must be paid prior to reinstatement of the Respondent's registration, pursuant to s. 54 of the College's Bylaws; and
- g. a direction that the Registrar publish notification of the disposition of this matter, pursuant to s. 39.3 of the HPA.

Legal Framework for Penalty and Costs

4. Having made a determination pursuant to section 39(1) of the Act, the Panel must decide what, if any, penalty is appropriate. Section 39(2) of the Act authorizes the Panel to impose the following penalties:

39 (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:

- (a) reprimand the respondent;
- (b) impose limits or conditions on the respondent's practice of the designated health profession;
- (c) suspend the respondent's registration;
- (d) subject to the bylaws, impose limits or conditions on the management of the respondent's practice during the suspension;
- (e) cancel the respondent's registration;
- (f) fine the respondent in an amount not exceeding the maximum fine established under section 19 (1) (w).

5. If the Panel orders a suspension or cancellation, the following additional provisions apply:

39 (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), and

(c) impose conditions on the respondent's practice of the designated health profession that apply after the lifting of the suspension or the reinstatement of registration.

6. Section 39(5) and (7) authorizes the Panel to award costs to the College in an amount not to exceed 50% of the actual legal costs to the College for the hearing:

39 (5) If the discipline committee acts under subsection (2), it may award costs to the college against the respondent, based on the tariff of costs established under section 19 (1) (w.1).

[...]

(7) Costs awarded under subsection (5) must not exceed, in total, 50% of the actual costs to the college for legal representation for the purposes of the hearing.

7. On February 1, 2019, the Respondent became a former registrant when he did not renew his annual registration.
8. Section 26 of the HPA defines “registrant” to include “former registrant” for the purposes of Part 3 of the Act which deals with “Inspections, Inquiries and Discipline”:

"registrant" includes a former registrant, and a certified non-registrant or former certified non-registrant to whom this Part applies

9. The Discipline Committee dealt with the jurisdiction of a former registrant in *College of Massage Therapists of British Columbia v. Gill*, 2019 CMTBC 01:

25. The Panel agrees with the rationale above. The interpretation of the HPA should likewise be given a purposive approach having regard to the College's duty to protect the public. Interpretations that limit the College's sanctioning powers and encourage members to resign or allow their registration to lapse in order to avoid consequences are contrary to the purpose of the HPA. This is particularly the case, where the College's registration committee is required to process registration applications and grant registration to individuals who meet the conditions and requirements under section 20(2) of the HPA.

26. The Panel finds, having regard to the words of the statute, their context, and the purpose of the HPA, that the HPA's reference to “registrant” and “respondent” in sections 37 to 39 includes a “former registrant”. The Panel finds that it may order

any of the penalties listed in section 39(2) against a former registrant, including a suspension.

10. The Panel adopts the reasoning above from *Gill* and finds that it has jurisdiction to impose orders under section 39 against the Respondent.
11. *Law Society of BC v. Dent*, 2016 LSBC 05 consolidated a list of relevant factors to consider in determining an appropriate penalty:
 - a. nature, gravity and consequences of conduct;
 - b. character and professional conduct record of the respondent;
 - c. acknowledgement of the misconduct and remedial action; and
 - d. public confidence in the legal profession including public confidence in the disciplinary process.
12. Many professional regulation tribunals, including this College, have considered the *Dent* factors. These factors were recently applied in *Gill*. The Panel considers the *Dent* list of relevant factors to be the appropriate framework in this case.

Nature, gravity and consequences of conduct

13. The College submits that the misconduct by the Respondent was at the most serious end of the spectrum of professional misconduct as he engaged in sexualized touching of three women. The College notes that the Respondent committed multiple instances of professional misconduct over almost two years, involving three complainants.
14. In the Conduct Decision, this Panel found:
 - a. The Respondent massaged the sides of ■■■ breasts with both hands, almost to her nipples, the touching was prolonged, and took up a significant portion of the treatment. The Panel found that the Respondent massaged ■■■ for a non-therapeutic purpose and failed to provide appropriate draping. The Panel found that the Respondent's touching constituted sexual conduct.

- b. The Respondent failed to describe appropriate disrobing and draping options and told ■■■ words to the effect of “it is a full body massage so clothes will get in the way”. The Respondent massaged ■■■ buttocks and touched ■■■ breasts including her nipples, for a non-therapeutic purpose. The Respondent exposed and massaged ■■■ buttocks and breasts during the massage. The Panel found this amounted to sexual misconduct as the Respondent engaged in touching of a sexual nature.
 - c. The Respondent told ■■■ that it was necessary to expose her breast to provide treatment, which was untrue. He massaged her breast for a non-therapeutic purpose and failed to provide appropriate draping by exposing her breast when there was no therapeutic reason to do so. The Panel found this amounted to sexual misconduct as the Respondent engaged in touching of a sexual nature. The Panel found that the Respondent used his position of power and authority as a professional to make it seem that it was therapeutically necessary to uncover ■■■ breast when it was not required.
15. The Panel finds that the Respondent’s conduct was at the most serious end of the spectrum because it was sexual (involving sexual touching); there were multiple instances of the conduct over a prolonged period of time; and the Respondent abused his position of power, authority, trust, and misled his patients.
16. This factor weighs in favour of a more serious penalty.

Character and professional conduct record of the respondent

17. The Respondent was registered on November 25, 2014. He does not possess a previous disciplinary record. The absence of a disciplinary record must, however, be assessed in context. The Respondent had only been a registrant for a short period of time before the conduct at issue in these proceedings occurred. The absence of a prior professional conduct record does not mitigate against the imposition of a serious penalty in this case.
18. There was no evidence presented as to the Respondent’s character which would mitigate against the imposition of a serious penalty in this case.

19. The Panel finds that this factor does not mitigate against the imposition of a more serious penalty.

Acknowledgement of the misconduct and remedial action

20. The Respondent did not acknowledge his misconduct. The Respondent did not admit nor contest the Citation allegations and did not attend the hearing.
21. There was no evidence before this Panel as to any remedial action which the Respondent undertook.
22. The Panel agrees with the College's submission that the absence of an admission or demonstrated remorse is not an aggravating factor but is the absence of a mitigating factor.
23. The Panel finds this factor does not mitigate against the imposition of a more serious penalty.

Public confidence in the profession including public confidence in the disciplinary process

24. The College notes that it has a duty to serve and protect the public and to exercise its powers and discharge its responsibilities under all enactments in the public interest pursuant to section 16 of the HPA. The College submits that imposing a penalty in the circumstances sends an important message to the public and to members of the profession that this conduct will not be tolerated. The public must have confidence that members of a regulated profession will follow expected standards and will be held accountable when they fail to do so. The College submits that this is a central purpose of disciplinary proceedings.
25. The College submits that the penalty in this case will serve as a general deterrent to other members of the profession. The College submits that imposing a serious penalty is necessary to send a strong message to the public and the profession that there is zero tolerance for sexual misconduct.
26. The Panel agrees with the College's submissions referenced in the preceding paragraphs 24 and 25. Public confidence in the profession and in the disciplinary

process is essential. The public must have confidence that members of the profession will be held to account. The Panel agrees with the Discipline Committee findings in *Gill*:

48. The Panel agrees that a central purpose of disciplinary proceedings is to protect the public and ensure public confidence in the profession. The public must have confidence that members of the profession will cooperate with their regulators and will be held to account when they fail to do so. The Panel finds this factor favours a more serious penalty.

27. The Panel also agrees that a message of general deterrence should be sent to the profession that sexual misconduct will not be tolerated.
28. The Panel agrees with the *College of Massage Therapists of British Columbia v. Martin*, 2015 CMTBC 01, professional misconduct of a sexual nature is particularly grievous for this profession as physical touch is the primary treatment modality for massage therapists:

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.

29. This factor weighs in favour of a more serious penalty.

Caselaw

30. The College notes in its written submissions of June 29, 2021, that there are almost no prior College disciplinary proceedings in which a panel made a finding of professional misconduct of a sexual nature following a contested hearing.

31. The College referred to the following consent orders reached under section 37.1 of the HPA:
- a. *Re Bodhi Jones* (August 5, 2020): a registrant admitted he touched three complainants inappropriately and in a sexual manner without consent. The registrant was convicted of three counts of sexual assault. He agreed to cancellation of his registration and that he could not apply for reinstatement for 30 years.
 - b. *Re Breault* (December 4, 2019): a registrant admitted that, prior to becoming a registrant of the College but after he applied to do so, he touched a complainant inappropriately and in a sexual manner while conducting a massage. He was subsequently convicted of sexual assault as a result of this conduct. He agreed to cancellation of his registration and that he could not apply for reinstatement for 20 years.
 - c. *Re Brown* (December 19, 2017): a registrant admitted that he had engaged in a sexual relationship with a complainant, sexualized communications with others and attempted to mislead the College during the investigation. He agreed to cancellation of his registration and that he could not apply for reinstatement for 30 years.
32. The College submitted that the consent orders referred to in paragraph 31 are of limited relevance to the Panel but can serve as an important reference point as they signal the severity of the misconduct and the high-water mark of the appropriate period for applying for reinstatement.
33. The College referred to the *Martin* decision, noting that the Discipline Committee found that registrant had engaged in multiple instances of sexual touching without therapeutic purpose. The Panel ordered the former registrant was reprimanded, fined \$35,000 and ordered to pay costs in the amount of \$81,216.31. The College urges this Panel not to follow the *Martin* decision as it is readily distinguishable on the basis that that Panel had found it could not cancel or suspend the Registrant. The *Gill* decision has been issued since the *Martin* decision and has clarified the issue of discipline against former registrants.

34. The College also referred to the legal framework and authorities in other provinces. Specifically, the College referred to Alberta and Ontario as having severe penalties for registrants who are found to have engaged in touching of a sexual nature. In Alberta and Ontario, registrants who are found to have engaged in sexual touching have their registration revoked. In Ontario, a registrant may not apply for reinstatement before five years and in Alberta a registrant is permanently prohibited from reapplying.
35. The College did refer, in its submissions, to two Ontario decisions: *Ontario (College of Massage Therapists of Ontario) v Williams*, 2020 ONCMTO 6 and *Schwarz v The College of Physicians and Surgeons of Ontario*, 2021 ONSC 3313.
36. The Panel has considered the authorities provided by the College. The Panel finds that the consent orders referred to by the College are relevant. While they are not outcomes following a full hearing on the merits, they remain important for the following reasons. Consent orders under section 37.1 of the HPA are reached following the issuance of a citation. A registrant delivering a proposal must admit the nature of the complaint or other matter that is to the subject of the discipline hearing, and consent to an order under section 39(2) or (8). While the proposal is delivered to the Inquiry Committee for acceptance or rejection, if a proposal is accepted, the Inquiry Committee's order is considered to be an order of the Discipline Committee made under section 39. As such, each of the consent orders referred to by the College above are considered to be orders of the Discipline Committee. The consent orders are recent, all involve sexual touching, and all resulted in cancellation.
37. While the Panel appreciates the College's submissions with respect to Alberta and Ontario, it notes and finds those are different regulatory regimes. Those provinces have enacted mandatory revocation for sexual based misconduct whereas British Columbia has not done so.
38. The Panel agrees with the College that the *Martin* decision is distinguishable and should not be followed as *Martin* was decided and released prior to *Gill* which

established that the Panel does have the authority to impose the full range of penalties upon former registrants.

39. The Panel weighed the *Dent* factors, and considered the authorities above, and finds that the nature and gravity of the conduct proven, the need for general deterrence and the need for public confidence in the profession all weigh in favour of a serious penalty in this case. As noted above in paragraph 15 of these Reasons, the Respondent's misconduct is at the most serious end of the spectrum because it was sexual (involving sexual touching), there were multiple instances of the conduct over a prolonged period of time, the Respondent abused his position of power, authority, and trust; and misled his patients. A strong message must be sent to both the profession and the public that this conduct will not be tolerated in this profession. The Panel finds that the Respondent's conduct warrants cancellation as the maximum penalty available, together with both a prohibition on the period after which the Respondent can apply for reinstatement and remedial education should the Respondent choose to apply for reinstatement in the future.
40. The Panel agrees with the College that a permanent prohibition on the Respondent's ability to apply for reinstatement may not be compatible with the HPA. The Panel finds that a period of five years, as requested by the College is both a reasonable and an appropriate period of time.
41. The Panel also agrees that remedial education is appropriate if the Respondent chooses to apply for reinstatement. The Panel has concluded that, as submitted by the College, a course on ethics and boundaries is a necessary and integral component of the Respondent's remedial education. The Panel accepts the submission of the College in that regard, and orders that the Respondent successfully complete the Center for Personalized Education for Professionals ("CPEP") Professional, Problem-based Ethics ("PROBE") or a similar course as acceptable to the College if there is a change to the course as offered at the time that the Respondent elects to complete such course. In either case, the Respondent must successfully complete the course at his own expense and prior to any application for reinstatement. Nothing in this order restricts the Registration

Committee's powers to determine whether to reinstate the Respondent, and if so, from determining that other requirements may be appropriate and necessary.

42. The College's submissions regarding the appropriate amounts for a fine and costs are based upon an agreement which the College reached with the Respondent that:
 - a. The College would not seek a fine greater than \$5000, and would forebear the execution of any fine until such time as the Respondent applies for reinstatement; and
 - b. The College would cap its claim for costs at \$20,000, and forebear the execution of an order for costs until such time as the Respondent applies for reinstatement.
43. The Panel recognizes that a joint submission on penalty from the parties should generally be accepted unless to do so would bring the administration of justice into disrepute or would be contrary to the public interest. The Panel accepts the College's submissions that an agreement about financial consequences should be similarly treated. The Panel does note, however, that a joint submission on costs must still meet the statutory requirements set out in section 39(5) of the HPA and the tariff in the College's Bylaws. In this case, the College has confirmed that \$20,000 in costs meets those requirements and is considerably less than 50% of the actual costs to the College for legal representation for the purposes of this matter.
44. Accordingly, the Panel orders the imposition of a fine of \$5,000 and costs payable to the College in the amount of \$20,000, both of which must be paid prior to reinstatement.
45. Pursuant to section 39.3 of the HPA, the Panel directs the Registrar to notify the public of the Conduct Decision and this decision, and to include the information set out in section 39.3(2).

Order

46. The Panel orders that:

- a. The Respondent's registration is cancelled as of the date of this order;
- b. The Respondent shall be prohibited from applying for reinstatement of his registration with the College for five years from the date of this order;
- c. The Respondent must complete the following remedial education course, or another similar course as approved by the College, at his own expense: Center for Personalized Education for Professionals ("CPEP") Professional, Problem-based Ethics ("PROBE");
- d. The Respondent shall be prohibited from applying for reinstatement of his registration with the College until completion of the remedial education in (c);
- e. The Respondent must pay a fine in the amount of \$5,000;
- f. The Respondent is directed to pay costs to the College in the amount of \$20,000; and
- g. The Respondent must pay any outstanding amounts, including the fine and costs in (e) and (f), to the Registrar before applying for reinstatement of his registration.

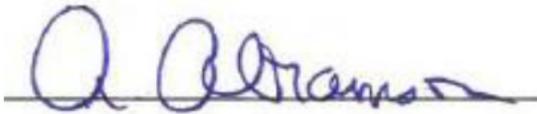
47. The Panel directs:

- a. Pursuant to sections 39.3(1)(d) and (e) of the Act, the Registrar notify the public of the Conduct Decision and Order made herein; and
- b. Pursuant to section 39.3(3)(a) of the Act, the Registrar withhold from public notification any information that could reasonably be expected to identify any of the complainants in this matter.

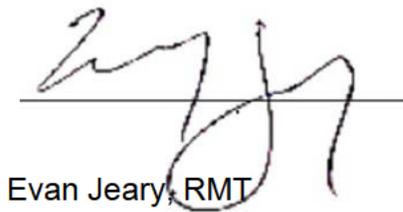
Notice of Right to Appeal

48. 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.

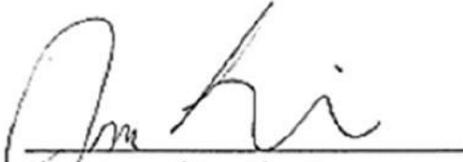
Dated: October 26, 2021

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Arnold Abramson, Chair

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Evan Jeary, RMT

A handwritten signature in black ink, appearing to read "J Lie", written over a horizontal line.

Jennifer Lie, RMT