

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*

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Trevor Scott, RMT

(the "Registrant")

REASONS FOR DECISION
(Determination made pursuant to section 39(1)
of the *Health Professions Act*)

Dates and Place of Hearing:

March 1 – 4, July 12 – 13, and August 17, 2016

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

-and-

UBC Robson Square
800 Robson Street, Telus Boardroom
Vancouver, BC

Counsel for the College:

Lisa Fong and Brock Martland

Counsel for the Registrant:

John Green and Scott Nicoll

Hearing Sub-Committee of the Discipline Committee (the “Panel”)

Lynne Harris (Chair)
Marilynne Waithman
Shoko Nagai

Independent Counsel for the Panel:

Eric Wredenhagen (March 1-4, 2016)
Susan Precious (July 12-13, August 17, 2016)

Court Reporter:

Charest Reporting Inc.

INTRODUCTION

1. Further to a citation issued to the Registrant under s. 37 of the *Health Professions Act* (“HPA” or the “Act”) on October 16, 2015 (the “Citation”), the Panel convened for a hearing, to inquire into allegations that the Registrant 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*. The hearing proceeded on March 1 through 4, July 12 and 13, and August 17, 2016 at Charest Reporting and UBC Robson Square in Vancouver, British Columbia

REGISTRATION AND PRACTICE HISTORY

2. The Registrant has been a registrant of the College of Massage Therapists of British Columbia since 2009.
3. From 2009 to present, the Registrant has practiced as follows:
 - From 2009 to 2011, the Registrant worked at a massage therapy clinic whose name was not put into evidence.
 - In December 2011, the Registrant opened Synergy Health & Wellness Clinic in Prince George with [REDACTED]. The Registrant has worked at Synergy since the time it opened.
4. As regards s. 39.2 of the HPA, the Panel did not receive notice of any action previously taken under Part 3 of the Act respecting the Registrant. In fact, the Registrant testified that he has never been the subject of a complaint arising from his conduct as a massage therapist.

PRE-HEARING PRELIMINARY APPLICATIONS AND ORDERS

5. The Panel was constituted on November 10, 2015 following the issuance of the Citation.
6. The original dates proposed for the hearing were March 1-4, 2016. Counsel for the College and the Registrant then both agreed the hearing required additional time and those dates were no longer suitable. Alternate dates were canvassed for April to July 2016.

7. The College brought an application to schedule the hearing on March 1-4 and April 28-29, 2016 on the basis that the College, Respondent and the Panel were available on those dates. The College subsequently amended its application to seek the hearing dates in the alternative, and to seek as first choice the dates of February 26-March 4, 2016.
8. On December 21, 2015, The Panel issued its reasons and ordered that the discipline hearing proceed on March 1-4 and April 28-29, 2016.

PRELIMINARY APPLICATIONS AND ORDERS AT HEARING

First Preliminary Application and Order at Hearing

9. On the first day of the hearing, March 1, 2016, the Registrant made an application (the "Bias Application") to disqualify the Discipline Committee Panel on the basis that there was a reasonable apprehension of bias arising from the College's selection of prosecuting counsel, Lisa Fong.
10. The Registrant's counsel submitted that there was a reasonable apprehension of bias because Ms. Fong acted for the College in other matters and had played a role in educating the members of the Discipline Committee. The Registrant's counsel further argued that one of the panel members was responsible for instructing Ms. Fong.
11. The application was dismissed at the time of hearing and written reasons for that decision were issued on May 4, 2016. The Panel found that members of the Panel (or of any discipline hearing panel of the College) did not instruct, or in fact even have any contact with, College prosecuting counsel in any way having to do with the hearing. The Panel then analyzed the argument that exposure of the Panel to Ms. Fong in her various (alleged) capacities in relation to the College was such that an "informed, reasonable and right-minded person" might think it possible that the Panel would favour Ms. Fong's arguments. The Panel did not accept this argument. First, only one Panel member received training from Ms. Fong and it was of a general nature and had occurred four years previously. Second, the Panel said it understands its duty to be even-handed and that it should not accept

everything Ms. Fong says. Third, the Panel observed that it would have independent legal counsel for the hearing. Finally, the Panel found there was a lack of evidentiary foundation and legal precedent for the application.

12. The Registrant's counsel also raised bias allegations in relation to the College's Director of Compliance, who previously worked for Ms. Fong's law firm. The Panel also dismissed that allegation given that the Director of Compliance had had no interactions with the Panel in relation to this proceeding.

Second Preliminary Application and Order at Hearing

13. The College served the expert report of registered clinical psychologist, Dr. Lori Haskell, on February 8, 2016, 17 business days prior to the commencement of the hearing.

14. On March 2, 2016, Dr. Haskell was examined and cross-examined on her qualifications. College counsel then advised that the College was tendering Dr. Haskell as an expert on the following issue:

... the psychology of sexual abuse, including behaviours of women who have experienced sexual abuse.

15. The Registrant's counsel advised that he had no objection to Dr. Haskell being qualified on the above basis and the Panel advised that they were prepared to accept Dr. Haskell as qualified and issue a ruling. College counsel then revised the wording for the proposed scope of Dr. Haskell's expertise as follows:

... an expert in the psychology of sexual abuse, including behaviours of women who have experienced sexual abuse *and including characteristics of sexual offenders*.

16. Registrant's counsel took issue with the revised scope of expertise. Argument with respect to Dr. Haskell's qualifications for the entirety of the proposed scope of expertise then took place on March 4, 2016.

17. On March 22, 2016, the Panel issued written reasons ruling on Dr. Haskell's qualification as an expert. The Panel carefully reviewed Dr. Haskell's qualifications and the relevant law, and found:

Dr. Haskell has, with respect to the issue for which the College sought to qualify her – namely, the “psychology of sexual abuse, including behaviours of women who have experienced sexual abuse and including characteristics of sexual offenders” –

knowledge and expertise regarding that issue that are not possessed by the ordinary untrained person. She is therefore qualified to give expert evidence on that issue.

18. The Panel's finding with respect to the admissibility of Dr. Haskell's expert report is set out below.

ISSUES

19. The issues for determination before the Panel are as follows:

1. Whether in a massage therapy treatment session on or about October 3, 2014, the Registrant acted for a sexual and non therapeutic purpose and/or engaged in sexual conduct by intentionally touching his penis and placing his penis on the Complainant's covered wrist, and in particular whether:
 - a. While the Complainant was face-down on the massage table, and her arms lay at her sides with her palms and wrists facing the ceiling, and with a thin draping sheet covering her from her neck down to past the back of her knees, the Respondent massaged the Complainant's buttocks with both hands and then started to massage the left side of the Complainant's back with one of his hands.
 - b. The Respondent unzipped his pants, and masturbated himself with his free hand while continuing to nominally massage the Complainant by rubbing with one hand, moving it back and forth about an inch, in a straight-line.
 - c. After approximately ten minutes, the Respondent wiped or otherwise touched his penis twice against the Complainant's wrist which was covered by the thin draping sheet.
 - d. After repositioning himself at the Complainant's head, and massaging the Complainant's neck and shoulders using both hands for about three minutes, the Respondent moved to the Complainant's left side, at or around her left shoulder and neck, and started to rub the left side of her neck with one hand.
 - e. The Respondent unzipped his pants, and masturbated himself with his free hand for about three to five minutes while continuing to nominally rub the left side of the Complainant's neck with one hand.
 - f. At the end of the session the Respondent rolled the thin draping sheet into a ball, and walked out of the room with it while the Complainant was on the massage table.
2. Whether by engaging in any or all of the conduct described above, the Registrant:
 - a. engaged in professional misconduct,
 - b. failed to comply with section 75 of the Bylaws, and failed to comply with the standards expressed by the following provisions of the *Code of Ethical Conduct*.
 - i. Section 1(2) of the *Code of Ethical Conduct*.

General Duty of Patients

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

ii. Section 2(a) of the *Code of Ethical Conduct*.

Sexual Conduct Prohibited

2. A Registrant shall not

(a) engage in sexual conduct with a patient....

20. The oral testimony at the hearing consisted of the testimony of the complainant, [REDACTED] (the "Complainant"); the Complainant's common law partner, [REDACTED]; [REDACTED], the Complainant's family physician; and [REDACTED], a constable with the RCMP. The College also called Dr. Lori Haskell, as described above. The admissibility of Dr. Haskell's evidence was at issue and the Panel's decision in that regard is set out below. The Registrant testified and also called [REDACTED]; along with [REDACTED], an employee at their clinic.

FACTS AND EVIDENCE

21. The evidence of each of these witnesses is outlined below in the order in which they testified at the hearing.

Evidence of the Complainant

Direct Examination

22. The Complainant gave evidence on March 1, 2016.

23. The Complainant attended two massage therapy treatment sessions with the Registrant. Her first session was on September 26, 2014. Her second session was on October 3, 2014. The Complainant's family physician referred her to the Registrant's clinic following a motor vehicle accident which took place on [REDACTED]. This was the first time the Complainant had been to a massage therapist.

24. On September 26, 2014, the Complainant's treatment session was approximately 45 minutes in length. She described a massage where the Registrant used both hands kneading her back from her shoulders down to her lower back. She felt fewer aches and pains on her body after the massage.

25. On October 3, 2014, the Complainant returned for her second massage. It commenced at 11 a.m. and was approximately 45 minutes long. The Complainant was lying on the massage table face down, with her face in the face portal looking towards the floor. Her arms were on the table alongside her torso and her palms were facing upward.
26. The Complainant was wearing socks, a pair of jeans, a tank top with spaghetti straps, and a pink fleece jacket with long sleeves.
27. The Complainant had not taken any medication that day.
28. The Complainant had a shower that morning and washed her hair. She denied having a distinctive body odour that day, saying she has never had any body odour problems in her life.
29. The Complainant described being covered by two thin sheets: one which was draped over her shoulders and another which was draped around her waist.
30. The massage started with the Registrant kneading her buttocks, working his way up to her lower back, working his way to her middle and then to her back and her shoulders, kneading with both hands. The Registrant was positioned to the left side of the Complainant's body. The Complainant estimated this portion of the massage lasted approximately five minutes.
31. The Complainant testified that the Registrant then started masturbating. The Complainant says she concluded the Registrant was masturbating because, at that point in the session, he was delivering a one-handed massage with his left hand, the Registrant was moving the fingers of his left hand in the same general area on her body at a slow and steady speed, she heard a short zipper sound, and she described the Registrant's breathing as sounding like he was trying to breathe normally but "breaking up". The Complainant stated that the Registrant's right hand was "pulling his penis". She concluded that because of the rhythm of his left hand moving on her back and because she had "past experience when my guy would put his hand on my breast and squeeze it while he's pulling his penis". The Complainant estimates that portion of the massage lasted about 15 minutes.

32. The Complainant testified that the Registrant then wiped his penis twice on the sheet covering her left wrist. She estimated this lasted about two to three seconds. The Complainant described the Registrant's penis as being a "floppy thing" on her wrist, a "sausage shape". She testified that she felt no wetness, and noted no smell.
33. The Complainant testified that the Registrant then proceeded to massage her back with both hands, kneading her back, working his way up to her shoulders. She says that the Registrant moved to position himself in front of her, massaging between her shoulders and her neck. He again did this using his left hand only. The Complainant says that the Registrant then started masturbating again. She concluded that he started masturbating again because she heard laboured breathing that was "breaking up" or "quivering", she heard a slow and short zipper sound again, he was moving his left hand in the same manner as earlier in the massage, and his right hand was "pulling his penis". She again concluded his right hand was pulling his penis based upon the rhythm of the Registrant's left hand and because his right hand was not on her. The Complainant estimated that the second incidence of masturbation was shorter than the first.
34. The Complainant testified that she had not received a one-handed massage during her first massage therapy session with the Registrant.
35. The Complainant stated that her eyes were closed for the duration of the massage on October 3, 2014. She did not see the Registrant masturbate. She testified that she had her eyes closed because she was in shock.
36. The Complainant testified that at the end of the massage, the Registrant pulled the sheets that were covering her body (on top of her clothing) and gathered them in the middle of her back. He then lifted the sheets and walked out of the door. He then told her not to get up too quickly as she might be a little dizzy.
37. The Complainant said that she then tried to gather herself together, she sat up at the edge of the massage table, walked to where her shoes were by the door, put on her shoes and left the room. She said that she saw the Registrant walking out of the laundry room and then she looked at the receptionist and said she would

make a call for another appointment and then walked out. The Complainant started crying and ran to her car and drove home.

38. The Complainant testified that when she arrived at home and told her common law partner, [REDACTED], what took place; he first suggested that he confront the Registrant. [REDACTED] then suggested that they go to the police station. The Complainant and [REDACTED] then travelled to the police station where the Complainant met with [REDACTED] and made a complaint. The Complainant told the RCMP she was scared and that she did not want anything to happen.
39. The Complainant testified that after she left the police station, she went to the office of her family physician, [REDACTED]. The Complainant met with [REDACTED] who prescribed her something to calm her nerves. The Complainant then returned home.
40. The Complainant stated that she returned to [REDACTED] office two days later and [REDACTED] spoke to her at that time about making a complaint to the College of Massage Therapists of BC.

Cross examination

41. On cross-examination, the Complainant agreed that the two swipes to her wrist with what she described as the Registrant's penis were "real quick" and that her wrists were covered by a sheet. The Complainant agreed that she did not tell [REDACTED] [REDACTED] or the College investigator that her wrist was covered by a sheet when she initially relayed the events of October 3, 2014 massage to them.
42. The Complainant also agreed that as a result of the motor vehicle accident, she experienced numbness in her hands, elbows, and forearms. She described this numbness as a "loss of feeling".
43. The Complainant agreed that after her first appointment with the Registrant she reported to him that she experienced a decrease in pain but that it was only temporary. The Complainant also agreed that on October 3, 2014, she reported that she experienced some increased pain in her right knee.

44. The Complainant acknowledged that during the massage therapy treatment on October 3, 2014, her head was placed in the massage therapy table's face portal. She confirmed she did not lift her head during the entire massage and at some points her eyes were closed.
45. The Complainant agreed on cross-examination that she did not hear the sound of the Registrant masturbating.
46. The Complainant admitted that when the Registrant began massaging her back with one hand on October 3, 2014, her first thought was that the he was texting on his phone. She did not hear the sound of the beep or numbers but she assumed that must have been what he was doing given that he only had one hand on her back. She stated that once she heard the Registrant's breathing, she realized he was masturbating.
47. The Complainant admitted that she did not hear the sound of the zipper going up at any point during the treatment session on October 3, 2014. She also admitted that the sound of a zipper going up and down is the same.
48. The Complainant was examined about whether the Registrant ejaculated on the sheet that was covering her. She stated that he did ejaculate on the sheet after the first incidence of masturbation. She subsequently conceded that she did not see, feel or smell semen.

Evidence of [REDACTED]

Direct Examination

49. [REDACTED] testified on March 2, 2016. He has been the common law partner of the Complainant [REDACTED].
50. [REDACTED] testified that when the Complainant returned home following her massage on October 3, 2014, he was relaxing at home in the bathtub. When he first saw her, he observed her to be visibly upset: she was sobbing, her face was reddish and she was shaking. He asked her what was wrong. The Complainant told him. He suggested they then travel to the police station. [REDACTED] described that they went to the police station, the Complainant met with an officer to provide

her story, and then they left. From the police station, the couple travelled to meet with the Complainant's family physician, [REDACTED]. After the Complainant met with [REDACTED], they returned home.

51. [REDACTED] denied the Complainant had any discernable odour. He said she smelled clean. He said she showers every day.

Cross-Examination

52. On cross-examination [REDACTED] was simply asked whether in the truck driving the Complainant to her meetings he was positioned directly over top of her. [REDACTED] acknowledged that in the truck he was not positioned directly over top of the Complainant.

Evidence of Constable [REDACTED]

Direct Examination

53. Constable [REDACTED] is a constable with the Royal Canadian Mounted Police assigned to the [REDACTED]. On October 3, 2014 he was a general duty officer. He was alerted to the Complainant's attendance at the front counter of the station desk at approximately 12:15 p.m.
54. [REDACTED] testified that he spoke with the Complainant in an interview room at the station. He estimated that during the interview, he was seated approximately two feet away from the Complainant. He estimated he was in the room with the Complainant for just over 20 minutes. [REDACTED] said that he did not notice anything with respect to any smell or body odour.
55. [REDACTED] also testified that the Complainant indicated she did not wish to proceed with an investigation but just wanted to document the incident. [REDACTED] then ran the Registrant's name through the police databases. [REDACTED] stated that he found no record of any files that were relevant to the Registrant.

Cross-Examination

56. On cross-examination, the Registrant's counsel inquired about the ventilation system at the station and confirmed that [REDACTED] was not standing directly over top of the Complainant.

Evidence of [REDACTED]

Direct Examination

57. [REDACTED] is a physician practicing family medicine. She is the Complainant's family doctor. [REDACTED] referred the Complainant to Synergy Health & Wellness Clinic following a motor vehicle accident.
58. [REDACTED] testified that the Complainant did not have an appointment but attended to see her on October 3, 2014. [REDACTED] thought the Complainant looked distressed so agreed to see her without an appointment. [REDACTED] described meeting with the Complainant for between 20 to 30 minutes. She described the Complainant's appearance as quite upset and shaky. She said the Complainant's speech was nervous. [REDACTED] said the Complainant appeared anxious and distraught.
59. [REDACTED] testified that she did not notice a smell or odour from the Complainant that day and was sitting relatively close to her (approximately 3-4 feet away) in a small space. [REDACTED] stated that she provided the Complainant with some advice and with a Xanax prescription.

Cross-Examination

60. On cross-examination, [REDACTED] agreed that on October 3, 2014, the Complainant would still have had three prescriptions available to her: Tylenol 3, Flexeril and ibuprofen 600, if taken properly. [REDACTED] reviewed the adverse reactions of each of those medications.

Evidence of Dr. Lori Haskell

Qualification

61. The Panel's ruling on the qualification of Dr. Haskell is described above.

Direct Examination

62. The direct examination of Dr. Haskell took place on July 12, 2016 and was brief. Dr. Haskell identified her expert report of February 8, 2016. She then confirmed that she did not offer an opinion as to whether the Registrant committed sexual misconduct, or as to the underlying facts alleged. Similarly, she confirmed that she was not offering an opinion on the Complainant or the Registrant's credibility.

Cross-Examination

63. The cross-examination of Dr. Haskell was also very brief. Counsel for the Registrant confirmed that Dr. Haskell did not interview the Registrant or the Complainant, or any of their family members. Counsel for the Registrant also confirmed that Dr. Haskell did not review the health or mental records of either the Registrant or the Complainant, and that she had never visited Synergy Health & Wellness.

Admissibility

64. The admissibility of Dr. Haskell's report was contested and addressed by both the Complainant and Registrant in their written submissions.
65. The test for the admissibility of an expert report is set out in *R. v. Mohan*, [1994] 2 SCR 9 and establishes four criteria for admission:
1. relevance;
 2. necessity in assisting the trier of fact;
 3. the absence of any exclusionary rule;
 4. a properly qualified expert.
66. The College argues that the rules are relaxed in administrative proceedings and that the Panel can receive any relevant expert evidence, dealing with concerns as a matter of weight. The Panel accepts that evidentiary rules are relaxed in administrative proceedings, but as noted in the case cited by the College in support of that proposition, *Decision F06-07, Re Fraser Health*, [2006] B.C.I.P.C.D. No. 26 (B.C. Privacy Commissioner), "this will not, of course, mean that 'anything

goes' as regards expert opinion evidence in administrative proceedings". Rather, administrative bodies must consider the purpose for admitting the report.

67. The crux of the College's position with respect to relevance, and the purpose for adducing Dr. Haskell's report, is to respond to evidence that the College anticipated would be tendered by the Registrant. In particular, the College anticipated the Registrant would raise two issues: first, that it was "implausible" that the Complainant failed to look or get up from the massage therapy table during the alleged masturbation; and, second, that aspects of the Registrant's personal characteristics and context, such as the absence of past sexual misconduct complaints and a happy marriage, constitute evidence that the Registrant did not engage in sexual misconduct. In sum, the College's position with respect to Dr. Haskell's report is that the College "anticipates, and therefore has an obligation to address, arguments relating to these factors."
68. The Registrant's position is that Dr. Haskell's report is irrelevant. The Registrant argues that the main purpose of the report is to bolster the Complainant's unreliable testimony.
69. The Panel disagrees with the Registrant's characterization of the College's reasons for seeking to admit the report and accepts that the College sought to adduce the report in anticipation of the two issues identified above.
70. The Registrant, however, ultimately did not take the positions anticipated by the College on the issues of the Complainant's credibility and the relevance of his personal characteristics. The Registrant did not submit that the Complainant's failure to look or get up from the massage table was "implausible", and so undermined her credibility. Rather, his counsel argued that her conduct was "unreasonable" and suggested this undermined the reliability of her evidence. With respect to the Registrant's personal characteristics, he did not argue that he possesses specific traits that fall outside of the profile of someone who would commit sexual misconduct.
71. Given the positions actually adopted by the Registrant, the Panel is of the view that the expert evidence provided in Dr. Haskell's report is not of assistance in the

determination of this matter. As such, the Panel does not admit the report of Dr. Haskell.

Evidence of [REDACTED]

Direct Examination

72. [REDACTED] testified on July 12, 2016. She has been employed at Synergy Health & Wellness since [REDACTED].
73. [REDACTED] recalled the Complainant attending the clinic twice. She testified that when the Complainant was leaving the clinic at the conclusion of her second visit on October 3, 2014, she did not observe anything out of the ordinary with respect to the Complainant's departure. [REDACTED] says she asked the Complainant whether she would like to rebook, and the Complainant answered "no". According to [REDACTED], the Complainant then paid and left. She testified there was nothing unusual about the Complainant.

Cross-Examination

74. On cross-examination, [REDACTED] was presented with the Complainant's invoices and asked whether the Complainant could have paid before and not after the October 3, 2014 massage. Despite convincing documentary evidence with respect to the time of payment, [REDACTED] only reluctantly conceded there was a possibility that she might be mistaken in assuming payment occurred after the massage.
75. When asked whether she had detected a smell on the Complainant, [REDACTED] stated: "I remember breathing out when I was talking to her." The Panel does not accept [REDACTED] evidence that two years after the fact, she remembers breathing out when talking to the Complainant. In particular, [REDACTED] provided no reason for why she might have been breathing out when she encountered the Complainant, or why she would now remember that fact. It is noted that [REDACTED] evidence in this regard effectively insulated her from having to answer questions about the presence or absence of a body odour coming from the Complainant.

Evidence of [REDACTED]

Direct Examination

76. [REDACTED] has been married to the Registrant [REDACTED]. She met him at the [REDACTED] College of Massage Therapy. In her testimony, [REDACTED] reviewed the curriculum from the massage therapy program that she and her husband completed together. She also recounted her practice history, including that she worked at two other massage therapy clinics before joining her husband in their business in May 2011. [REDACTED] confirmed that [REDACTED] is the only employee of their clinic. She then reviewed the Clinic's activities and the Registrant's interactions with patients generally.
77. [REDACTED] testified that the Registrant typically prefers to sit rather than stand while delivering treatment. She stated that he delivered treatments while sitting on an exercise ball. Her evidence was that the ball does make sounds which she described as "a rubbing sound".
78. [REDACTED] testified that based upon her observations, the Registrant was quite slow in his treatment approach and very thorough in applying massage to one area.
79. [REDACTED] confirmed that she and the Registrant received instruction on the delivery of one-handed massage during their massage therapy training.

Cross-Examination

80. [REDACTED] confirmed that on October 3, 2014, the Registrant used "room 3" of the clinic as the treatment room for the Complainant.
81. [REDACTED] admitted that, when dealing with a patient who has a noticeable odour, one approach is to suggest that the person moves their arms in. She also agreed that communication is part of the interaction with the patient who is being treated.
82. [REDACTED] also admitted that as part of her ordinary day-to-day work at the clinic, she is not in the treatment rooms with the Registrant observing his treatment technique.

Evidence of Trevor Scott, RMT

Direct Examination

83. The Registrant is 39 years old and is married to [REDACTED].
84. The Registrant testified that he has been a registrant of the College since 2009. He has never been the subject of a complaint arising from his conduct as a massage therapist. He does not have a criminal record and has never been arrested.
85. The Registrant confirmed that he completed his massage therapy training at the [REDACTED] College of Massage Therapy for three years starting in 2005 and ending in 2008. The Registrant reviewed the training he received during that time.
86. In particular, the Registrant said he was taught how to deliver a one-handed massage. He stated that the decision of whether to employ that technique would depend on how deep into the tissues the massage is applied. He said that when delivering a one-handed massage, the second hand only maintains the stability of the joints, it is not required.
87. With respect to sitting and leverage, the Registrant testified that he was taught that massage therapy is not about strength. Rather, he said, the more leverage you have, the easier it is to apply body weight into the tissues and change the depth of the massage. By contrast, when you are trying to get lateral shear, standing is counterproductive. The Registrant testified that with shearing, the lower muscles stay low and the upper tissues are pushed away in a direction that puts them under load so that they are able to glide free. He said this creates mobility and ease of motion. The Registrant explained that he does not believe that deep pressure is a more effective technique.
88. The Registrant testified that he was taught about the use of breathing techniques, including taking a deep breath with his hands placed on the patient's back to create a flow. He said this is a technique used to relax patients.
89. The Registrant testified that his clients primarily come to him via word of mouth. He said the clinic receives many families and sees patients with a wide range of

injuries. The Registrant stated that he treats predominantly women. He estimated 80% of his patients are women.

90. The Registrant testified that he primarily sits on the left side of the patient.
91. When asked to describe his use of a one-handed massage, the Registrant explained that it involves very slow, light massage with lots of repetition, and some flushing strokes. The flushing strokes would involve two hands.
92. The Registrant testified that he started sitting on a ball in early 2014 because he had replaced the flooring in the clinic and used a vinyl plank. There was no underlay underneath the plank. He found the flooring was becoming damaged by the wheels on his chair and therefore decided to use an exercise ball instead.
93. The Registrant testified that he treats many patients with strong odours. He testified that typically he manages those scenarios by breathing through his mouth or putting his arm up to shield his nose. However, the Registrant stated that he used a towel to cover his nose and mouth with the Complainant.
94. When asked whether the smell came from her, he replied "I don't know where the smell came from."
95. The Registrant reviewed his health history clinic form on direct examination, noting that the Complainant indicated she bruised easily, had headaches and was on certain medications. He testified that this made him aware that her sensations would be altered. The Registrant further testified that the marks the Complainant placed on the diagrams in the form showed she has numbness on her left side from the shoulder down through to the elbow and into the hand.
96. The Registrant testified that during his interview with the Complainant at the first session, he reviewed several standard items, including that she could undress to her level of comfort (fully clothed or unclothed) and that she had the "right of refusal", which he described as meaning that if she wanted to finish the massage at any point and for whatever reason, to let him know and the massage would be over. The Registrant stated that when he told that to the Complainant she had a

“horrified look” on her face. As a result, he explained the right of refusal a second time.

97. The Registrant testified that given the Complainant’s injuries from her motor vehicle accident, his treatment plan was to deliver a relaxation massage as she was in an acute stage of pain. The massage was intended to move the blood and calm the tissues and relax the muscles.
98. The Registrant testified that this was the Complainant’s first experience with a massage therapist so he knew he had to be fairly upfront with what he was doing. The Registrant recalled that the Complainant was fully dressed during both treatment sessions and that he treated her through a sheet and her clothing. He testified that during the second treatment session, she also left her shoes on.
99. The Registrant said that during the first treatment session on September 26, 2014, he started treatment on the Complainant’s low back on the left hand side, working mainly in the centre of her body across the spine, targeting the areas around the low back. He used primarily repetitive strokes, very light with long flowing strokes down the back. He did not target any areas between the shoulder blades and the spine due to the numbness radiating down the Complainant’s arms.
100. The Registrant testified that during the second treatment session on October 3, 2014, the Complainant said she had some relief temporarily after the first treatment but then her symptoms intensified. Her hip had gotten worse and was irritating her glute region and her lower back. The Registrant testified that based upon this information, his treatment during the second session would have been even lighter and it would have been more focussed into the areas around the spine.
101. The Registrant testified that, during the second session, he was standing for the portion of the treatment to the glutes but thereafter he was seated on the exercise ball on her left side. He stated that he used his fists to deliver the massage in the glute area. He then did repetitive motions, which he described as “like an exaggerated vibration”. From there he moved up through the Complainant’s low back and into the shoulder area. At that point, he transitioned into the upper shoulders, upper trapezius and then worked on both sides of the neck.

102. The Registrant testified that while his left hand was performing the massage, his right hand was sitting on his lap for part of the session and holding a towel for the other part of it. He denied that he was masturbating, he denied ever taking his penis out of his pants, and he denied rubbing his penis on the Complainant in any manner.

Cross-Examination

103. The Registrant admitted on cross-examination that he delivered the one-handed massage with his left hand but that he is right-handed. He explained that he uses his non dominant hand because he has had issues with his right hand due to a past fractured wrist.

104. The Registrant denied that he left the room with the sheet that had been draped over the Complainant.

105. The Registrant agreed that he did not record that he spoke with the Complainant about a different treatment plan for the second session in the clinical record.

106. The Registrant agreed that there is a need to communicate with the patient on some occasions to ensure that the treatment is going properly. The Registrant admitted that on October 3, 2014, he did not say anything to the Complainant while she was on the massage table. He explained that he thought she was asleep and that he was confident he was not causing her any pain. The Registrant stated that he thought the Complainant was asleep due to her regular breathing and given that she made no movements.

107. The Registrant testified that he used the one-handed massage so that he could hold the towel with his right hand. He also admitted he used the one-handed technique to use less pressure because he has a tendency to want to get into the deeper muscles.

108. The Registrant admitted that he has dealt with numerous other patients with odours and this was the first and only time that he has held a towel to his face.

109. With respect to the Complainant's smell, the Registrant testified that it was overpowering. He admitted that he had other options to deal with odour such as

applying a product under his nose. He also testified that he did not know where the smell came from. He stated that he placed the towel over both his nose and mouth for approximately 30 minutes. The Respondent also agreed that the manner in which he had to position himself and the length of time the towel was on his face were exceptional measures to take.

DOCUMENTARY EVIDENCE

110. The following documents were admitted into evidence at the hearing:

- EXHIBIT 1: Citation
- EXHIBIT 2: Confidential patient history form
- EXHIBIT 3: Drawing of massage therapy treatment room
- EXHIBIT 4: Photograph of pink fleece jacket
- EXHIBIT 5: Pink fleece jacket
- EXHIBIT 6: Group of photographs depicting an RCMP interview room
- EXHIBIT 7: Photos of ██████████ exam room 1
- EXHIBIT 8: Photos of the interior of Synergy
- EXHIBIT 9: Invoices for ██████████ treatments at Synergy
- EXHIBIT 10: Document titled "Confidential Patient History Form" with the two progress notes
- EXHIBIT 11: Affidavit of Trevor Scott

LAW

Conduct subject to discipline under the Act

111. Section 39 of the HPA authorizes the Discipline Committee to dismiss a matter or determine that a registrant has not complied with the Act, a regulation, or a bylaw; has not complied with a standard, limit or condition imposed the Act, or has committed professional misconduct or unprofessional conduct.

112. Part 3 of the Act defines "professional misconduct" to include "sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession".

113. Section 75 of the College's Bylaws provides as follows:

- 75 Every Registrant must comply with
 - a. the Code of Ethics,

- b. the Standards of Practice set out in Schedule “D”, and
- c. the rules and requirements for Patient Records set out in Schedule “E”.

114. At the time of the events giving rise to this matter, paragraphs 1(2) and 2(a) of the College’s *Code of Ethical Conduct* provided as follows:

General Duty of Patients

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

Sexual Conduct Prohibited

2. A Registrant shall not

- (a) engage in sexual conduct with a patient....¹

115. The College submitted that masturbation by a registrant during the treatment of a patient necessarily involves sexual conduct as prohibited by paragraph 2(a) of the Code of Ethical Conduct. Similarly, the College submitted that a registrant touching a patient with his penis also necessarily involves sexual conduct. The Registrant did not make submissions on whether masturbation would constitute sexual conduct. The Panel accepts that either of the identified acts would by itself constitute sexual conduct as prohibited by paragraph 2(a) of the Code of Ethical Conduct.

Burden of proof

116. Both the College and the Registrant agree that the College bears the burden of proof in this matter. The College explained that “it must prove the facts from which the panel may conclude that Mr. Scott engaged in professional misconduct, or a breach of a standard or a bylaw.” The Panel agrees and finds the burden of proof rests with the College.

Standard of proof

117. The College relied on *R. v. McDougall*, 2008 SCC 53 for the principle that there is only one civil standard of proof, and therefore, that the Panel must decide this matter on a balance of probabilities.

¹ The provisions in the new Code are found in sections 20 and 21.

118. The Respondent argued that the standard of proof requires “clear and cogent evidence”.

119. The Panel finds that the applicable standard is a balance of probabilities and that the “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test” (*McDougall*, para. 46).

Non-visual sensory evidence

120. The Complainant testified she did not see the Registrant masturbate because she was lying face down for the duration of the treatment session. The College argued that despite that fact the Panel can accept the Complainant’s non-visual sensory evidence. The College relied on four cases in this regard.

121. In *CPSO v. Li*, [2002] O.C.P.S.D. No. 45 (December 19, 2002), the Ontario College of Physicians and Surgeons Discipline Committee heard the evidence of a patient who described feeling a part of Dr. Li’s body pressed against her buttocks:

[16] During the examination, Patient A stated that she felt a part of Dr. Li’s body press against her buttock, causing her to move forward on her toes. She described this as the size of one or two fingers and did not believe it could have been a stethoscope, pen or reflex hammer.

122. The *Committee* accepted the complainant’s testimony that what she felt could not have been a reflex hammer, a pen or a stethoscope and came to the conclusion that it could only have been the doctor’s erect penis pressing through his and the patient’s clothing (para. 84).

123. In *Markman (Re)*, 1999 O.C.P.S.C. No. 6, the Discipline Committee of the Ontario College of Physicians and Surgeons accepted a complainant’s testimony that while performing her clerical duties at the hospital, Dr. Markman came up behind her and pressed his groin into her back. The complainant testified that she felt Dr. Markman genitals against her back pushing her into a counter. It is notable that in this case, the registrant admitted to cupping the breast of the complainant but denied pressing his genitals against her back (paras. 6, 14 and 18).

124. In *College of Massage Therapists of Ontario v. Strauch* (Discipline Panel of the CMTO, December 11, 2008), the Discipline Committee accepted the complainant’s

evidence that the massage therapist had masturbated despite the fact that she was lying face down and did not see the act. She testified that she heard sounds that she associated with masturbation and that she felt his semen land on the sheet and on her right leg. She also smelled the sheet and believed what she smelled to be semen. She contacted the police. DNA analysis of the sheets and swabs from her leg confirmed the presence of the registrant's semen. It is important to note that not only did the College hearing proceed by way of agreed facts, the registrant had been charged and convicted criminally of committing an indecent act contrary to the *Criminal Code*, he admitted he committed professional misconduct on all counts in the College proceedings, and a joint submission on penalty was filed by the parties.

125. In *R. v. R.J.E.*, [1999] B.C.J. No. 332 (BCSC), a female complainant alleged that her mother's boyfriend sexually assaulted her on several occasions between the ages of 13 and 16. His identification was at issue because the victim had kept her eyes closed each time, but the court accepted her testimony on identification of the perpetrator. She testified that she knew the accused since she was three years old, that she knew how he breathed and how he smelled and how he behaved (para 10). The Court took note of that fact that after the first assault, the accused came up to her room and apologized and said that it would not happen again (para 38). It is notable that the issue in RJE was not whether the sexual conduct occurred but the identity of the perpetrator.

126. The Panel accepts that it can consider non-visual evidence in deciding whether the burden of proof has been met in this matter.

ANALYSIS OF EVIDENCE, FINDINGS OF FACT, AND CONCLUSIONS

127. The Complainant provided the following evidence of the Registrant's sexual conduct during her massage therapy treatment session on October 3, 2014:

- a. the Registrant delivered a one-handed massage;
- b. the Complainant heard the sound of a zipper going down twice;
- c. the Registrant's breathing sounded normal but laboured, or as though he was trying to sound normal;

- d. the rhythm of the Registrant's left hand on the Complainant's body and a past sexual experience.

128. The Panel reviews each of these below.

One-handed massage

129. The Panel finds that the evidence of the Complainant and the evidence of the Registrant with respect to the Registrant's positioning and delivery of the massage on October 3, 2014, were, for the most part, consistent.

130. The Complainant testified as follows:

Q Once you're on the table can you describe how the massage section started.

A It started with Mr. Scott kneading my bum, working his way up to my lower back, working his way to my middle, then to my back and then my shoulders, kneading with both hands.

Q Do you have any recollection vis-à-vis your body where Mr. Scott was positioned?

A He was positioned on my left side.

Q Do you have any sense of how long this part of the massage took?

A I didn't have the time or -- about five minutes.

Q What happened next?

A He proceeded to move over to the left side, because he brushed against my arm here, and he had the one hand -- I know it was his left hand because I felt his fingers and his thumb -- you know, I could feel it on my side right here. And I was just thinking, you know, like, what's going on here, you know, like, you know -- and then it -- he started masturbating.

131. The Registrant testified as follows:

Q Now, can you describe how the massage proceeded from the point when you massaged [REDACTED] hip/buttock area through to that five-minute point I stopped you on earlier.

A So like I said, I started -- I started on the left-hand side. We started in the glute area. And when I work on glutes I use fists so that I can get a fairly broad pressure while still maintaining depth. It is not as pokey as fingers and especially it is generally more comfortable. So I worked standing, fists in the glutes doing kneading as if I was kind of kneading bread, worked on the left, moving to the right, worked on that side, moved back over to the left and sat down and started working on the low back, focusing predominantly on the short rotator muscles of the -- that attach to the spinous process of the vertebrae. As I said, I get fairly substantial relief from working on those muscles even through the pressure doesn't have to be deep or intense. There was also still quite a bit of repetitive motions doing just 1 to 3 inches of back and forth, almost like an exaggerated vibration, just to try and calm that area down, decrease the amount of tension stored there. We did that up through the low back into the shoulder blade area.

At that point I transitioned into upper shoulders, upper trapezius muscle, where it's a bit more flushing over the top of the shoulders, and then one hand to the back of the neck and working both sides of the neck, once with thumb with one side, and fingers with the other.

Q And you're sitting during this portion of the massage?

A Towards the neck, yes, I was sitting at a 45 degree angle to [REDACTED].

132. The Registrant testified that he was delivering this treatment while seated on an exercise ball. The Complainant's evidence was that she did not see the Registrant sitting on an exercise ball, however, her face was resting in the face portal of the massage therapy treatment table, and she acknowledged that she was not looking for an exercise ball when she entered the treatment room.

133. The Complainant and the Registrant also delivered consistent evidence with respect to the key aspects of the one-handed massage. The Registrant stated that he used his left hand to deliver the one-handed massage. His hand was not placed flat on the Complainant's body. Rather, his fingers were touching her body. His fingers moved back and forth a short distance. The Complainant estimated the movement distance spanned $\frac{1}{4}$ to $\frac{1}{2}$ an inch. The Registrant estimated that span to be about 1 to 3 inches.

134. During her direct examination, the Complainant testified as follows:

Q Could you describe for us in words where you felt the left hand.

A His left hand was right here.

Q How would you describe that in words on your body?

A It would be, like, more like the middle of my back side here.

Q Which side?

A My left.

Q Was that one of the areas that you advised Mr. Scott was problematic?

A No.

Q Can you verbally -- or can you describe for us the motion of the one hand.

A Well, he was squeezing like -- it would be motioning like up and down, like moving his fingers up and down like this.

Q Okay. Now, you just talked about his fingers. Could you feel his hand or just his fingers?

A I felt his fingers. They were like this.

Q Okay. Can you describe that motion for us, please.

A Having experience with past exes, they would squeeze my breast like that while they're pulling their penis with their right hand.

Q Could you describe the motion of the fingers for us.

A It was moving up and down like this.

Q Can you describe the expanse of the movement?

A It wasn't going -- like, he wasn't going like this. Like, it was just, like, short like this.

Q Would you be able to tell us, when you say "like this," how far that is, the expanse?

A I'd say probably a quarter of an inch, maybe half an inch.

Q And just for clarity, you showed us the motion with fingers. Was the hand moving as well?

A No, just his fingers. They were like this.

Q And the finger motion, did it travel to any other parts of your body?

A No, it stayed in the same area, right here.

Q Can you describe the speed of the finger motions.

A It was a slow and steady speed. It wasn't going fast. It wasn't -- it was just a steady speed like this.

Q Did you experience this motion in your first massage session?

A No.

135. On cross examination, the Registrant gave the following description of his one-handed massage:

Q All right. And I think you started to give somewhat of a demonstration to help us understand what the motion was with your left hand, but let me make it fairly specific. During the course of the one handed part of the back massage on [REDACTED] on the second occasion, could you show the panel, please, how it was that you held and used your hand on her back.

A It was a broad pressure, then small 1- to 3-inch strokes depending on whether I wanted to be more specific or wanted to be more gentle and broad, sedating.

Q When someone does something like that in a courtroom setting I need to try to narrate it so the record reflects it. So I'm trying to do that, but I welcome you to qualify or disagree with how I describe it. You made a motion with your left hand close to flat but cupped, extended in front of you on the table, your left hand?

A Yes.

Q Moving it forwards and backwards and bringing it back to your body by a few inches. Is that a fair description?

A Yes.

Q When you were applying the one-handed massage on [REDACTED] neck on the second occasion could you describe that method, please.

A So I was diagonal to her body and I had my hand and fingers on the right side of her neck, thumb on the left side, and I was targeting the attachment points of the muscles along the transverse processes of her vertebrae.

Q And the motion you made there, sir, with your hand, if you could repeat that. I take it essentially cupped in a C shape but facing down?

A Yes.

Q And I took you to be moving perhaps your middle finger and your thumb?

A Yes.

Q Would those be the points of contact?

A The fingers -- it would vary between the three fingers, but the thumb would be fairly constant.

136. The Panel does not take any issue with the administration of a one-handed massage or with the delivery of a one-handed massage on the date in question. The College did not argue that the use of a one-handed massage was at issue in and of itself.
137. Rather, the question is what the Registrant might have been doing with his right hand at the time that he was delivering the one-handed massage. Certainly, the use of just one hand to massage the Complainant leaves the Registrant's other hand free. However, that does not mean that the Registrant used his right hand to masturbate. In fact, the Complainant acknowledged that she first surmised the Registrant was using a one-handed message so that he could text with his cell phone using the other hand.
138. The Complainant and Registrant have entirely different accounts of what the Registrant was doing with his right hand during the time that he was delivering the one-handed massage with his left hand. The Complainant stated that the Registrant used his right hand to masturbate twice during the treatment session and then wipe his penis on her wrist. The Registrant denied any sexual conduct at all. Rather, he said his right hand was on his lap or holding a towel to his face during the one-handed massage. There is no agreement between the parties on this aspect of the evidence, and the determination that the Registrant was massaging the Complainant using only one hand is not by itself sufficient to resolve that conflict.

Sound of a zipper

139. In the course of her direct examination, the Complainant stated that she heard the sound of a zipper. She described the sound as “short” and “slow”, adding that she heard “the teeth of a zipper”:

Q So apart from the one hand, your testimony about the experience and the breath, was there any other reason why you concluded Mr. Scott was masturbating?

A I heard a zipper. I heard the teeth of a zipper,

Q You said you heard a zipper. Can you tell us what you heard, what sound you heard?

A I heard the teeth of a zipper like I zipper up my pants. It was short. It wasn't like zippering up a coat.

Q Can you describe the volume of what you heard.

A It was slow but loud enough for me to hear.

Q Did you hear any sound like this in your first session?

A No.

140. On cross examination, the Complainant also gave evidence that she assumed that the sound she heard was the Registrant's pants unzipping because he had to unzip his pants to pull his penis out to masturbate:

Q Now, you said the zip was Mr. Scott unzipping his pants?

A Yes.

Q You saw him unzip his pants?

A No, but he was unzipping his pants to pull out his penis. You can't pull your penis with your zipper up.

Q I agree. You saw him unzip his pants?

A No, I heard the zipper of a pants.

Q You heard something that sounded like a zipper?

A No, I -- I zipper my pants all the time, my jacket. We all know what a zipper sounds like. At least I hope we all do.

Q You heard something that sounded like a zipper?

A No, I heard a zipper.

Q And the zipper was Mr. Scott's pants?

A It would have to be his pants because it was only me and him in the room and I was on the massage table face down looking at the ground.

Q You assumed that Mr. Scott unzipped his pants?

A He unzipped his pants to masturbate, yes.

141. The Complainant also stated that she heard the sound of a zipper twice and she was firm that on both occasions the zipper was going down. She stated she did not hear the sound of a zipper going up.

Q You heard the little zip twice; is that right?

A The first time after he swiped his penis on my wrist, and then after him massaging the top of my head and moved to the left side between my head and my shoulders I heard another little zip.

Q How did, in your head, Mr. Scott get the zipper up? You didn't hear that, did you?

A I don't know. Like, no, I didn't hear that. I was, like, screaming in my head, oh, my god, oh, my god. This again? Oh, my god, when is this going to end? Like, I didn't stop my head and say, okay, I want to hear him zip up his pants. Everything -- like, I was in shock. This guy -- this guy masturbated not once but twice.

Q And the screaming in your head and the thoughts about the masturbation, they began when you heard the little zip the first time?

A Little zip, then the breathing through his nose.

Q And again, you did not hear a little zip up?

A No, I was in shock that I heard the zipper and the breathing and him masturbating. I didn't even hear the music playing that was supposed to be playing. I didn't hear that. Like ...

...

Q And you didn't hear a little zip up when Mr. Scott left the room?

A No.

...

Q But you didn't hear a little zip up?

A No, I didn't.

142. Despite the Complainant stating that the zipper was going down both times, she was not able to explain the difference between the sound of a zipper going up and one going down:

Q Can you tell me what the difference between the sound of a zipper going down and a zipper going up is in terms of sound?

A Well, it would sound the same, you know. Like, going up and down, it sounds the same.

143. The Registrant testified that he was wearing pants with a zipper on October 3, 2014.

144. The Panel did not hear evidence of any other possible source of the zipper sound.

145. The Panel finds that the Complainant's description of the sound of a zipper was clear; she heard two short sounds of a zipper from a pair of pants. The only person whose pants it could have been was the Registrant's. There was no other evidence of what the sound could have been.
146. The Panel does, however, have some concerns with the reliability of the Complainant's evidence regarding the sound of the zipper that she heard.
147. The Panel does not accept that both times the Complainant heard a zipper, it was going down. First, the Complainant could not explain how she could identify the direction of the zipper as she agreed that for her the sound of a zipper moving up is the same as the sound of a zipper moving down.
148. Second, the Complainant's evidence as to number and sequence of zipper sounds does not accord with the Complainant's version of events. If the Registrant had unzipped his pants to remove his penis to masturbate the first time, and then unzipped his pants to remove his penis to masturbate a second time, he would have had to zip up his pants between the two times he masturbated. The Complainant did not hear a third zipper sound. She also did not hear a fourth zipper sound at the end of the treatment session before the Registrant left the room.
149. Of particular concern to the Panel is the Complainant's evidence that "you can't pull your penis with your zipper up". It is unclear from that statement whether the Complainant is inferring masturbation occurred based on having heard a zipper sound, or whether she is assuming there must have been a zipper sound because of her conclusion that the Registrant masturbated and would have had to remove his penis from his pants to do so.

Sound of breathing

150. The Complainant gave evidence on direct examination that the Registrant sounded like he was "trying to breathe normal" but his breathing was "breaking up". She explained that by "breaking up" she meant his breathing was like a "quiver" and

was "laboured". The Complainant described the speed of the Registrant's breathing as "normal". She described the volume of the breathing as "normal".

Q Why do say he started masturbating?

A I've had experience. I'm 47 years old and I've had a good sex life and masturbation was part of that. And my -- the guys that I had would have their hand on my breast and would do a little bit of squeezing on my breast. And the way what happened was -- like, the way he was breathing -- he was breathing through his nose and he was trying to breathe normal. Like, I'm like oh, my god, what are you doing? Oh, god, yeah, I -- this guy was masturbating.

...

Q Can you describe the depth of the breathing you say you heard.

A Well, I've had experience having masturbation in public because the guys that I had were moaners, so I'd tell them, you know, like, let's be quiet because there's people outside. Like, I'd be camping and friends would be outside of our camper, and I'd just say, shh, be quiet, you know, and do my thing, and he would be masturbating and rubbing my breast. And his breathing would -- he was trying to breathe normal, but it would be breaking up like this. He was trying to sound like he was breathing normal, but this guy was masturbating.

Q Can you describe the volume of the breathing that you heard.

A It was like normal breathing, but because I could hear him breaking up, it was loud to me, but it was like a normal -- he was trying to breathe normal.

Q Okay. You use the phrase "breaking up." Can you tell us what you mean by that. And you're doing something with your hand. I'm sorry. I don't know if that's part of what you're trying to describe to us.

A No, I'm just --

Q Okay.

A Like, he would be breathing. It'd be like a quiver, breathing in, breathing out, like a laboured breathing. Like that. And it was loud enough for me to hear.

Q Okay. And did I understand -- you said "quiver." Sorry, quiver breathing in or quiver breathing out or --

A A breathing in and out.

Q Can you describe the speed of the breathing.

A It was like normal -- like a normal breathing. Like it wasn't going very fast or -- you know, like, but this guy was masturbating.

Q Did the speed change?

A No. Like I said, he was trying to breathe normal.

Q Did you hear any breathing like this in your first session?

A No.

151. On cross-examination, the Registrant gave evidence that his breathing is unusual most days because he has a partially blocked nostril:

Q In terms of your breathing on the second date with [REDACTED], October 3rd treatment, you were trying deliberately to breathe deeply and slowly?

A I don't recall trying to affect my breathing in any way other than I covered my face.

Q Okay. So your memory of your breathing is you don't have a memory one way or another, but you don't recall anything unusual in your breathing that day?

A My breathing is unusual most days. In my treatments I have had clients comment on it before.

Q Okay.

A I have a partially blocked nostril on this side that makes me whistle sometimes, so I try to breathe through my mouth or take slow breaths. It embarrasses me more than anyone else really notices, I think.

152. The Panel finds that the Complainant's evidence with respect to the Registrant's breathing was consistent throughout her direct and cross examinations. The Complainant testified that, at the time she understood him to be masturbating, the Registrant was trying to sound normal, the volume was normal, and the speed was normal, yet she heard something that sounded laboured as though it was breaking up. The Panel finds the Registrant's evidence of a partially blocked nostril and the need to breathe through his mouth or take slow breaths is implausible given his evidence that he needed to cover his face with a towel to get the smell of the Complainant "out of [his] nose". Irrespective, the Registrant stated that his partially blocked nostril embarrassed him "more than anyone else really notices" so on his own evidence, the blocked nostril is unlikely to have been what the Complainant heard as sounding unusual. Finally, the Registrant's account of a blocked nostril does not respond to the Complainant's evidence that the sound of his breath was "quivering".

The Registrant's right hand

153. The Complainant testified that the Registrant was "pulling his penis with his right hand". She acknowledged that she did not see the Registrant masturbating with his right hand but believed that he was doing so because of the rhythm of his left hand on her body, and her experience of past sexual activity involving masturbation:

Q [REDACTED], before the break you gave us some testimony about the motion of the left hand that was on your back. Can you say anything about the right hand?

A He -- he was pulling his penis with his right hand.

Q And why do you say that?

A Because his hand, he was going to the rhythm of masturbating with his right hand, because I have had my past experience when my guy would put his hand on my breast and squeeze it while he's pulling his penis.

Q What, if anything, could you see that Mr. Scott was doing?

A I was in shock. My eyes were closed and I was like, oh, my god, what are you doing? Why are you doing this? You're jeopardizing your career. Why? It's stupid. Oh, god, please let it stop. Oh, god. Please let this be over.

Q Are you able to tell us how long the masturbation was?

A It took, like, forever. Forever. Like, I wanted it to stop. I don't know. It was a 45-minute massage. I don't know. About 15 minutes. I don't know.

154. On cross-examination, the Complainant agreed that she did not hear the Registrant masturbating:

Q And when he's -- I guess you're imagining he's stroking himself?

A I heard the zipper of his pants. I heard the teeth. I heard him -- his laboured breathing, his quivered breathing. It was loud enough for me to hear. This guy was masturbating.

Q You did not hear the slapping of a penis?

A No.

Q You did not hear skin sliding up and down, hands slapping on a penis?

A Oh, my god, I was just in shock about what things were -- what was happening. This guy was masturbating. In my head I'm like, oh, god. Oh, please help me. Let me get -- please, let me get out of here. Lord god, please. Oh, my god, this guy -- this guy is jeopardizing his career for this stupid thing. I'm an old lady. All this was going through my head.

Q You did not hear skin slapping?

A No.

Q Sliding up a penis?

A No.

Q That's a distinctive sound.

A No, it's not.

Q Have you ever masturbated someone?

A Yes.

Q And what did that sound like?

A It didn't sound slappy.

Q It had a sound?

A Not all the time, no.

Q In other words, though, you didn't hear anything other than a zip as far as sound?

A And the breathing, yes.

....

Q You did not hear Mr. Scott rubbing his penis?

A You know what? Maybe I didn't want to hear it because all this was going in my head, like, oh, my god, oh god, let me get out of here. How come I can't move?

Q So your evidence today is you did hear him rubbing his penis or you didn't?

A Oh, I didn't hear him rubbing his penis. All I know is he masturbated not once during my 45 minutes but twice.

....

Q You believed that he might have been texting on his phone?

A Well, he had the one hand on me. That was my first thought, until I heard the zipper and the breathing. Then I knew he was masturbating.

Q So you're guessing as to what's going on and you heard sounds that sounded like texting?

A No, I didn't hear any texting, because you could hear the beep, the numbers, whatever. I just assumed because he had the one hand on me, like -- I'm, like, thinking, okay, what are you doing? I'm paying for massage here, you know. And then next thing you know, I heard the zipper, I heard the laboured breathing, and this guy was masturbating.

Q So it wasn't the one hand that alarmed you; it was the sound of the zipper?

A Yes.

....

Q But your testimony is that you didn't hear him masturbate?

A No, I know he was masturbating, but no. When you're trying to be sneaky about it, you're not going to be loud and, like, flap your penis and have somebody hear it. You want to be, you know, like, maybe stroking it softly. I don't know. But all I know if this guy masturbated not once but twice.

155. The Registrant by contrast, flatly denied he masturbated during the treatment session and instead said during both his direct and cross examination that his right hand was on his lap or holding a towel to his face:

Q When you are giving the vibration massage that you describe, one hand or two hands?

A One hand.

Q And what's the other hand doing?

A Was sitting on my lap for part of it; I was holding a towel for the other part of it.

Q Were you masturbating?

A I was not masturbating.

Q Were you masturbating at any point in that second massage therapy session?

A I have never masturbated during a message session, never.

Q But did you massage in that session?

A No.

Q Now, do you recall -- maybe I misspoke. Do you recall masturbating in that second massage session?

A No.

Q Have you ever masturbated in a massage therapy session?

A No.

156. The Registrant also explained during this direct examination that he changed the Complainant's treatment plan to deliver a one-handed massage during the October 3rd treatment session because while the Complainant had experienced some improvement, some of her symptoms also intensified:

A She had come back in the second treatment and said that she had some relief temporarily after the first treatment, but it didn't last. And then some of the symptoms ended up becoming more intense, more acute, such as her headaches had become more intense and more frequent. The hip pain that was drawn on her health history, she wasn't very concerned about it during the first treatment, but after the first treatment she made mention of it, that it had gotten worse and it had encompassed her glute region and was irritating her low back as well.

Q And being told this information, would it have changed anything to how you proceed with your plan for your massage that day?

A Yes, because it means that as much as I thought I was doing a relaxation massage, the first treatment I was still doing too much pressure. We got some change, we got some progress, but it didn't last, and it actually intensified the symptoms after the fact. So it meant that my treatment was going to be a little bit more light, but also it was going to be a bit more focused into the areas around the spine. The main area of her complaint that she had at that point was her low back, pelvis, and so I was going to focus more on the spine and affecting the muscles that were short and attaching to the spine because I have had some really good progress with other clients with pain like that by massaging these very small, very fine muscles, still staying in a very light pressure, and get a fairly substantial release of tissue and release of tension. It also had -- the next treatment had to address the glutes because they had not been addressed the first time, and obviously that was something that needed to be or it would have gotten worse.

157. The Complainant agreed that she felt some improvement after the first session and that some of her symptoms intensified. She did not recall telling the Registrant that

the symptoms in her thigh or her headaches intensified after the first treatment, but she did recall that the symptoms in her right knee intensified.

158. Not having seen or heard the Registrant masturbating with his right hand, the Complainant's conclusion that he was doing so was based exclusively on the comparison of the rhythm of his left hand moving on her body to something she experienced on a prior occasion when a sexual partner was squeezing her breast while masturbating. However, the Panel was not provided with sufficient description of the prior experience of breast squeezing and masturbation, or the nature of the comparison the Complainant was making, and as such, the Panel did not feel it could reasonably infer that the movement of the Registrant's left hand on the Complainant's back meant that he was masturbating with his right hand.

The Complainant's odour and Registrant's use of a towel

159. The Registrant provided three explanations for using a one-handed massage on October 3, 2014. First, as described above, the Complainant's symptoms intensified thereby requiring a lighter massage on the second session. Second, he said he was concerned about applying too much pressure using two hands. Third, he said the Complainant had a strong body odour which he addressed by using his right hand to hold a towel to his face.
160. On cross-examination, the Registrant agreed that the positioning of his body and the measures he took to cover his face with a hand towel were exceptional:

Q So the concern about standing -- your concern was that you might end up unwittingly or unintentionally applying too much pressure?

A Yes.

Q Surely that is something, though, that you can control, that you must have to deal with that potential problem often in treating patients.

A That's why I sit and use one hand.

Q Wouldn't this be a case that would call for you, though, if you're trying to get distance, to vary the usual technique and try to get some further distance from the patient?

A It wouldn't be further distance. It's still just the length of my arm.

Q On the rubber ball that you were seated on during this massage is it the case that you were trying to pull back or lean back to keep as much distance as you could from the smell?

A I altered my position generally by turning my body to the side.

Q Okay. What do you mean by turning your body to the side?

A Rather than facing so my body is -- chest is directly facing towards the client, I would turn so I was kind of at a 45 degree angle to her.

Q And I think you gave evidence about that angle yesterday. Part of the aim that you had in reorienting your body so that you weren't perpendicular was also to deal with the smell; is that right?

A Yes.

Q Did you also turn your head so that you were not directly looking down at the patient?

A Yes.

Q And I guessed that you turned your head to the right, but is that the direction you turned your head to?

A Yes.

Q How far did you turn your head and for how long?

A I couldn't say. My neck gets sore if I turn it to the right for too long, so I can't keep it there forever.

Q But for some part of this you were twisting or turning your head to avoid the intensity of the smell; you agree?

A Yes.

Q And is it your position that you're simply powerless to do anything about this situation?

A It is my position that I did something about the situation.

Q But you don't speak about it; you don't address it with the patient?

A I didn't feel it was necessary.

Q I mean you're in a position where you're now reorienting your body to a different angle, twisting your head. You have obtained a hand towel. You've held it to your face for at least a half hour. Those seem to me pretty exceptional measures that you have taken to deal with the situation.

A Yes.

161. The Registrant also gave evidence that he did not leave the patient to go over to the corner table to retrieve a hand towel, rather he "did not break contact" with the Complainant. He explained "I had a hand on her shoulder as I walked around, a hand on her body as I walked around."

162. The Registrant's evidence about the Complainant's smell was inconsistent. On direct examination, the Registrant stated that "in one circumstance I had to actually go get a towel and cover my face because I just couldn't seem to get [the smell] out of my nose". The Registrant confirmed he was referring to the Complainant.

When asked by his counsel where the smell came from, he stated "I don't know where the smell came from".

163. On cross-examination, the Registrant admitted that he held a towel to his face because of "this overpowering smell when [he got] close to the patient". However, after stating that it was overpowering and overwhelming, he could not describe the smell as "he [did not] recall at this point". He simply stated that it was strong. The Registrant's prior statement in an affidavit was then put to him as follows:

Q It was obvious to you?

A It was obvious to me, yes.

Q If I could ask to you look, please, at the affidavit of paragraph 58. You have got in fact a bold subheading, "Body Odour," 58: "During the second appointment [REDACTED] had a strong odour of what I can only describe best as dirty old sweat. It was incredibly powerful and unpleasant to the point of requiring me to cover my face with a towel. I noticed it throughout the entire massage. As I massaged her I was right over top of the smell." That's an accurate description of what you say the overwhelming smell was?

A That's what I have in here, yes.

Q And you weren't able today to tell us about the nature of the smell, but you agree with the way you have expressed it here, "dirty old sweat"? That's what you say the smell is?

A Yes.

Q And this is strong language, "strong odour," "incredibly powerful," "unpleasant to the point of requiring me to cover my face," something you say you noticed throughout the entire massage. You say that's how strong the smell was?

A Yes.

164. The Registrant also conceded on cross-examination that there was no explanation for the source of the odour he described other than it was coming from the Complainant.

165. The Registrant also agreed that in facing body odour of a patient, he had a number of different options to deal with that issue, including speaking to the patient, simply toughing it out, and placing a scented product under his nose.

166. The Registrant also admitted on cross-examination that he has dealt with a number of patients with odours on different occasions including heavy smokers, mill workers who were sweaty and smelly after finishing a shift, people who are just sweaty, tree planters, and athletes, and that some of these individuals can have smells that are "fairly intense". Notwithstanding these experiences, the Registrant

said the only time he has ever held a towel to his face was during the October 3, 2014 treatment of the Complainant.

167. In contrast, the Complainant testified that she showered and washed her hair the morning of the massage and that she likes to keep clean and has never had problems with body odour in her life. The Complainant also stated that she was wearing clean clothes.
168. Three witnesses who interacted with the Complainant just after the massage on October 3, 2014 massage, specifically her common law partner, an RCMP officer and her family physician, all testified that they were positioned in close proximity to her, but did not notice any body odour.
169. The Registrant's receptionist, [REDACTED], did not recall whether or not the Complainant might have been giving off an odour at the time she paid for her massage treatment at the reception on October 3, 2014. Rather, [REDACTED] stated, "I remember breathing out when I was talking to her."
170. The Panel finds that the Complainant did not have an unusual odour on October 3, 2014 for the following reasons. It accepts that the Complainant showered and washed her hair the morning of the treatment and was wearing clean clothes. The Panel also accepts the evidence of her common law partner, her family physician and [REDACTED] that she did not have an unusual odour, all of whom were in the Complainant's immediate proximity during a period of hours of the massage.
171. The Panel finds it implausible that the Registrant used a hand towel to cover his face from the Complainant's alleged odour for the following reasons: the Complainant did not have an unusual odour, she was fully dressed during the massage and that she had two sheets on top of her, the length of time he says he held the towel to his face, the awkward manner in which he positioned his body while holding the towel to his face, the fact that he has treated many other patients with intense body odours before and has never used a towel to his face, and the fact that he indicated one of his nostrils was partially blocked. The Panel finds it to be unbelievable that [REDACTED] would recall breathing out when she interacted with the Complainant and gives no weight to her testimony. In addition, the

Registrant's evidence with respect to the source and strength of the Complainant's body odour was inexplicably inconsistent.

Wiping penis twice on wrist

172. The Complainant said that after the Registrant masturbated the first time, he wiped his penis on her left wrist, which was covered by a sheet. The Complainant said that the Registrant's penis did not come into contact with the skin of her wrist due to the presence of the sheet. During direct examination, she described this incident as follows:

Q What happened after the masturbation?

A He wiped his penis on my wrist.

Q Do you know which wrist?

A It was my left wrist. I was laying down like this and he had wiped his penis on my wrist.

Q Did his penis come in contact with your skin?

A No, thank god. I had the sheet over my wrist.

Q You were making -- just now you were just making a motion. Can you describe that motion?

A It was like a swipe swipe.

Q Sorry, in what direction?

A Well, my arm would be laying like this, so his penis would have been swiping downwards this way, up, down, up, down.

Q And can you describe where on your wrist he was swiping?

A Right in my inner wrist.

Q And can you tell us what it felt like?

A It felt like his penis was wiping on my wrist. I felt it like a floppy thing on my wrist, so swipe swipe.

Q Can you describe any if -- what, if any, shape that you would have felt?

A I would describe it as a sausage shape.

Q What, if any, wetness did you feel?

A I didn't feel any wetness.

Q Was there -- what, if any, smell did you smell?

A I didn't smell.

Q So apart from what you felt, was there any other reason why you say that Mr. Scott was wiping his penis on your sheet-covered wrist?

A He must have come, because why else would he be doing -- wiping his penis on my wrist after he masturbated? He was wiping semen.

Q Who do you think he was wiping semen?

A Because he was wiping -- he wiped it on my wrist over top the sheets that were on my wrist.

Q Did you feel anything like this in your first session?

A No.

Q Could it have been any other part of his body touching you?

A No.

Q Why do you say that?

A I have had experience when I'd be covered by my sheet and my ex would wipe his penis on my sheet playfully. I'm like, I just washed the sheets and he wiped his penis on my arm.

Q What, if anything, could you see?

A I didn't see anything; I had my eyes closed.

Q Was there any reason why you had your eyes closed?

A I was in shock. I was like -- I went to a professional to get a massage and he ended up masturbating.

Q How long did the wiping take?

A I don't know. It was like two swipes. Two, three seconds. I don't know.

173. On cross-examination the Complainant was asked how she knew what she felt was a penis:

Q The assumption you made, though, was that it was a penis, not a hand?

A It was a penis. I've had experience where my guy -- I'd have the sheet because we were just finishing. He'd wipe his penis on my body through the sheet. I'm like what are you doing? Like, these are clean sheets. And we'd laugh about it.

174. Later during cross-examination she described the Registrant's penis as feeling like a sausage.

175. The Complainant was also asked about whether the Registrant was circumcised or not and she testified that she did not know, she did not look, she just knew it was the tip of his penis.

176. On cross-examination, the Complainant also agreed she had numbness in her forearms and hands.

177. The Complainant also agreed that she did not have semen on her wrists, nor was there semen on any of her clothes or on the floor.
178. The Panel finds that the Complainant did not see, smell or feel any semen on her body or elsewhere in the room. She did feel something she described as a penis making two quick swipes on her wrist. She says she knew it was a penis because it felt floppy and was the shape of a sausage. In the *Li* case, a similar description was accepted as adequate evidence.
179. The Panel does not consider the Complainant's evidence to have been undermined because she could not determine whether a penis was circumcised or not, when she did not see it and was describing having only felt the tip of a penis through a sheet. The Panel does, however, have concerns about the reliability of the Complainant's evidence due to the fact that what she felt was through a sheet and on a part of her body which she acknowledged had numbness from a motor vehicle accident. Given that her evidence concerning this incident was based exclusively on touch (as opposed to sight, sound or smell), the evidence of her touch impairment is more important. The Panel also again notes that in delivering her evidence, the Complainant relies on her recall of very specific past sexual experiences. While references to past experiences may assist in the description of factual observations (whether by touch, sight, sound or smell), the recall of those past experiences cannot take the place of such observations.

Second masturbation

180. The Complainant gave evidence that after the penis swiping, the Registrant was massaging by her shoulders and neck and then started masturbating a second time. She stated that he was masturbating again because she heard his laboured breathing, she heard a zipper again, and he was making a similar motion and rhythm with his left hand on her body again. With respect to this last point, she stated:

Q Okay. So are you able to tell us anything you heard or you observed in relation to the right hand?

A It didn't move; it stayed in the same position.

Q I'm sorry. I meant the right hand.

A Oh, his right hand? It stayed -- the left hand stayed in the same position and it was like -- it was almost like he was masturbating. He was masturbating the way his fingers -- his left hand fingers were going to the rhythm of him pulling his penis.

Q So my question to you is are you able to tell us anything about his right hand?

A His right hand certainly wasn't on me.

181. The Complainant testified that the Registrant then gathered up the sheets in the middle of her back and left the room with them.

182. The Panel has the same concerns with the reliability of the Complainant's evidence with respect to the first masturbation. In addition, there are plausibility issues with respect to the second masturbation, including it having taken place immediately after the alleged ejaculation of the first masturbation, the zipper evidence that does not align with the Complainant's versions of events and the fact that the Complainant's evidence relied heavily on the Registrant's right hand not having been on her body. There was also an absence of evidence with respect to the clinic's laundry and sheet changing practices.

Complainant's Trust issues

183. The Registrant's counsel suggested to the Complainant that she made the assumptions that she did about masturbation during the massage therapy treatment session and reacted in the manner in which she did because she did not trust men due to a violent and tragic incident involving one of her immediate family members. The Complainant denied that proposition. The Registrant's counsel then asked why the Complainant remained fully clothed during both treatment sessions.

184. The Panel accepts the Complainant's evidence that she does not have trust issues with men but finds that the Complainant was uncomfortable around the Registrant as it was the first time she had received a massage therapy treatment. For this reason she remained fully clothed during both treatment sessions.

Q When you -- why did you stay fully clothed during both massage therapy sessions?

A Because this was my first massage and I -- I don't know. I was wearing my tank top. I was going to take it off, but then I'm like, no, I think I'll just wait until I get the feeling of being massaged a few times and then I'll be feeling comfortable, yes.

Q You were uncomfortable around Mr. Scott at the beginning of the massage therapy sessions?

A Well, I was -- didn't want to take my clothes off.

Q You were uncomfortable around Mr. Scott at the beginning of the massage therapy sessions; correct?

A Yes.

185. The Panel notes that both the Complainant and the Registrant were aware that this was a new experience for the Complainant.

Whether the Complainant was asleep

186. During his cross-examination, the Registrant explained that he did not check with the Complainant to ascertain whether he was causing her any pain because, at least in part, he thought she was asleep. The College argued this explanation poses credibility problems for the Registrant as one would have expected this important point to have been raised during his direct examination. The Registrant argued that it was not raised earlier because it was not in issue.

187. The Panel finds it possible that the Registrant could have thought the Complainant was sleeping. The Panel also finds it very unlikely that the Complainant was in fact sleeping during the treatment session given her detailed testimony of what took place during the session which clearly establishes that she was not asleep.

DETERMINATION OF THE PANEL

188. The College submits that the Panel cannot accept the Registrant's version of events without being able to reconcile his account of an incredibly powerful and unpleasant smell with the unchallenged and unassailable evidence of many witnesses that the Complaint had no odour. If the Panel cannot do this, the College contends that the only reasonable conclusion left to the panel is that the Registrant fabricated his account to conceal the fact that he masturbated during his massage of the Complainant on October 3, 2014.

189. The Registrant submits that the Complainant "has behaved unreasonably". He says that

It is not sufficient to destroy the livelihood of [the Registrant] and his family and his reputation based upon the mere suppositions of the complainant, when she could have simply looked to confirm her suspicions. Perhaps her actions are somewhat understandable given her history before meeting [the Registrant]. None of that changes that all of this could have been avoided had she simply looked to confirm what must be seen as implausible suspicions. But at no time did she treat her MRT fairly. She cannot now come to justice and say that she wants the Committee to conclude that she was right in her guesses when the best evidence was there for that taking and all she had to do was look. The fact that she could not bring herself to look, but chose instead to make the events of the day fit within her hastily reached conclusion, is not sufficient. Her evidence is still unreliable.

190. The Panel does not accept either of these propositions.

191. The Panel does not accept the College's submission that if it cannot accept the Registrant's version of events that the Panel has sufficient evidence for the Panel to conclude he committed sexual misconduct. While Panel has reservations with Registrant's evidence as set out above, and in particular the plausibility of his right hand holding a hand towel to cover his face given that the Panel found that the Complainant did not have an unusual body odour, that alone is not sufficient to prove the College's case. As the College noted, it has the burden to prove the facts from which the Panel may conclude that Mr. Scott engaged in professional misconduct, or a breach of a standard or a bylaw.

192. With respect to the Registrant's submission, the Panel does not accept that a patient who is the victim of sexual assault has any obligation to watch the assault take place in order to preserve "the best evidence" in the event he or she chooses to later pursue a College complaint. The Panel is troubled by the language that the Complainant's failure to lift her head in such circumstances was therefore "unreasonable", "unfair" or in any way a precondition to her making a complaint to the College. The Panel finds the Complainant to be credible but has concerns about the reliability of some of her evidence. In particular, the Complainant did not see, hear, feel or smell the Registrant masturbating. While the Panel accepts that non-visual evidence can be adduced in sexual misconduct cases, the masturbation in this case was not actually perceived by the Complainant using any of her senses. Rather, she inferred the Registrant masturbated based upon the fact that his breathing sounded normal, there was the sound of a zipper twice going down

but never going up, and the rhythm of the Registrant's left hand touching her body which she compared to a past sexual experience for which insufficient information was adduced to make a comparison. Moreover, the Complainant's evidence that she felt the Registrant twice wipe his penis on her wrist is unreliable because her wrist was covered by a sheet and her sense of feeling in her wrist was impaired by numbness from a motor vehicle accident.

193. At the end of the day, and after extensive deliberation, the Panel is left with a situation where it is uncertain what happened in the treatment room on October 3, 2014. The Panel is in the position that it cannot resolve the conflicts in the evidence between the Complainant and the Registrant and determine on a balance of probabilities what actually occurred during this treatment session, and in particular, whether the Registrant engaged in sexual conduct. The Panel does not make this statement lightly. The Panel also understands that where it cannot reconcile the conflicts and reach a decision it has the duty to say so. It is well established that where the Panel cannot reach a decision, the party bearing the burden of proof has not met that burden and must fail. Accordingly, the Panel dismisses this matter.

October 31, 2016



Lynne Harris (Chair)



Marilynne Waithman



Shoko Nagai