

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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Matthew Arie Romyn

(the "Former Registrant")

**REASONS FOR DECISION**

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

**Dates and Place of Hearing:**

May 29, 2015

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

**Counsel for the College:**

Julia Hincks  
Lisa C. Fong

**Counsel for the Former Registrant:**

The Former Registrant was unrepresented

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

Perminder S. Tung (Chair)  
Catherine Ryan, RMT  
Rachel Shiu, RMT

**Independent Counsel for the Panel:**

Eric Wredenhagen

**Court Reporter:**

Charest Reporting Inc. (Alyssa Fontaine)

## **INTRODUCTION**

The Panel convened for a hearing on May 29, 2015 at 1650 – 885 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, to inquire into allegations that the Former Registrant, while still registered with the College, engaged in conduct amounting to unprofessional conduct or professional misconduct within the meaning of Part 3 of the *Health Professions Act* (the “HPA” or the “Act”), and/or failed to comply with section 75 of the College's Bylaws and with standards, specifically sections 1(2) and 2(a) of the *Code of Ethical Conduct*.

The hearing came to order at 2:00 p.m. on May 29, 2015 at which time the court reporter, Alyssa Fontaine, was sworn in.

The Former Registrant was in attendance and was self-represented.

## **BACKGROUND AND REGISTRATION HISTORY**

The Former Registrant was issued certificate number 005336 on April 20, 2007, and practiced in and around Courtenay, British Columbia.

The Former Registrant's registration was cancelled on March 15, 2013 for non-payment of fees.

On or about October 4, 2013, the Former Registrant was convicted on five counts of sexual assault contrary to section 271 of the *Criminal Code*, one count in respect of each of five individual women. The sexual assaults occurred in 2011. Four of the five women also made formal complaints to the College; the fifth contacted the College and made allegations about the Former Registrant, but did not proceed with a complaint.

## **PRELIMINARY APPLICATIONS: CITATION AND PRIVACY ORDER**

### *Application to amend Citation*

The College advised that it was bringing a preliminary application to amend the Citation to Appear. There were two proposed amendments: (1) striking out the designation “RMT” following the Former Registrant's name on the first page, given that he was no longer a registrant of the College; and (2) striking out the word “conditional” in paragraph 3 immediately preceding the words “sentence of imprisonment”, on the basis that the Former Registrant had in fact served a term of imprisonment following his criminal conviction for sexual assault.

The Former Registrant indicated that he took no issue with the proposed amendments and

consented to the application. The Panel therefore directed, pursuant to section 67(3) of the College Bylaws, that the Registrar amend the Citation as sought by the College. This was done and the Amended Citation to Appear (the "Citation") was subsequently filed as **Exhibit 1**.

*Application to hold portions of hearing in private*

The College advised that it was applying for an order that portions of the hearing be held in private, as contemplated by section 38(3) of the *HPA*. The privacy request applied to portions of the evidence to be given by the first of the two witnesses called by the College, Joëlle Berry, the College's Director of Compliance, and to the entirety of the evidence of the College's second witness, Edward Cooper, a lawyer retained by the College to attend at and report on the decision made at the Former Registrant's criminal trial. The College also sought directions that (1) the complainants be referred to by their initials during the course of the hearing; and (2) that if any transcripts or exhibits of the proceeding are ordered, that they be supplied in redacted form.

The underlying reason for the College's privacy request was that a publication ban had been imposed in the Former Registrant's criminal proceeding pursuant to section 466.4(1) of the *Criminal Code*, prohibiting the publication, broadcast or transmission of information that could identify a complainant or witness. The College submitted that, since the names of the complainants would be mentioned during the evidence of Ms. Berry and Mr. Cooper, a privacy order was appropriate to protect their identity, and that members of the public present at the hearing should be excluded only from those specific portions of the hearing at which the names of complainants would be mentioned. The College submitted that although section 38(3) stated that a privacy order could be made in response to a request from "the complainant, the respondent or a witness" (none of which applied here), the Panel nonetheless had the power to control its own procedure in a manner consistent with the rules of natural justice and procedural fairness: *Prasad v. Canada (Minister of and Immigration), Employment* [1989] 1 S.C.R. 560. Finally, the College submitted that since the Panel was not a court, it did not have the court's power to control the dissemination of information regarding the identities of victims of sexual assault, and could only do so by means of controlling, and where necessary restricting, access to the hearing.

The College argued that some mitigation of the effects of a privacy order could be effected by the means of section 69(4) of the Bylaws, which provides that any person may order, at his or her own expense, a transcript "of any part of the hearing which he or she was entitled to attend." Although no person is "entitled" to attend a portion of a hearing in respect of which a section 38(3) privacy order has been made, the College submitted that the Panel's order could permit the ordering of a transcript of any part of the hearing, including the portions held in private, provided the transcript was redacted with respect to the names of the complainants.

The Former Registrant stated he took no issue with the College's position and consented to the College's application. The Panel therefore ordered and directed as follows:

- (1) That the evidence of Mr. Cooper, and the portions of the evidence of Ms. Berry during which the complainants' names would be mentioned, be held in private pursuant to section 38(3) of the HPA;
- (2) That the complainants would be referred to by their initials during the course of the hearing (except for the evidence referred to in paragraph (1), immediately above);
- (3) That, if transcripts or exhibits of this proceeding are ordered by any member of the public, such transcripts or exhibits shall be redacted to comply with the publication ban imposed in the Former Registrant's criminal proceeding.

## ISSUES

The issue for determination by the Panel is whether the Former Registrant's conviction, on or about October 4, 2013, on five counts of sexual assault contrary to section 271 of the *Criminal Code*, constitutes unprofessional conduct or professional misconduct, and/or constitutes a failure to comply with section 75 of the Bylaws, specifically with the following provisions of the College's *Code of Ethical Conduct* (Schedule "C" to the Bylaws):

*General duty to patients*

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

*Sexual conduct prohibited*

2. A Registrant shall not  
(a) engage in sexual conduct with a patient ...

The Citation alleges the individual particulars of the assaults committed by the Former Registrant against each of the complainants. Because each complainant to the College had previously been found by the Provincial Court Judge who presided over the Former Registrant's criminal trial to be a credible witness in that proceeding, with the result that the Former Registrant was convicted on each of the five counts of which he was charged, the Panel did not consider it necessary, in this Reasons, to particularize the specific allegations in relation to each complainant individually. In the interest of fully protecting the complainants' privacy, and because in this case the particulars of the individual allegations in respect of each complainant are immaterial, the Panel has also chosen to dispense with the practice of referring to complainants by their initials.

## FACTS AND EVIDENCE

### *The College's case*

As stated above, the College called two witnesses: (1) the College's Director of Compliance, Joëlle Berry; and (2) Edward Cooper, a lawyer retained by the College to attend at the decision portion of the Former Registrant's trial, and report back to the College as to the verdict imposed.

Ms. Berry testified that she assumed employment with the College and became its Director of Compliance in May 2012. At that time, she obtained a copy of the College's active caseload from her predecessor. One of the active files that Ms. Berry reviewed concerned complaints received by the College about the Former Registrant from four female complainants. According to Ms. Berry, a fifth individual had contacted the College and made "allegations" regarding the Former Registrant, but had not made a formal complaint. Ms. Berry testified that she reviewed the RCMP's file, which included interviews of each of the four women who had complained to the College, as well as the aforementioned fifth woman who had contacted the College but not complained, and also a sixth woman who had gone to the police but had not pursued a complaint to the College. Ms. Berry's review of the police file revealed that the Former Registrant had been charged with a total of six counts of sexual assault: one count in respect of each of the six women. She confirmed that the five women who contacted the College were the same five (of the total of six) women in respect of whom the Former Registrant had been charged criminally.

Ms. Berry testified that, on behalf of the College, she retained a lawyer named Edward Cooper to attend at the decision portion of the Former Registrant's criminal trial on October 4, 2013. Mr. Cooper provided the College with a memorandum dated October 8, 2013 which, together with a covering email of the same date, and an internal College email dated October 30, 2013, was filed as **Exhibit 2** (the "Cooper Memorandum"). The Cooper Memorandum also attached a copy of the Information showing the six counts against the Former Registrant (one of which was stayed before trial).

In summary, the Cooper Memorandum stated as follows:

- A publication ban was ordered with respect to any evidence that could identify any of the complainants.
- The judge summarized the evidence of the Former Registrant's acts in respect of each of the complainants. Those acts (taken together) included the following: touching a patient's breasts while massaging her neck, and then continuing, even after the patient had crossed her arms to cover her breasts, to touch the patient's breasts on the sides and under her arms; repeatedly touching the labia of four patients while massaging either their abdomen or their legs; touching one patient's pubic bone, and another's *mons pubis*; touching a patient's pubic hair; lifting the covering sheet and looking at another patient's body.

- One of the complainants was 16 years of age at the time she received treatment from the Former Registrant.
- One of the complaints related to a treatment received on or about February 22, 2011; the remaining four complaints (not including the charge that was stayed at trial) all related to treatment that took place on or about December 3, 2011.
- The Former Registrant admitted at his criminal trial that he had committed “common assault”; that is, he admitted the touching alleged by the complainants, but denied that he had had any sexual intent. His counsel also argued that there was collusion between the complainants.
- The judge found that while there had been some discussion between the complainants about what had taken place, there had been no collusion to fabricate or tailor their evidence. He found that the complainants had been in vulnerable positions. He found the evidence of the complainants to have been “convincing” and found that the Former Registrant had been “less than candid”. On this basis, the judge concluded that the Former Registrant had acted knowingly and with the requisite intent to be convicted of sexual assault. The Former Registrant was accordingly convicted of five counts of sexual assault under section 271 of the *Criminal Code* – one conviction in respect of each of the four complainants to the College, as well as in respect of the fifth woman who had contacted the College but had not filed a complaint.

Through Ms. Berry, the College also introduced the following documents: (1) a Warrant of Committal Upon Conviction, evidencing the detention of the Former Registrant for the five counts of sexual assault for which he had been convicted; (2) a Probation Order, setting out the terms of the Former Registrant’s two-year period of probation following his incarceration; and (3) a Provincial Court Record of Proceedings and Endorsement of Information Continuation. These documents were collectively marked and filed as **Exhibit 3**.

Finally, Ms. Berry testified as to a document that was subsequently entered as **Exhibit 4**, a page entitled “Registration History”. Ms. Berry testified that this was a printout from the College’s registration database and showed the Former Registrant as being initially registered on April 20, 2007. His registration was cancelled on March 15, 2013 for non-payment of fees.

Ms. Berry was not cross-examined by the Former Registrant.

After Ms. Berry finished giving evidence, the College called Edward Cooper. Mr. Cooper testified that he had practiced law for 21 years, and practiced exclusively in the area of criminal law. He confirmed that he had been retained by the College to attend at court and to report on the decision rendered by the judge at the conclusion of the Former Registrant’s trial. He confirmed his authorship of the Cooper Memorandum that had already been filed as Exhibit 2. He testified that he had based his memorandum on notes he had taken while in court,

supplemented by a memorandum to file that had been prepared by an administrative staff person at the College. He testified that he had received a copy of the Information showing the Charges against the Former Registrant either from Crown counsel or from the court file, though he could not recall which. He confirmed, however, that the copy of the Information attached to the Cooper Memorandum was the copy he had received in relation to the Former Registrant's trial.

Mr. Cooper was not cross-examined by the Former Registrant.

The College closed its evidential case following the evidence of Mr. Cooper.

### ***The Former Registrant's case***

The Former Registrant testified on his own behalf. He called no other witnesses.

(The evidence given by the Former Registrant related mainly to the economic and other impacts on him of his criminal conviction, and hence was evidence that related more properly to the Panel's consideration of penalty under section 39(2) of the Act. However, the Former Registrant testified that because he is not legally trained, it would be difficult for him to separate evidence relating to verdict under section 39(1) from evidence relating to penalty under section 39(2). The College therefore consented to the Registrant giving his evidence at the portion of the hearing dealing with the initial determination under section 39(1) of the Act, and asked the Panel to consider the appropriate portions of that evidence for the purposes of assessing penalty.)

The Former Registrant testified that he had no intention of contesting the verdict of the court. He said he understood that the process had been followed and that the judge had made a decision, and that the court's decision was binding and final.

He testified that he had served his prison sentence following his conviction and sentencing, and that he is currently approximately halfway through his two-year period of probation. Before being released, he attended a once-a-week rehabilitation program for sex offenders for eight weeks between February and April 2014. He was released on June 4, 2014. He currently attends a 90-minute group support and maintenance session for sexual offenders once a month. He is not pursuing massage therapy as a career.

The Former Registrant testified that, as a result of his conviction for sexual assault, he will be on the sexual offender registry program for the next 20 years.

The Former Registrant stated that as a result of his criminal conviction and being on the sex offender registry, his employment prospects are limited. He currently works as a part-time pizza delivery driver. He has also done some unlicensed massage therapy work, which he stated was done for male clients only, and after providing what he described as "full disclosure" of his conviction (he stated that he had not used the term "massage therapy" and had not described himself as a massage therapist). He stated that as an "indirect result" of what had happened, his

family had split up. He stated that he was currently trying to maintain a stable shared parenting arrangement for his two young children.

The Former Registrant then testified that he had “two questions” that he wished to put to the College’s Inquiry and Discipline Committees. One is why the College did not take quicker action after the initial complaint that occurred in February 2011. He stated that “letters were exchanged” but that nothing subsequently happened. His suggestion appeared to be that, had the College acted more quickly in response to the initial complaint in February 2011, he might not have committed the further assaults that took place in December 2011. His second question was why, after having been contacted by his lawyers to “provide an expert” for his trial (for exactly what purpose was not made clear), there was no response from the College. His suggestion appeared to be that, had the College been more responsive to this request for an expert, the trial outcome could somehow have been different. However, there were no further particulars given, and no specific evidence as to what specific communications had in fact taken place between the College and either the Former Registrant or his legal counsel. No letters or other documents were tendered evidencing such communications. The Former Registrant providing no specifics or details in his oral testimony.

On cross-examination, the Former Registrant admitted that (1) he had not pursued an appeal of his conviction; and (2) that all of the acts in respect of which he had been charged criminally had occurred during his provision of massage therapy treatment.

## **LAW**

### *Burden and Standard of Proof*

There is no doubt that the College bears the burden, in a professional disciplinary, of proving the factual allegations made against a respondent (in this case, the Former Registrant) which, once proved, allow the Panel to make, among others, a determination that the respondent engaged in professional misconduct, or breached a standard or a bylaw.

The College submitted that the standard of proof applicable to this case, and to all professional disciplinary cases, is the civil law standard of proof on a balance of probabilities, following the Supreme Court of Canada’s decision in *F.H. v. McDougall*, 2008 SCC 53. In 2010, the B.C. Supreme Court confirmed the application of *McDougall* to professional discipline cases in British Columbia: *Kaminski v. Association of Professional Engineers and Geoscientists of BC*, 2010 BCSC 468.

The Panel accepted the College’s submission and directed itself accordingly. The Former Registrant made no submissions on this point (or on any other point of law).

*Definition of “sexual assault” in criminal law*

The College cited the decision of the Supreme Court of Canada in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, for the interpretation of both the physical and mental elements of the term “sexual assault” under the Criminal Code. The College summarized these elements as follows:

“Sexual” assault under the *Criminal Code* occurs when a person (a) commits a requisite kind of physical act with (b) the requisite mental intention:

- a. The requisite physical act is established by proof of three elements; (i) touching, (ii) the sexual nature of the contact (which is determined objectively), and (iii) the absence of consent.
- b. The requisite mental element is only the intention to commit the assault (by touching the complainant).

As stated in *Ewanchuk*, the inclusion of sexual assault in the Criminal Code “expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force” and to “[protect] the personal integrity, both physical and psychological, of every individual”.

The definition of the criminal offence of sexual assault is of some importance in this case, given the convictions of the Former Registrant and the College’s position that these criminal convictions in themselves constituted professional misconduct (this issue is dealt with further below).

*Proof of conviction under section 71 of the Evidence Act*

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

Section 71(5) of the *Evidence Act* provides that:

(5) A certificate containing the substance and effect of the charge and of the conviction or finding of guilt, as the case may be, purporting to be signed by

- (a) the officer having custody of the records of the court in which the offender was convicted or found guilty, or
- (b) a person authorized to act for the officer,

is, on proof of the identity of a person named in the certificate as the offender, sufficient evidence of the conviction of that person or the finding of guilt against that person, without

proof of the signature or of the official position of the person purporting to have signed the certificate.

The Panel found that these criteria for admissibility had been satisfied by Exhibit 3, namely, the Warrant of Committal Upon Conviction and the Probation Order. On this basis, the Panel found that the Former Registrant's conviction had been proved.

Further, the Former Registrant, in his testimony in chief, also admitted his conviction on the five counts of sexual assault, constituting further and independent proof of his conviction.

*"Professional misconduct" under the HPA / Breaches of Bylaw and Standards of Conduct*

The College submitted, and the Panel accepted, that the courts have developed a "common law test for professional misconduct, which encompasses conduct that would reasonably be considered by members of the profession as dishonourable, disgraceful, or unprofessional." The term "professional misconduct" therefore encompasses, in the College's words, "breaches of professional standards not expressly codified in or under bylaws."

The *HPA* defines professional misconduct as follows in section 26:

26 In this part:

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

Section 26 also goes on to define the term "unprofessional conduct" by stating that it "includes professional misconduct"; however, as the section does not define what *else* is included in the term "unprofessional conduct", the Panel has decided to restrict itself to the term "professional misconduct" to avoid any possible ambiguity.

The College also pointed out that, under the College's Bylaw 75, every registrant "must comply" with the College's *Code of Ethical Conduct*. The two sections relied on in particular have been set out above, but are repeated here:

*General duty to patients*

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

*Sexual conduct prohibited*

2. A Registrant shall not  
(a) engage in sexual conduct with a patient ...

## **ANALYSIS, FINDINGS, AND SECTION 39(1) DETERMINATION**

The Panel found that the conviction of the Former Registrant on five counts of sexual assault had been proved, both by the tendering of documents satisfying the *Evidence Act* requirements for proof of a conviction, and also by the Former Registrant's own admission as to the fact of his criminal conviction. The Panel was not specifically asked to consider Mr. Cooper's evidence as evidence of the Former Registrant's conviction, presumably because it was unnecessary to do so in this case.

Because the criminal conviction of the Former Registrant has been proved, the Panel also accepts the factual findings of the trial judge that the Former Registrant touched the breasts, labia, and pubic areas of some or all complainants, that he did so with intent to touch, that the touching was objectively sexual in nature, that no consent was given by any of the complainants to the sexual touching and/or viewing of their bodies, and that the complainants were in a vulnerable position in relation to the Former Registrant.

On the basis of the conviction as proved, and on the basis of its adoption of the factual findings of the trial judge, the Panel has no difficulty in making the determination, pursuant to section 39(1)(c) of the *HPA*, that the Former Registrant committed professional misconduct. This does not mean that every conviction under the *Criminal Code*, no matter what the offense, will automatically constitute professional misconduct in all cases. The nature of the offense must be considered. However, in this case, sexual assault by means of the non-consensual sexual touching of a patient by a massage therapist, during the course of the provision of massage therapy services, unambiguously falls into the category of professional misconduct. In the Panel's view, any right-thinking member of the profession would consider the conduct for which the Former Registrant was criminally convicted to be "dishonourable, disgraceful and unprofessional", and to fall well below any reasonable minimum standard of professional conduct.

Further, in contrast to the criminal law, even the presence of consent (had it existed) would not necessarily have determined the issue in the Former Registrant's favour in the regulatory setting. This is seen most clearly from the *Code of Ethical Conduct*, compliance with which is made mandatory by the College's Bylaw 75. The *Code*, in section 2(a), unambiguously prohibits a massage therapist from engaging in *any* sexual conduct with a patient, regardless of consent. It also prohibits "tak[ing] advantage of a patient's vulnerabilities for the Registrant's sexual ... interest or benefit". In the Panel's view, compliance with these sections of the *Code* is not only made mandatory by the College's Bylaws; these sections also embody and codify the standards of the massage therapy profession. These standards, and these sections of the *Code*, were breached by the Former Registrant.

The judge in the criminal trial made a clear finding (as reflected in the Cooper Memorandum, which was unchallenged by the Former Registrant) that the complainants were in a vulnerable position. The Panel has adopted that finding, and further finds that this vulnerability would

have been particularly pronounced in the case of the 16-year-old complainant. The Panel has no hesitation in finding that the Former Registrant breached sections 1(2) and 2(a) of the *Code of Ethical Code*, and thereby also breached the Bylaws of the College.

The Panel therefore makes the determination, pursuant to section 39(1) of the *HPA*, that for the reasons set out above, the Former Registrant (a) did not comply with a bylaw imposed under the Act, (b) did not comply with a standard imposed under the Act, and (c) committed professional misconduct. Following its determination, the Panel communicated its decision orally to the parties at the hearing, with these written reasons to follow, and invited the parties to proceed to make submissions on penalty, publication and costs.

## **PENALTY, PUBLICATION AND COSTS**

The College submitted that the fundamental purpose of professional discipline is to protect the public: *McKee v. College of Psychologists (BC)*, [1994] 9 W.W.R. 374 (BCCA). Citing *Adams v. Law Society of Alberta*, 2000 ABCA 240, the College drew the Panel's attention to the following passage in particular:

A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

The Panel adopts the above principles from the *McKee* and *Adams* decisions, and notes that it is this "public" aspect of professional discipline that makes it important to proceed in cases such as this one, where the person who committed the misconduct has, in effect, resigned from the profession by not paying his or her annual professional fees. It is vital that a clear message be sent both to the profession and to the public that the conduct engaged in by the Former Registrant is conduct that will bear severe consequences. As the B.C. Court of Appeal said (citing with approval the language of a Law Society discipline panel) in relation to the disbarment of a lawyer:

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

*McGuire v. Law Society of British Columbia*, 2007 BCCA 442

The College cited *Jaswal v. Newfoundland Medical Board* (1996), 42 Admin L.R. (2d) 233, a decision of the Newfoundland Supreme Court that outlined factors to be considered in

determining an appropriate penalty. The Panel considered a number of these factors, which are set out below (substituting the words “massage therapist” for “physician” and “massage therapy” for “medicine”):

- the nature and gravity of the proven allegations;
- the number of times the offence was proven to have occurred;
- the role of the massage therapist in acknowledging what had occurred;
- whether the offending massage therapist had already suffered other serious financial or other penalties as a result of the allegations having been made;
- the impact of the incident on the offended patient;
- the need to promote specific and general deterrence and, thereby, to protect the public and ensure the safe and proper practice of massage therapy;
- the need to maintain the public's confidence in the integrity of the massage therapy profession;
- the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct; and
- the range of penalty imposed in other similar cases.

The nature of the conduct alleged and proven against the Former Registrant is extremely serious. He was convicted of five counts of sexual assault against vulnerable female patients. One of those patients was 16 years of age. The conduct occurred over a span of time, with the first incident taking place in February 2011 and the latter four incidents in December 2011.

The Former Registrant acknowledged the fact of his convictions and did not attempt to dispute them or excuse his conduct, which the Panel considered to weigh in his favour. On the other hand, the Former Registrant did not clearly acknowledge the specifics of his conduct (as distinct from the fact of his criminal conviction), nor did he express any remorse or regret for the impact his conduct may have had on his victims. This was in contrast to his evidence regarding the several negative effects on him of having been criminally convicted of sexual assault, and being placed on the sex offender registry.

Regarding the effects of the Former Registrant's conviction on him, he testified (as outlined above) that it had severely curtailed his economic opportunities, and that apart from some freelance “bodywork” that he had engaged in for a time, he was making a living as a part-time

pizza delivery driver. He stated even many jobs that people might think of as “minimum wage, dead end jobs” were closed to him. In his closing submission, he stated that his time in prison had taken care of any need for specific deterrence, and that as a sexual offender he had been threatened with beatings, stabbing and rape while incarcerated. In terms of his status as a (former) registrant of the College, he agreed that the revocation of his registration would have been an appropriate remedy for his conduct, had he been a registrant at the time of the hearing.

The Former Registrant’s evidence as to the serious economic impact on him of his criminal conviction and his status as a registered sexual offender was not challenged by the College, and was accepted by the Panel.

There was no evidence presented as to the impact of the Former Registrant’s sexual assaults on his victims. As mentioned above, the Former Registrant did not make any statement – whether as evidence or in his submissions – suggesting that he had given thought to the impact of his conduct on his victims. The Panel was also somewhat troubled by the suggestions made by the Former Registrant that (1) had the College responded more quickly to the February 2011 complaint, it could have deterred his similar conduct in December 2011; and (2) had the College responded to his legal counsel’s request for an expert witness, this could have led to a different outcome (presumably, an acquittal) at the criminal trial. The Panel was unable to avoid the impression that the Former Registrant was not inclined to take complete responsibility either for his own conduct or for the effect of that conduct on the complainants.

The most important factors to consider in terms of penalty, in the Panel’s view, were the related factors of general deterrence, the need to maintain the public’s confidence in the integrity of the massage therapy profession, and the degree to which the Former Registrant’s conduct fell outside the range of permitted conduct. In this regard, there is no doubt that the conduct fell far outside the range of permissible conduct. The non-consensual sexual touching of a patient by a massage therapist is both a criminal offense and a very serious breach of trust on the part of the therapist. Conduct of this nature demands the imposition of a significant penalty that will convey both to the profession and to the public that there can be and will be no tolerance for intentional, non-consensual sexual touching of patients by a massage therapist, even where such touching is disguised as inadvertent or accidental contact that occurs during the course of massage therapy.

Having determined that the Former Registrant committed, among other things, professional misconduct, the Panel may order one of the penalties set out in section 39(2) of the *HPA*:

- (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:
  - (a) reprimand the respondent;
  - (b) impose limits or conditions on the respondent's practice of the designated health profession;

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

The College submitted that in this case, given that the Former Registrant is no longer a registrant of the College, the penalties set out in subparagraphs (b), (c), (d) and (e) are unavailable to this Panel. The Panel agrees with this submission, as it finds that each of the aforementioned subsections assume that a respondent is currently registered, which the Former Registrant obviously is not. The Panel notes, however, that this creates a significant discrepancy between the penalties that can be ordered in respect of a current as opposed to a former registrant, even if the conduct at issue is equally serious in both cases. Had the Former Registrant continued to be a registrant of the College at the time of this hearing, and had the same findings of fact have been made, the Panel would have considered the appropriate penalty to be an order cancelling the respondent's registration, pursuant to subparagraph 39(2)(e) of the *HPA*. Having made that order, however, it would also then have been able to make one or more orders under section 39(8) of the *HPA*, which states as follows (emphasis in bold added):

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

- (a) impose conditions on the lifting of the suspension or the eligibility to apply for reinstatement of registration,
- (b) direct that the lifting of the suspension or the eligibility to apply for reinstatement of registration will occur on
  - (i) a date specified in the order, or
  - (ii) the date the discipline committee or the board determines that the respondent has complied with the conditions imposed under paragraph (a), and
- (c) impose conditions on the respondent's practice of the designated health profession that apply after the lifting of the suspension or the reinstatement of registration.

In other words, had the Former Registrant been a registrant at the time of this hearing, the Panel could not only have revoked his registration, but could also have imposed conditions on his eligibility to apply for reinstatement (and enforced those conditions), and could have imposed

continuing conditions on practice even in the event that reinstatement should occur at some future date. While the likelihood of reinstatement appears low – and the Former Registrant testified that he had no intention of ever reapplying to be a registered massage therapist – the provisions of subparagraph (8) provide an additional degree of public protection that is unavailable where, as in this case, a registrant has allowed his or her registration to lapse prior to a hearing. There would appear to be no principled reason for this discrepancy. Although the Panel is unable to say with certainty, in the absence of submissions from the parties, what orders it would have made under section 39(8) if it had had the power to do so, the following are examples of possible orders under that section that the Panel would have at least considered seriously:

- A direction that the Former Registrant would be unable even to apply for reinstatement for a period of at least ten (10) years;
- A condition that any reinstatement application be accompanied by a medical opinion from a psychiatrist, registered psychologist, or other professional specializing in the treatment of sexual offenders, certifying that the Former Registrant could be a considered a very low risk to re-offend;
- A condition that, following reinstatement (if in fact reinstatement were to be ordered at some future date), the Former Registrant continue to undergo psychological counselling, and provide consent to have his treating professional report periodically to the College;
- A condition that, if reinstated at some future date, the Former Registrant treat female patients only in the presence of a female chaperone.

Because none of the above conditions, directions and orders are available in this case, the College submitted that the penalties available to the Panel were either or both of a reprimand pursuant to section 39(2)(a), and a fine pursuant to section 39(2)(f) of the Act. Section 71 of the Bylaws provides that the maximum amount of a fine the Panel may order under section 39(2)(f) of the Act is \$50,000. The College submitted that the appropriate penalty in this case was a reprimand and a fine in the amount of \$32,000.

With some reluctance, the Panel accepted that the imposition of a significant fine was the only means by which it could accomplish the objectives of specific and general deterrence, maintenance of public confidence, and denunciation of the Former Registrant's serious misconduct. The Panel has declared above that it would have cancelled the Former Registrant's registration had that been an option open to it. The College cited a number of cases involving similar conduct, but only one – the *Kit Wong (Re)* decision of the Discipline Committee of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of B.C. – appears to have involved the imposition of a significant fine (\$10,000), in addition to a reprimand and revocation of registration. In *Kit Wong (Re)*, the registrant had engaged in professional misconduct and contravened practice standards by “touching one female patient's breast and

genitalia in a sexual nature and kissing the same female patient on the cheek, by touching a second female patient's breast in a sexual nature, by touching a third female patient's genitalia in a sexual nature and by brushing a fourth female patient's genitalia in a sexual nature".

In the Panel's view, the case before it justified a substantially greater fine than the fine imposed in *Kit Wong (Re)* for the following reasons: (1) cancellation of registration, the most serious penalty that can be imposed in a disciplinary proceeding, is not available to be imposed on the Former Registrant, so any fine imposed must be in an amount that reflects the gravity and seriousness of the Former Registrant's conduct; (2) it must be clear to any member of the profession who may face similar charges in the future that resigning one's registration, or allowing it to lapse prior to a hearing, is not a means by which a serious disciplinary consequence can be avoided; (3) in this case, the number of victims is greater than in *Kit Wong (Re)* (five rather than four), and one of the Former Registrant's victims was 16 years of age at the time of the assault.

At the same time, the Panel must consider the mitigating factors, including the Former Registrant's lack of discipline history with the College, and the fact that he has already incurred criminal sanctions and has served a period of incarceration and probation. There is also the fact that, as the Former Registrant testified, the economic impact on him of his conviction and his status as a registered sex offender is serious, and is likely to remain so for some time. The Panel also noted that the Former Registrant took a co-operative and non-contentious approach to the hearing although, as mentioned above, it would have liked to see a greater assumption of responsibility and a clearer admission by the Former Registrant of his actual conduct and its likely or at least possible effects on the victims of that conduct.

Weighing the aggravating and mitigating factors against each other, and having regard to the purposes for which the penalty would be imposed as well as to the penalties available in this case, the Panel concluded that the appropriate penalty was (1) a reprimand, and (2) a fine in the amount of \$25,000.

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

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

## **ORDER OF THE PANEL**

For the reasons set out above, and having determined pursuant to section 39(1) of the Act that the Former Registrant did not comply with a bylaw of the College (mandating compliance with sections 1(2) of 2(a) of the *Code of Ethical Conduct*); did not comply with the standards of the massage therapy profession; and committed professional misconduct, the Panel hereby orders THAT:

1. The Former Registrant be and hereby is reprimanded;
2. The Former Registrant be and hereby is fined the amount of \$25,000;
3. Public notification of this determination and order shall be made in accordance with section 39.3 of the Act;
4. There will be no order as to costs.

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

REASONS FOR DECISION, DETERMINATION AND ORDER of the Panel:



Langley, BC

June 26, 2015

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Perminder S. Tung (Chair)

Place

Reissue Date



Telkwa, BC

June 26, 2015

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Catherine Ryan, RMT

Place

Reissue Date



Vancouver, BC

June 26, 2015

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Rachel Shiu, RMT

Place

Reissue Date