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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Michael Henniger, RMT

(the "Respondent")

WRITTEN REASONS

Date and Place of Discipline Hearing:	November 30, 2020 Charest Reporting (Zoom)
Panel of the Discipline Committee:	Arnold Abramson, Chair Carol Williams, Public Member Rachel Shiu, RMT
Counsel for the College:	Elizabeth Allan
Counsel for the Respondent:	No one appearing
Independent Counsel for the Panel:	Lynsey Gaudin

Introduction and Background

1. On November 30, 2020 a panel of the Discipline Committee of the College of Massage Therapists of British Columbia (the "**Panel**") convened via Zoom video link to hear and consider evidence regarding the alleged conduct and competence of Michael Henniger, RMT, pursuant to s. 38 of the *Health Professions Act,* RSBC 1996 c 183 (the "**HPA**" or the "**Act**", and the "**Discipline Hearing**").

2. An Affidavit of Service of a process server was filed affirming that Mr. Henniger was personally served on October 5, 2020, with a copy of the Citation dated August 5, 2020.[1] The Citation set out the hearing date as well as the allegations against Mr. Henniger. The allegations are as follows:

    a. he failed to adequately communicate the treatment plan to treat the patient's pectoral muscles, including that he would treat at or near the patient's breasts'

    b. he failed to obtain informed consent to treat at or near the patient's breasts;

    c. he failed to communicate the intended depth of pressure used;

    d. after the patient said words to the effect of "it is really sore, can we go lighter?", he stated words to the effect of "pain is good" and "it will fix it";

    e. he failed to adequately adjust treatment and communicate with the patient after she expressed that she was experiencing pain; and further, or in the alternative,

    f. he failed to keep adequate clinical records in relation to the treatment delivered to the patient on or about October 31, 2017.[2]

3. As described in more detail below, the allegations against the Respondent concern a single incident alleged to have occurred on October 31, 2017, in the course of Mr. Henniger providing massage therapy services to [redacted] (the "**Complainant**" and the "**October 31 Treatment**", respectively). The October 31 Treatment was the first and only time the Respondent provided massage services to the Complainant.

[1] Affidavit of Personal Service of Avtar Bains dated October 9, 2020 [marked as "**Exhibit P2"**].
[2] College of Massage Therapists of British Columbia, Citation regarding Michael Henniger, dated August 5, 2020 [marked as "**Exhibit P1**"].

4. The Respondent has been a registrant of the College since 2014. At the time material to the allegations in the Citation, the Respondent was a practicing RMT at Turning Point Wellness Center ("**Turning Point**") located at 3571 Chatham Street, Richmond, British Columbia. Since initiation of these discipline proceedings, the Respondent has applied for non-practicing status with the College.

5. If found guilty of some or all of the allegations in the Citation, the Panel must determine whether such conduct amounted to a breach of the HPA, the CMTBC Bylaws, the CMTBC Code of Ethics and/or the CMTBC Standards of Practice and whether or not the same amounts to a professional misconduct and/or unprofessional conduct.

6. This Discipline Hearing is only for the purpose of determining liability. A separate and subsequent hearing on the matter of appropriate penalty will only occur if there is a finding of guilt on one or more of the enumerated allegations.

Procedural Matters

A. Preliminary Order

7. Further to the Preliminary Order of the Panel dated October 22, 2020, the Discipline Hearing was held by way of video-conference; was held in private; and the College was permitted to adduce certain of its evidence by affidavit, with all witnesses being available to attend for cross-examination and/or questioning if required.

B. Hearing Proceeding in the Absence of the Respondent

8. The Discipline Hearing was called to order at 10:00 a.m., at which time neither the Respondent or legal counsel for the Respondent were present. The Panel adjourned the proceeding for 10 minutes to allow the Respondent and/or his legal counsel an opportunity to appear. No one appeared.

9. The College argued the Discipline Hearing should proceed in the Respondent's absence. In support, the College filed evidence that Mr. Henniger had sufficient notice of the Discipline Hearing, including that:

   a. the Citation was personally served upon Mr. Henniger;[3]

   b. Mr. Henniger was provided notice and details to attend the Pre-Hearing Conference;[4]

   c. Mr. Henniger was notified of the Pre-Hearing Order issued by the Panel;[5]

   d. Mr. Henniger was provided copies of all materials the College intended to rely upon at the Discipline Hearing;[6] and

   e. Mr. Henniger was provided notice and details to attend the Discipline Hearing via Zoom.[7]

10. The College also submitted correspondence from Mr. Henniger to the College, dated November 17, 2020, advising that he did not plan to attend the Discipline Hearing, saying "but in no way is this an admission of guilt."[8]

11. Section 38(5)(a) of the HPA permits a discipline committee to proceed with a hearing in the absence of a respondent "on proof of receipt of the citation by the respondent".

12. The Panel accepts that the Respondent was provided adequate notice of the Discipline Hearing as required by s. 38(5)(a) of the Act. Beyond proof of service of the Citation (see Exhibit P2), the College was diligent in keeping Mr. Henniger appraised of the proceedings, as well as his rights to attend and participate. The Panel accepts Mr. Henniger's correspondence of November 17, 2020, as further proof that he had knowledge of the Hearing and chose not to participate.

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[3] Exhibit P2, *supra* note 1.
[4] Affidavit of Gillian Morgan dated October 21, 2020, at Exhibit A [marked as "**Exhibit P3"**].
[5] Affidavit of Elaine Gordon dated October 23, 2020, at Exhibits A and E [marked as "**Exhibit P4"**].
[6] *Ibid.*, at Exhibits F and G.
[7] *Ibid.*, at Exhibit J.
[8] *Ibid.*, at Exhibit I.

13. The Panel ordered that the Discipline Hearing proceed in the absence of the Respondent.

C. Plea

14. The Respondent's absence in no way constitutes an admission or inference of guilt. A plea of not guilty to all allegations in the Citation was entered on behalf of the Respondent.

D. Onus

15. The College bears the onus of proving the allegations in accordance with the standard of proof discussed in the oft-cited case of *F.H. v McDougall*.[9] The standard of proof to be applied by the Panel is a balance of probabilities, which means that the Panel must be reasonably satisfied that misconduct took place based on the preponderance of evidence.

Relevant Statutory Provisions, CMTBC Bylaws and CMTBC Code of Ethics

16. The allegations in the Citation engage several statutory provisions, CMTBC Bylaws and provisions of the CMTBC Code of Ethics. They are reproduced here for reference.

17. Section 39 of the HPA sets out the determinations which the Panel may make following the Discipline Hearing:

> **39** (1)On completion of a hearing, the discipline committee may, by order, dismiss the matter or determine that the respondent
>
> (a)has not complied with this Act, a regulation or a bylaw,
>
> (b)has not complied with a standard, limit or condition imposed under this Act,
>
> (c)has committed professional misconduct or unprofessional conduct,
>
> (d)has incompetently practised the designated health profession, or
>
> (e)suffers from a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs their ability to practise the designated health profession.

[9] 2008 SCC 53, at paras 40-46.

18. Section 26 of the HPA defines "unprofessional conduct" and "professional misconduct", as follows:

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

19. An RMT's legal obligations regarding patient consent (for individuals who have attained the age of majority) are further set out in the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, Ch 181 (the "**Consent Act**"), the relevant provisions being:

> **Consent rights**
>
> **4** Every adult who is capable of giving or refusing consent to health care has
>
> (a) the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,
>
> (b) the right to select a particular form of available health care on any grounds, including moral or religious grounds,
>
> (c) the right to revoke consent,
>
> (d) the right to expect that a decision to give, refuse or revoke consent will be respected, and
>
> (e) the right to be involved to the greatest degree possible in all case planning and decision making.
>
> **General rule — consent needed**
>
> **5** (1) A health care provider must not provide any health care to an adult without the adult's consent except under sections 11 to 15.
>
> (2) A health care provider must not seek a decision about whether to give or refuse substitute consent to health care under section 11, 14 or 15 unless he or she has made every reasonable effort to obtain a decision from the adult.
>
> **Elements of consent**
>
> **6** An adult consents to health care if
>
> (a) the consent relates to the proposed health care,

(b) the consent is given voluntarily,

(c) the consent is not obtained by fraud or misrepresentation,

(d) the adult is capable of making a decision about whether to give or refuse consent to the proposed health care,

(e) the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about

(i) the condition for which the health care is proposed,

(ii) the nature of the proposed health care,

(iii) the risks and benefits of the proposed health care that a reasonable person would expect to be told about, and

(iv) alternative courses of health care, and

(f) the adult has an opportunity to ask questions and receive answers about the proposed health care.

20. At the time material to the events set out in the Citation, the CMTBC Bylaws, Schedule "D" – Standards of Practice, held:

Patient assessment

1 A Registrant must

(a) formulate a treatment plan, […]

Treatment planning and patient management

2 A Registrant must

(a) design and implement a management and treatment plan based on clinical findings, […]

Informed Consent

3 A Registrant must

(a) ensure the patient is fully informed regarding assessment and treatment, and provides consent,

(b) discontinue treatment if the patient withdraws consent, and

(c) monitor and work within the patient's pain threshold relative to efficacy of treatment.

…

Communication and relationships

10 A Registrant must

(a) utilize professional oral and written communication.

21. The CMTBC Bylaws, Schedule "E" addresses the standard for patient records:

Record keeping requirements

3 (1) A Registrant must keep

a. a clinical record for each patient (the "Health Care Record") containing …

(vii) all dates of attendance together with sufficient information to clearly explain why the patient came to see the Registrant and what the Registrant learned from both the patient's current medical history and the assessment, including, but not limited to

(A) information relevant to the patient's condition,

(B) clinical impressions, and

(C) clinical findings and periodic reassessment findings,

(viii) a clear record of the specifics of

(A) any treatment plan, including any revisions made thereto,

(B) treatment provided and the patient's response to such treatment,

(C) any follow-up plan, and

(D) any recommendation or instructions for patient self-care related to the patient's condition, …

22. The salient provisions of the CMTBC Code of Ethics include:

Duty to Patients – General Duties

2. Massage therapists must act in the best interest of the patient

…

4. Massage therapists must treat the patient with respect and uphold the patient's dignity.

[…]

Duty to Patients – Treatment

9. RMTs must obtain informed consent for therapeutic services.

[…]

Duty to Society

25. RMTs must comply with all applicable laws and regulations relating to the practice of massage therapy.

Decision and Evidence

23. In reaching its decision, the Panel considered the evidence presented by the College in its entirety. The College presented five witnesses who provided testimony by way of Affidavit, including [redacted][10], Elaine Gordon[11], [redacted][12], Kate Parisotto[13] and Gillian Morgan.[14]

24. Mark Finch, RMT, also provided *viva voce* expert evidence testimony on behalf of the College. To first qualify Mr. Finch as an expert witness, the College examined Mr. Finch respecting his credentials and experience as an RMT. Mr. Finch attained his Diploma in Therapeutic Massage from the New Zealand College of Massage in 1996 and has had 24 years of clinical massage experience. He has been a member in good standing with the CMTBC since 2012 and currently works as a fulltime RMT in British Columbia.

25. Mr. Finch testified that he has completed various continuing education courses, including certifications in Structural Integration, Neuromuscular Therapy (also known as Trigger-point Therapy) and Visceral Manipulation (techniques focusing on connective tissues). Mr. Finch also teaches continuing education courses to RMTs in British Columbia.

[10] Affidavit of [redacted] affirmed November 8, 2020[marked as "**Exhibit P5**"].
[11] Exhibit P4, *supra* note 5.
[12] Affidavit of [redacted] affirmed November 10, 2020 [marked as "**Exhibit P6**"].
[13] Affidavit of K. Parisotto affirmed November 5, 2020 [marked as "**Exhibit P7**"].
[14] Exhibit P3, *supra* note 4.

26. For a witness to be qualified as an expert, the witness must be someone who has acquired special knowledge about the subject matter of the opinion evidence through study or experience.[15] Qualification of a person as an expert witness may be refused where that person has insufficient familiarity with the standards of practice that apply to the particular profession at issue.[16] These principles have been accepted by tribunals in the disciplinary context.[17]

27. The Panel was satisfied with Mr. Finch's qualifications as an expert in these proceedings. The Panel found Mr. Finch has sufficient familiarity with the standards of practice of an RMT to offer opinion on proper RMT treatment standards and conduct, and was of assistance to the Panel in assessing details outside of their knowledge and experience. The Panel qualified Mr. Finch to give opinion evidence on the following:

> anatomy, massage therapy techniques and standards for patient communication during the course of treatment.

28. Mr. Finch's expert report was submitted into evidence by the College (the "**Expert Report**").[18]

29. Any failure to specifically refer to a piece of evidence, testimony, or a document, does not suggest that it has not been considered by the Panel.

30. This Panel is not bound by the rules of evidence that apply in court actions. Nonetheless, the Panel must assess any hearsay evidence submitted to determine whether it is reliable, and thereafter assess the weight to be placed on the evidence.

31. The Respondent having failed to appear, the Discipline Hearing proceeded on the uncontested evidence of the College. The Panel must assess the probative value and weight to be afforded to any evidence. In this respect, the Panel notes that portions of

[15] *R v Mohan*, [1994] SCJ No 36, [1994] 2 SCR 9, at para 27.
[16] *Chen v Ross*, 2012 BCSC 1605, at paras 46-52.
[17] See, for e.g., *College of Nurses of Ontario v Clitheroe*, 2008 CarswellOnt 11457 (Ontario College of Nurses Discipline Committee).
[18] Expert Report of Mark Finch dated November 13, 2020 [marked as "**Exhibit P8**"].

the Affidavit evidence submitted by the College included statements by various affiants containing hearsay, double hearsay and, remarkably, even a single instance of triple hearsay. The Panel views such evidence as unsatisfactory, and otherwise attributes no weight to such statements. In coming to its determination on the allegations in the Citation , the Panel has considered only evidence it views as clear, cogent and convincing.

32. It should be noted that the College does not submit the original complaint[19] for the truth of its contents (or otherwise as a similar prior statement); instead, the College suggests it is narrative evidence only. The Ontario Divisional Court discussed the use of narrative evidence in a disciplinary proceeding in *Yar v College of Physicians and Surgeons of Ontario*:

> 42 The appellant suggests that the Discipline Committee considered inadmissible prior consistent statements in the testimony of the witnesses including the nurses and Dr. Chu.
>
> 43 We disagree.
>
> 44 The prior statements referred to by the appellant are not inadmissible prior consistent statements. The statements made by the witnesses are part of the narrative providing background information and context to the incidents involving H.K. and M.L. and they explain why the Hospital reported its concerns to the College. This is admissible narrative evidence. The witnesses were present for cross-examination. No objection was made with respect to the admissibility of this evidence during the hearing.[20]

33. In this way, the Panel accepts the original complaint as narrative assistance to the extent it assists in understanding the context of other evidence.

34. The written reasons below will deal with each allegation separately, outlining the relevant evidence and the Panel's findings in relation to each charge.

[19] Exhibit P7, *supra* note 13.
[20] [2009] OJ No 1017, 174 ACWS (3d) 1199, at paras 42-44.

Allegation One: Mr. Henniger failed to adequately communicate the treatment plan to treat the patient's pectoral muscles, including that he would treat at or near the patient's breasts.

35. The first allegation concerns whether or not Mr. Henniger adequately communicated the treatment plan to treat the Complainant's pectoral muscles, including that he would treat at or near her breasts.

36. The College submits that Mr. Henniger's conduct amounts to a breach of ss. 1 and 2 of the CMTBC Bylaws, Schedule "D", and ss. 9 and 25 of the CMTBC Code of Ethics.

37. The evidence of the College is that, upon entering the treatment room at the October 31 Treatment, the Complainant and Mr. Henniger had a brief discussion about pain the Complainant was experiencing. The Complainant explained she had "tightness, soreness and chest pain at my sternum" and told him that she wanted massage services to "help release the pressure and tightness."[21] From this discussion, the Complainant understood the "treatment plan" was "that he was going to treat my upper body and focus on my shoulders and around my sternum and collarbone as that is where I was experiencing discomfort."[22] Pressure or "the Complainant's expectation for pressure" was never discussed.[23]

38. The Complainant also deposes that when Mr. Henniger began treating near her breasts, Mr. Henniger did not communicate with her.[24] Notably, the Complainant deposes that Mr. Henniger *never* asked her whether he could massage near her breasts – neither before, during or after the October 31 Treatment.[25]

39. Mr. Finch's opinion evidence is that Mr. Henniger's clinal records (the "**Treatment Records**") were inadequate based partially on the fact they contained no mention of a

[21] Exhibit P5, *supra* note 10, at para 7.
[22] *Ibid*., at paras 7-8.
[23] *Ibid*., at para 15.
[24] *Ibid*., at para 18.
[25] *Ibid*.

treatment plan in any respect, including no notation of treatment to the Complainant's pectoral muscles.[26]

40. As the Respondent was neither present nor did he submit evidence through legal counsel, no evidence was provided to contradict the above evidence presented by the Complainant or the testimony of Mr. Finch. The Panel must nonetheless assess the probative value and weight to be afforded to the above evidence.

41. The Panel finds the Complainant's evidence credible. On the above evidence, the Panel finds Mr. Henniger did not formulate and/or design and implement a treatment plan with the Complainant at the October 31 Treatment, or otherwise adequately communicate a treatment plan with the Complainant. He did not specifically communicate a plan to treat her pectoral muscles, and at no point – even following the Complainant expressing discomfort and pain to the treatment[27] – did Mr. Henniger communicate that he would treat at or near her breasts.

42. Further, while the standard for clinical records is not perfection, the Panel views Mr. Finch's evidence as persuasive regarding the lack of existence of a treatment plan. The Panel finds it is more likely than not that the Treatment Records do not indicate a treatment plan because Mr. Henniger did not communicate a treatment plan to the Complainant, as the Affidavit of [redacted]. indicates in paragraphs 8, 15, 17 and 18 (see, Exhibit P5), or engage with the Complainant to design and implement any related plan.

43. It is a Standard of Practice that an RMT formulate a treatment plan as well as "design and implement" how to manage that plan with the patient. Communication between the RMT and the patient is a necessary step to establishing a treatment plan. The Panel finds Mr. Henniger failed to adequately formulate and communicate the treatment plan to treat

[26] See, Exhibit P8, *supra* note 18, at p 6.
[27] Exhibit P5, *supra* note 10, at para 17.

the patient's pectoral muscles, including that he would treat at or near the patient's breasts. The Respondent is guilty of this charge.

Allegation Two: Mr. Henniger failed to obtain informed consent to treat at or near the patient's breasts.

44. The second allegation concerns whether or not Mr. Henniger obtained informed consent to treat at or near the Complainant's breasts at the October 31 Treatment. The College argues Mr. Henniger's conduct amounts to a breach of s. 3 of the CMTBC Bylaws Schedule "D",[28] and ss. 9 and 25 of the CMTBC Code of Ethics.

45. It is the Complainant's evidence that, at no point before, after or during the October 31 Treatment did Mr. Henniger ask whether he could massage near her breasts.[29] When Mr. Henniger began treating near the Complainant's breasts, the evidence is that the Complainant expressly told Mr. Henniger she was experiencing pain in her sternum and that she was not expecting him to touch her in the way he was.[30] Despite this verbal cue, Mr. Henniger failed to adjust his treatment.[31]

46. The Complainant deposed to feeling both physically and emotionally uncomfortable for the remainder of the day following the October 31 Treatment.[32]

47. Mr. Finch's expert evidence is that consent is usually gained when an RMT formulates a treatment plan with the patient. This initial consent is not always enough, however; Mr. Finch said that treatment to the breastbone or sternum (being a potentially vulnerable or sexualized area) requires "an additional consent process" to ensure that the patient understands and continues to consent to treatment.[33] He said this process should include

[28] Note: This section has since been repealed. However, the relevant provision applicable to the Respondent's conduct on October 31, 2017, remains s. 3 of the CMTBC Bylaws.
[29] Exhibit P5, *supra* note 10, at para 18.
[30] *Ibid.*, at para 17.
[31] *Ibid.*, at paras 17-18.
[32] *Ibid.,* at para 22.
[33] Exhibit P8, *supra* note 18, at pp 2-3.

"an opportunity to withdraw consent"[34] and, importantly, when a patient requests an adjustment to treatment, that patient is withdrawing consent for the treatment on that area with that intensity.[35] In Mr. Finch's opinion, continuing treatment in this scenario without adjustment could be considered continuing treatment without informed consent.[36]

48. Mr. Finch's evidence is that "there should be no intentional contact with breast tissue" when treating pectoral muscles.[37] While incidental or unavoidable contact with the breasts may occur depending what treatment is being offered, what position the patient is in or the anatomy of the patient, this situation should be communicated between RMT and patient within the process of consent.[38]

49. As the Respondent was neither present nor did he submit evidence through legal counsel, no evidence was provided to contradict the above evidence presented by the Complainant. The Panel must nonetheless assess the probative value and weight to be afforded to the above evidence.

50. A registrant's obligation to obtain a patient's informed consent was, at the material time, set out at s. 3(a)-(c) of the CMTBC Bylaws, Schedule "D". The relevant provisions require a patient provide consent, as well as the requirement that a registrant discontinue treatment if the patient withdraws consent (see, s. 3(b)). An RMT's legal obligations regarding patient consent are further set out in the Consent Act, including the right of every adult to refuse consent to health care on any grounds (see, s. 4(a)).

51. The Panel has already found that Mr. Henniger failed to communicate a treatment plan to the Complainant, including that treatment would include massage at or near her breasts. Part and parcel with this failure is that Mr. Henniger did not obtain the

[34] *Ibid.,* at p 3.
[35] *Ibid.,* at pp 3-4 [emphasis added].
[36] *Ibid.*
[37] *Ibid.*, at p 5 [emphasis added].
[38] *Ibid.*

Complainant's consent to treat at or near her breasts. The Panel finds Mr. Henniger failed to obtain any (let alone "adequate") consent from the Complainant in relation to treatment at or near her breasts.

52. Even if Mr. Henniger had obtained initial consent, which this Panel has concluded on a balance of probabilities that he had not, the need to obtain on-going consent, or re-establish consent once broken, is relevant in the circumstances. The Panel finds Mr. Henniger not only failed to obtain initial, general consent to treat near the Complainant's breasts, but that Mr. Henniger failed to re-establish consent following a clear verbal direction from the patient wherein consent was withdrawn.

53. The Panel finds Mr. Henniger failed to obtain informed consent to treat at or near the Complainant's breasts at the October 31 Treatment. The Respondent is guilty of this charge.

Allegation Three: Mr. Henniger failed to communicate the intended depth of pressure used.

54. The third allegation is whether or not Mr. Henniger communicated the intended depth of pressure used in the October 31 Treatment. The College argues Mr. Henniger's conduct amounts to a breach of s. 3(a) of the CMTBC Bylaws, Schedule "D" (at the relevant time), which held that registrants must ensure patients have provided informed consent to treatment.

55. The College's evidence is that Mr. Henniger never discussed pressure, or her expectation for pressure, with the Complainant at the October 31 Treatment.[39] Further, Mr. Henniger did not ask the Complainant if the technique or the pressure being used was acceptable.[40]

56. As the Respondent was neither present nor did he submit evidence through legal counsel, no evidence was provided to contradict the above evidence presented by the

[39] Exhibit P5, *supra* note 10, at para 15.
[40] *Ibid.,* at para 12.

Complainant. The Panel must nonetheless assess the probative value and weight to be afforded to the above evidence.

57. The Panel finds Mr. Henniger failed to communicate the intended depth of pressure to be used to treat the Complainant at the October 31 Treatment. The Respondent is guilty of this charge.

Allegation Four: Mr. Henniger, after the patient said words to the effect of "it is really sore, can we go lighter?", stated words to the effect of "pain is good" and "it will fix it".

58. The fourth allegation concerns statements allegedly made by Mr. Henniger in the course of the October 31 Treatment, particularly that, after the Complainant said words to the effect of "it is really sore, can we go light?", Mr. Henniger stated words to the effect of "pain is good" and "it will fix it".

59. The College argues Mr. Henniger's conduct amounts to a breach of ss. 3(b), (c) and 10(a) of the CMTBC Bylaws, Schedule "D", as well as ss. 2, 4 and 25 of the CMTBC Code of Ethics.

60. The College's evidence is that, during the course of treatment at the October 31 Treatment, the Complainant told Mr. Henniger that where he was touching was really sore, and asked if he could go lighter.[41] To this, Mr. Henniger replied words to the effect of "pain is good" and "the pain will fix it".[42] Following this expression of discomfort, Mr. Henniger said words to the effect of "it will get worse before it gets better".[43]

61. As the Respondent was neither present nor did he submit evidence through legal counsel, no evidence was provided to contradict the above evidence presented by the Complainant. The Panel must nonetheless assess the probative value and weight to be afforded to the above evidence.

[41] *Ibid.*, at para 12.
[42] *Ibid.,* at para 13.
[43] *Ibid.,* at para 14.

62. The Panel finds Mr. Henniger did make the statements set out in the fourth allegation, or words to their effect, to the Complainant during the October 31 Treatment and that these amounted to a failure to continue treatment in the best interest of the Complainant. The Panel further finds that these statements by Mr. Henniger were unprofessional in that they disregarded and invalidated the Complainant's expression of discomfort and request for a modification to treatment. In doing so Mr. Henniger breached ss. 3(b), (c) and 10(a) of the CMTBC Bylaws, Schedule "D", as well as ss. 2, 4 and 25 of the CMTBC Code of Ethics. The Respondent is guilty of this charge.

Allegation Five: Mr. Henniger failed to adequately adjust treatment and communicate with the patient after she expressed that she was experiencing pain.

63. The fifth allegation in the Citation concerns whether or not Mr. Henniger adequately adjusted treatment and communicated with the Complainant after she expressed that she was experiencing pain. The College argues Mr. Henniger's conduct amounts to a breach of ss. 3(b) and (c) of the CMTBC Bylaws, Schedule "D", as well as ss. 2, 4 and 25 of the CMTBC Code of Ethics.

64. The College's evidence is that the Complainant made two expressions of pain to Mr. Henniger during the October 31 Treatment:

    a. Firstly, when Mr. Henniger was treating the Complainant's right collarbone and armpit area, the Complainant told Mr. Henniger that where he was touching was really sore, and asked if he could go lighter.[44]

    b. Secondly, when Mr. Henniger was treating near the Complainant's breasts, the Complainant told Mr. Henniger that she had pain in her sternum and that she was not expecting him to touch her in the way he was.[45]

[44] *Ibid.,* at para 12.
[45] *Ibid.,* at para 17.

Following each of the above expressions of pain, Mr. Henniger continued treating the Complainant's body in the same areas and using the same amount of pressure.[46]

65. The expert evidence of Mr. Finch is that pain is an experience. He cited the definition provided by the International Association for the Study of Pain (IASP) in this regard, which holds that pain is "[a]n unpleasant sensory and emotional experience associated with, or resembling that associated with, actual or potential tissue damage … This experience is unique to the individual"[47], and opined that RMTs must respect a patient's experience of pain.[48]

66. Mr. Finch said RMTs need to be responsive to both verbal and non-verbal communication from the patient regarding pain. For example, asking "is that OK", referencing a pain scale of 1-10, and being aware of non-verbal cues such as bracing, breathing changes, the patient becoming tense or sweating, or pupil dilation.[49] He opined it was inconsistent with expected standards for an RMT to continue treatment without adjustment (whether through communication or a change in the treatment pressure) after a patient expresses pain or discomfort.[50]

67. As the Respondent was neither present nor did he submit evidence through legal counsel, no evidence was provided to contradict the above evidence presented by the Complainant. The Panel must nonetheless assess the probative value and weight to be afforded to the above evidence.

68. On the evidence, the Panel can make no conclusion other than that Mr. Henniger failed to adjust treatment and failed to communicate adequately with the Complainant following her expressions of pain at the October 31 Treatment. The Respondent is guilty of this charge.

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[46] *Ibid.,* at paras 14, and 17-18.
[47] Exhibit P8, *supra* note 18, at p 3.
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*, at p 4.

Allegation Six: Mr. Henniger failed to keep adequate clinical records in relation to the treatment delivered to the patient on or about October 31, 2017.

69. The last allegation in the Citation concerns whether or not Mr. Henniger kept adequate clinical records in relation to treatment delivered to the Complainant at the October 31 Treatment. The College argues Mr. Henniger's conduct amounts to a breach of ss. 3(1)(a)(vii) and (viii)(A) and (B) of the CMTBC Bylaws, Schedule "E", respecting record keeping requirements.

70. The College's evidence is that, upon arrival for the October 31 Treatment, the Complainant partially completed the Treatment Form provided at the clinic by including only her personal information and her signature to the cancellation policy. [51] She did not complete the "Mark Areas of Pain" portion, nor did she check any of the "Medical Conditions" set out on the form.[52] The remainder of the Treatment Form contains Mr. Henniger's notations and constitute the extent of the Treatment Records for the October 31 Treatment.[53]

71. It is Mr. Finch's expert opinion that the "record keeping requirements" set out in the CMTBC Bylaws are *minimum* requirements for clinical records, and that they are in place to ensure patient safety.[54] Mr. Finch testified that an additional best practice for RMTs is to document consent.

72. Mr. Finch opined that Mr. Henniger's Treatment Records respecting the October 31 Treatment did not meet the minimum standards for clinical records as set out in the CMTBC Bylaws. Particularly, Mr. Finch held that the Treatment Records did not contain:

- the patient's primary complaint or patient goals;

[51] Exhibit P5, *supra* note 10, at para 6.
[52] *Ibid.,* at Exhibit B.
[53] Exhibit P7, *supra* note 13. Note: These records being certified by Mr. Henniger as "true and accurate copies of all of records that relate in any way to provision of massage therapy services to [redacted]
[54] Exhibit P8, *supra* note 18, at p 5.

- any medical history (or notation that there is no relevant medical history); or
- the treatment plan or any treatment provided (including any notation of work on pectoral muscles).[55]

73. Mr. Finch also testified that Mr. Henniger's Treatment Records contained no documentation regarding consent, which he said was a best practice to include.

74. As the Respondent was neither present nor did he submit evidence through legal counsel, no evidence was provided to contradict the above evidence presented by the Complainant. The Panel must nonetheless assess the probative value and weight to be afforded to the above evidence.

75. The Panel finds Mr. Henniger failed to keep adequate clinical records in relation to the treatment delivered to the Complainant at the October 31 Treatment. The Respondent is guilty of this charge.

Professional Misconduct or Unprofessional Conduct

76. Having found Mr. Henniger guilty of the allegations contained in the Citation, the Panel must determine whether a finding under s. 39 of the HPA is warranted.

77. Mr. Henniger has been found to have breached CMTBC Bylaws, Schedule "D" – Standards of Practice ss. 1, 2, 3 and 10, CMTBC Bylaws, Schedule "E" ss. 3(a)(vii) and (viii), and CMTBC Code of Ethics ss. 2, 4, 9 and 25. This Panel finds that these breaches constitute non-compliance with applicable bylaws for the purpose of s. 39(1)(a) of the Act.

78. Counsel for the College further argues the appropriate finding is professional misconduct on each paragraph in the Citation. In this regard, the College argues that it makes no difference to the sanction that may be imposed whether the finding is of professional misconduct, unprofessional conduct or any of the other findings available pursuant to s.

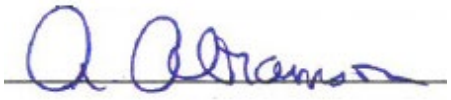
[55] *Ibid.*, at p 6.

39(1) of the Act. Referring to s. 26 of the Act, the College suggests the term "professional misconduct" is broader than unprofessional conduct as it "includes" the latter, but is not otherwise defined.

79. The HPA, CMTBC Bylaws and CMTBC Code of Ethics set out what is considered professional conduct for registrants of the College. Mr. Henniger has breached several provisions of the HPA, CMTBC Bylaws and CMTBC Code of Ethics by virtue of his conduct at the October 31 Treatment. This Panel finds that any of these breaches, and certainly all of them considered together, constitute unprofessional conduct. For the foregoing reasons, this Panel finds that Mr. Henniger has thus committed unprofessional conduct pursuant to s. 39(1)(c) of the Act.

80. The Panel is prepared to receive submissions as to the appropriate order to be made under section 39(2) of the HPA at a date to be determined.

DATED at Vancouver, British Columbia, this 12th day of January, 2021.



Arnold Abramson (Chair)

Carol Williams (Public Member)

Rachel Shiu (RMT)