

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”)

PENALTY ORDER AND REASONS

Date and Place of Discipline Hearing:

By Written Submissions

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:

Gerry Fahey

Independent Counsel for the Panel:

Lynsey Gaudin

Introduction

1. On January 12, 2021 a panel of the Discipline Committee of the College of Massage Therapists of British Columbia (the “**Panel**”) rendered Written Reasons regarding the conduct and competence of Michael Henniger, RMT (“**Mr. Henniger**”). The Panel found Mr. Henniger to have breached several provisions of the *Health Professions Act*, RSBC 1996 c 183 (the “**HPA**” or the “**Act**”), the Bylaws of the College of Massage Therapists of British Columbia (the “**CMTBC Bylaws**”) and the Code of Ethics of the College of Massage Therapists of British Columbia (the “**CMTBC Code of Ethics**”), and that such breaches constituted non-compliance with applicable bylaws for the purpose of s. 39(1)(a) of the Act. Mr. Henniger was thus found to have committed unprofessional conduct pursuant to s. 39(1)(c) of the Act.
2. The Panel must now determine the appropriate penalty and costs to make order in the circumstances.

Proposal on Joint Submission

3. Counsel for the College and counsel for Mr. Henniger, respectively, provided written submissions to the Panel concerning penalty and costs.
4. The Panel was later advised, that the parties had reached substantial agreement on the issue of penalty and costs. The joint submission as to penalty presented to the Panel is as follows:
 - (a) suspend the Respondent’s registration for a period of seven (7) days, commencing from the date that he is made aware of the Panel’s order pursuant to s. 39(2)(c) of the HPA;
 - (b) impose a condition on the Respondent’s registration that he is required to complete remedial education at his own expense pursuant to s. 39(2)(b) of the HPA (as further particularized by the College in its submissions);

(c) the Respondent shall be prohibited from seeking reinstatement of his registration with the College until the later of the completion of his suspension or completion of the remedial education pursuant to s. 39(8) of the HPA;

(d) direct that the Respondent pay costs in the sum of \$6,500.00 within 14 days of the date of this Order pursuant to s. 39(5) of the HPA; and

(e) direct the Registrar to publish notification of the disposition of this matter pursuant to s. 39.3 of the HPA,

(collectively, the “**Joint Submission**”).

5. The following authorities were provided by the College to support its submissions on penalty: *Law Society of British Columbia v Dent*, 2016 LSBC 5; *CMTBC v Gill*, 2019 CMTBC 1; *College of Nurses of Ontario v Pendergast*, 2016 CanLii 153067; *Ontario (College of Massage Therapists of Ontario) v Al-Shamlah*, 2020 ONCMTO 35; *Ontario (College of Massage Therapists of Ontario) v Tchepourov*, 2019 ONCMTO 22; and *Ontario (College of Massage Therapists of Ontario) v Tsioris* (February 23, 2012).
6. The College submitted that the Joint Submission meets the goals of an order of this nature based on a consideration of the following factors: the nature, gravity and consequences of conduct; character and professional conduct record of the Respondent; acknowledgment of the misconduct and remedial action; and public confidence in the legal profession including public confidence in the disciplinary process.
7. On the matter of costs, the College submitted that such an award is intended as compensation for expenses incurred to the successful party. Rather than being part of the penalty, the College submitted that costs are awarded to the regulatory body so that the membership does not bear the entire financial burden of conducting the discipline proceedings. The College submitted that costs in the amount of \$6,500 achieve this purpose and represent less than 50% of the actual costs of the College for legal representation in this matter.

8. The Panel is mindful of the principle that a joint submission should not be disregarded unless there are good and cogent reasons for doing so. Relying on authority in *R v Anthony-Cook*, 2016 SCC 43, the British Columbia Court of Appeal in *R v Cheema*, 2019 BCCA 268 at para 23, remarked as follows:

23 In *Anthony-Cook*, the Court made it clear that joint submissions should only be rejected if the proposed sentence "would bring the administration of justice into disrepute or is otherwise contrary to the public interest". This occurs only where that sentence "would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system". This deferential approach recognizes that Crown and defence counsel have a high degree of knowledge of the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. Accordingly, counsel are well-placed to arrive at a joint submission that reflects the interests of the accused and the general public at large [...]

9. This principle has been affirmed in the context of professional disciplinary decisions (see, for e.g.,: *Law Society of Saskatchewan v Blenner-Hassett*, 2018 SKLSS6; *Tse, Re*, [2018] AWLD 3238 (Hearing Tribunal of the College of Physicians and Surgeons of Alberta); *Ontario (College of Physicians and Surgeons of Ontario) v Otto*, 2018 ONCPSD 46).
10. The Panel is satisfied the Joint Submission is appropriate in the circumstances and that it accords with other penalty decisions made by other committees for similar misconduct and adequately addresses the College's mandate to protect the public through a penalty that serves as specific and general deterrence.

Public Notification

11. The only issue not agreed between the parties concerns public notification of this matter.
12. Mr. Henniger specifically submitted that any public notification made in respect of this matter should make "abundantly clear" that it did not involve "allegations of touching in a sexual manner". Upon requesting leave of the Panel to make final comment on this issue, Mr. Henniger requested as follows:

[...] the Respondent requests that the Panel make it abundantly clear in its reasons that this is not a case of sexual conduct nor does it involve allegations of sexualized behavior particularly given paragraphs 17-20 of its pre-hearing decision of October 22, 2020 which might leave that impression. There is a tangible risk that without such clarity the public notice required by the HPA would unfairly and inappropriately damage the Respondent's reputation.

13. In reply, the College submitted that a publication order for both the liability and penalty portions of this matter must be made pursuant to the HPA, and that there are no exceptions applicable to the circumstances. The College also submitted that publication furthers the goal of public protection and should be upheld.
14. The College further noted that no specific allegation of sexual misconduct was made in the Written Reasons. In the event the Panel wishes to rely on this fact in its decision on penalty, the College suggested it would support such language since the findings of fact in the liability decision are the basis for the sanction is sought by way of the Joint Submission.
15. Section 39.3 of the HPA provides that the Panel must direct the Registrar to notify the public of the outcome of a discipline hearing. The relevant provisions provide:

39.3(1) Subject to subsections (3) and (4), the board, inquiry committee or discipline committee, as the case may be, must direct the registrar to notify the public of the information set out in subsection (2) with respect to any of the following actions:

...

(d) a determination made under section 39(1); ...

39.3(2) The following information must be included in the notification required under this section:

(a) the name of the registrant respecting whom or the health profession corporation respecting which the action was taken;

(b) a description of the action taken;

(c) the reasons for the action taken.

39.3(3) In the following circumstances, the inquiry committee or discipline committee, as the case may be, must direct the registrar to withhold all or part of the information otherwise required to be included in the public notification under this section:

(a) the inquiry committee or discipline committee considers it necessary to protect the interests of the complainant, if any, in the matter, or another person, other than the registrant, affected by the matter;

(b) the complainant, if any, in the matter, or another person, other than the registrant, affected by the matter, has requested that the notification not contain information that could reasonably be expected to identify the complainant or the other person.

16. The conclusions on liability (as set out in the Written Reasons) concern a finding of unprofessional conduct, which is defined in s. 26 of the HPA. The Panel is statutorily required to direct the Registrar to notify the public of this matter, including the issuance of its Written Reasons and this Order. The Panel will make no further comment on this issue and directs the Registrar to publish in the normal course.

Orders

17. Upon consideration of the Joint Submission of the College and Mr. Henniger, the Panel makes the following orders pursuant to s. 39 of the HPA:
- a. that the Respondent's registration with the College be suspended for a period of seven (7) days from the date of this Order pursuant to s. 39(2)(c) of the HPA;
 - b. that the Respondent's registration with the College is subject to completion of remedial education pursuant to s. 39(2)(b) of the HPA, at his own expense, including the following courses:

- (i) “Clinical Record Keeping: A Hands-On Approach” by Dawn Armstrong (or a similar course as is acceptable to the College);
 - (ii) “Professional Practice 1” by the Canadian College of Massage and Hydrotherapy (or a similar course as is acceptable to the College);
and
 - (iii) “Law, Ethics and Professionalism” by CMTBC (or a similar course as is acceptable to the College),
- c. that the Respondent be prohibited from seeking reinstatement of his registration with the College until the later of the completion of his suspension or completion of the remedial education pursuant to s. 39(8) of the HPA;
 - d. that the Respondent pay costs in the sum of \$6,500.00 to the College within 14 days of the date of this Order pursuant to s. 39(5) of the HPA; and
 - e. that the Registrar publish a copy of this Order and the Written Reasons to the College of Massage Therapists of British Columbia’s website pursuant to s. 39.3 of the HPA, and that such publication withhold the name of the Complainant in accordance with s. 39.3(3) of the HPA.

DATED at Vancouver, British Columbia, this 22nd day of April, 2021.



Arnold Abramson (Chair)



Carol Williams (Public Member)



Rachel Shiu (RMT)