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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Leonard Krekic

(the "Respondent")

REASONS FOR DECISION
(Application of the Respondent)

Date and Place of Hearing:	By written submissions
Panel of the Discipline Committee (the "Panel")	Arnold Abramson, Chair Elisa Peterson, RMT Michael Wiebe, RMT
Counsel for the College:	Elizabeth Allan Greg Cavouras
Counsel for the Respondent:	Scott Nicoll Gurleen Randhawa
Counsel for the Panel:	Susan Precious

Introduction

1. The discipline committee hearing in this matter was scheduled for March 8-12, 15-19, and 22-23, 2021 (the "Discipline Hearing"). Due to the Respondent's application for a stay of proceedings in the Supreme Court, the Discipline Hearing commenced on March 9, 2021. It proceeded during the remaining scheduled days. Additional hearing days were added from April 27 to 30, 2021 inclusive. Further hearing days were still required, and the Discipline Hearing has been scheduled to reconvene and continue September 29, 30, and October 1, 2021.

2. On April 30, 2021, the Respondent called Gudbjartur (Bodhi) Haraldsson as a lay witness. The College objected on the basis that it had no notice under section 38(4.1) of the *Health Professions Act*, RSBC 1996 c.183 (the "Act" or "HPA") and that the test under section 38(4.2) that it is necessary to ensure that the legitimate interests of the Respondent will not be unduly prejudiced was not satisfied. The panel of the Discipline Committee (the "Panel") permitted Mr. Haraldsson to be called as a lay witness pursuant to section 38(4.2) of the Act. Mr. Haraldsson testified as a lay witness about the layout of the North Surrey massage and certain equipment contained in the clinic room.

3. After Mr. Haraldsson's testimony as a lay witness was completed, the Respondent indicated that he intended to call Mr. Haraldsson as an expert witness pursuant to section (4.2)(c) of the HPA to provide expert opinion evidence pertaining to massage therapy treatments, approaches, patient management and interaction. The College objected on the basis that Mr. Haraldsson does not meet the legal requirement that an expert must be impartial, independent, and unbiased. Both parties questioned Mr. Haraldsson on his qualifications. Both parties indicated they wanted to make further submissions on Mr. Haraldsson's qualification as an expert witness and proposed handling that by written submissions. The Panel set a schedule for exchange of written submissions. The Panel has now received and considered those written submissions. For the reasons that follow, the Panel declines to permit Mr. Haraldsson to testify as an expert witness.

Parties Submissions

4. On April 30, 2021, the Respondent questioned Mr. Haraldsson about his qualifications. As noted above, the College does not challenge Mr. Haraldsson's technical qualifications. The College submits that Mr. Haraldsson should be excluded on the basis that he does not meet the requirement that an expert must be impartial, independent, and unbiased. The College cross-examined Mr. Haraldsson regarding those issues.

5. Mr. Haraldsson prepared an expert report dated February 21, 2021.

6. Mr. Haraldsson's expert report addresses the following issues, as quoted in the Respondent's written submission of May 13, 2021 in paragraph 21:

    a. The general process for an RMT to obtain informed consent;

    b. What RMTs are taught with respect to obtaining consent for the treatment of sensitive or potentially sexualized areas of the body;

    c. What happens when a patient refuses to give consent or withdraws it;

    d. Whether there are limitations on the areas of a body that an RMT can work on;

    e. Whether it is acceptable practice for an RMT to engage in conversation about religion or spirituality;

    f. Whether it is acceptable for an RMT to move or adjust a patient's clothing or undergarments during treatment and how an RMT could obtain consent to do so;

    g. Whether it is possible for an RMT to inadvertently press their groin against a patient's hand;

    h. Whether it is appropriate for an RMT to use a portion of their body such as their leg or arm to brace themselves against the table when providing treatment and what the reasons for the same would be;

    i. Whether it is appropriate or professional for an RMT to hug a patient under any circumstance;

j. Whether there are recognized and appropriate treatments in massage therapy that involve touching various areas of a patient's body, including but not limited to the mons pubis, sacrotuberous ligament, and gluteus maximus;

k. Whether Mr. Krekic's treatment of each of the complainants given their areas of complaint was appropriate;

l. Whether it was possible for the complainants to feel that certain areas of their body were being touched (i.e. mons pubis, labia) given the treatment that was administered to them;

m. Whether the seated diaphragm treatment was an appropriate treatment;

n. Whether there are guidelines for technique selection;

o. Whether it is acceptable for an RMT to ask a patient to sign a management plan after the patient is undressed and lying on the massage table; and

p. Whether it is necessary for an RMT to say more than the patient should leave on any clothes that they are uncomfortable in removing when discussing disrobing options.

7. In his report, as referenced in paragraph 22 of the Respondent's written submission of May 13, 2021, Mr. Haraldsson also provides opinion evidence with respect to:

a. The Respondent's selection of techniques and alignment assessments and the approach he uses to treat patients; and

b. Whether focusing on the pelvic structure is consistent with the mechanical structure approach.

8. The College submits that most of the questions raised are addressed in the report of another expert retained by the Respondent and who is anticipated to be called. The Respondent submits that 6 of the questions put to Mr. Haraldsson are not addressed in any other expert report.

9. The Respondent submits that the Panel has the authority to qualify Mr. Haraldsson as an expert pursuant to section 38(4.2)(c) of the Act to ensure that the legitimate interests of a party will not be unduly prejudiced.

10. The Respondent relies upon the test in *R. v. Mohan*, [1994] 2 S.C.R. 9; namely that to be admitted, expert evidence must meet the following criteria:

    a. Relevance;

    b. Necessity in assisting the trier of fact;

    c. The absence of any exclusionary rule; and

    d. A properly qualified expert.

11. The Respondent relies on *United City Properties Ltd. v. Tong*, 2010 BCSC 111 with respect to addressing the impartiality and admissibility of expert evidence. *United City Properties* sets out 14 criteria to consider. The Respondent noted in particular comments made at paragraph 50 of that decision,

> [50] The approach advocated by McWilliams is consistent with, if not entirely identical to, the state of the law in England. In Hodge Malik, Phipson on Evidence, 16th ed. (London: Sweet & Maxwell Ltd., 2005) at part 33-42, the author reviews the English law, including conflicting decisions of the lower courts and a more recent decision of the Court of Appeal, and concludes at p. 1011:
>
> The current state of the law may be summarized by the following principles:
>
> (1) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.
>
> (2) The existence of such an interest, whether as an employee of one of the parties or otherwise, does no [sic] automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.
>
> (3) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.
>
> (4) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether an expert witness should be permitted to give evidence.
>
> (5) The questions which have to be determined are whether:
>
> (a) the person has relevant expertise; and

> (b) he is aware of his primary duty to the Court if they give expert evidence, and are willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.
>
> (6) The judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.
>
> (7) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence**.**

12. The Respondent submits that Mr. Haraldsson possesses special and peculiar knowledge through study and experience, pertaining to massage therapy treatment and approaches as well as patient management and interaction. The Respondent submits that Mr. Haraldsson testified that he understands that his role as an expert in this matter is to assist the Panel and not to act as an advocate for any party to this matter and that he has complied with that duty. The Respondent submits that the College bears the onus of establishing that Mr. Haraldsson's evidence lacks objectivity. In the event the Panel finds bias, the Respondent submits that the expert report should still be admitted, and any concerns should be addressed through the weight of the opinion evidence.

13. The College submits that *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, is the guiding authority. The Supreme Court of Canada expressed that "expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence". *White Burgess* established a two-step test, involving the threshold admissibility criteria from *R. v. Mohan* as step one, and the gatekeeper cost-benefit analysis as step two. The College submits the Respondent fails on both steps.

14. The College also disputes the Respondent's submission that the College has the onus to establish Mr. Haraldsson's evidence lacks objectivity and that there is no basis to assert bias. Rather, as the party opposing the admission of the proposed expert evidence, the College submits it has met the initial burden of raising a "realistic concern" about Mr. Haraldsson's independence, impartiality, and lack of bias, based on his many personal and professional connections to the Respondent

and that the burden now sits with the Respondent to rebut these concerns on a balance of probabilities.

15. The College submits that Mr. Haraldsson has been closely associated with the Respondent for almost 20 years, as follows:

    a. Mr. Haraldsson was employed by the Respondent for over 10 years, and was then a co-worker of the Respondent for approximately three additional years.

    b. In that time, Mr. Haraldsson and the Respondent had more than a purely professional relationship: they exercised, studied, socialized, and prayed together.

    c. Mr. Haraldsson has an ongoing financial and reputational interest in the clinic where much of the conduct alleged in the Citation took place.

    d. Mr. Haraldsson has publicly endorsed the Respondent and unhesitatingly acknowledges that he regards him as a very good practitioner.

    e. Mr. Haraldsson has previously acted as a “character witness” for the Respondent at a section 35 proceeding involving one of the very same matters that is before the Panel.

    f. In this Discipline Hearing, Mr. Haraldsson has agreed to appear as both a lay witness and an expert witness for the Respondent.

    g. Mr. Haraldsson testified that a finding of sexual misconduct against the Respondent would be an undesirable outcome and a “stain on the profession”.

16. The College submits that the facts above disqualify Mr. Haraldsson at both steps of the test.

Analysis and Findings

17. The Panel agrees with the College that *White Burgess* is the leading case on point and sets out the appropriate approach.

Step One

18. In *White Burgess*, the Supreme Court of Canada described the first step as follows:

> [46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 Can. Crim. L.R. 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.
>
> [47] Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during Mohan voir dires, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 Queen's L.J. 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.
>
> [48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.
>
> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can

> be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

19. Mr. Haraldsson has testified as to his duty as an expert and indicated that he would fulfil that duty. As a result, the burden shifts to the College to show that there is a realistic concern that Mr. Haraldsson's expert evidence should not be received because he is either "unable and/or unwilling to comply with that duty". The College has shown there is a realistic concern that Mr. Haraldsson's evidence should not be received because Mr. Haraldsson is "unable" to comply with his duty because of his long standing and numerous professional and personal connections with the Respondent. The burden is therefore on the Respondent to establish on a balance of probabilities this aspect of the admissibility threshold.

20. The Panel appreciates that the threshold requirement is not onerous and that it is rare for the threshold requirement not to be met. The Panel finds that the Respondent has not overcome this burden at this threshold level. While the Panel is satisfied that Mr. Haraldsson is "willing" to carry out his duty to the tribunal, the Panel is not satisfied that he is "able" to do so because of his relationship with the Respondent.

21. The Panel agrees with the Respondent's submission that an employment relationship alone would be insufficient grounds on which to automatically find the threshold requirement is not met. However, this case does not raise an issue pertaining to an employment relationship alone. Mr. Haraldsson's relationship with the Respondent is long standing and extends across multiple bases, many of which are precisely the grounds contemplated by the Supreme Court of Canada in paragraph 48 above. Moreover, several of those grounds would be disqualifying on their own.

22. Mr. Haraldsson is a partner in PainPro. He shares in PainPro's income. Three of the six complainants in this Discipline Hearing have alleged sexual misconduct took place at a PainPro clinic and while the Respondent was a PainPro therapist, and while both the Respondent and Mr. Haraldsson worked at PainPro. The Panel considers that Mr. Haraldsson has a financial interest in the Panel not making any adverse findings, at least insofar as concerns the allegations pertaining to PainPro. The Panel does not agree with the Respondent's argument that this connection is too remote.

23. Mr. Haraldsson participated in the section 35 proceedings involving the Respondent as a "character witness" to "vouch" for the Respondent. The Respondent testified about the Respondent's reputation and standing in the profession. Mr. Haraldsson agreed he made the following statements that were recorded in the transcript from the section 35 proceeding from September 2014:

> Yeah, and anyone I have talked to that knows [the Respondent] or has dealt with him has had nothing but positive experience. He's an honest, straightforward type of guy and everybody – I have never heard a single bad thing or negative – or innuendos or rumours or any of it.

24. When asked whether he was "vouching" for the Respondent in 2014, Mr. Haraldsson replied "absolutely". When asked whether he participated in the section 35 proceedings to "help out" the Respondent, Mr. Haraldsson replied "he asked me to, yes".

25. The Panel considers Mr. Haraldsson acted as an advocate for the Respondent in the section 35 proceedings.

26. The section 35 proceeding was initiated following the receipt of Patient 2's complaint, which is one of the six complaints that is the subject of this Discipline Hearing and relating to which Mr. Haraldsson's is being asked to provide expert opinion evidence.

27. Mr. Haraldsson stated that he was not privy to the details of the complaint at the time he participated in the section 35 proceedings. However, the fact that Mr. Haraldsson acted as an advocate prior to knowing the allegations against the Respondent shows the absence of impartiality and independence which is required of an expert. That

Mr. Haraldsson now asserts he can play the neutral and impartial role of an expert does not change that he has already acted as an advocate for the Respondent in relation to the matters that are now before this Panel.

28. The Panel notes that Mr. Haraldsson has also participated in this Discipline Hearing as a lay witness called on behalf of the Respondent.

29. In addition to having a financial interest in the outcome of these proceedings, and to having acted as an advocate, the Panel is also concerned about the long and extensive professional and personal relationship that Mr. Haraldsson has shared with the Respondent. This is not the case of an employment relationship alone, but of a relationship that has deep and wide roots. Mr. Haraldsson was hired by the Respondent in 2003, they worked closely together until approximately 2017, they worked in adjacent treatment rooms, they shared patients, Mr. Haraldsson assisted the Respondent as an instructor at courses presented through Reconnect Movement Therapy, both the Respondent and Mr. Haraldsson served on the College's Board at the same time, they read the Bible together, and they prayed together. Mr. Haraldsson characterized the Respondent as a "friend" and agreed that they saw each other socially, they shared meals, and they worked out together. Mr. Haraldsson has endorsed the Respondent many times on Linkedin.

Step Two

30. The second step of the *White Burgess* test involves balancing the potential risks and benefits of admitting the evidence. The Supreme Court of Canada stated:

> [54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

31. While the Panel has found that the first step of the test is not met, and it is not required to analyze the second step, the Panel will make the following comments.

The Panel acknowledges that some or even all of the questions Mr. Haraldsson has been asked would be relevant to these proceeding. The Panel also acknowledges that Mr. Haraldsson possesses a significant amount of technical experience. However, the Panel considers that the risks in admitting Mr. Haraldsson's evidence in the face of his extensive connections with the Respondent to be dangerous. The Panel finds the comments in *R. v. Docherty*, 2010 ONSC 3628 about the concern public perception of the administration of justice to be persuasive:

> [21] Quite apart from the issue of probative value of such evidence, it must be pointed out that the defence had other options in this case. They could have requested that the Court order additional funding if the circumstances warranted it. They could have requested an adjournment if further time was needed to find an objective psychiatrist at Legal Aid rates. In fact, some extra time was provided to the defence in the setting of the sentencing hearing date. It cannot therefore be said that there was a necessity to rely on an expert whose objectivity would clearly be in question and whose evidence could only cause concern to the court that the public perception of the administration of justice would be impaired if any weight was given to it. For these reasons the report was not admitted into evidence on sentencing.

32. The Panel is of the view here too that admitting expert evidence from an expert who lacks objectivity causes concerns that the public perception of the administration of justice would be impaired if any weight was given to this evidence. This is a pressing concern where section 16(1) of the HPA mandates that "It is the duty of a College at all times (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest."

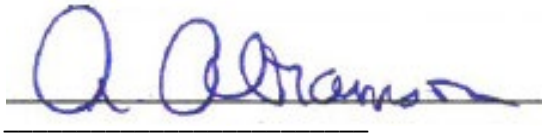
33. The Panel is not satisfied that admitting this evidence under section 38(4.2) of the HPA, as the Respondent is seeking to do, is necessary to ensure that the legitimate interests of the Respondent will not be unduly prejudiced.

34. Finally, for the reasons expressed it *White Burgess*, the Panel considers it would be inappropriate to allow expert evidence to be admitted but to accord it little or no weight where it has concluded that Mr. Haraldsson lacks the necessary independence, impartiality, objectivity and neutrality.

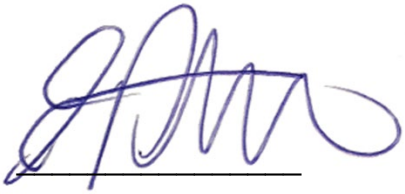
Conclusion

35. The Panel declines to qualify Mr. Haraldsson as an expert to provide opinion evidence.

Dated: June 18, 2021



Arnold Abramson, Chair



Elisa Peterson, RMT

Michael Wiebe, RMT