

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:

Steven Anderson

(the “Respondent”)

REASONS FOR DECISION

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| Date and Place of Hearing: | June 14 to 17, and 25, 2021 By video conference |
| Panel of the Discipline Committee (the “Panel”) | Marilynne Waithman, Chair Deborah Charrois, LL.B., LL.M Evan Jeary, RMT |
| Counsel for the College: | Andrew Gay, Q.C. Katrina Labun |
| For the Respondent: | Steven Anderson |
| Independent Legal Counsel to the Panel: | Susan Precious |

Introduction

1. On October 8, 2020, the College issued a citation pursuant to section 37 of the *Health Professions Act* RSBC 1996, c.183 (the “HPA” or “Act”) naming Steven Anderson, former RMT, as Respondent. An amended citation was issued on April 8, 2021 (the “Amended Citation”).
2. This panel of the Discipline Committee (the “Panel”) of the College of Massage Therapists of British Columbia (the “College”) conducted a discipline hearing on June 14 to 17, and 25, 2021 (the “Discipline Hearing”) to determine whether the Respondent failed to comply with the College’s bylaws (the “Bylaws”), failed to comply with a standard or limit on the practice of massage therapy imposed under the Act, committed professional misconduct or unprofessional conduct, committed obstruction of the College investigator in the lawful exercise of her powers of investigation, or failed to respond to inquiries, requests, and directions from the College in a professional and responsive manner.
3. For the reasons set out below, the Panel finds that the allegations set out in the Amended Citation are proven to the requisite standard. The Panel has determined that the Respondent failed to comply with the Bylaws, failed to comply with a standard or limit imposed under the Act, obstructed the College investigator in the lawful exercise of her powers of investigation, failed to respond to inquiries, requests and directions from the College in a professional and responsive manner, committed professional misconduct, and committed unprofessional conduct in relation to the allegations which were proven.

Background

4. The particulars of the allegations against the Respondent were set out in the Amended Citation as follows:
 1. On September 11, 2014, in the course of providing massage therapy to A.A., you:
 - a. failed to comply with section 3 (a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by inserting a finger of your hand beyond the patient’s labia majora and massaging the interior walls of her vagina without ensuring the patient was fully informed regarding assessment and treatment and provided consent;

- b. failed to comply with section 2 (a) of Schedule C of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by engaging in sexual touching of the patient's vagina;
 - c. failed to comply with section 9 (d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by inserting a finger of your hand beyond the patient's labia majora and massaging the interior walls of her vagina when doing so was outside of the scope of practice of massage therapy in British Columbia; and
 - d. failed to comply with a standard or limit on the practice of massage therapy imposed by the College under the Act, and committed unprofessional conduct, by inserting a finger of your hand beyond the patient's labia majora and massaging the interior walls of her vagina, contrary to the Notice to the Profession Re: "Medical Electricity" and "Pelvic Floor Treatments".
- 2. On August 29 and September 11, 2014, having provided massage therapy to A.A., you failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
- 3. On January 15, January 28, March 12, and April 4, 2014, in the course of providing massage therapy to B.B., you
 - a. failed to comply with section 3(a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by massaging the area in the vicinity of the patient's vulva without ensuring the patient was fully informed regarding assessment and treatment and provided consent;
 - b. failed to comply with section 2(a) of Schedule C of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by engaging in sexual touching of the area in the vicinity of the patient's vulva; and
 - c. failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
- 4. On January 31, 2014, in the course of providing massage therapy to C.C., you
 - a. failed to comply with section 3(a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by massaging the following parts of the patient's body without ensuring the patient was fully informed regarding assessment and treatment and provided consent:
 - i. the patient's labia and around the external opening of the patient's vagina; and
 - ii. the patient's ischiocavernosus muscle;
 - b. failed to comply with section 2(a) of Schedule C of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by engaging in sexual touching of:
 - i. the patient's labia and around the external opening of the patient's vagina; and
 - ii. the patient's ischiocavernosus muscle;

- c. failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions;
 - d. failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by removing blackheads from the patient's back by picking her skin with your thumbs when doing so was outside the scope of practice of massage therapy in British Columbia; and
 - e. in the alternative to paragraph 4(d) above, failed to comply with section 3(a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by removing blackheads from the patient's back by picking her skin with your thumbs without ensuring the patient was fully informed regarding assessment and treatment and provided consent.
5. On February 28 or March 7, 2014, in the course of providing massage therapy to D.D., you failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by diagnosing the patient with a medical condition, avascular necrosis, when making medical diagnoses was outside of the scope of practice of massage therapy in British Columbia.
 6. On May 30, 2014, in the course of providing massage therapy to D.D., you
 - a. failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by inserting one finger of your hand beyond the patient's anal verge and massaging the interior wall of the rectum, when doing so was outside the scope of practice of massage therapy in British Columbia; and
 - b. failed to comply with a standard or limit on the practice of massage therapy imposed by the College under the Act, and committed unprofessional conduct, by inserting one finger of your hand beyond the patient's anal verge and massaging the interior wall of the rectum, contrary to the Notice to the Profession Re: "Medical Electricity" and "Pelvic Floor Treatments".
 7. On February 21, February 28, March 7, April 4, April 25, May 22, May 30, and June 12, 2014, having provided massage therapy to D.D., you failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
 8. On January 22, 2019, you failed to comply with section 69.3(1)(a) of the Bylaws and engaged in unprofessional conduct by providing massage therapy services to a patient identified as "Jessica Chan" while your registration was suspended. Particulars of this allegation include that you massaged "Jessica Chan's" gluteal muscles, legs, back, neck and shoulders.
 9. On January 22, 2019, you failed to comply with section 69.3(1)(a) of the Bylaws and engaged in unprofessional conduct by holding yourself out as being a Registrant of the College while your registration was suspended. Particulars of this allegation include that you stated to a patient identified as "Jessica Chan": "This is part of how I'm different as a massage therapist than others."
 10. On January 22, 2019, you failed to comply with section 69.3(1)(f) of the Bylaws by not prominently displaying a notice of suspension in a form and in an area approved by the Registrar, which stated the duration and reasons for the suspension.

11. On July 9, 16, 23, 2016 and August 2, 6, 15, 23, and 29, 2016, in the course of providing massage therapy to E.E., you
 - a. failed to comply with section 3(1)(a)(vii) of Schedule E of the Bylaws then in effect by not keeping a clinical Health Care Record containing sufficient information to explain why the patient came to see you and what you learned from both the patient's current medical history and the assessment;
 - b. failed to comply with section 3(1)(a)(viii) of Schedule E of the Bylaws then in effect by not keeping a clinical Health Care Record containing a clear record of the specifics of any treatment plan, treatment provided and the patient's response, any follow-up plan, and any recommendations or instructions for patient self-care; and
 - c. failed to comply with section 3(2) of Schedule E of the Bylaws then in effect by not making every reasonable effort to ensure that the information contained in the Health Care Record was current, accurate, and complete.
12. You committed professional misconduct or in the alternative unprofessional conduct in that:
 - a. on December 6, 2017, in the course of investigation INQ-2017-00070, you provided misleading information concerning your records to the College investigator. Particulars of this allegation include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to F.F., when in fact you did not produce your contemporaneous records relating to F.F. and the records you did produce were created by you after you received the College's request for records dated November 15, 2017;
 - b. on April 18, 2018, in the course of investigation INQ-2017-00070, you advised the College investigator that you recorded the typewritten records you produced on December 6, 2017 on the same day as the treatment referenced in the records, when in fact you created them after you received the request for records dated November 15, 2017;
 - c. on July 5, 2018, in the course of investigation INQ-2017-00070, you advised the College Director of Inquiry and Discipline that the typewritten records you produced on December 6, 2017 were reproduced from the originals and made to be more readable, when in fact the typewritten records were materially different from the originals;
 - d. on November 7, 2018, in the course of investigation INQ-2018-00046, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to E.E., when in fact you did not produce your contemporaneous records relating to E.E. and the records you did produce were created by you after you received the College's request for records dated October 23, 2018;
 - e. on March 19, 2019, in the course of investigation INQ-2018-00046, you advised the College investigator that you recorded the typewritten records you produced on November 7, 2018 at the same time as the treatment referenced in the records, when in fact you created them after you received the request for records dated October 23, 2018;
 - f. on January 7, 2019, in the course of investigation INQ-2018-00055, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator

typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to D.D., when in fact you did not produce your contemporaneous records relating to D.D. and the records you did produce were created by you after you received the College's request for records dated December 21, 2018;

- g. on March 11, 2019, in the course of investigation INQ-2019-00010, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to B.B., when in fact you did not produce your contemporaneous records relating to B.B. and the records you did produce were created by you after you received the College's request for records dated February 20, 2019;
- h. on March 12, 2019, in the course of investigation INQ-2019-00011, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to A.A., when in fact you did not produce your contemporaneous records relating to A.A. and the records you did produce were created by you after you received the College's request for records dated February 25, 2019; and
- i. in June or July 2019, in the course of investigation INQ-2019-00026, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to C.C., when in fact you did not produce your contemporaneous records relating to C.C. and the records you did produce were created by you after you received the College's request for records dated June 17, 2019.

13. The conduct described above in paragraph 12(a) to (i) also constituted obstruction of the College investigator in the lawful exercise of her powers of investigation, contrary to s.31(1) of the Act.

14. The conduct described above in paragraph 12(a) to (i) also constituted a failure to respond to inquiries, requests, and directions from the College in a professional and responsive manner, contrary to s.28 of the Code of Ethics then in effect.

- 5. On May 27, 2021, the Panel directed that the Discipline Hearing be held in private, that any transcript of the Discipline Hearing that is made available to the public be redacted such that the names and all related identifying information of all non-expert witnesses and individuals whose treatment records are in evidence be withheld, and the Discipline Hearing be held by video-conference. Further to the College's June 24, 2021 request and by consent of the parties, the Panel refers to the patients by their initials in these Reasons.
- 6. The Discipline Hearing took place via video-conference, hosted by Charest Reporting. The parties led evidence and delivered written closing submissions. The

Panel's decision takes into account the evidence led at the Discipline Hearing and the parties' submissions.

7. No issues were raised with respect to service of the original or Amended Citation. The Panel is satisfied that the Respondent was properly served in this matter.

Legal Framework

Burden and Standard of Proof

8. There is no dispute between the parties about the applicable burden and standard of proof in this matter. The College bears the burden of proof and must prove its case on a balance of probabilities. The law on this point is well established. In *F.H. v. McDougall*, 2008 SCC 53, in the Supreme Court of Canada held that the applicable standard was on a balance of probabilities and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test".
9. The College is not required to prove the charges as they are precisely phrased in the Amended Citation. Rather, the College must prove the matters alleged in the Amended Citation which are essential to a finding of professional misconduct, unprofessional conduct, breach of the Act, or a breach of the Bylaws. It is a question of whether the Respondent receives adequate notice of the factual allegations and breaches that are alleged to have occurred: *Ratsoy v. Architectural Institute of British Columbia*, 1980 CanLII662 and *Bartel v. Manitoba (Securities Commission)* (2003), 173 Man. R. (2d) 43 (C.A.).

Jurisdiction over Former Registrant

10. The Discipline Committee has jurisdiction over the Respondent as a former registrant under the HPA. Section 26 of the HPA, which applies to Part 3 of the Act dealing with inspections, inquiries and discipline, expressly defines "registrant" for the purposes of that section to include a "former registrant".

Professional Misconduct and Unprofessional Conduct

11. Section 39(1) of the HPA provides:

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.

12. Section 26 of the HPA contains the following definitions:

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

...

"unprofessional conduct" includes professional misconduct.

13. In *Salway v. Association of Professional Engineers and Geoscientists of British Columbia*, 2010 BCCA 94, the Court of Appeal held that courts will show significant deference to disciplinary decisions of professional regulatory tribunals regarding the interpretation of their professional standards and it is the disciplinary body of the professional organization that sets the professional standards for that organization. The Panel agrees with the reasoning expressed in *Salway*, and the College's submission, that in assessing whether conduct is professional misconduct or unprofessional conduct, the Panel must use its own judgment and expertise and should be guided by the content of the College's bylaws and standards.

14. The term unprofessional conduct is defined to include professional misconduct. The term professional misconduct is defined to include sexual misconduct. Unprofessional conduct is broader than professional misconduct, and is generally understood to be less egregious than professional misconduct.

15. In *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, the Supreme Court of Canada held that professional misconduct is a "wide and general

term” which encompasses conduct that would reasonably be considered by members of the profession to be “dishonourable, disgraceful, or unprofessional”.

16. In *The College of Massage Therapists of British Columbia v. Martin*, 2015 CMTBC 01, a panel of the Discipline Committee approved the definition in *Pearlman*, and described misconduct as a departure from the expected standards of the profession:

[191] The common law definition of professional misconduct encompasses conduct that would reasonably be considered by members of the profession as dishonourable, disgraceful, or unprofessional (see R. Steinecke, *A Complete Guide to the Regulated Health Professions Act*). The meaning of professional misconduct, and the definition of a professional standard of practice, need not be expressly set out in writing, whether in a regulation, bylaw, (written) standard or a code of ethic. Where a professional standard is not explicitly set out in writing, it may be determined “by reference to evidence of a common understanding within the profession as to expected behaviour of a reasonable professional, or by deducing it from the profession’s fundamental values” (*Walsh v. Council for Licensed Practical Nurses*, (2010) 317 D.L.R. (4th) 152 (N.L.C.A.); *Yazdanfar v. College of Physicians and Surgeons of Ontario*, 2013 ONSC 6420).

17. Importantly, *Martin* also clarified that the meaning of professional misconduct and the definition of a professional standard of practice need not be expressly set out in writing. Where it is not set out in a regulation, bylaw, standard or code of ethics, the standard may be determined by reference to a common understanding within the profession as to behaviour or fundamental values.
18. Unprofessional conduct was described in *The College of Massage Therapists of British Columbia v. Gill*, 2019 CMTBC 01 with reference to the following definition: “that which violates ethical code or rules of profession or such conduct which is unbecoming member of profession in good standing.” In *Gill*, the Respondent was found to have demonstrated unprofessional conduct for failing to respond to College communications.

Failure to Comply with the Act, a Regulation or a Bylaw

19. Section 19 of the HPA provides the College with the authority to enact bylaws establishing the standards and limits for the practice of the profession, and requires a registrant to practise the profession in accordance with the College’s bylaws:

Bylaws for college

19 (1)A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:

..

(k) establish standards, limits or conditions for the practice of the designated health profession by registrants;

..

(8) A registrant must not practise a designated health profession except in accordance with the bylaws of the college.

20. In 2014, section 75 of the College's Bylaws required, amongst others, that every registrant comply with the Code of Ethical Conduct (Schedule "C"), the Standards of Practice (Schedule "D"), and the rules and requirements for Health Care Records (Schedule "E"). In 2016, the Code of Ethical Conduct was replaced by the Code of Ethics. Section 75 of the Bylaws continued to require registrants to remain in compliance with all three schedules. A breach of any of the schedules is a breach of the Bylaws. While the Bylaws were amended between the dates of misconduct alleged in the Citation, Schedule C, D and E did not change at the time of the treatments of A.A., B.B., C.C. and D.D..

Consent

21. Registrants must obtain the consent of patients prior to providing massage therapy. At the time of the treatments of A.A., B.B., C.C. and D.D., section 3 of Schedule D of the Bylaws required as follows:

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

22. In addition, section 5(1) of the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C., 1996, c.181 (the "*Health Care Consent Act*"), which applies to College registrants, establishes a general rule that "A health care provider must not provide any health care to an adult without the adult's consent". The elements of that consent are set out in section 6 of the *Health Care Consent Act*.

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.

23. Amongst others, this codifies the principle that consent must be informed, and that informed consent requires that a reasonable person would understand the proposed health care and make a decision about whether to receive the proposed health care.
24. In 2011, the Ministry of Health issued “Health Care Providers’ Guide to Consent to Health Care”, which applies to College registrants. The Guide asks the following in determining whether consent is informed, “what information would a reasonable person in the patient’s position want in order to make a decision?” The Guide notes that consent may be given expressly or impliedly, orally or in writing, however consent cannot be implied if a patient does not have any information about the health care being provided. There must be a reasonable basis to believe a patient’s cooperation is the result of informed consent.
25. Marvin Mohring, RMT was qualified as an expert to give opinion evidence in the area of massage therapy. Mr. Mohring provided expert opinion evidence about the steps a prudent RMT would follow to obtain informed consent. Specifically,
 - a. The RMT listens to the patient’s history.
 - b. The RMT informs the patient about what areas of the body will be handled, the benefits of the handling, and the risks of the handling, including any risks associated with not performing the handling.
 - c. The RMT informs the patient regarding their clothing options.

- d. The RMT ensures that the patient understands that they may ask to alter or stop treatment at any time.
 - e. The RMT affirms or explicitly asks if consent is granted with a phrase such as “Do I have your consent?”.
26. Mr. Mohring’s expert report dated March 1, 2021 addressed the steps that an RMT takes to obtain informed consent when treating in a sensitive area of the patient’s body. He provided the following opinion:

[28] (#36 *Would a reasonably prudent RMT take additional steps, or spend additional time, to obtain informed consent to massage in or around a patient’s perineum or another sensitive or private area of the body? How should an RMT ensure a patient is fully informed regarding assessment and treatment and provides consent to massage in such an area of the body?*) In my opinion informed consent is expected in all therapeutic interactions including assessment and treatment which may include areas considered sensitive. The steps taken to inform the patient, to involve the patient in the choice and help them understand and give their consent are equally rigorous in non-sensitive areas. Diagrams, posters, and anatomical models are often used to support patient education to gain consent. During the initial evaluation portion of a session, when the patient is fully clothed and interpersonal dynamics are such that power differential is minimized between the therapist and patient, a reasonably prudent RMT would take the steps to describe why they might assess areas considered sensitive, such as a patient’s upper inner thighs, buttocks, perineum, lateral chest wall and breasts. Seeking consent to assess an area may be very close temporally to assessment itself; however, it is a necessary step to explain why assessment is required and the therapist must do so prior to assessment. Following assessment, if it is determined that the patient would benefit from treatment in a sensitive area, a reasonably prudent RMT would first fully describe the progression of the treatment, including matters of undraping the area, the hand contact and massage manipulations in the area, and the duration of treatment in the area as well as the benefits and expected changes. For example, a reasonably prudent RMT may explain that because sensitive areas are often not the first area of the body handled, that region would remain draped (covered) while other areas were being treated. A reasonably prudent RMT would describe that following the sequence of massage manipulations leading to the sensitive area, the RMT would pause prior to proceeding to the sensitive area, ask again if the therapist still has their consent to proceed in an affirmative manner, wait for their answer, and then undrape (uncover) the sensitive area, and proceed with the treatment. Again, this explanation is done prior to starting the treatment. Once the patient is informed about how treatment will proceed, they can give consent. Specific to the sensitive area, that consent is affirmed prior to treating the sensitive area as a patient may change their mind. That process takes just a few moments when seeking consent and even less time during the treatment as it is a follow up to the informational conversation where consent was previously granted. Additionally, a reasonably prudent RMT will understand the cues from the patient’s body that signal if the handling is not appropriate or as the patient thought it might be. The words may not be said and a hand signal may not be given but the therapist must ask to verify what those non-verbal cues might mean from the patient. An example might be “I’m noticing your breathing has changed, is this handling still OK?”.

27. Mr. Mohring gave evidence about the relationship between the assessment of the patient’s condition and obtaining informed consent. The intake process is more than

a physical assessment and includes questions relating to the patient's health history. The interview often leads to general observations about aspects such as posture, gait, and range of motion. This sequence leads to a progressively more specific understanding about the patient's status in relation to how massage therapy might benefit their circumstance and that relate to treatment goals.

28. The Panel accepts Mr. Mohring's expert opinion, including specifically, with respect to obtaining informed consent.
29. At the material times, sections 1 and 2 of Schedule D of the Bylaws provided as follows:
 1. A Registrant must
 - (a) perform a comprehensive assessment based on history, observation, palpation, movement, neurology, referred sensation and special tests as relevant,
 - (b) formulate a treatment plan, and
 - (c) monitor vital signs as relevant (pulse, blood pressure, respiration rate, temperature).
 2. A Registrant must
 - (a) design and implement a management and treatment plan based on clinical findings, and
 - (b) design and coach a home care program and activities of daily living.

Record Keeping

30. At the time of the treatments of A.A., B.B., C.C. and D.D., section 4 of Schedule E of the Bylaws provided as follows:
 4. A Registrant must
 - a. generate an indelible clinical record for each patient, containing
 - (i) the patient's name, address and birth date,
 - (ii) the name of any referring practitioner,
 - (iii) the date of each professional visit, and the name of the person who rendered the treatment,
 - (iv) health history obtained and updated, findings obtained, clinical impressions and relevant information of the patient's condition,
 - (v) a treatment plan, including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions, and
 - (vi) all written reports received from or sent to other sources with respect to the patient,

b. ensure that the information in a Health care Record is current, legible, accurate and complete

...

(d) avoid

- (i) falsifying any part of a patient's Health Care Record, or
- (ii) signing or issuing a certificate, report or any document that contains false or misleading statements concerning a patient's Health Care Record, and

(e) maintain possession and control over a patient's Health Care Record until that record can be destroyed or transferred in accordance with section 5 of this Schedule.

31. At the time of E.E.'s treatment, section 3(1) and (2) of Schedule E of the Bylaws provided as follows:

3 (1) A Registrant must keep

(a) a clinical Health Care Record for each patient containing

(i) the patient's full name, gender, date of birth and personal health number,

(ii) the patient's current address and telephone number, as of the date of their last attendance.

(iii) the name of the Registrant who rendered the treatment to the patient,

(iv) the name of any referring Registrant or Licensed Practitioner,

(v) the patient's current medical health history, as of the date of their last attendance,

(vi) any reports received from or sent to other Registrants, Licensed Practitioners, and insurance providers with respect to the patient,

(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 selfcare related to the patient's condition, and

(ix) a record of any changes made to the Health Care Record and the reason for such change,

(x) a key to any shorthand notations used in the Health Care Record,

(b) a key to any shorthand notations used in the Health Care Records,

(c) a record with respect to each patient containing the date of the service rendered, type of service, charge made for the service and record of payment, and

(d) for each day, keep a day book, daily diary, appointment sheets or equivalent containing the names of patients seen or treated, or in respect of whom professional services are rendered.

(2) A Registrant must make every reasonable effort to ensure that the information contained in the Health Care Records and Other Records is current, accurate and complete.

32. Mr. Mohring provided evidence on the information that an RMT should record with respect to a patient's consent to treatment. In his opinion, a reasonably prudent RMT will record that the patient has consented to treatment in the Health Care Record. Consenting to treatment means the patient understands the therapist's proposed treatment or treatment plan. This includes: the RMT's assessment findings, the specifics of any treatment plan, the patient's response to such treatment, any follow-up plan and recommendation or instructions for patient self-care or remedial exercise, a list of past injuries, surgeries, current medications, and mobility issues, the patient's current reasons for seeking care from the RMT, and the fact that the patient consented to treatment. Consent to treatment is recorded in the Health Care Record after consent is granted and should be recorded within 24 hours of the appointment.

Sexual Touching

33. Section 2 of Schedule C of the Bylaws in force at the time of treatment of A.A., B.B., and C.C. contained the following provision regarding sexual conduct:

Sexual Conduct Prohibited

2. A Registrant shall not

- (a) engage in sexual conduct with a patient,
- (b) engage in sexual conduct with a former patient within one year of termination of massage therapy, or
- (c) make any inquiry into a patient's sexual history, unless such an inquiry is directly related to the assessment or treatment of a patient's condition.

34. The College submits that "sexual conduct" under section 2(a) of the Bylaws above includes non-consensual touching. The College relies upon the following passage from the *Martin* decision which discusses section 2(a) in relation to other provisions in the Bylaws:

[195] The difference between the two sections of the Code is that section 2(a) would presumably include both consensual sexual conduct with a patient as well as any non-consensual touching, both of which are defined by section 28(4) of the College's Bylaws as "professional misconduct of a sexual nature" (the definition also includes "touching of a sexual nature" and "behaviour or remarks of a sexual nature"). Section 1(2) prohibits taking advantage of a patient's "vulnerabilities" but does not define what such vulnerabilities consist of, or whether they are inherent or specific to an individual patient.

35. The College also submits that criminal law is relevant to this area because past Discipline Committee cases have found that to be so (*Martin*). The College cites *R. v. Chase*, [1987] 2 S.C.R. 293 in which the Supreme Court of Canada held:

11. Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (*Taylor, supra, per Laycraft C.J.A.*, at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

36. The Panel agrees that criminal law cases are helpful to interpret similar concepts in this area, and is aware of how past Discipline Committee decisions have cited

criminal law cases. The Panel wishes to be clear though that criminal law cases ought to be referenced with care and mindful of context. There are notable distinctions in the criminal realm, namely the different standard of proof and requirement of a mental element.

37. The panel in *Martin* addressed the assessment of whether conduct is sexual in nature as follows:

[197] The same principle applies in the regulatory context. The two key questions to determining whether intentional conduct of a sexual nature occurred are (1) was the conduct that took place, viewed objectively, of a sexual nature? and (2) did the person who is alleged to have committed the conduct in fact intend that conduct? This test may be particularly difficult to apply in the massage therapy context, as the practice of the profession inherently involves physical contact. Therefore, in order to determine whether conduct is “objectively” of a sexual nature, a Panel must scrutinize with care all evidence about the conduct at issue, including whether or not any touch alleged to be sexual in nature may have had a therapeutic rationale, or may have been accidental.

38. The Panel agrees that in the regulatory context, the assessment of whether or not touch is sexual in nature is objectively determined and involves a scrutiny of all of the evidence about the conduct at issue. Whether the touch may have had a therapeutic rationale is an important consideration in that assessment.
39. The College submits that the part of the body touched is relevant. The College cites the following passage from *College of Massage Therapists of Ontario v. Schoelly*, 2018 ONCMTO 36 in support of its argument that where the part of the body touched is inherently sexual, the touching may be found to be sexual in the absence of any sign of sexual gratification on the part of the registrant:

There was no evidence of the intent or motive of the Registrant committing this act or any sign of sexual gratification; however, *R. v. Chase* established that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances. Similarly, *Yaghini*[39] established that “[w]hether the alleged perpetrator derived sexual gratification or had a sexual purpose is a relevant factor, but the absence of a sexual motivation would not necessarily preclude a finding that the behaviour in question was sexual in nature.” The Panel determined that lack of evidence of intent or motive or any sign of sexual gratification is not important in the circumstances of the present case, because there is never a clinical reason for a Registered Massage Therapist to touch a client’s genitals. This last point is important to emphasize, given the Code specifies that “sexual nature” does not include “touching, behaviour or remarks of a clinical nature appropriate to the service provided”.[40]

Given that there is never a clinical reason for a Registered Massage Therapist to touch a client’s genitals and, having found that the Registrant touched the Client’s genitals, the Panel concluded that the touching was “sexual in nature.”

40. The Panel agrees with the reasoning in the *Schoelly* decision about the relevance of the part of the body touched and the absence of any clinical reason to touch a patient's genitals.
41. The timing of the reporting of the alleged incidents alone is not a basis to discount the credibility of the complainants. The Panel agrees with the following reasoning by the Supreme Court of Canada in *R. v. D.D.*, 2000 SCC 43 regarding the fact that there is no inviolable rule on how people who are the victims of trauma such as a sexual assault will behave:

65 A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

42. The panel in *Martin* set out the following list of additional factors that are relevant considerations in alleged sexual misconduct cases. The Panel agrees with this list:

[223] The College submitted that in addition to the above considerations, there are also "special factors" that should be considered in cases of alleged sexual misconduct. The first is that, in light of the degree of trust that a patient places in a health-care provider, an initial reaction to a perceived improper sexual touch may be, and is likely to be, confusion or shock: *Li (Re)*, [2002] O.C.P.S.D. No. 45. Second, the College submits, it should not be considered unusual for a female patient not to object immediately to inappropriate touching. Third, patients may try to convince themselves that they have misinterpreted the health professional's conduct and, may even return to the professional after such conduct has occurred, and that doing so should not be seen as diminishing their credibility if the patient provides a reasonable explanation for returning: *Noriega (Re)*, [2014] O.C.P.S.D. 27. Fourth, evidence in sexual misconduct cases may involve perception based on senses other than vision. For example, in *Li*, the hearing panel accepted the evidence of a patient who described feeling Dr. Li's body pressed against her buttocks, and that what she felt was not a reflex hammer, a pen or a stethoscope, but was his erect penis pressing through both their clothing. In *Markman (Re)*, [1999] O.C.P.S.D. No. 6, the Committee found that the doctor had thrust his genitals or pelvic area into the back or buttocks of two complainants, based on their evidence of having perceived such contact through touch.

Scope of Practice

43. Section 9(d) of the Bylaws in effect at the material times provided:

Professionalism

9 A Registrant must

- (a) maintain personal hygiene and professional appearance,
- (b) differentiate between personal and professional belief and behaviours,

- (c) evaluate strengths and weaknesses as a therapist, and set goals for improvement, and
- (d) maintain awareness of, and practice within, the current scope of practice of massage therapy in British Columbia.

44. Section 1(1)(c) of Schedule C of the Bylaws in effect at the material times provided:

General Duty to Patients

1(l) A Registrant shall:

- (a) act in the best interest of a patient;
- (b) only provide a treatment if the Registrant has a reasonable expectation that it will be of benefit to a patient;
- (c) only provide massage therapy treatments that fall within the scope of practice of massage therapy, as defined in the Regulation.

45. Three scope of practice issues are raised in the Amended Citation: (1) putting a finger beyond the anal verge or labia majora, (2) making a diagnosis, and (3) removing blackheads by picking the skin on C.C.'s back.

46. Scope of practice of massage therapy is defined by the HPA and the *Massage Therapists Regulation*, B.C. Reg 280/2008 (the "Regulation").

47. Modern principles of statutory interpretation govern this analysis, including that the words in an Act are to be read in its entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. Regulations must be interpreted having regard to their enabling statute.

48. Section 12 of the HPA provides for the designation of a health profession. Sections 12 and 13 of the HPA provide for the creation by regulation of non-exclusive scopes of practice for multiple health professions. Within those scopes of practice, certain activities may be designated as reserved acts, meaning they may only be performed by certain members of a specific health profession.

49. Section 4 of the Regulation sets out the scope of practice for massage therapy:

Scope of practice

4 A registrant may practise massage therapy.

50. "Massage therapy" is currently defined in section 1 of the Regulation as follows:

1 In this regulation:

...

"massage therapy" means the health profession in which a person provides, for the purposes of developing, maintaining, rehabilitating or augmenting physical function, or relieving pain or promoting health, the services of

(a) assessment of soft tissue and joints of the body, and

(b) treatment and prevention of physical dysfunction, injury, pain and disorders of soft tissue and joints of the body by manipulation, mobilization and other manual methods.

51. There are presently no restricted activities in the Regulation.

52. The Respondent is alleged to have exceeded his scope of practice in 2014. At that time, "massage therapy" was defined in the Regulation as follows:

the kneading, rubbing or massaging of the human body, whether with or without steam baths, vapour baths, fume baths, electric light baths or other appliances, and hydrotherapy or any similar method taught in schools of massage approved under the *Physiotherapists Act*, but does not include any form of medical electricity.

53. From 2008 until it was repealed on April 20, 2015, section 5 of the Regulation contained the following under "restricted activities":

5 (1) No person other than a registrant may practise massage therapy.

(2) Subsection (1) does not apply to a person

(a) employed by and on the premises of a hospital which has been designated by the minister, and

(b) who is acting under the direction of a medical practitioner.

54. The regulations of other health professions contain restricted activities which permit "putting a finger beyond the anal verge", "putting a finger beyond the labia majora", or both. Specifically, the midwives, nurses, chiropractors, naturopathic physicians and dentists have been granted such restricted activities. Physicians contain a very broad scope of practice for "medicine" in the Medical Practitioners Regulation. In addition, that regulation expressly provides that "a registrant in the course of practising medicine may perform any restricted activity".

55. It is clear on reading the plain wording of the Regulation, with the assistance of other health professions' regulations noted above, and employing modern principles of statutory interpretation, that there is no authority for a health profession to perform restricted activities that can be inferred from silence in the Regulation. There is no scope of practice in the Regulation for massage therapists to perform internal massage, and specifically, to put a finger beyond the anal verge or labia majora.

56. This statutory interpretation is consistent with the object of the Act and intention of the Legislature. Section 16 of the HPA sets out the twin duties of the College to serve and protect the public, and exercise its powers and discharge its responsibilities under all enactments in the public interest. This public protection object was referenced by the Ministry of Health on introduction of the Act in the Legislature.
57. The framework for restricted activities set out in the HPA and the various health professions' regulations advances the public protection object of the legislation. The Health Professions Council was tasked with considering how the scope of practice for each health profession should be legislatively defined. The Health Professions Council identified that reserved acts are aspects of a profession's scope of practice which present a significant risk of harm and should therefore, be reserved for a particular profession or shared amongst particular professions. The Health Professions Council developed a list of reserved acts. That list expressly included:
- 2. Performing the following physically invasive or physically manipulative acts
 - e. putting an instrument, hand or finger(s),
 - v. beyond the labia majora, [or]
 - vi. beyond the anal verge...
58. The College made submissions to the Health Professions Council that massage therapists should be granted those reserved acts. The Health Professions Council rejected that submission, concluded it was not within the scope of practice of massage therapy and recommended in February 1999 that RMTs be granted no reserved acts.
59. The College disagreed with that decision and sent correspondence in 2002 requesting that the Health Professions Council reconsider its recommendation. On October 23, 2002, the Minister of Health indicated that she did not intend to reconsider the decision and asked the College to advise its registrants of the scope of practice definition set out in the Regulation, in particular that the practice of "medical electricity" and "pelvic floor massage" could not be performed by registrants. The College issued a Notice to the Profession which was mailed to

registrants in approximately early 2003. According to the affidavit of Kate Parisotto, Director of Inquiry and Discipline at the College, it was printed on blue paper.

60. The Notice to the Profession advised registrants to stop performing pelvic floor work:

The Minister has recently advised the College that she will not accept any further submissions on a pelvic floor work reserved act for massage therapists. In addition to her decision to accept the Council's recommendations (i.e. that no reserved acts be granted to massage therapists) and to so amend the Regulation, the Minister has also directed the College to advise its members to stop providing this service to the public.

In order to protect registrants from unauthorized practice complaints or prosecutions now and in the future, the Board hereby advises massage therapists to cease providing pelvic floor work to the public. The Board has also repealed Advisory statement #2 and it has been removed from the college's website.

....

The Board advises massage therapists not to use any form of medical electricity in their practice, including TENS machines, laser and therapeutic ultrasound. The Board also advises therapists not to treat the muscles of the pelvic floor by direct massage.

...

Therapists who continue to provide pelvic floor treatments or use equipment like TENS or ultrasound machines in their massage practice risk being investigated by the College for a breach of the Bylaws, or being prosecuted by another health profession that has been granted the applicable reserved act.

61. The Respondent testified that he recalled receiving a notice from the College on blue paper but that it did not include any information on medical electricity. The College Board meeting minutes preceding the issuance of the Notice to the Profession indicate that the notice was to also address medical electricity. Under cross-examination, the Respondent conceded the content of the Notice to the Profession was more or less the same as the notice he received. The Panel accepts the College's evidence on this point and finds that the Notice to the Profession prohibiting pelvic floor work was issued in or about early 2003. There was no evidence of any other notice issued during the material times and the Panel finds it more likely that the blue notice the Respondent recalled receiving and which contained similar content to the Notice to the Profession was in fact the same Notice to the Profession which advised massage therapists to cease providing pelvic floor work to the public.

62. This is also consistent with the Respondent's testimony that he was among only five RMTs trained in pelvic floor treatment in British Columbia, and that he was aware of

and involved in efforts to lobby the government to grant precisely that scope of practice to massage therapists.

63. The Notice to the Profession also constitutes a limit established by the College's Board on the designated profession of massage therapy by registrants pursuant to sections 19(1)(k) and 19(1.1) of the HPA.
64. Diagnosis of a medical condition is also outside of the scope of massage therapy. It is not contained in the definition of massage therapy in the Regulation, nor is it listed in the Regulation as a restricted activity (as massage therapy has been granted no restricted activities).
65. Several other designated professions have been granted the ability to make a diagnosis in their regulations: chiropractors, dentists, midwives, nurses and naturopaths. As previously noted, the definition of "medicine" is very broad and physicians may perform any restricted activity, so they too may make diagnoses.
66. The interpretation of the Act and the Regulation as not permitting massage therapists to make diagnoses is also consistent with the Health Professions Council's recommendation to not grant any reserved acts with respect to diagnosis to massage therapists. The College made submissions to the Health Professions Council that diagnosis be granted as a reserved activity, but the Health Professions Council did not accept that position. The Health Professions Council noted that massage therapy did include the ability to make assessments, which is different than diagnosis.
67. Mr. Mohring's opinion was also that diagnosis does not fall within the scope of practice of massage therapy. He stated "diagnosis is often a definitive term and the likelihood of accuracy is very high. A diagnosis also carries with it a complete rationale and justification as it usually involves differentiating between one condition and other similar or related conditions. It includes tests and measures not available to or outside the scope of practice of the RMT such as imaging results, blood tests, or other precise measures." The Panel agrees with and accepts this definition.

68. The Panel finds that diagnosis of a medical condition as the cause of an individual's symptomology is clearly outside the scope of practice of massage therapy.
69. Likewise, the removal of blackheads from a patient's body is outside of the scope of practice of massage therapy for many of the same reasons outlined above. This act does not fall within the definition of massage therapy. It is not "the kneading, rubbing or massaging of the human body". It is not a reserved act in the Regulation as, again, there are no reserved acts.
70. Performing procedures below the dermis is however a reserved act for other professions such as dentists, naturopaths, and nurses. As noted above, physicians may perform any restricted activity.
71. In Mr. Mohring's opinion, the removal of blackheads is outside of the scope of massage therapy because blackheads form within the dermis. The Panel agrees.

Evidence

72. The College called seven witnesses and adduced the evidence of two witnesses by affidavit. The College called the following witnesses:
 - a. A.A.
 - b. B.B.
 - c. C.C.
 - d. D.D.
 - e. Undercover investigator "Jessica Chan"
 - f. Expert, Dr. Claudia Krebs
 - g. Expert, Marvin Mohring
73. During the Discipline Hearing, the Panel qualified Dr. Krebs as an expert to provide opinion evidence in the area of human anatomy. Dr. Krebs is a Professor of Teaching at the University of British Columbia. She holds an MD and a PhD in anatomical sciences from the University of Cologne, Germany. She has been teaching gross anatomy of the pelvis and perineum to health professional students

as a faculty member at UBC. Dr. Krebs prepared an expert report dated April 9, 2021.

74. As noted above, during the Discipline Hearing, the Panel qualified Mr. Mohring as an expert to provide opinion evidence in the area of massage therapy. Mr. Mohring holds a B.Sc. in Kinesiology from the University of Waterloo and a Master's in Education from St. Francis Xavier University. He has been a Registered Massage Therapist in Ontario for approximately 27 years, and has 20 years experience teaching as a full time faculty member at Algonquin College. Mr. Mohring prepared a report dated March 1, 2021.
75. The College led affidavit evidence from:
 - a. Affidavit #1 of Kate Parisotto, Director of Inquiry and Discipline at the College (affirmed May 25, 2021)
 - b. Affidavit #1 of Liza Szabo, Inspector appointed by the College (affirmed May 26, 2021)
76. The Respondent testified on his own behalf. He did not call any other witnesses.
77. The evidence led is discussed below in relation to each of the allegations from the Amended Citation.

Credibility of the Respondent

78. The assessment of a witness's credibility is done by considering a number of factors. In *Faryna v. Chorny*, [1951] B.C.J. No. 152, the Court of Appeal described that assessment as follows:

The real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

79. The College relied on *Ahluwalia v. The College of Physicians and Surgeons of Manitoba*, 1999 CanLII 14044, in which the Manitoba Court of Appeal described the relevant factors as follows:

The panel looked to all of the evidence in making its credibility findings, including: the quality of the appellant's evidence as compared to the testimony of the witnesses called by the College; the inconsistency and evasiveness that they found in the appellant's testimony; the inability of the appellant to accept responsibility for his actions; the

documents that the appellant prepared and submitted to the College and his solicitor; and the communications that he had with the College.

80. The Panel agrees with the factors set out above in *Ahluwalia* and finds that the decision of *Bradshaw v. Stenner*, 2010 BCSC 1398 (which applied *Faryna v. Chorny*) also sets out the following helpful approach to the assessment of credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

81. After consideration of all of the evidence, the Panel finds that the Respondent was not a credible witness for many reasons.
82. The Respondent was evasive and failed to make reasonably called for admissions. On cross-examination, the Respondent was asked about his written statement to Ms. Parisotto that his typewritten notes for F.F. were "reproduced from the originals and made to be more readable...clarification of acronyms, abbreviations spelled out, etc.". The Respondent admitted that the records he created did more than just clarify acronyms and spell out abbreviations. The Respondent rationalized this departure with reference to the word "etc." in his statement to Ms. Parisotto, implying that he

truthfully conveyed all of the differences between the two documents to Ms. Parisotto by including the word “etc.”

83. It was put to the Respondent on cross-examination that he understood in 2014 that he had no legitimate basis for recommending internal treatment via the rectum to D.D. The Respondent answered, “I couldn’t say for sure”.
84. The Respondent was asked on cross-examination about the following question and answer given to the College investigator in his April 18, 2018 interview regarding his typewritten treatment records for F.F.: “Q. Okay. And when did you record the treatment notes? A. The evening of, you know, following the treatment.” On cross-examination, it was put to the Respondent that his statement to the College investigator was not true. The Respondent admitted the statement was false; stating, “If you put it that way, no it wasn’t true”. The Respondent rationalized his lie as follows, “the notes were distillation... I think that my intent was that the notes were what I was had done during the treatment that I put in a format that was readily [sic] for her.” The Respondent then refused to admit that he did not tell that to the College investigator. First, he said that “I believe I did tell her that”. When confronted about there being nothing in the interview transcript to that effect, the Respondent changed his evidence and recollection, stating that it “may have been in a telephone conversation.”
85. The Respondent’s testimony about his failure to provide contemporaneous treatment records when asked to do so was contradictory and unlikely. The Respondent stated that he did not think that the College wanted them (when it is apparent from the documents that the opposite is the case), he did not know how to send them to the College (yet he had already done so for other patients), and that he thought email was not a secure method for sharing information. The Respondent’s explanation of security concern arose for the first time on re-examination and is not contained in any of his communications with the College at the time the requests were made. The Respondent also testified that he included little detail in his contemporaneous treatment notes to protect the privacy of his patients if the clinic experienced a break-in and his computer was stolen.

86. The Respondent testified that he treated C.C. outside of her underwear but then admitted on cross-examination that he did not remember whether she was wearing underwear during the treatment.
87. Some of the Respondent's testimony was not only inconsistent with other oral and documentary evidence but entirely implausible. The Respondent's testimony about his theory that A.A. sustained an internal injury during the birth of her child contradicted A.A.'s own testimony about her labour experience when she testified that no medical professional had told her she sustained the injury asserted by the Respondent. The Respondent's purported belief that blood flow had been interrupted due to trauma during childbirth seven years prior is implausible given the substantial length of time without symptoms, likelihood that interrupted blood flow would constitute an emergency, and that A.A.'s chief complaint was on the opposite side of her body and the result of a recent motor vehicle collision. The Respondent admitted on cross-examination that there was nothing in his clinical records regarding his theory that A.A.'s blood flow had been interrupted for years, and there was nothing demonstrating that he did any investigation into that theory. When confronted about the fact that there is no anatomical association between the obturator internus and gluteal arteries, the Respondent agreed.

Analysis

Allegation 1: A.A.

88. A.A. testified that she is an RMT. [REDACTED] A.A. was a student at the West Coast College of Massage Therapy [REDACTED] where she was a student of the Respondent.
89. At some point after graduation, A.A. began seeing the Respondent for massage therapy in relation to work related conditions. While she could not remember the exact number and dates of her visits, A.A. had multiple treatments with the Respondent over the mid to late 1990s and early 2000s.
90. A.A. testified that she stopped seeing the Respondent after one session in which the Respondent's fingers brushed up against her vagina.

91. A.A. testified that she did not return to see the Respondent for approximately seven to nine years. The Respondent's testimony and records indicate that there was a gap of nine years from when A.A. stopped seeing him until she returned again in 2014.
92. A.A. testified that she returned to see the Respondent in 2014. A.A. explained that she returned to see the Respondent because many years had passed, and she was experiencing issues which she thought only the Respondent could address for her. Her areas of complaint were: hip, neck and forearms. A.A. had been in a motor vehicle accident earlier that year.
93. A.A. testified that when she returned to see the Respondent in 2014, he did not ask her to complete an intake form. She did not recall him asking for any update on her health history despite the passage of time. She believes she would have told him about her accident. The Respondent admitted on cross-examination that A.A. did not complete an intake form in 2014, and that his contemporaneous notes did not contain a treatment plan, the record was silent on what information the Respondent provided to A.A., and that the record did not contain any health history from the previous nine years. The Respondent created typewritten notes in 2019 after the College requested that he produce his clinical records.
94. A.A. saw the Respondent approximately two to three times in 2014. Her final visit was on September 11, 2014. The Respondent spoke to A.A. during several appointments about performing internal pelvic floor work on two other patients. During one of those times, A.A. responded, "ew no thank you, not for me". She was referring to the fact that she would not perform that work as an RMT on her own patients.
95. A.A. testified that during the September 11, 2014 treatment session, the Respondent asked A.A. to undress and left the room. She undressed. She was naked under the drape. She does not wear underwear and did not bring shorts with her that day. The Respondent returned and started the treatment with her right hip. He then did something he had not done at previous appointments. The Respondent put his hand around her hip and was rocking her quite vigorously. A.A. testified

she did not feel the entry of the Respondent's fingers into her vagina. A.A. said that it was a feeling she was not used to. A.A. testified that "then all of a sudden it was very clear", he had inserted one or more fingers into her vagina without her consent and massaged the inside of her vagina. A.A. testified that she "came to a realization...I started tensing up, slid up the table..trying to get away from his hand."

96. A.A. testified that "nothing was said", "zero words were said". She described herself as frozen. The Respondent then removed his fingers, wiped them on the sheet and continued with the treatment. A.A. testified that the Respondent did not say anything to her about performing internal massage on her prior to commencing the treatment. The Respondent did not seek or obtain consent to insert his fingers into A.A.'s vagina.
97. The Respondent testified that he performed internal massage of A.A.'s vagina. The Respondent's treatment records for September 11, 2014 indicate that he performed "internal MFR work on the R Obturator internus after clearing the low back and hips from fascial & muscular restriction" on A.A. In his written submissions, the Respondent argues, "The inability of A.A. to feel my fingers until they were "inside", suggests that there was sensory impairment and calls into question her testimony about trying to crawl away as I was approaching the vaginal orifice."

Allegation 1(a)

1. On September 11, 2014, in the course of providing massage therapy to A.A., you:
 - a. failed to comply with section 3 (a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by inserting a finger of your hand beyond the patient's labia majora and massaging the interior walls of her vagina without ensuring the patient was fully informed regarding assessment and treatment and provided consent
98. Section 3(a) of Schedule D of the Bylaws in effect at the material times, required the Respondent to ensure that a patient is fully informed regarding assessment and treatment, and provide consent.
99. A.A. testified that on September 11, 2014, the Respondent inserted one or more fingers into her vagina and massaged the interior of her vagina. A.A.'s testimony was clear and convincing. A.A. did not testify that she was unable to feel the Respondent's fingers or had any type of sensory impairment. Rather, she testified

that it was a feeling she was not used to. She was clear in her description of her realization that the Respondent's fingers were inside of her and that once she realized that she attempted to get away from the Respondent's hand by sliding up the table. The Respondent did not undermine this evidence on cross-examination.

100. When he was under cross-examination, the Respondent admitted that he inserted his fingers into A.A.'s vagina. The Respondent's treatment records from September 11, 2014 indicate that he performed internal massage work on A.A. The Panel finds that the Respondent inserted a finger of his hand beyond A.A.'s labia majora and massaged the inside walls of her vagina.
101. A.A. testified that the Respondent did not notify her in advance that he intended to insert his finger into her vagina and massage her internally and he did not communicate to her at the time that he was doing so. The Respondent did not explain the therapeutic basis for inserting his finger in her vagina and performing internal massage. A.A. testified that the Respondent did not request or obtain her consent for the Respondent to insert his finger in her vagina or to perform internal massage. The Respondent's treatment records do not reference any consent sought or received. The Panel accepts A.A.'s unshaken evidence on this point as well and finds that A.A. was not fully informed regarding the assessment, treatment, or rationale and did not provide her consent. The Panel described the requirements that registrants must adhere to in obtaining informed consent and finds that the Respondent failed to comply with those requirements and, specifically, failed to comply with section 3(a) of Schedule D of the Bylaws which were then in effect.
102. The Panel also previously outlined the meaning of professional misconduct above and finds that the Respondent's conduct falls squarely within the meaning of professional misconduct. Touching of A.A.'s genitals without consent is conduct that would reasonably be considered by members of the profession to be "dishonourable, disgraceful, or unprofessional" and is a marked departure from the expected standards of the profession.
103. The College has proven this allegation to the requisite standard.

Allegation 1(b)

1. On September 11, 2014, in the course of providing massage therapy to A.A., you:
 - b. failed to comply with section 2 (a) of Schedule C of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by engaging in sexual touching of the patient's vagina;
104. Section 2(a) of Schedule C of the Bylaws in effect at the material times, required the Respondent to not engage in sexual conduct with a patient.
105. As set out above, the Panel finds that the Respondent inserted his finger into A.A.'s vagina and performed internal massage without notifying A.A. prior to doing so, without advising her of the therapeutic rationale or treatment plan, without seeking her consent and without obtaining her consent.
106. The Respondent did not provide evidence of a therapeutic basis to massage the inside of A.A.'s vagina.
107. As set out above, the Respondent's treatment record for September 11, 2014 references the obturator internus muscle.
108. The Respondent testified that he believed A.A. was suffering from "pudendal nerve entrapment" which was causing her pelvis to go out of alignment. The Respondent testified that the cause of the entrapment was related to the birth of A.A.'s child. The Respondent testified that an injury to the obturator internus during childbirth caused scar tissue that was interrupting blood flow in A.A.'s gluteal arteries. However, when the Respondent was interviewed by the College's investigator, he said that he was "trying to mobilize the scar tissue...and restore blood flow through the gluteal arteries, the superior and inferior gluteals, and trying to get internal release of piriformis." The Respondent told the College's investigator that he accomplished this and knew he did so because he felt a "change in the blood flow with [his] right hand." There is no mention of A.A.'s gluteal arteries or piriformis in the Respondent's treatment records.
109. A.A. testified that no physician has ever told her that she sustained an injury during childbirth, including an injury to the obturator internus. A.A. testified that she did not suggest to the Respondent that she suffered an injury while giving birth to her child.

110. The Respondent agreed on cross-examination that he did not receive any clinical records indicating that A.A. had experienced an injury in childbirth.
111. Dr. Krebs explained that the obturator internus muscle forms “the anterolateral wall of the true pelvis.” Dr. Krebs described the role the obturator internus muscle plays in hip mobility, noting that its main function is to stabilize the hip joint and it has minimal influence on external rotation of the hip. Dr. Krebs opined that the obturator internus muscle is a weak external rotator of the hip and is not typically associated with hip pain.
112. In Dr. Krebs’ opinion, “Pudendal nerve entrapment has been described as a rare syndrome caused by trauma to the pudendal nerve directly. There is no reported evidence of pudendal nerve entrapment secondary to obturator internus damage.” Dr. Krebs’s evidence is that there is no reported evidence in the literature of the obturator internus being a muscle injured in childbirth. Moreover, she is of the opinion that assuming the existence of scar tissue on the obturator internus, it is very unlikely that even extensive scar tissue could reduce blood flow in any artery. In Dr. Krebs’s opinion, “From an anatomical consideration, the obturator internus muscle cannot block or reduce blood flow in the obturator artery, the artery of ligamentum teres (“foveal artery”), the superior and inferior gluteal arteries, or any other artery”
113. The Respondent did not undermine Dr. Krebs’s evidence in cross-examination.
114. The Panel finds that there is no evidence that A.A. experienced an injury in childbirth, let alone an injury to the obturator internus which caused scar tissue that was interrupting blood flow in A.A.’s gluteal arteries. The Panel found Dr. Krebs’ evidence in her report and in her oral testimony to be very clear and convincing. The Panel accepts her evidence in its entirety and gives it significant weight. It is clear from Dr. Krebs’ evidence that the anatomy in question does not function in the way suggested by the Respondent, nor that any of his interventions could accomplish what he suggests. Leaving aside the very real issues of consent and scope of practice, there is quite simply no therapeutic justification for the Respondent’s internal massage of A.A.

115. The Panel agrees with the College's submission that the Respondent did not obtain any health history relating to A.A. since he had seen her nine years earlier, and he appears to have manufactured an obviously speculative theory, with no evidentiary or scientific support, to justify internal massage. The Panel agrees with the College's submission that this demonstrates a shocking breach of trust.
116. This is particularly troubling because the Respondent knew massage therapists were not permitted to perform internal massage. The Respondent testified that he was one of five practitioners trained in internal pelvic floor work and was aware of and involved in efforts to lobby the government to include internal pelvic floor work as a restricted act for the profession. There would be no need to lobby the government to add the restricted act if that was already permitted.
117. The Panel finds that on September 11, 2014, in the course of providing massage to A.A., the Respondent failed to comply with section 2 (a) of Schedule C of the Bylaws then in effect, which required registrants to not engage in sexual conduct with a patient. The Panel considers the following factors establish that the touching was sexual:
- a. The part of A.A.'s body involved was her vagina which is a sexual body part.
 - b. The Respondent lacked any therapeutic justification to touch inside A.A.'s vagina.
 - c. The Respondent's asserted justifications that are without any basis whatsoever and are implausible, which suggests that they were fabricated.
 - d. The Respondent knew internal massage was prohibited and performed internal massage regardless.
 - e. The Respondent did not obtain consent.
 - f. The Respondent inserted his finger into A.A.'s vagina without any notice to A.A. before doing so and after she had expressed that that very act was offensive to her and something that she would not perform on her own patients.

118. As indicated earlier in these reasons, the Respondent is not required to have a sexual motivation or gratification in order for it to be sexual touching. A.A.'s sexual integrity was violated by the Respondent's insertion of his finger into her vagina without consent and without therapeutic purpose. This is conduct that would reasonably be considered by members of the profession to be "dishonourable, disgraceful, or unprofessional" and is a marked departure from the expected standards of the profession. The Panel finds that the Respondent committed professional misconduct by engaging in sexual touching of A.A.'s vagina.

119. The College has proven this allegation to the requisite standard.

Allegation 1(c)

1. On September 11, 2014, in the course of providing massage therapy to A.A., you:
 - c. failed to comply with section 9 (d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by inserting a finger of your hand beyond the patient's labia majora and massaging the interior walls of her vagina when doing so was outside of the scope of practice of massage therapy in British Columbia

120. Section 9(d) of Schedule D of the Bylaws in effect at the material times, required the Respondent to maintain an awareness of, and practice within, the current scope of practice of massage therapy in British Columbia.

121. Section 1(1)(c) of Schedule C of the Bylaws in effect at the material times, required the Respondent to only provide massage therapy treatments that fall within the scope of practice of massage therapy, as defined in the Regulation.

122. The Panel finds that inserting a finger beyond a patient's labia majora and massaging the interior walls of the patient's vagina were outside of the scope of practice of massage therapy in British Columbia in September 2014, for all of the reasons set out in the "legal framework" section of these reasons.

123. There is no factual dispute between the parties that on September 11, 2014, the Respondent did indeed insert his finger in A.A.'s vagina and perform an internal massage of her vagina, and the Panel has made that finding above.

124. While the College is not required to prove that the Respondent knew that inserting his finger into A.A.'s vagina and performing an internal massage was outside of his

scope of practice, the Panel has found that he did know as much. As mentioned above, the Respondent testified that he was one of five practitioners trained to perform internal pelvic floor work and was aware and participated in efforts to lobby the government to adjust the scope of practice for massage therapists.

125. The statutory framework in place at the time clearly did not permit internal massage and the College issued a Notice to the Profession on exactly that issue in 2003, prior to the conduct alleged in this hearing.

126. The Panel finds that the Respondent failed to comply with section 9(d) of Schedule D of the Bylaws and maintain an awareness of, and practice within, the current scope of practice of massage therapy in British Columbia, and failed to comply with section 1(1)(c) of Schedule C of the Bylaws to only provide massage therapy treatments that fall within the scope of practice of massage therapy, as defined in the Regulation, when on September 11, 2014, in the course of providing massage therapy to A.A., he inserted a finger of his hand beyond A.A.'s labia majora and massaged the interior walls of her vagina when doing so was outside of the scope of practice of massage therapy in British Columbia.

127. The College has proven this allegation to the requisite standard.

Allegation 1(d)

1. On September 11, 2014, in the course of providing massage therapy to A.A., you:
 - d. failed to comply with a standard or limit on the practice of massage therapy imposed by the College under the Act, and committed unprofessional conduct, by inserting a finger of your hand beyond the patient's labia majora and massaging the interior walls of her vagina, contrary to the Notice to the Profession Re: "Medical Electricity" and "Pelvic Floor Treatments"

128. The 2003 Notice to the Profession informing registrants to cease providing pelvic floor work constitutes a standard or a limit on the practice of massage therapy imposed by the College under the HPA, for all of the reasons set out earlier in the "legal framework" section of this decision.

129. The Notice to the Profession was delivered to the profession in early 2003 and was printed on blue paper.

130. The College is not required to prove that the Respondent received the Notice to the Profession as he is bound by a limit on the practice of the profession in any event. Nevertheless, the Panel found the Respondent's testimony about whether or not he received the Notice to the Profession unconvincing. First, the Respondent acknowledged receiving a blue Notice to the Profession around the same time. There was no evidence of any other notice issued and, as noted above, the Panel finds it more likely that the Respondent did indeed receive the Notice to the Profession prohibiting pelvic floor work. Second, the Respondent was clearly keeping apprised of the developments pertaining to this very scope of practice issue given his interest and involvement to some degree with efforts to lobby the government. The Panel finds it more likely that the Respondent knew internal massage was not within his scope of practice and simply disagreed with that limit.
131. Accordingly, the Panel finds that on September 11, 2014, in the course of providing massage therapy to A.A., the Respondent failed to comply with a standard or a limit on the practice of massage therapy imposed by the College under the Act, and committed unprofessional conduct, by inserting a finger his hand beyond A.A.'s labia majora and massaging the interior walls of her vagina, contrary to the Notice to the Profession Re: "Medical Electricity" and "Pelvic Floor Treatments".
132. The College has proven this allegation to the requisite standard.

Allegation 2: A.A.

2. On August 29 and September 11, 2014, having provided massage therapy to A.A., you failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions
133. Section 4(a)(iv) and (v) of Schedule E of the Bylaws in effect at the material times required the Respondent to generate an indelible clinical record for each patient containing: the health history obtained and updated, findings obtained, clinical impressions and relevant information of the patient's condition; and a treatment plan, including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.

134. The Panel accepts A.A.'s testimony and the Respondent's admission that when A.A returned to see the Respondent in 2014, he did not ask her to complete an intake form. The Panel also accepts A.A.'s testimony that she did not recall him asking for any update on her health history despite the passage of nine years. This is consistent with the absence of that information in the Respondent's contemporaneous notes. The Panel also finds those notes did not contain a treatment plan and they did not contain any record of information that the Respondent provided to A.A.
135. The Panel agrees with the College's submission that the content of the Respondent's typewritten notes which were created in 2019, following the College's demand that he produce his clinical records are not relevant.
136. The Panel finds that on August 29 and September 11, 2014, having provided massage therapy to A.A., the Respondent failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of A.A.'s health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
137. The College has proven this allegation to the requisite standard.

Allegation 3: B.B.

138. B.B. [REDACTED] She testified that she fractured her hip in 2008 after falling on the ice. She underwent reconstructive surgery the next day and a second surgery one year later to remove the hardware placed in her hip during the first surgery. B.B. testified that in 2014, she sought massage therapy from the Respondent in the hopes of addressing her hip injury and what she described as extreme chronic pain and decreasing mobility issues. B.B. had receipts for treatments received from the Respondent on January 15, January 28, March 12 and April 4, 2014.
139. B.B. testified that the first appointment was fairly standard. B.B. recalled filling out a standard form. B.B. does not recall the Respondent taking a general health

history, asking her any specific information about the hip fracture, or requesting that she provide medical records relating to the hip fracture at the first, or at any of the subsequent appointments. B.B. recalled the Respondent only speaking to her in general terms about the services he would be providing; that is massage to her hip and leg. He did not discuss his assessment method, a treatment plan or rationale. At no point did the Respondent tell B.B. that he would need to massage in her groin or vaginal area. B.B. did not provide consent to massage in the groin or vaginal areas. She does not recall providing consent to massage the buttocks area either. B.B. does recall the Respondent telling her about his ability to help in difficult situations and that he was confident he would be able to improve her quality of life. B.B. recalled at the second appointment, the Respondent told her that he once helped a woman get pregnant.

140. B.B. testified that on the next three appointments, the Respondent massaged her vaginal area without her consent. B.B. described feeling pressure and circular motions in the groin area adjacent to her vagina, and that the Respondent was touching in the lower part of her vagina towards the hip socket. The touch was skin on skin. The Respondent was simultaneously massaging her buttocks with his other hand. B.B. testified that there was no conversation about this treatment while the touch was taking place. B.B. recalls asking the Respondent during the second or third treatment session what he was doing. The Respondent told B.B. that he was massaging her obturator internus muscle. B.B. recalls the Respondent saying that it improved blood flow to the area.
141. B.B. recalls the fourth appointment being different than the others. As she was lying face down on the massage therapy table, B.B. felt the Respondent touching her more “forward in the groin area”, towards the front of her body and “adjacent to her vaginal opening”. In response to a Panel question and on re-direct examination, B.B. clarified that the Respondent touched her vulva on all three appointments. B.B. felt a sensation through her body of climax. There was no conversation between the Respondent and B.B. when this was taking place. B.B. testified feeling frozen. Shortly after that the massage ended. The Respondent left the room, B.B.

got dressed and left. She recalls shaking at the bus stop and trying not to cry. B.B. never returned to the Respondent.

142. The Respondent testified that he did “not recall” if he completed an intake form for B.B. He admitted on cross-examination that if he had one for B.B., he would have produced it to the College. The Respondent’s records do not contain any notation about seeking or receiving consent from B.B.

143. The Respondent’s non-contemporaneous treatment records which were created in 2019 after the College demanded that he produce his clinical records state “focussed more on MFR this time to help to restore mobility to the lumbar spine, hips, and pelvis especially with respect to the R Obturator internus (worst of the two).”

Allegation 3(a)

3. On January 15, January 28, March 12, and April 4, 2014, in the course of providing massage therapy to B.B., you
 - a. failed to comply with section 3(a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by massaging the area in the vicinity of the patient's vulva without ensuring the patient was fully informed regarding assessment and treatment and provided consent

144. Section 3(a) of the Schedule D of the Bylaws in effect at the material times required the Respondent to ensure that a patient is fully informed regarding assessment and treatment, and provide consent.

145. In this allegation, the Respondent is alleged to have touched in the vicinity of the vulva, which means the area near or surrounding the external female genitalia. The College is not pursuing this allegation in relation to the January 15, 2014 appointment.

146. The Panel accepts B.B.’s testimony that the Respondent did not tell her about the nature of the services he would provide other than massage to the hip and leg. He did not obtain a health history from B.B., he did not ask her to produce her medical records, he did not tell her about his assessment method or treatment plan.

147. The Respondent did not contest this evidence on cross-examination, and did not contradict this testimony during his direct examination. B.B.'s evidence is consistent with the Respondent's treatment records.
148. Mr. Mohring's expert report sets out the steps that an RMT ought to take to assess a patient presenting with hip pain. This includes obtaining a health history (including imaging records), having the patient complete questionnaires, and observing the patient's response to physical tests. The Panel does not find any evidence that the Respondent took those steps with B.B.
149. The Panel accepts B.B.'s testimony that during the second and third appointments, the Respondent massaged "adjacent to her vagina", and that during the fourth appointment, the Respondent massaged the groin area again but this time "adjacent to the vaginal opening", and that during all three appointments the Respondent "touched her vulva". The Panel finds that in all three instances the Respondent was massaging the area in the vicinity of B.B.'s vulva. The Panel accepts B.B.'s evidence that the Respondent touched her in the area of her vulva, and touched her vulva. Her account was specific, clear and convincing and her testimony was firm.
150. The Panel accepts B.B.'s evidence that the Respondent did not communicate to her before or during his massaging the area in the vicinity of B.B.'s vulva and only told her when asked that he was massaging the obturator internus muscle. The Panel finds this establishes that B.B. was not fully informed regarding the assessment and treatment. The Panel also accepts B.B.'s evidence that the Respondent did not request or obtain B.B.'s consent to massage her in the area in the vicinity of her vulva. The Respondent did not undermine that evidence.
151. The Panel finds that on January 28, March 12, and April 4, 2014, in the course of providing massage therapy to B.B., the Respondent failed to comply with section 3(a) of Schedule D of the Bylaws then in effect by massaging the area in the vicinity of B.B.'s vulva without ensuring she was fully informed regarding assessment and treatment and provided consent.
152. The Panel finds that the Respondent's conduct falls squarely within the meaning of professional misconduct. Touching a patient's external genitalia without consent is

per se professional misconduct, is conduct that would reasonably be considered by members of the profession to be “dishonourable, disgraceful, or unprofessional” and is a marked departure from the expected standards of the profession.

153. The College has proven this allegation to the requisite standard.

Allegation 3(b)

3. On January 15, January 28, March 12, and April 4, 2014, in the course of providing massage therapy to B.B., you
 - b. failed to comply with section 2(a) of Schedule C of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by engaging in sexual touching of the area in the vicinity of the patient's vulva; and

154. Section 2(a) of Schedule C of the Bylaws in effect at the material times required the Respondent to not engage in sexual conduct with a patient. The College is not pursuing this allegation in relation to the January 15, 2014 appointment.

155. As indicated above, the Panel has found that on January 28, March 12 and April 4, 2014, the Respondent massaged B.B. in the area of her vulva, and touched her vulva. The Panel also accepts B.B.'s evidence of having experienced a sensation of “climax” and finds this to be further evidence of sexual touching.

156. The Panel agrees with the College's submission that there was no therapeutic reason for the Respondent to massage near, or for that matter, on B.B.'s vulva. The Panel does not accept that B.B.'s hip pain related to her obturator internus, nor did the Respondent have any information to reasonably suggest that was the case. The Panel accepts the expert testimony of Dr. Krebs that it is unlikely that the source of pain localizing to the hip can be primarily attributed to the obturator internus. The Panel also accepts the expert testimony of Mr. Mohring that there are various possible causes of hip pain in the hip socket region requiring differential assessment.

157. The Panel has set out the principles with respect to sexual touching earlier in these reasons. Applying those principles, the Panel finds that a reasonable person looking at the totality of the circumstances would conclude that the touching was sexual in nature in this case and that B.B.'s sexual integrity was violated. These include:

- a. The location of the body part (external genitalia) is a sexual body part.

- b. There was no therapeutic justification for massaging in the area.
 - c. The Respondent did not inform B.B. of the body parts he proposed to massage.
 - d. The Respondent did not seek or obtain B.B.'s consent.
 - e. B.B. experienced a sensation of climax on the fourth appointment.
 - f. B.B. expressed that she experienced feelings of shame and embarrassment.
158. The Panel finds that on January 28, March 12, and April 4, 2014, in the course of providing massage therapy to B.B., the Respondent failed to comply with section 2(a) of Schedule C of the Bylaws by engaging in sexual touching of the area in the vicinity of B.B.'s vulva. The Panel finds the Respondent's conduct would reasonably be considered by members of the profession to be "dishonourable, disgraceful, or unprofessional" and is a marked departure from the expected standards of the profession. The Panel finds that the Respondent committed professional misconduct by sexually touching B.B.
159. The College has proven this allegation to the requisite standard.

Allegation 3(c)

- 3. On January 15, January 28, March 12, and April 4, 2014, in the course of providing massage therapy to B.B., you
 - c. failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
160. Section 4(a)(iv) and (v) of Schedule E of the Bylaws in effect at the material times required the Respondent to generate an indelible clinical record for each patient containing: the health history obtained and updated, findings obtained, clinical impressions and relevant information of the patient's condition; and a treatment plan, including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.

161. As noted above, the Panel found that the Respondent did not obtain a health history from B.B., he did not ask her to produce her medical records, he did not tell her about his assessment method or treatment plan, and he did not tell her about the nature of the services he would provide other than massage to the hip and leg. While B.B. did recall completing a standard form during the first appointment, the Respondent did not produce the form and there is no information before the Panel about what, if any, information was obtained.
162. The Panel set out the standards required for record-keeping earlier in these reasons.
163. Mr. Mohring provided opinion evidence that the Respondent's records do not contain a health history, instructions considered self-care or remedial exercise, or treatment revisions, and do not meet the expected standards of practice relating to record-keeping. The Panel agrees and accepts Mr. Mohring's evidence. The Panel also finds that the Respondent's records do not contain a treatment plan.
164. The Panel finds that on January 15, January 28, March 12 and April 4, 2014, in the course of providing massage therapy to B.B., the Respondent failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws in effect at the material times by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
165. The College has proven this allegation to the requisite standard.

Allegation 4: C.C.

166. C.C. testified that she had a treatment with the Respondent on January 31, 2014. She was seeking treatment for lower back spasms.
167. The Respondent met C.C. in the reception area and brought her to the treatment room. He left the room to give her an opportunity to undress. C.C. undressed and removed her underwear and covered herself with a drape.
168. On the Respondent's return, C.C. described her muscle spasms. The Respondent then started massaging her upper back and middle back. C.C. testified that she felt the Respondent's nails picking at her back as though he was trying to remove a

blackhead. The Respondent massaged her lower back and her gluteal muscles. The Respondent then massaged her inner thigh and began to massage closer and closer to her vaginal area. The Respondent massaged inside the labia, at the vaginal opening on the right side, with one finger using a circular motion. The Respondent told C.C. that the name of the muscle he was massaging (though she could not recall that name as she had not heard of it before) was directly connected to her clitoris. The Respondent told C.C. that he did internal massage work to assist with fertility. C.C. did not mention infertility to the Respondent and she was not seeking to get pregnant at the time. C.C. described feeling completely frozen and terrified. She wanted it to stop but knew she could not protect herself because of how bad her back was. C.C. then felt the Respondent's fingernails picking on her back again, before he finished the session.

169. C.C. did not recall completing any paperwork. She told the Respondent that she was experiencing lower back pain. C.C. testified that the Respondent did not ask her any questions about her health history, he did not tell her his assessment method, or provide a treatment plan. The Respondent did not tell C.C. where on her body he would be massaging, specifically, he did not tell her he would massage her gluteal muscles or near the vaginal area. The Respondent did not say what he thought caused C.C.'s back pain. C.C. testified she knows the Respondent did not tell her the pain was caused by a problem with hips because had he done that, she would have corrected him and told him it was caused by her spine.
170. C.C. testified that the Respondent did not ask for consent to pick at her back, to massage her gluteal muscles, or to massage in or near the vaginal area. When asked if she gave consent, C.C. was emphatic in her denial.
171. C.C. testified that two weeks after her treatment with the Respondent, she had a CT scan which recorded a disc protrusion likely affecting the L5 nerve root.
172. The Respondent admitted on cross-examination that he did not provide an intake form as part of the records produced in relation to C.C. and that was "possibly" because he did not complete one.

173. The Respondent's treatment records indicate that he treated C.C.'s ischiocavernosus muscle. The Respondent admitted on cross-examination that he made a comment to C.C. about her clitoris.

Allegation 4(a)

4. On January 31, 2014, in the course of providing massage therapy to C.C., you
 - a. failed to comply with section 3(a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by massaging the following parts of the patient's body without ensuring the patient was fully informed regarding assessment and treatment and provided consent:
 - i. the patient's labia and around the external opening of the patient's vagina; and
 - ii. the patient's ischiocavernosus muscle;
174. Section 3(a) of the Schedule D of the Bylaws in effect at the material times required the Respondent to ensure that a patient is fully informed regarding assessment and treatment, and provide consent.
175. The Panel accepts C.C.'s evidence that the Respondent massaged her on her labia and around the opening of her vagina. Her account was specific, clear and convincing and her testimony was unshaken on cross-examination. C.C.'s version of events, including the side of her body which was touched by the Respondent did not waver.
176. This is consistent with the Respondent's testimony and the expert evidence of Dr. Krebs. The Respondent's treatment records indicate that he treated C.C.'s ischiocavernosus muscle. In Dr. Krebs's opinion, this muscle covers the crura of the clitoris and therefore "Massage of the ischiocavernosus muscle is a massage of the clitoris."
177. The Panel finds based upon the evidence before it that C.C. was not fully informed by the Respondent about the assessment and treatment and she did not give consent to massage of her labia and around the external opening of her vagina or the ischiocavernosus muscle. The Respondent did not undermine C.C.'s testimony in this area either and his records do not evidence that he requested or obtained consent from C.C.

178. The Panel finds that on January 31, 2014, in the course of providing massage therapy to C.C., the Respondent failed to comply with section 3(a) of Schedule D of the Bylaws then in effect by massaging C.C.'s labia and around the external opening of the patient's vagina and ischiocavernosus muscle without ensuring C.C. was fully informed regarding assessment and treatment and provided consent.

179. The Panel finds that the Respondent's conduct falls squarely within the meaning of professional misconduct. Touching a patient's external genitalia without consent is *per se* professional misconduct, is conduct that would reasonably be considered by members of the profession to be "dishonourable, disgraceful, or unprofessional" and is a marked departure from the expected standards of the profession.

180. The College has proven this allegation to the requisite standard.

Allegation 4(b)

4. On January 31, 2014, in the course of providing massage therapy to C.C., you
 - b. failed to comply with section 2(a) of Schedule C of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by engaging in sexual touching of:
 5. the patient's labia and around the external opening of the patient's vagina; and
 6. the patient's ischiocavernosus muscle;

181. Section 2(a) of Schedule C of the Bylaws in effect at the material times required the Respondent to not engage in sexual conduct with a patient.

182. The Panel accepts that the Respondent massaged C.C.'s labia and inside her labia next to her vaginal opening. He massaged skin on skin. He used one finger making circular motions. The Respondent did not challenge this evidence. He admitted that he massaged her ischiocavernosus muscle and that he told her that muscle was connected to her clitoris.

183. The Respondent massaged these body parts without consent and without therapeutic justification. The Respondent did not provide any explanation as to how massage of these body parts related to C.C.'s back complaints.

184. Dr. Krebs also provided the opinion that the ischiocavernosus muscle is not associated in any way with the back. Her expert report states that there "is no

evidence in the literature, nor is there any anatomical plausibility that the ischiocavernosus muscle is in any way associated with back pain.” As the Panel noted above, she also opined that massage of the ischiocavernosus muscle is massage of the clitoris. The Panel accepts this evidence which was uncontested.

185. Applying the legal principles set out above relating to sexual touching, the Panel finds that a reasonable person looking at the totality of the circumstances would conclude that the touching was sexual in nature in this case for the following reasons:

- a. The parts of the body touched are sexual body parts (labia, near vaginal opening, and ischiocavernosus muscle).
- b. There was no therapeutic reason for the Respondent to massage these body parts.
- c. The Respondent did not inform C.C. where he proposed to massage her.
- d. The Respondent did not seek or obtain C.C.’s consent to massage those body parts.
- e. The Respondent made a statement that the ischiocavernosus muscle was directly connected to the clitoris while touching that area. He stated that “he does internal massages to help with fertility”.

186. As previously noted, it is not necessary to find that the Respondent had a sexual motive to determine that the touching was sexual in all of the circumstances. The Panel finds that on January 31, 2014, in the course of providing massage therapy to C.C., the Respondent failed to comply with section 2(a) of Schedule C of the Bylaws by engaging in sexual touching of the area in the vicinity of C.C.’s labia and around the external opening of her vagina and the ischiocavernosus muscle.

187. C.C.’s sexual integrity was violated by this sexual touching. C.C. testified about the effects this experience has had on her. She testified that she has had a difficult time seeing any male medical professionals, and now only requests female RMTs. C.C. testified that she was unable to seek certain treatments she was hoping to have after the incident. She has had to terminate some appointments mid-session because

she was shaking or otherwise unable to continue with the treatment. On a personal level, she has found her intimate relationships have been affected and she has difficulty with trust and touch.

188. The Panel finds the Respondent's conduct would reasonably be considered by members of the profession to be "dishonourable, disgraceful, or unprofessional" and is a marked departure from the expected standards of the profession. The Panel finds that the Respondent committed professional misconduct by sexually touching C.C.

189. The College has proven this allegation to the requisite standard.

Allegation 4(c)

4. On January 31, 2014, in the course of providing massage therapy to C.C., you
 - c. failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions;

190. Section 4(a)(iv) and (v) of Schedule E of the Bylaws in effect at the material times required the Respondent to generate an indelible clinical record for each patient containing: the health history obtained and updated, findings obtained, clinical impressions and relevant information of the patient's condition; and a treatment plan, including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.

191. The Panel accepts C.C.'s testimony that the Respondent failed to ask her any questions about her health history and did not communicate to her about any treatment plan. This is consistent with the Respondent's evidence on cross-examination. This is also consistent with the Respondent's records relating to C.C. which show an absence of health history and treatment plan.

192. Mr. Mohring's expert opinion is that the Respondent's records do not meet professional standards.

193. The Panel finds that on January 31, 2014, in the course of providing massage therapy to C.C., the Respondent failed to comply with section 4(a)(iv) and (v) of

Schedule E of the Bylaws in effect at the material times by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.

194. The College has proven this allegation to the requisite standard.

Allegation 4(d)

4. On January 31, 2014, in the course of providing massage therapy to C.C., you
 - d. failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by removing blackheads from the patient's back by picking her skin with your thumbs when doing so was outside the scope of practice of massage therapy in British Columbia; and

195. Section 9(d) of Schedule D of the Bylaws in effect at the material times, required the Respondent to maintain an awareness of, and practice within, the current scope of practice of massage therapy in British Columbia.

196. Section 1(1)(c) of Schedule C of the Bylaws in effect at the material times, required the Respondent to only provide massage therapy treatments that fall within the scope of practice of massage therapy, as defined in the Regulation.

197. The Panel accepts C.C.'s evidence regarding the Respondent on two occasions during the course of her massage on January 31, 2014, picking at her back with his fingernails in a manner that felt like he was removing blackheads.

198. The Respondent's testimony was not inconsistent with C.C.'s evidence, he was vague and mentioned that he did not recall picking at her back. In his interview with College investigator, however, the Respondent was asked about C.C.'s description of using his nail to pick at her skin and whether that sounded like a technique he used. The Respondent answered:

Q. And can you describe that to me?

A. A blackhead.

Q. So what would you - -

A. So in a - -

Q. - - what would you do?

A. So basically you would have to expel the blackhead.

Q. Oh, okay.

A. And then work on trying to deal with the underlying cause of why the blackhead occurred in the first place.

Q. Oh, okay.

A. And it's usually from lack of local circulation.

Q. I see. Do you normally have a conversation with the patient during the technique?

A. No. They - - they often are thankful.

199. The Respondent then adopted the interview questions and answers on this issue in his cross-examination testimony. The Respondent described using his thumbs for this technique.

200. For the reasons that the Panel outlined earlier in this decision, the removal of blackheads is outside of the scope of practice of massage therapy in British Columbia.

201. The Panel finds that on January 31, 2014, in the course of providing massage therapy to C.C., the Respondent failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by removing blackheads from C.C.'s back by picking her skin with his thumbs when doing so was outside the scope of practice of massage therapy in British Columbia.

202. The College has proven this allegation to the requisite standard.

Allegation 4(e)

4. On January 31, 2014, in the course of providing massage therapy to C.C., you
 - e. in the alternative to paragraph 4(d) above, failed to comply with section 3(a) of Schedule D of the Bylaws then in effect, and committed professional misconduct or in the alternative unprofessional conduct, by removing blackheads from the patient's back by picking her skin with your thumbs without ensuring the patient was fully informed regarding assessment and treatment and provided consent.

203. Given that allegation 4(d) is proven, the Panel does not consider it necessary to deal with the alternate pleading at paragraph 4(e).

Allegation 5 to 7: D.D.

204. D.D. has a physical job. He experienced multiple injuries which caused back, hips, shoulders and neck pain. He was in constant pain which impacted his work and required him to switch to a desk job.

205. D.D. testified that he was seen by a number of health care providers and was never diagnosed with “bone death” of his femur, or with necrosis. His physiatrist conducted a bone scan and did not diagnose him with avascular necrosis.

206. When D.D.’s condition worsened from another injury, he sought out assistance from the Respondent. His aim was to get back to active work duties which required some physical testing.

207. D.D. did not recall what the Respondent said to him in relation to how he would conduct an assessment and treatment. The first treatment session did not stand out to D.D. Over the course of further treatments, the Respondent devoted additional focus to his hip pain and at one point suggested that there was a lack of blood flow to D.D.’s right hip. The Respondent told D.D. he could address this arterial blood flow issue in two ways, either from the outside by addressing the gluteal muscles, or by going in through the anus and targeting the hip joint. D.D. testified that at first, he did not challenge the validity. The Respondent attempted the external approach for approximately two sessions. While there was some improvement overall, there was not a significant change to D.D.’s hip. D.D. told the Respondent that they might as well try the other approach if the Respondent thinks it is the right way to proceed. The Respondent then attempted the internal approach entering via the anus. While D.D. was lying face down on the massage therapy table, the Respondent inserted his gloved finger to the right side of the anus and massaged internally for approximately three to five minutes. D.D. does not recall exactly what the Respondent told him prior to performing the technique but does remember the Respondent telling him it would create more blood flow which would benefit his hip. D.D. also recalled the Respondent telling him that if he did not correct a loss of blood

flow to the head of the femur, he would experience a problem with his hip. D.D. does not recall there being any conversation during the procedure.

208. The Respondent did not dispute that he inserted his finger in D.D.'s rectum. The Respondent testified on direct examination that D.D. requested the internal treatment to try to improve the blood flow and that D.D. managed to have a full recovery of his hip pain and was able to return to full active work duties.
209. The Respondent agreed on cross-examination that no intake form was produced to the College for D.D. and that if one existed in the patient records it would have been produced. The Respondent could not recall if he completed an intake form for D.D. Other than a reference to "stork standing", the Respondent agreed on cross-examination that there is no record of his assessment of D.D.'s hip pain. He also admitted there is no reference to his treatment plan. The Respondent's treatment records for February 28, 2014 refer to avascular necrosis.
210. The Respondent agreed that his records state that there has been no change in avascular necrosis but that the records do not identify how the Respondent arrived at the theory that D.D. was experiencing avascular necrosis. The Respondent agreed that he arrived at a differential diagnosis that D.D. was suffering from avascular necrosis. The Respondent concluded that D.D. did have avascular necrosis. The Respondent was aware that D.D. was seeing other health care professionals in relation to his injuries and agreed that he did not request any of their records. When asked on cross-examination whether the Respondent told D.D. that his entire rationale was theoretical and not supported by any empirical evidence, the Respondent replied that "it was just my recollection from sports medicine about what happened with Bo Jackson's injury." The Respondent agreed that any notion that D.D. was suffering from the same injury as Bo Jackson was entirely theoretical. The Respondent was asked on cross-examination, "You understood in 2014 that you did not have any legitimate basis for recommending that he receive internal treatment through his rectum", and responded "I couldn't say for sure."

211. The Respondent's typewritten records for D.D. contain entries for the dates February 21, February 28, March 7, April 4, April 25, May 22, May 30, and June 12, 2014.

Allegation 5

5. On February 28 or March 7, 2014, in the course of providing massage therapy to D.D., you failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by diagnosing the patient with a medical condition, avascular necrosis, when making medical diagnoses was outside of the scope of practice of massage therapy in British Columbia.

212. Section 9(d) of Schedule D of the Bylaws then in effect required that a registrant maintain awareness of and practice within the current scope of practice of massage therapy in British Columbia. Section 1(1)(c) of Schedule C of the Bylaws then in effect required that a registrant only provide massage therapy treatments that fall within the scope of practice of massage therapy as defined in the Regulation.

213. The Panel set out above in the legal framework section of this decision the reasons why making a diagnosis is outside of the scope of practice of massage therapists in British Columbia.

214. The Panel finds that the Respondent made a diagnosis of avascular necrosis. He talked to D.D. in 2014 about there being a lack of blood flow to the femur in D.D.'s right hip. The Respondent admitted and the Panel finds that the Respondent made a differential diagnosis that D.D. had avascular necrosis. The Respondent ruled out other possibilities and concluded that D.D.'s hip pain was caused by avascular necrosis. This is consistent with the references in the Respondent's treatment record entry for March 7, 2014 to avascular necrosis, as well as the reference to Bo Jackson.

215. The Respondent's conduct in making a diagnosis is troubling from a public protection perspective. The Respondent had no evidentiary foundation for his theory of avascular necrosis other than one historical popular culture reference with absolutely no relevance to D.D. In Dr. Krebs's opinion, "It is therefore not plausible that the underlying cause for avascular necrosis of the femur is a strangulation of the obturator artery or the artery of ligamentum teres by the obturator internus

muscle.” The Panel accepts D.D.’s unrefuted evidence that his treating physicians who conducted a bone scan did not diagnose him with avascular necrosis. The College is not required to prove that the Respondent was wrong in his diagnosis, however, the fact that he was indeed wrong demonstrates the public protection risk in the Respondent acting outside of his scope of practice in making a diagnosis.

216. The Panel finds that on February 28 or March 7, 2014, in the course of providing massage therapy to D.D., the Respondent failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by diagnosing D.D. with avascular necrosis, when making medical diagnoses was outside of the scope of practice of massage therapy in British Columbia.

217. The College has proven this allegation to the requisite standard.

Allegation 6

6. On May 30, 2014, in the course of providing massage therapy to D.D., you
 - a. failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws then in effect by inserting one finger of your hand beyond the patient’s anal verge and massaging the interior wall of the rectum, when doing so was outside the scope of practice of massage therapy in British Columbia; and
 - b. failed to comply with a standard or limit on the practice of massage therapy imposed by the College under the Act, and committed unprofessional conduct, by inserting one finger of your hand beyond the patient’s anal verge and massaging the interior wall of the rectum, contrary to the Notice to the Profession Re: “Medical Electricity” and “Pelvic Floor Treatments”.

218. Section 9(d) of Schedule D of the Bylaws in effect at the material times required the Respondent to maintain an awareness of, and practice within, the current scope of practice of massage therapy in British Columbia.

219. Section 1(1)(c) of Schedule C of the Bylaws in effect at the material times required the Respondent to only provide massage therapy treatments that fall within the scope of practice of massage therapy, as defined in the Regulation.

220. The Notice to the Profession also constitutes a limit established by the College’s Board on the designated profession of massage therapy by registrants pursuant to sections 19(1)(k) and 19(1.1) of the HPA. The Notice to the Profession limited

registrants from performing internal pelvic work. The Notice to the Profession clearly states that "the muscles of the pelvic floor are accessed through the anus or vagina".

221. As outlined earlier in these reasons, inserting a finger beyond a patient's anal verge and massaging the interior wall of the rectum is outside of the scope of practice of massage therapy in British Columbia. Likewise, it is contrary to the limit imposed in the Notice to the Profession.
222. The Panel accepts D.D.'s evidence that the Respondent inserted a finger of his hand beyond D.D.'s anal verge and massaged the interior of his rectum. The Respondent admitted that he did those acts. The Respondent's treatment records indicate that this treatment occurred on May 30, 2014.
223. The Panel finds that the Respondent failed to comply with section 9(d) of Schedule D and section 1(1)(c) of Schedule C of the Bylaws in effect at the time by inserting one finger of his hand beyond D.D.'s anal verge and massaging the internal wall of the rectum when to do so was outside of the scope of practice of massage therapy in British Columbia.
224. The Panel finds that the Respondent failed to comply with a limit on the practice of massage therapy imposed by the College under the Act, and committed unprofessional conduct, by inserting one finger of his hand and beyond D.D.'s anal verge and massaging the interior wall of the rectum, contrary to the Notice to the Profession Re: "Medical Electricity" and "Pelvic Floor Treatments".
225. The College has proven the allegations in paragraphs 6 (a) and (b) of the Amended Citation to the requisite standard.

Allegation 7

7. On February 21, February 28, March 7, April 4, April 25, May 22, May 30, and June 12, 2014, having provided massage therapy to D.D., you failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of the patient's health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.
226. Section 4(a)(iv) and (v) of Schedule E of the Bylaws in effect at the material times required the Respondent to generate an indelible clinical record for each patient

containing: the health history obtained and updated, findings obtained, clinical impressions and relevant information of the patient's condition; and a treatment plan, including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.

227. Based upon the evidence of D.D., the Respondent and the Respondent's patient records for D.D., the Panel finds that the Respondent did not complete an intake form for D.D., there is no evidence of the Respondent having obtained a health history of D.D., there is no record of the Respondent's assessment of D.D.'s hip pain, and there is no reference to the Respondent's treatment plan.

228. The Panel finds that the Respondent's contemporaneous records for D.D. fail to comply with record-keeping standard of the profession and that on February 21, February 28, March 7, April 4, April 25, May 22, May 30, and June 12, 2014, having provided massage therapy to D.D., the Respondent failed to comply with section 4(a)(iv) and (v) of Schedule E of the Bylaws then in effect by not generating and maintaining a record of D.D.'s health history and a treatment plan including objectives, treatments provided, instructions given, periodic reassessment findings and treatment revisions.

229. The College has proven this allegation to the requisite standard.

Allegations 8 to 9: "Jessica Chan"

230. [REDACTED] was formerly employed with a security company as an investigator. During the material times, she used the name "Jessica Chan" and will be referred to by that name in these reasons. She received an assignment to investigate the Respondent and specifically whether the Respondent was performing massage therapy without a chaperone. Ms. "Chan" prepared an investigation report summarizing her investigation.

231. Ms. "Chan" booked an appointment for a massage therapy appointment at the South Burnaby Massage Therapy Clinic on January 14, 2019 under the name "Jessica Chan" with someone other than the Respondent. Ms. "Chan" subsequently called again and the Respondent answered. Ms. "Chan" asked about booking an

appointment with an RMT. The Respondent answered, "Um, kind of sort of...I'm not 100% RMT anymore." He made a reference to a "kinesiology consult." Ms. "Chan" testified she attended an appointment with the Respondent on January 22, 2019. She completed an intake form. Ms. "Chan" had a covert camera with a microphone which produced a recording of the appointment. Ms. "Chan" testified that during the appointment, the Respondent massaged her back, gluteal muscles, arms, shoulders, and neck. Ms. "Chan" testified that she did not see any notice in the clinic stating that the Respondent's registration was suspended.

232. On January 18, 2019, the Respondent's registration was suspended pursuant to an interim order of the College's Inquiry Committee made under section 35 of the HPA.

233. The Respondent testified that even though his registration was suspended at the time, he was still permitted to use "massage technique." The Respondent testified this was based upon his understanding that the absence of any restricted acts meant that anyone could perform massage therapy techniques. The Respondent admitted on cross-examination that he continued to perform massage therapy techniques while he was suspended.

Allegation 8

8. On January 22, 2019, you failed to comply with section 69.3(1)(a) of the Bylaws and engaged in unprofessional conduct by providing massage therapy services to a patient identified as "Jessica Chan" while your registration was suspended. Particulars of this allegation include that you massaged "Jessica Chan's" gluteal muscles, legs, back, neck and shoulders.

234. Section 69.3(1)(a) of the Bylaws provides "A Registrant whose registration is suspended must, for the duration of the suspension (a) not provide massage therapy services in British Columbia or hold herself out as being a Registrant."

235. In 2019, the Regulation defined massage therapy as follows:

the health profession in which a person provides, for the purposes of developing, maintaining, rehabilitating or augmenting physical function, or relieving pain or promoting health, the services of

(a) assessment of soft tissue and joints of the body, and

(b) treatment and prevention of physical dysfunction, injury, pain and

disorders of soft tissue and joints of the body by manipulation, mobilization and other manual methods.

236. The Panel finds that the Respondent's registration was suspended on January 18, 2019 pursuant to an interim order of the College's Inquiry Committee made under section 35 of the HPA. Accordingly, the Respondent's registration was suspended at the time of the January 22, 2019 appointment with the investigator (who presented herself as "Jessica Chan").
237. The Panel accepts Ms. Chan's testimony and finds that the Respondent provided massage therapy services to Ms. "Chan" when he massaged her back, gluteal muscles, arms, shoulders, and neck. This is consistent with the Respondent's testimony. This falls within the definition of massage therapy set out in the Regulation above.
238. The Respondent's position that he could continue to deliver massage therapy services while his registration was suspended because of the absence of reserved acts for the profession is simply wrong. As noted above, the Bylaws required that he not provide massage therapy services for the duration of his suspension.
239. The Panel finds that the Respondent provided massage therapy to a patient while his registration was suspended in violation of section 69.3(1)(a) of the Bylaws that were in effect at the material times. The Panel finds this constitutes unprofessional conduct. The College has proven this allegation to the requisite standard.

Allegation 9

9. On January 22, 2019, you failed to comply with section 69.3(1)(a) of the Bylaws and engaged in unprofessional conduct by holding yourself out as being a Registrant of the College while your registration was suspended. Particulars of this allegation include that you stated to a patient identified as "Jessica Chan": "This is part of how I'm different as a massage therapist than others."
240. Section 69.3(1)(a) of the Bylaws required that "A Registrant whose registration is suspended must, for the duration of the suspension (a) not provide massage therapy services in British Columbia or hold herself out as being a Registrant."
241. Ms. "Chan's" investigation report records that the Respondent made the following statements to her during her appointment on January 22, 2019:

And this is part of how, how I'm different as a massage therapist than others...That you know because I've got my degree in kinesiology that um I apply a lot of kines-principles to what I'm doing and, and that you know is all about um improving or restoring motion right? 'Cause kinesiology is about movement.

[emphasis in original]

242. The Panel agrees with the College's submission that in making the statement "this is...how I'm different as a massage therapist...", the Respondent was holding himself out as being a registrant of the College at a time when his registration was suspended.
243. The Panel finds the above statement was made while the Respondent's registration was suspended.
244. The Panel finds that on January 22, 2019, the Respondent failed to comply with section 69.3(1)(1) of the Bylaws and engaged in unprofessional conduct by holding himself out as being a Registrant of the College while his registration was suspended.
245. The College has proven this allegation to the requisite standard.

Allegation 10

10. On January 22, 2019, you failed to comply with section 69.3(1)(f) of the Bylaws by not prominently displaying a notice of suspension in a form and in an area approved by the Registrar, which stated the duration and reasons for the suspension.

246. Section 69.3(1)(f) of the Bylaws required that a registrant whose registration is suspended, for the duration of the suspension, prominently display, a notice of suspension in a form and in an area approved by the Registrar, which states the duration and reasons for the suspension.
247. The Panel accepts Ms. "Chan's" testimony that on January 22, 2019 she did not see any notice in the South Burnaby Massage Therapy Clinic stating that the Respondent's registration was suspended. The Respondent did not refute or test this evidence.
248. The Panel finds that on January 22, 2019, the Respondent failed to comply with section 69.3(1)(f) of the Bylaws by not prominently displaying a notice of suspension

in a form and in an area approved by the Registrar which stated the duration and reasons for the suspension.

249. The College has proven this allegation to the requisite standard.

Allegation 11: E.E.

11. On July 9, 16, 23, 2016 and August 2, 6, 15, 23, and 29, 2016, in the course of providing massage therapy to E.E., you

- a. failed to comply with section 3(1)(a)(vii) of Schedule E of the Bylaws then in effect by not keeping a clinical Health Care Record containing sufficient information to explain why the patient came to see you and what you learned from both the patient's current medical history and the assessment;
- b. failed to comply with section 3(1)(a)(viii) of Schedule E of the Bylaws then in effect by not keeping a clinical Health Care Record containing a clear record of the specifics of any treatment plan, treatment provided and the patient's response, any follow-up plan, and any recommendations or instructions for patient self-care; and
- c. failed to comply with section 3(2) of Schedule E of the Bylaws then in effect by not making every reasonable effort to ensure that the information contained in the Health Care Record was current, accurate, and complete.

250. The requirements of sections 3(1)(a)(vii) and (viii), and 3(2) of Schedule E are set out at paragraph 31 of these reasons.

251. Mr. Mohring's opinion is that the Respondent failed to meet the expected professional standards of record-keeping with respect to E.E. as the Respondent failed to make clinical notes that documented the questions and responses pertaining to patient history and present symptoms and failed to include contemporary pain or disability inventories. He opined that the Respondent's assessment findings did not contain sufficient detail. In addition, Mr. Mohring opined that the Respondent did not record any clear indication of measurable treatment goals or treatment planning, and no clear indication of progression of treatment. Given the severity of E.E.'s presentation, greater detail was required in the Health Care Record. The Panel agrees with and accepts this evidence.

252. The Panel finds that the typewritten records for E.E. contain entries for the following dates: July 9, 16, 23, 2016 and August 2, 6, 15, 23, and 29, 2016. The records do not however comply with the standards required by the Bylaws. They do not include sufficient information to clearly explain why E.E. came to see the

Respondent and what the Respondent learned from E.E.'s current medical history and assessment; or a clear record of the specifics that are required to be contained in the records. In particular, the records do not include E.E.'s health history, any treatment plan (let alone a clear record of the specifics of the treatment plan, as required), any revisions made to a treatment plan, E.E.'s response to the treatment provided, or any recommendations or instructions to patient for self-care related to the patient's condition. In addition, the Panel finds that the records do not comply with the requirement to make every reasonable effort to ensure that the information contained in records is current, accurate and complete because there are no measurable indicators to establish a baseline initial health presentation and functional status, there are no markers to establish progression or regression, and the records lack a timeline of symptoms and progress to determine quantifiable or qualitative change to any area.

253. Accordingly, the Panel finds that on July 9, 16, 23, 2016 and August 2, 6, 15, 23, and 29, 2016, in the course of providing massage therapy to E.E., the Respondent failed to collect and record the information required to comply with section 3(1)(a)(vii) and (viii) of Schedule E of the Bylaws. The Panel finds the Respondent failed to make every effort to ensure the information contained in E.E.'s records was complete, and therefore failed to comply with section 3(2) of Schedule E of the Bylaws.

254. The College has proven this allegation to the requisite standard.

Allegation 12 (a) to (c): F.F.

12. You committed professional misconduct or in the alternative unprofessional conduct in that:

- a. on December 6, 2017, in the course of investigation INQ-2017-00070, you provided misleading information concerning your records to the College investigator. Particulars of this allegation include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to F.F., when in fact you did not produce your contemporaneous records relating to F.F. and the records you did produce were created by you after you received the College's request for records dated November 15, 2017;
- b. on April 18, 2018, in the course of investigation INQ-2017-00070, you advised the College investigator that you recorded the typewritten records you

produced on December 6, 2017 on the same day as the treatment referenced in the records, when in fact you created them after you received the request for records dated November 15, 2017;

- c. on July 5, 2018, in the course of investigation INQ-2017-00070, you advised the College Director of Inquiry and Discipline that the typewritten records you produced on December 6, 2017 were reproduced from the originals and made to be more readable, when in fact the typewritten records were materially different from the originals;

255. On November 15, 2017, the College investigator, Ms. Szabo, wrote to the Respondent requesting as follows:

The College requests that you provide a complete and accurate copy of all your records that relate in any way to your provision of massage therapy services to [F.F.]

For greater certainty, this request for records includes all documents, drawings, photographs, letters, papers, and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means. If your records are not easily readable, please provide typed transcriptions of any handwritten notes.

256. On December 6, 2017, the Respondent faxed typewritten records for F.F. to the attention of Ms. Szabo and stated, “the enclosed documents are true and accurate copies of all of my records that relate to my provision of massage therapy services to [F.F.]”

257. The Respondent was interviewed by Ms. Szabo on April 18, 2018. The Respondent agreed on cross-examination that he was asked the following questions and gave the following answers at a time when he had only provided the College with the typewritten records he sent on December 6, 2017:

Q. So who recorded these treatment notes?

A. I recorded them.

Q. Okay. And when did you record the treatment notes?

A. The evening of, you know, following the treatment.

258. The Respondent agreed on cross-examination that the statements above were not true.

259. On June 14, 2018, Ms. Parisotto wrote to the Respondent asking him to confirm whether the treatment records provided were copies of the original documents without any modification or typed or otherwise reproduced from the original

document. Ms. Parisotto asked the Respondent to produce any original documents that were not included.

260. The Respondent replied to Ms. Parisotto by fax on July 5, 2018 stating, “With respect to the clinical records, the copies provided to you are reproduced from the originals and made to be more readable...clarification of acronyms, abbreviations spelled out, etc.” The same day, the Respondent sent a copy of a screenshot of patient records for F.F. relating to one session. Ms. Parisotto followed up on July 6, 2018 requesting screenshots of all of the original records for F.F. On July 12, 2018, the Respondent sent screenshots of all his treatment records for F.F. The Respondent agreed on cross-examination that he sent the above communications in relation to the above noted requests.
261. The Respondent’s typewritten records produced on December 6, 2017 are far more detailed than his original computer notes.
262. The Panel finds that the Respondent created the typewritten records for F.F. which were produced on December 6, 2017 after Ms. Szabo’s request for records on November 17, 2017. As noted above, the Respondent admitted that his statement to the College’s investigator on April 18, 2018 that his records were prepared the same day as the treatment was not true. The Respondent agreed that many details referenced in the typewritten records are not contained in the computer notes. The Panel finds the Respondent’s statement to the College investigator on December 6, 2017 that the typewritten records were “true and accurate copies of all” of the Respondent’s records for F.F. was misleading information because they were not a true and accurate copy of the Respondent’s records, and the Respondent was withholding the original computer notes. The Respondent’s statement to Ms. Parisotto on July 5, 2018 that “the copies provided to you are reproduced from the originals and made to be more readable...clarification of acronyms, abbreviations spelled out, etc.” was untrue and misleading. The typewritten records were materially different from the original notes, and significantly, the typewritten records created several years after the treatments contain far more details than the original computer notes.

263. The Respondent's conduct is far more serious than the conduct in *CMTBC v. Gill*, 2019 CMTBC 01 in which a registrant failed to respond to College communications in a responsive and timely manner. The Panel agrees with the College's submissions that the Respondent committed professional misconduct by representing to the College investigator that the records he provided were true and accurate copies of all of his records relating in any way to the provision of massage therapy to F.F., by lying in his interview when he stated the records were made the same day as the treatment, and by not producing the original notes on his computer which he later provided by way of screenshots. This conduct demonstrates a lack of honesty and integrity: *Ahluwalia v. College of Physicians and Surgeons of Manitoba*, 1999 CanLII14044 (Man. C.A.) and is a marked departure from the standard expected from the profession.

264. The College has proven allegations 12 (a), (b) and (c) to the requisite standard.

Allegation 12 (d): E.E.

12. You committed professional misconduct or in the alternative unprofessional conduct in that:

- d. on November 7, 2018, in the course of investigation INQ-2018-00046, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to E.E., when in fact you did not produce your contemporaneous records relating to E.E. and the records you did produce were created by you after you received the College's request for records dated October 23, 2018;

265. On October 23, 2018, Ms. Parisotto sent the Respondent a letter requesting that he produce all records relating to E.E. Ms. Parisotto's letter of October 23, 2018 states that an investigator has been appointed by the College in this matter, that the investigator will generally interview the registered massage therapist (i.e. the Respondent), the complainant, and any relevant witnesses, and that the investigator "may also ask for additional information or documents."

266. On November 7, 2018, the Respondent faxed his typewritten treatment records relating to E.E. to the College, with attention to Ms. Parisotto. In that fax, the Respondent stated, "the enclosed documents are true and accurate copies of all my records that relate in any way to my provision of massage therapy services to E.E."

The Respondent agreed on cross-examination that he sent this fax and made that statement and that it was not true.

267. On March 19, 2019, the Respondent emailed Ms. Szabo screenshots of records relating to E.E. On cross-examination, the Respondent agreed those screenshots contained treatment notes that had not been produced to Ms. Parisotto in response to the College's request for records.

268. The Panel finds that on November 7, 2018, during the course of the investigation, the Respondent provided misleading information concerning his records to the College investigator by stating that the typewritten records he provided were true and accurate copies of all records relating to the provision of massage therapy to E.E. when those were not true and accurate copies, and the Respondent did not produce the original computer notes. While the records were faxed to the attention of Ms. Parisotto and not Ms. Szabo who was the College investigator, it is clear that the records were being provided to the College for its investigation, and more specifically, to the investigator. The Respondent was aware that the investigator had been appointed and would be requesting any additional documents (something that would only be possible upon review of the existing documents produced). The Panel finds this conduct demonstrates a lack of honesty and integrity, and is a marked departure from the standard expected of the profession and amounts to professional misconduct.

269. The College has proven this allegation to the requisite standard.

Allegation 12(e)

270. The College advised that it is not pursuing allegation 12 (e).

Allegation 12 (f): D.D.

12. You committed professional misconduct or in the alternative unprofessional conduct in that:

- f. on January 7, 2019, in the course of investigation INQ-2018-00055, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to D.D., when in fact you did not produce your contemporaneous records relating to D.D. and the records you did produce were created by you after you received the College's request for records dated December 21, 2018;

271. On December 21, 2018, Ms. Parisotto wrote to the Respondent and requested that he produce all of his records relating to D.D. to the College. Ms. Parisotto expressly noted in her letter that a College investigator will be interviewing the Respondent in relation to these allegations, and that the Respondent will be asked to provide further information.

272. On or around January 7, 2019, the Respondent delivered an envelope to the College which contained typewritten treatment records relating to D.D. The Respondent included a statement in that package that "the enclosed documents are true and accurate copies of all my records that relate in any way to my provision of massage therapy services to [D.D.]"

273. On cross-examination, the Respondent agreed he hand delivered those records and made the representation regarding the accuracy and truthfulness of the records. The Respondent agreed on cross-examination that the statement about the records being true and accurate was not correct. The Respondent also agreed on cross-examination that at that time, he had other records on his computer which he did not produce. The Respondent agreed on cross-examination that the typewritten records were produced in 2019 following the College's request for records – five years after the treatment was delivered to D.D.

274. On March 5, 2019, the Respondent produced screenshots of his computer records in response to an email from Ms. Szabo.

275. The Panel finds that on January 7, 2019, in the course of the investigation in this matter, the Respondent provided misleading information to a College investigator

when he submitted typewritten records which he represented were true and accurate copies of all his records that related in any way to his provision of massage therapy to D.D., when in fact he did not produce his contemporaneous records relating to D.D. and the records he did produce were created after he received the College's request for records dated December 21, 2018. As noted in the previous allegation, while the Respondent's communication of January 7, 2019 to the College was sent to the attention of Ms. Parisotto and not Ms. Szabo, it is clear that the records were being provided to the College for its investigation, and more specifically, to the investigator. The Respondent had been advised of the investigator's appointment to investigate this complaint and that the investigator would be requesting additional information and conducting an interview of him.

276. The Panel finds this conduct demonstrates a lack of honesty and integrity, and is a marked departure from the standard expected of the profession and amounts to professional misconduct.

277. The College has proven this allegation to the requisite standard.

Allegation 12(g): B.B.

12. You committed professional misconduct or in the alternative unprofessional conduct in that:

- g. on March 11, 2019, in the course of investigation INQ-2019-00010, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to B.B., when in fact you did not produce your contemporaneous records relating to B.B. and the records you did produce were created by you after you received the College's request for records dated February 20, 2019;

278. On February 20, 2019, Ms. Parisotto wrote to the Respondent notifying him that the College had received the complaint of B.B. Ms. Parisotto advised the Respondent in her letter that an investigator had been appointed in this matter, and that the investigator will interview the registered massage therapist, the complainant, and any relevant witnesses, and may also ask for additional information or documents.

279. By fax of March 1, 2019 to the College, the Respondent provided typewritten records relating to B.B. The Respondent stated, "the enclosed documents are true and

accurate copies of all my records that relate in any way to my provision of massage therapy services to [B.B.]”.

280. On cross-examination, the Respondent agreed that he had other records regarding B.B. at the time which he did not produce to Ms. Parisotto. He also agreed that he prepared the typewritten records in 2019 after receiving the College’s communication and five years after he delivered the treatment to B.B.
281. On May 23, 2019, the Respondent emailed screenshots of his computer records relating to B.B. to Ms. Szabo in response to Ms. Szabo’s May 8, 2019 request for same.
282. The Panel finds that the Respondent provided misleading information to the College investigator by sending a fax in which he represented that the typewritten records were true and accurate copies of all of his records relating to the provision of massage therapy to B.B. when in fact he did not produce his other computer records, and the typewritten records which he did produce were created by the Respondent after he received the College’s request. While the Panel does not have the February 20, 2019 request, it is clear from the entirety of the record that one was made on or about that date. As noted above, while the Respondent’s March 1, 2019 fax to the College was directed to the attention of Ms. Parisotto, it is clear that the records were being provided to the College for its investigation, and more specifically, to the College investigator. The Respondent had been advised of the investigator’s appointment to investigate this complaint and that the investigator would be requesting additional information and conducting an interview of him.
283. The Panel finds this conduct demonstrates a lack of honesty and integrity, and is a marked departure from the standard expected of the profession and amounts to professional misconduct.
284. The College has proven this allegation to the requisite standard.

Allegation 12 (h): A.A.

12. You committed professional misconduct or in the alternative unprofessional conduct in that:

h. on March 12, 2019, in the course of investigation INQ-2019-00011, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to A.A., when in fact you did not produce your contemporaneous records relating to A.A. and the records you did produce were created by you after you received the College's request for records dated February 25, 2019; and

285. On February 20, 2019, the College sent a letter to the Respondent notifying him that they have received a complaint from A.A. The College's letter of February 20, 2019 advises the Respondent that the College had appointed an investigator in this matter who would be conducting an interview of the Respondent and others and who may be requesting additional documents from him.

286. On February 25, 2019, the College sent the Respondent a letter requesting that he produce his records in relation to A.A.

287. On March 12, 2019, the Respondent sent a fax to the College enclosing typewritten records related to A.A. The Respondent stated, "the enclosed documents are true and accurate copies of all my records that relate in any way to my provision of massage therapy services to [A.A.]" On cross-examination, the Respondent agreed that he sent that communication and made that statement.

288. The Respondent also agreed on cross-examination that he prepared the typewritten records in 2019 after he received a request from the College for the records, and five years after the treatment was delivered to A.A. The Respondent also testified that sending the typewritten records was the only way he knew how to get his records to the College at that time.

289. On May 15, 2019, Ms. Szabo emailed the Respondent asking him to provide screenshots of this records relating to A.A. On May 29, 2019, the Respondent emailed Ms. Szabo the screenshots.

290. The Panel finds that during the course of the investigation, the Respondent provided misleading information concerning his records to the College investigator by submitting typewritten records which he represented were true and accurate copies

of all of his records that related in any way to his provision of massage therapy to A.A. when in fact he did not produce his original computer records relating to A.A. and the records that he did produce were created after the Respondent received a request for records on February 25, 2019. As noted above, while the Respondent's March 12, 2019 communication was directed to Ms. Parisotto, it was clear that the records were being provided to the College for its investigation, and more specifically, to the College investigator. The Respondent had been advised of the investigator's appointment to investigate the complaint and that the investigator would be requesting additional information and conducting an interview of him.

291. The Panel finds this conduct demonstrates a lack of honesty and integrity, and is a marked departure from the standard expected of the profession and amounts to professional misconduct.

292. The College has proven this allegation to the requisite standard.

Allegation 12 (i) C.C.

12. You committed professional misconduct or in the alternative unprofessional conduct in that:

- i. in June or July 2019, in the course of investigation INQ-2019-00026, you provided misleading information concerning your records to the College investigator. Particulars include that you submitted to the College investigator typewritten records which you represented were true and accurate copies of all your records that related in any way to your provision of massage therapy to C.C., when in fact you did not produce your contemporaneous records relating to C.C. and the records you did produce were created by you after you received the College's request for records dated June 17, 2019.

293. On June 17, 2019, Ms. Parisotto wrote to the Respondent requesting that he produce all of his records relating to C.C. The June 17, 2019 letter advises the Respondent that the College had appointed an investigator in this matter who would be conducting an interview of the Respondent and others and who may be requesting additional documents from him.

294. On July 15, 2019, the College received an envelope from the Respondent which contained a typewritten record for C.C. The Respondent included the same statement as with his other typewritten records, "the enclosed documents are true and accurate copies of all my records that relate in any way to my provision of

massage therapy services to [C.C.]” On cross-examination, the Respondent agreed that he provided those documents to the College and that they were created after the Respondent had seen C.C.’s complaint. The Respondent admitted on cross-examination that he drafted the typewritten records partially with the content of the complaint in mind.

295. The Respondent admitted on cross-examination that during the period between which he prepared the computer notes and the typewritten records, he suffered a concussion which “made [him] slower”.

296. The Panel finds that in June or July 2019, in the course of the investigation, the Respondent provided misleading information to the College investigator concerning his records by representing that his typewritten records were true and accurate copies of all of his records relating to the provision of massage therapy to C.C. when in fact he did not produce his original computer notes and the records he did produce were created by the Respondent after he received the College’s request for records dated July 17, 2019.

297. The Panel finds this conduct demonstrates a lack of honesty and integrity, and is a marked departure from the standard expected of the profession and amounts to professional misconduct.

298. The College has proven this allegation to the requisite standard.

Allegation 13

13. The conduct described above in paragraph 12(a) to (i) also constituted obstruction of the College investigator in the lawful exercise of her powers of investigation, contrary to s.31(1) of the Act.

299. Section 31(1) of the HPA provides as follows:

Prohibition against obstructing inspection or search

31 (1)A person must not obstruct an inspector in the lawful performance of duties or the lawful exercise of powers under this Act.

300. The term “obstruct” is not defined in the HPA. The College submits that it is not aware of any decisions that have considered this provision of the HPA. The College submits that the interpretation of a similar provision in the Criminal Code, R.S.C. 1985, c. C-46 which uses the term “obstructs” is instructive.

301. In *R. v. Yussuf*, 2014 ONCJ 143, the elements of criminal obstruction of a public officer or peace officer in the execution of their duty were described to include an act where the accused intends to make it more difficult for the police to execute their duty.

[52] I am therefore of the view that the elements of the offence that must be proved relating to the obstruction of peace officer in the execution of his duty therefore require that: Element 1 - There must be peace officer who is in the execution of a lawful duty as a peace officer;

Element 2- The accused person must know or be wilfully blind to the fact that this person is a peace officer and must know or be wilfully blind to the act the officer is executing;

Element 3- The alleged obstructive conduct must be an intentional act by the accused person, or an intentional omission by the accused person constituting a failure by the accused to comply with a legal duty;

Element 4- That act or omission must make it more difficult for a peace officer to carry out their duties; and

Element 5 - The accused person must intend to make it more difficult for the police to execute their duty.

302. The College submits in the professional regulation context no mental element is required (though it argues those elements are made out in any event). The Panel agrees that it is unlikely the Legislature intended the criminal elements of obstruction to apply in the professional regulation context and considers that there is no mental element required to be established in section 31(1) of the HPA.

303. The College submits that the elements are made out as follows:

a. Ms. Szabo’s affidavit evidence establishes that she was an inspector appointed by the College.

b. The Respondent knew that Ms. Szabo had been appointed by the College to investigate complaints about his conduct. Ms. Szabo’s affidavit establishes that on November 15, 2017, she wrote to the Respondent identifying herself as an inspector appointed by the College under the HPA. She was assigned to all of the subsequent investigations.

- c. The Respondent had a duty to provide his contemporaneous treatment records to the College in response to its requests. He intentionally provided misleading information concerning his records to the College and Ms. Szabo. The College submits that while he faxed the typewritten notes to Ms. Parisotto at the College, he was aware that an inspector had been appointed to investigate his conduct and that whatever records he submitted would be provided to the inspector.
- d. The Respondent made it difficult for Ms. Szabo to perform her duties. Ms. Szabo's duty was to investigate the complaints under section 28 of the HPA, which included the Respondent's records. By withholding records created at the time of treatment and providing records created in 2019, the Respondent made it difficult for Ms. Szabo to perform her duties.
- e. The evidence supports the Respondent intended to make it more difficult for Ms. Szabo to perform her duties. The Respondent's untrue and false statements about the accuracy of his records and scope of disclosure, as well as his repeated withholding of the requested records shows an intent to obstruct.

304. The Panel agrees with the College's submissions above in their entirety. Ms. Szabo was an inspector appointed under the HPA at all material times. The evidence before the Panel establishes that Ms. Szabo notified the Respondent of her role as an inspector. While the document requests were often made by Ms. Parisotto and the responding records were provided by the Respondent to Ms. Parisotto, the Respondent knew that the records were to be provided to Ms. Szabo in order for her to conduct the investigation. Ms. Parisotto communicated to the Respondent (for example, in her letter dated February 20, 2019), that "the College has appointed an investigator. Generally, an investigator will interview the registered massage therapist, the complainant, and any relevant witnesses. The investigator may also ask for additional information or documents. The investigator will contact you directly." Clearly, the investigator cannot discern what additional documents would need to be requested unless she receives the original production of documents from

the Respondent. Indeed, Ms. Szabo did do exactly that. On several occasions, Ms. Szabo emailed the Respondent to request that he provide screenshots of his original computer notes when he had failed to produce those to the College. The fact that Ms. Szabo was required to make repeated requests for the original records and complete production from the Respondent over time demonstrates that the Respondent made it difficult for her to perform her duties. While the Panel considers no mental element is required to be proven, it agrees with the College's submissions it would be proven in any event.

Allegation 14

14. The conduct described above in paragraph 12(a) to (i) also constituted a failure to respond to inquiries, requests, and directions from the College in a professional and responsive manner, contrary to s.28 of the Code of Ethics then in effect.

305. During the material times, section 28 of the Code of Ethics stated:

Massage therapists must respond to any inquiries, requests and directions from the College in a professional, responsive and timely manner.

306. During the material times, section 75 of the Bylaws required registrants to comply with the Code of Ethics. As the Discipline Committee held in *Gill*, a violation of the Code of Ethics may be a breach of the Bylaws and a breach of a standard imposed under section 39(1)(b) of the HPA.

307. As outlined above, the College requested that the Respondent produce records with respect to the patients described in paragraphs 12(a) to (i). With respect to each of those, the Respondent did not produce all of his records and falsely represented that he had done so. In five instances, the Respondent produced records that he created five years after the treatments in question, and after receiving the College's request for records.

308. The Respondent's production of records was not responsive because he did not provide what was requested of him and the College was required to follow up to obtain the requested records. The Respondent did not respond to the College's requests in a professional manner because he provided misleading responses to the College.

309. The Panel finds that the Respondent's conduct in paragraph 12(a) to (i) constituted a failure to respond to inquiries, requests, and directions from the College in a professional and responsive manner, contrary to section 28 of the Code of Ethics then in effect. The College has proven this allegation to the requisite standard.

Order

310. In summary, the Panel finds that the College has proven the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the Amended Citation to the requisite standard, with the exception of paragraph 12 (e) which the College did not pursue. As noted above, the Panel did not find it necessary to make the finding in paragraph 4(e) due to the findings made in paragraph 4(d).

311. Pursuant to section 39 (1) of the HPA, the Panel has determined that the Respondent:

- a. Has not complied with a bylaw and has committed professional misconduct in relation to the allegation at paragraph 1(a) of the Amended Citation;
- b. Has not complied with a bylaw and has committed professional misconduct in relation to the allegation at paragraph 1(b) of the Amended Citation;
- c. Has not complied with a bylaw in relation to the allegation at paragraph 1(c) of the Amended Citation;
- d. Has not complied with a standard or a limit imposed under the Act and has committed unprofessional conduct in relation to the allegation at paragraph 1(d) of the Amended Citation;
- e. Has not complied with a bylaw in relation to the allegation at paragraph 2 of the Amended Citation;
- f. Has not complied with a bylaw and has committed professional misconduct in relation to the allegation at paragraph 3 (a) of the Amended Citation;
- g. Has not complied with a bylaw and has committed professional misconduct in relation to the allegation at paragraph 3 (b) of the Amended Citation;

- h. Has not complied with a bylaw in relation to the allegation at paragraph 3 (c) of the Amended Citation;
- i. Has not complied with a bylaw and has committed professional misconduct in relation to the allegation at paragraph 4 (a) of the Amended Citation;
- j. Has not complied with a bylaw and has committed professional misconduct in relation to the allegation at paragraph 4 (b) of the Amended Citation;
- k. Has not complied with a bylaw in relation to the allegation at paragraph 4 (c) of the Amended Citation;
- l. Has not complied with a bylaw in relation to the allegation at paragraph 4 (d) of the Amended Citation;
- m. Has not complied with a bylaw in relation to the allegation at paragraph 5 of the Amended Citation;
- n. Has not complied with a bylaw in relation to the allegation at paragraph 6 (a) of the Amended Citation;
- o. Has not complied with a limit imposed under the Act and has committed unprofessional conduct in relation to the allegation at paragraph 6 (b) of the Amended Citation;
- p. Has not complied with a bylaw in relation to the allegation at paragraph 7 of the Amended Citation;
- q. Has not complied with a bylaw and has committed unprofessional conduct in relation to the allegation at paragraph 8 of the Amended Citation;
- r. Has not complied with a bylaw and has committed unprofessional conduct in relation to the allegation at paragraph 9 of the Amended Citation;
- s. Has not complied with a bylaw in relation to the allegation at paragraph 10 of the Amended Citation;
- t. Has not complied with a bylaw in relation to each of the allegations at paragraph 11(a)(b) and (c) of the Amended Citation;

- u. Has committed professional misconduct in relation to the allegation at paragraph 12(a) of the Amended Citation;
- v. Has committed professional misconduct in relation to the allegation at paragraph 12 (b) of the Amended Citation;
- w. Has committed professional misconduct in relation to the allegation at paragraph 12 (c) of the Amended Citation;
- x. Has committed professional misconduct in relation to the allegation at paragraph 12 (d) of the Amended Citation;
- y. Has committed professional misconduct in relation to the allegation at paragraph 12 (f) of the Amended Citation;
- z. Has committed professional misconduct in relation to the allegation at paragraph 12 (g) of the Amended Citation;
- aa. Has committed professional misconduct in relation to the allegation at paragraph 12 (h) of the Amended Citation;
- bb. Has committed professional misconduct in relation to the allegation at paragraph 12 (i) of the Amended Citation;
- cc. Has not complied with the Act in relation to the allegation at paragraph 13 of the Amended Citation; and
- dd. Has not complied with a bylaw and a standard imposed under the Act in relation to the allegation at paragraph 14 of the Amended Citation.

Schedule for Submissions on Penalty and Costs

312. The Panel requests that the parties provide written submissions regarding the appropriate penalty and costs.
313. The Panel requests that the parties provide the written submissions in accordance with the following schedule:
- a. Submissions must be delivered by counsel for the College to the Respondent and the Panel by no later than June 10, 2022;
 - b. Submissions must be delivered by the Respondent to counsel for the College and the Panel by no later than July 4, 2022; and
 - c. Reply submissions may be delivered by counsel for the College to the Respondent and the Panel by no later than July 11, 2022.
314. Submissions for the Panel should be delivered to Susan Precious, counsel for the Panel and may be delivered electronically.

Notice of Right to Appeal

315. The Respondent is advised that under section 40(1) of the Act, a respondent aggrieved or adversely affected by an order of the Discipline Committee under section 39 of the Act may appeal the decision to the Supreme Court. Under section 40(2), an appeal must be commenced within 30 days after the date on which this order is delivered.

Public Notification

316. The Panel directs pursuant to sections 39.3(1)(d) of the Act, the Registrar notify the public of the determination made herein.

317. The Panel directs pursuant to section 39.3(3)(a) of the Act, the Registrar withhold part of the information otherwise required to be included in the public notification under this section as the Panel considers it necessary to protect the interests of the complainants and another person affected by the matter. This includes the personally identifying information at paragraphs 88, 117(f), 138, 168, 230 of these reasons.

Dated: May 18, 2022



Marilynne Waithman, Chair



Deborah Charrois, LL.B, LL.M



Evan Jeary, RMT