2015 CMTBC 01
Reissued June 26, 2015

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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Donald Martin, RMT

(the "Registrant")

REASONS FOR DECISION

(Determination made pursuant to section 39(1) of the *Health Professions Act*)

Dates and Place of Hearing:

February 17, 19, 20, 24-27; and March 2, 3 and 6, 2015

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

Counsel for the College:

Lisa C. Fong
Julia Hincks

Counsel for the Registrant:

John M. Green

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

Lynne Harris (Chair)
Wendy Sanders, RMT
Rachel Shiu, RMT

Independent Counsel for the Panel:

Eric Wredenhagen

Court Reporter:

Charest Reporting Inc. (Patricia Bentley)

INTRODUCTION

[1] The Panel convened for a hearing on the above-noted dates between February 17 and March 6, 2015 at 1650 – 885 West Georgia Street, in the City of Vancouver, in the Province of British Columbia, to inquire into allegations that the Registrant committed professional misconduct and contravened certain of the College's Bylaws, and in particular, certain provisions of the *Code of Ethical Conduct* and the *Standards of Practice*.

[2] The hearing came to order at 9:30 a.m. on February 17, 2015 at which time the court reporter, Patricia Bentley, was sworn in.

[3] The Registrant was in attendance on all hearing dates except for March 6, 2015, and was represented by legal counsel throughout.

REGISTRATION AND PRACTICE HISTORY

[4] The Registrant was issued certificate number 03114 on August 25, 1992.

[5] From 1992 to the present, the Registrant has practiced as follows:

- For one year in Vancouver between 1992 and 1993
- In Victoria from September 1993 to December 1994
- From April to September 1995, as a part-time clinical supervisor and TA at the West Coast College of Massage Therapy in Vancouver
- From September 1995 to September 1997, as a therapist and supervisor at the Banff Springs Hotel
- From September 1997 to October 1999, as an instructor and clinic director for the West Coast College of Massage Therapy in Vancouver
- From November 1999 to August 2002, the Registrant did not practice massage therapy; he took a diploma in Information Technology and completed a masters degree in adult education
- From fall 2002 to 2004, as a clinic director of a massage therapy school in Fredericton, New Brunswick
- From 2004 to 2006, as an assistant director of the West Coast College of Massage

Therapy in Victoria (administrative work, not clinical practice)

- From 2006 to 2014, as an instructor at the West Coast College of Massage Therapy in Victoria

- From 2006 onward, as a therapist at various clinics in Victoria (concurrent with the instructor position), including the Victoria Exercise and Rehabilitation Centre ("Victoria Rehab") from April 2011 to March 2013

PRE-HEARING PRELIMINARY APPLICATIONS AND ORDERS

First Preliminary Application and Order

[6] On or about September 18, 2014, the Panel was advised that the College proposed to bring a preliminary application prior to the hearing for the following relief: (1) an order that certain practice conditions imposed by the Inquiry Committee on the Registrant's practice in 2013 pursuant to section 35 of the Act be continued pursuant to section 38(8) of the Act; and (2) an order that the three citations issued against the Registrant as at September 2014 (in respect of individual complaints made by the complainants V.S., D.K. and L.T.) be joined or consolidated into a single citation pursuant to section 67(1) of the College's Bylaws. The Panel was also provided with exchanges of correspondence between the parties' legal counsel dated September 3 and 4, 2014 and September 16, 2014 demonstrating that the issue of consolidation was not consented to by the Registrant, and was therefore a contentious issue between the parties.

[7] Legal counsel for the College and for the Registrant had initially contemplated an oral hearing of the application. Accordingly, an attempt was made to find a date on which the three members of the Panel, the Panel's independent legal counsel ("ILC"), and counsel for both parties were all available for a preliminary oral hearing on a date sufficiently in advance of the scheduled February and March 2015 hearing dates that the latter would not be put at risk. Finding such a date did not prove possible. Therefore, on the basis that the matters at issue on the application were pure issues of law that could be heard in writing without causing unfairness to either party, the Panel made a direction on September 23, 2014 (the "Direction"), pursuant to its powers under section 38(4.2)(c) of the *Health Professions Act* (the "Act"), directing that the applications would be heard in writing, and directing the parties to exchange written submissions on a timetable set out in the Direction. The Direction also provided that, in the event that the Panel had questions for legal counsel following its review of the written submissions, the Panel would either convene to address those questions to counsel, with counsel attending either in person or by telephone, or alternatively that the Panel would direct its questions to counsel in writing.

[8] Shortly after the issuance of the Panel's September 23, 2014 Direction, the College delivered written application materials on September 26, 2014. The Registrant delivered a written response to the College's applications on the timeline set out in the Direction, which was then

followed by the College's reply submissions. The Registrant also sought and was granted leave (which was opposed by the College) to file a sur-reply submission to the College's reply.

[9] Following receipt of all written submissions (including the Registrant's sur-reply), the Panel deliberated. A Decision and Order was released on December 5, 2014 granting the relief sought by the College. Specifically, (1) an order was made pursuant to section 38(8) of the Act extending the Practice Conditions; and (2) an order was made – with an accompanying direction to the Registrar – that the three existing citations issued against the Registrant be joined and consolidated into a single citation. The Panel's December 5, 2014 Decision and Order is attached to these Reasons for Decision as Appendix "A", and sets out in full the reasons for the orders made by the Panel (the names of two of the three complainants are redacted for the reasons set out below). The Panel does not propose to repeat its reasons here, except to note that one reason that the issue of consolidation was contentious was that consolidation (and hearing together of the individual complaint matters) was sought not solely on the grounds of efficiency or convenience, but also on the basis of the College's stated intention to bring a similar fact evidence application at the hearing for a direction "permitting the College to introduce the evidence of each complainant not only for her own matter, but also in relation to the two [which subsequently became three – see below] other complaint matters." The issue of similar fact evidence was ultimately addressed and argued by both parties in their closing submissions, and is discussed below.

Second Preliminary Application and Consolidation Order

[10] On December 15, 2014, legal counsel for the College delivered a new application, which sought to join a fourth citation that had been issued against the Registrant (on the basis of a complaint made by the complainant A.W.) to the then-current citation, which at that point was a consolidation of the three previous individual citations. The December 15 application also sought a direction from the Panel requiring the Registrant to "provide, by Friday, January 9, 2015, written notice of any preliminary applications that he intends to make."
Because of the impending holidays and also the relative proximity to the start of the hearing (just over two months away), immediate attempts were made to determine whether the Registrant would consent to or oppose the application. The Registrant's legal counsel advised by email dated December 18, 2014 that the further consolidation order sought by the College was opposed. However, it remained to be determined whether there would be a further exchange of written submissions, and if so, what the timeline would be (again, an especially important concern both because of holidays and the rapidly approaching hearing date).

[11] On December 22, 2014, the Panel issued a direction that a response (if any) by the Registrant to the Second Application be delivered by January 7, 2015, and that a reply by the College (if any) be delivered by January 9, 2015. This direction further provided that, if no response was received from the Registrant, his counsel's email of December 18, 2014 (objecting to consolidation of the A.W. citation with the other complaints) would be considered to be a response.

[12] No response was received from the Registrant, and hence no reply from the College, in January 2015. However, when the Panel met to deliberate on January 12, 2015, they were provided with an exchange of correspondence between counsel consisting of a letter from Mr. Green, counsel for the Registrant, to Ms. Fong, counsel for the College, dated January 8, 2015 and responding correspondence from Ms. Fong to Mr. Green dated January 12, 2015.

[13] Mr. Green's letter of January 8, 2015 requested, among other things, that the Panel "issue a subpoena" to a number of individuals so that they could be cross-examined by him. These individuals were "all complainants"; the College's Director of Compliance, Joëlle Berry; the College's contract investigator, Taras Hryb; and the College's proposed expert witness, Karen Fleming. The letter stated that the Registrant would be "unduly prejudiced" if these individuals failed to attend at the hearing or if cross-examination were denied, and that the Registrant "will be advancing the defence of collusion as a response to the College's use of similar fact evidence in this case."

[14] College counsel, Ms. Fong, responded to the letter of January 8, 2015 by a letter dated January 12, 2015. On the issue of Mr. Green's proposed cross-examination, she advised that the College would be calling each of the complainants as a witness, and that they would be available for cross-examination in the normal course. She also advised that, in order to "avoid any protracted dispute about Mr. Martin's right to explore 'collusion' with Ms. Berry and Mr. Hryb", they would be called as witnesses by the College and would likewise be available for cross-examination at the hearing. Finally, Ms. Fong took that position that the issue of expert evidence should be dealt with at the hearing.

[15] The Registrant's allegation of collusion was subsequently raised at the hearing and hence is dealt with further below.

[16] The Panel's Decision and Order on the second application addresses both the subject matter of the Second Application (the consolidation of the A.W. citation with the others) and the issues raised between counsel by means of their January 8/12 exchange of correspondence, and is attached to these Reasons as Appendix "B". In summary, the Panel ordered that the A.W. citation be joined with the existing consolidated citation (which had joined the individual citations of V.S., D.K. and L.T.) for the reasons set out in the January 14 Decision and Order. The further relief sought by the College was denied, as were the Registrant's requests in the January 8, 2015 letter, for the reasons set out in Appendix "B".

PRELIMINARY APPLICATIONS AND ORDERS (AT HEARING)

Citation amendment and similar fact evidence applications

[17] The hearing proper commenced on the morning of Tuesday, February 17, 2015. Following introductions, counsel for the College advised that the College was bringing three further

preliminary applications seeking: (1) an amendment of the Further Amended Citation to Appear; (2) directions as to when – i.e. at what point in the hearing – the College's similar fact application would be heard; and (3) an order that the portion of the hearing dealing with the evidence of two of the four complainants (D.K. and L.T.) be held in private pursuant to section 38(3) of the Act.

[18] The Registrant's counsel, Mr. Green, advised that the Registrant consented to the amendment of the citation, which was subsequently filed as Exhibit 1, entitled the Second Further Amended Citation to Appear (the "Citation"). The issue of the timing of the application regarding similar fact evidence occasioned some discussion, following which it was agreed by counsel that submissions on the "similar fact" issue would be made by as part of both parties' closing arguments. The issue to be argued, and to be decided by the Panel, was whether the evidence of each of the four individual complainants should be considered as "similar fact" evidence (meaning it would be viewed as probative not only of the evidence of that complainant, but also of the evidence given by one or more of the other complainants), or whether the evidence of each complainant would be considered only in respect of the allegations regarding that complainant (and hence, not similar fact evidence). There was no issue of admissibility to be determined as each complainant's evidence would be admissible in any event, at a minimum for the latter purpose. There was therefore no requirement for the Panel to make a preliminary decision on this issue.

Application re hearing in private

[19] The third application, however – an application by the College pursuant to section 38(3) of the Act supporting requests made by the complainants D.K. and L.T. to have their evidence heard in private – was contentious. Mr. Green objected that the application had not been brought in a sufficiently timely manner. While he had received notice on February 10, 2015 that a privacy application would be brought, he had only received D.K.'s letter and L.T.'s email requesting a hearing in private the previous day (February 16), along with the College's submissions on this issue. Mr. Green also submitted that D.K.'s and L.T.'s privacy requests required cross-examination, at least in part to determine whether they were the true authors of the letters. He also submitted that the contents of the privacy requests were prejudicial to the Registrant, in that they alleged and asked the Panel to draw an inference that sexual touching had in fact occurred. He submitted that the privacy application required evidence, which had not been filed, as both communications were unsworn. On the legal substance of the privacy requests, he submitted that D.K and LT were adults, and had a lower entitlement to privacy than would be the case had they been children. Finally, he submitted that the importance of the "open court" principle and the *dicta* of the Supreme Court of Canada on that issue militated in favour of keeping the hearing entirely public. He asked for an adjournment to Friday (February 20) so that he could prepare a more thorough response.

[20] The Panel determined that it would proceed to hear submissions from the College that day, Tuesday, February 17, and would grant Mr. Green an adjournment to Thursday, February 19 so

that he could prepare responding argument. The Panel subsequently heard argument from Mr. Green on February 19, followed by reply argument from the College on the morning of February 20. The Panel then adjourned to deliberate its decision on the privacy issue. (Unfortunately, this meant that no witnesses could be called during the initial four-day week of the hearing.)

[21] The hearing resumed on Tuesday, February 24th with the College initially calling the two complainant witnesses who had not requested a hearing in private. At the end of the day on Wednesday, February 25, 2015, the Panel released its written Interlocutory Decision and Order, a copy of which is attached to these Reasons for Decision as Appendix "C". For the reasons set out in the Interlocutory Decision and Order, the Panel ordered that the portions of the hearing at which the evidence of D.K. and L.T. would be given be held in private. In order to address the Registrant's concern that members of the public should have access to the entirety of the hearing so that they could understand how the Panel's decisions were made, the Panel ordered that redacted transcripts (redacted to remove identifying information of D.K. and L.T.) of the closed portions of the hearing be made available to any member of the public who wished to order them. Although the Interlocutory Decision and Order is self-explanatory, the Panel decided also to address the privacy issue in these reasons.

[22] The starting point is section 38(3) of the Act, which provides as follows:

> (3) A hearing of the discipline committee must be in public unless
>
> > (a) the complainant, the respondent or a witness requests the discipline committee to hold all or any part of the hearing in private, and
> >
> > (b) the discipline committee is satisfied that holding all or any part of the hearing in private would be appropriate in the circumstances.

[23] In other words, a hearing is presumptively public *unless* there is a "request" made by "the complainant, the respondent or a witness" that it be held in private. If such request is made, the discipline committee (in this case, the Panel) may grant the request if it is "satisfied" that it would be "appropriate in the circumstances" to hold all or any part of the hearing in private.

[24] Section 38(3) grants a broad discretion to the Panel. In its submissions, the College characterized this discretion as being "as broad as it can be". The Registrant characterized the College's argument as advancing the proposition that the Panel had an "unfettered" discretion, a characterization the College disputed. In any event, however, something more than a mere "request" must be required, or subsection (b) would be unnecessary. The question is how, and on what basis, the Panel may determine whether it is "satisfied" that it is "appropriate in the circumstances" to order that "all or any part of the hearing" should be held in private.

[25] Section 38(3) itself does not enumerate the factors the Panel should consider in exercising its discretion as to whether or not a request is "appropriate", nor does it provide any procedural guidance as to how any dispute arising between the parties (as in this case, for example, in

relation to the authenticity of the requests) should be resolved. The Panel is therefore required first to look at the wording of section itself; second, to consider that wording in the context of the legislative scheme of the Act as a whole; and third, to consider the submissions of the parties as to the factors that might appropriately weigh in the Panel's exercise of discretion.

[26] On its face, section 38(3) indicates that a request for a hearing in private may be made by one of three different classes of individuals: the complainant, the respondent or a witness. One possibility that is therefore raised by the wording of section 38(3) is that the "appropriateness" of a privacy request might have some relationship to which of the three enumerated classes of person is making the request.

[27] Another possible factor that may bear on the Panel's exercise of discretion is the fact that disciplinary hearings will differ in terms of the matters at issue, and therefore that the nature of the allegations in a Citation to Appear, which are part of the "circumstances" of a case, will also be relevant to the consideration of the appropriateness (or otherwise) of a privacy request.

[28] Further, in addition to (1) the status of the individual making the request; and (2) the nature of the allegations at issue in the hearing, there may be any number of other factors that could have a bearing on whether a request for a hearing in private (in whole or in part) would be granted. These factors will be specific to each individual case, and it is impossible and likely inadvisable to attempt to enumerate them in advance.

[29] In considering the first possibility – i.e. that the appropriateness or otherwise of a privacy request depends on the status of the individual making the request – the Panel noted that the word "request" appears at numerous points throughout the Act. In most such cases, a "request" triggers a mandatory action in response, with no room for any exercise of discretion (see for example ss. 21(3)(a), 25.94(2) and (3), 40.7 and 52.3(3)). A different kind of "request" is found in sections 32(3), 33(5), and 36(1) and (2), which relate to prehearing investigative and inquiry processes, and deal with requests made to a registrant either by the College's Registrar or by the Inquiry Committee. However, a Registrant may choose whether or not to respond to requests made pursuant to these sections. Hence, these requests do not call for an adjudicative decision to be made.

[30]Other than section 38(3), the only other section dealing with a "request" that relates specifically to a decision of the discipline committee (in this case, the Panel, as a subcommittee of the discipline committee) following a hearing is section 39.3(3), which is entitled "Public notification". Subsection (3) of that section provides as follows (with emphasis added):

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

necessary ***to protect the interests of the complainant,*** if any, in the matter***, or another person, other than the registrant***, affected by the matter;

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

[31] Section 39.3(3) applies to a the public notification of a number of actions, which include a discipline committee's determination of wrongdoing under section 39(1) of the Act and the imposition of disciplinary action under section 39(2).

[32] Both sections 38(3) and 39.3(3) deal with issues of privacy: the former, the privacy of the hearing; the latter, the withholding of identifying information from public notification. Section 39.3(2) specifies the information that must be included in a public notification of a disciplinary determination or order, including "the name of the registrant respecting whom … the action was taken". Consistent with this mandatory publication of the registrant's name, subsection 39(3) expressly does *not* permit the withholding of the registrant's identifying information from the public notification of a disciplinary action. However, it also *requires* the withholding from publication of any information that could "reasonably be expected to identify *the complainant* or another person, *other than the registrant*" (emphasis added) if requested by the complainant or other person. The clear inference is that the statutory scheme of the Act is intended to provide greater protection to the privacy interests of a complainant or other person than to those of registrant against whom an adverse determination has been made.

[33] For this reason, even though a privacy request under section 38(3) may also be made by a registrant, the Panel concludes that a request under that section made by a complainant will, in most cases, be more likely to be found "appropriate" than a request made by a registrant – particularly where a complainant (in this case, two complainants) has alleged that a registrant engaged in improper conduct of a sexual nature with her. This point is discussed further below.

[34] In this case, two of the four complainants – D.K. and L.T. – asked that their evidence be given in private. Each complainant provided a written communication outlining and explaining her request. D.K.'s request was in the form of a signed letter dated February 15, 2015. L.T.'s request was in the form of an email, also dated February 15, 2015. The email was unsigned.

[35] Mr. Green raised a number of procedural and substantive concerns. First, he submitted that the contents of D.K.'s and L.T.'s requests for privacy were prejudicial to the Registrant, in that both requests asserted that the Registrant had touched them in an inappropriate and sexual manner, which was the fundamental matter at issue in the hearing. The privacy requests, he argued, "suggested guilt". Further, he did not concede that the requests were in fact made by the complainants D.K. and L.T., at least not unaided, and he submitted that their authorship of the privacy requests should be tested by cross-examination before their merits were considered by

the Panel.

[36] With respect to these initial issues, the Panel was mindful of the fact that contents of the D.K.'s and L.T.'s privacy requests, including the references to the alleged sexual conduct of the Registrant, were not to be treated as evidence of any matter alleged in the Citation. At the same time, however, any person requesting a hearing in private is required to "satisfy" the Panel that holding all or part of a hearing in private is "appropriate in the circumstances". While section 38(3) does not contemplate a formal application or adversarial process, there is still an onus to be met. It is difficult to see how a person requesting a hearing in private could meet that onus without explaining the reasons for the request, especially given that the Panel is required to consider "all the circumstances" of a request. In the case of D.K., the details of the alleged sexual contact were general in nature. In the case of L.T., the details were slightly more particularized. In both cases, however, the statements that were made were consistent with the allegations set out in the Citation, which was already before the Panel. The Panel understands that a request for privacy made under s. 38(3) of the Act is not is evidence of the matters at issue in the hearing, and therefore did not accept the Registrant's submission that D.K.'s and L.T.'s requests were unfairly prejudicial.

[37] The Registrant's second argument with respect to the privacy requests was in essence that they were not evidence: they were unsworn (and in the case of L.T.'s request, unsigned), and their authenticity and reliability were contested. Counsel for the Registrant submitted that cross-examination on the content of the privacy requests should be allowed before the privacy decision was made. On this point, however, the Panel agreed with the College's submission that section 38(3) requires only a "request"; it does not state that a complainant (or other person requesting a hearing on private) is required to provide evidence to support or justify a request, nor does it state that there is a right to cross-examine on the content of a request. In fact, if that level of procedural formality were required (and this goes to the substance of the issue, which is discussed below), it could dissuade many complainants alleging unwanted sexual touching or sexual assault from coming forward. Also, imposing evidentiary requirements including the need for cross-examination *before* a privacy decision is made would necessarily mean that these procedures would take place in public, with no ability (in contrast to a court, as discussed below) to control the dissemination or publication of such information. This would appear to defeat the intention of the legislature in allowing for the possibility of a hearing in private.

[38] The Act imposes no specific formal requirement on a request. The Panel was satisfied that D.K.'s signed letter requesting privacy was authentic. In light of the concerns raised by the Registrant, the Panel would have preferred that L.T.'s request had been signed as well. To address the Registrant's concern regarding authenticity, the Panel directed in its interim decision that College counsel ask L.T. to confirm, at the outset of her direct examination, that she had in fact requested that the portion of the hearing during which her evidence would be heard be held in private. This was done, and L.T. so confirmed. (She was not subsequently cross-examined on this issue.)

[39] The College made submissions in support of D.K.'s and L.T.'s privacy requests. It pointed out that both D.K. and L.T. requested a hearing in private due to a "desire to maintain privacy over [their] private health matters" and also because of the "sexual nature of the allegations". With respect to the nature of the allegations, D.K. was concerned about possible impacts on her husband and child, while L.T. was additionally concerned about the possibility of being questioned on her sexual history. Additionally, in L.T.'s case, there was the factor of her being a professional, which raised concern about "the possible impacts that a public hearing could have on her professional reputation."

[40] The College relied on the Supreme Court of Canada's decision in *A.B. v. Bragg Communications Inc.* (2012 SCC 46), in which a young (age 15) female victim of cyberbullying had sought an order requiring an internet service provider to disclose the identity of the person who had published a fake Facebook profile in her name. She had also asked (1) that she be permitted to bring her application anonymously, (2) that there be a publication ban on the content of the fake Facebook profile. While lower court had been prepared to allow an order that the identity of the individual be disclosed, it declined to make the two additional orders sought by A.B. on the basis that she had not demonstrated specific harm to her resulting from publication. That decision was upheld by the Court of Appeal. The Supreme Court of Canada, however, allowed the appeal in part and permitted A.B. to bring the application anonymously, on the basis of the "relative insignificance of knowing a party's identity" and "the relative unimportance of the identity of a sexual assault victim". It also held that, since the application was anonymous, the publication ban was unnecessary, as A.B.'s identity would be protected.

[41] The College submitted that *Bragg* stood for the proposition that a complainant seeking privacy or anonymity need not prove any specific or actual harm flowing from publication of their identity, as complainants who allege sexual misconduct are, in the words of *Bragg*, "particularly vulnerable to the harms of revictimization on publication" (citing *Bragg*, supra, at para. 27). While this may be so, it appears to the Panel that there is some difficulty in relying on *Bragg* in support of this proposition, irrespective of the age of the victim. If one considers paragraph 27 of *Bragg* in its entirety, the reason becomes clear:

> If we value the right *of children* to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that *young victims* of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear *for most children* with the further protection of anonymity, we are compellingly drawn in the case to allowing A.B.'s anonymous legal pursuit of her cyberbully. (Emphasis added.)

[42] Although it may be, as the College argues, that *Bragg* also applies more generally to complainants alleging sexual abuse or assault or misconduct, it appears to the Panel that its different factual context (anonymous online publication of allegedly defamatory material of a sexual nature), as well as its focus specifically on younger victims, means that its applicability to the case before this Panel was not clear.

[43] However, the College also cited *C.W. v. L.G.M.* (2004 BCSC 1499), a case in which the plaintiff sought to maintain her anonymity despite the fact that she was bringing a civil action for damages for sexual assaults allegedly committed against her between 1981 and 1991. Mr. Justice Joyce recognized at the outset "the important principle that generally speaking the court must administer justice in public" as this principle "protects the integrity of the process and promotes respect for and confidence in the judicial system." He went on to state, however, that

> … this important principle of the openness of the court process is subject to an overarching principle: the fundamental object of the court is to see that justice is done between the parties. There are circumstances where the principle of the open court must give way in order to achieve justice. The question is what those circumstances are and, if they exist, how far the principle of an open court must yield in order to ensure that justice may be done.

[44] After reviewing a number of cases, Joyce J. enumerated a number of principles that he found to be applicable in the context of a civil action, and commented as follows:

> I am of the opinion that there is a superordinate social or public interest in protecting victims of sexual abuse from further injury. Victim of sexual abuse should not be deterred from seeking compensation in the court because the process will cause further harm.

[45] He went on to state that a grant of anonymity to a plaintiff should only be permitted if certain preconditions were met, one of them being that the protection of the plaintiff's identity should only be permitted if it would "not impair the defendants' ability properly to defend themselves". This is an important consideration in this proceeding as well, and is addressed further below.

[46] However, there are also a number of inherent limits to the applicability of any court decision to the conduct of a regulatory proceeding under the Act. First, notwithstanding the many cases cited by both counsel on the importance of the "open *court* principle" (emphasis added), it is clear that the Panel, as a discipline committee constituted under the Act, is not a court. Even if the legislature has chosen to make disciplinary hearings in the health professions public, subject to a hearing panel's discretion to hold all or part of a hearing in private, it does not necessarily follow that all judicial *dicta* about the importance of open courts necessarily apply, or apply without modification, to the operation of administrative tribunals conducting regulatory disciplinary proceedings, which are governed by the tribunal's statute.

[47] In his submissions on the privacy issue, Mr. Green argued that:

> … there is nothing in the statutory framework of the *Health Professions Act* that suggests our legislature intended for any health college to have the ability to ignore the open court principle.

[48] He went to argue that the Registrant had a right to an open hearing as a matter of natural justice, and that it was "trite law that the open court principle applies to quasi-judicial tribunals".

[49] The difficulty in addressing these arguments lies at least in part in the unstated premise that by exercising a discretion that the Act permits the Panel to exercise, it would be "ignor[ing] the open court principle". Another implied premise is that holding part of a hearing in private would impact the Registrant's right to natural justice or procedural fairness. Finally, an explicit premise – quoted above – is that "the open court principle applies to quasi-judicial tribunals."

[50] In support of the latter argument, Mr. Green cited the Supreme Court of Canada's decision in *Vancouver Sun (Re)*, 2004 SCC 43, which involved an appeal by the Vancouver Sun newspaper of an order that a judicial investigative hearing held in connection with the Air India bombing be held *in camera*. Ultimately, it was held by the majority that the name of the potential Crown witness could be released, but only after that individual had taken the position that the hearing should be public, and also "subject to any order of the hearing judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given …" (*Vancouver Sun (Re)*, headnote). Returning to the argument of Mr. Green regarding quasi-judicial tribunals, it is notable that the paragraphs from *Vancouver Sun (Re)* that he cites in support of that argument say nothing at all regarding quasi-judicial tribunals, or administrative or regulatory bodies. Those paragraphs are reproduced below exactly as they appear in Mr. Green's submission on the privacy issue:

> 23. This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings …
> …
> 25. Public access to the courts guarantees the integrity of judicial process by demonstrating that "justice is administered in a nonarbitrary manner, according to the rule of law": Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, at para.22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> 26. The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein …

[51] Although the above paragraphs, at least on their face, seem to address a context which is quite different from the one in which the Panel finds itself, the *Vancouver Sun (Re)* decision – as do many of the decisions cited by counsel on the "open court principle" – also demonstrates a further reason why judicial *dicta* on the importance of open courts cannot simply be straightforwardly applied to the professional discipline context. Judges deciding either civil or

criminal matters – the latter in particular – have both the statutory and the inherent authority to protect a person's privacy, where appropriate, that a regulatory tribunal simply does not have. As the case law cited to the Panel demonstrates, a judge may grant a party anonymity, in appropriate circumstances; a judge can control access to his or her courtroom, in appropriate circumstances; and, perhaps most significantly, a judge may order a publication ban on terms appropriate to the case, and has the authority to sanction any person who breaches such a ban. Judicial pronouncements about the importance of open courts must be considered in the full context of a judge's other powers to protect the identity of parties, witnesses, or vulnerable persons.

[52] As the College forcefully argued, the Panel has no such powers. As a regulatory tribunal, it has only the power and authority conferred on it by the Act. It cannot order a ban on publication of identifying information. Where protection of a person's name or other identifying information is appropriate, the Panel has only one means open to it of protecting a person's privacy, which is to order that the hearing, or the portion of it at which that person gives evidence, be closed to the public. If a hearing is not held in private, the Panel has no means of preventing any evidence given in the hearing room from being disseminated or published by anyone in attendance at the hearing.

[53] In its interim decision, the Panel considered College counsel's argument with respect to publication bans issued under section 486.4, but took notice of and cited section 486(1) of the *Criminal Code*, since it appeared to parallel more closely the Panel's power under section 38(3) of the Act. Section 486(1) of the *Criminal Code* provides as follows:

> **486.** (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may order the exclusion of all or any members of the public from the court room for all or part of the proceedings if the judge or justice is of the opinion that such an order is in the interest of … the proper administration of justice ….

[54] However, in addition to the parallel provided by section 486(1) of the *Criminal Code*, the Panel also found the College's argument regarding a judge's power to issue a publication ban to be both compelling and relevant to the issue at hand. To repeat, a judge has an array of powers available to him or her, including the power to issue a publication ban, that a regulatory tribunal simply does not have. If the "open court principle" were to be applied to this proceeding, without consideration of the many contextual differences between a court's powers and this Panel's powers, the effect would be to nullify or severely restrict any ability of the Panel to exercise its statutory discretion under section 38(3) of the Act.

[55] Mr. Green also argued that his client had a "right to an open hearing" and that it would be an abrogation of the rules of natural justice to deny that right. He relied on a number of cases in support of the proposition that his client was entitled to a fair hearing and a high standard of justice, including *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 SCR 1105; and in *Dunsmuir v. New Brunswick*, [2008] 1

SCR 190**.**

[56] No issue can be taken with the proposition that the Registrant is entitled to a fair hearing. However, as previously stated in the interim decision, the Panel does not consider that the Registrant's rights to procedural fairness have in any way been curtailed by the issuing of a partial privacy order. The Panel agrees with the *dicta* of Lord Justice Diplock, who in a decision of the English Court of Appeal entitled *Myers v. Director of Public Prosecutions* ([1964] 3 W.L.R. 10) stated as follows:

> Where, as in the present case, a personal bias or *mala fides* … is not in question, the rules of natural justice … can, in my view, be reduced to two. First, [the Director of Public Prosecutions] must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing.

[57] As the Panel stated in its interim decision,

> The Panel does not consider that [the Registrant's right to a fair hearing] is compromised by the Panel's exercise of discretion to allow a portion of the hearing to occur in private, as permitted by the Act. The Registrant will be able to hear the evidence of all complainants directly, including D.K. and L.T., will be entitled to test and challenge that evidence through cross-examination, and will be entitled to make submissions to the Panel regarding both the complainants' evidence, and his own. These rights are unaffected by whether or not a particular portion of the hearing is public or in private.

[58] Consequently, the Panel finds its obligation of fairness to the Registrant, and the Registrant's ability to defend himself (one of the criteria mentioned in the *C.W.* decision) were not in any way compromised by its Interim Order under section 38(3) of the Act.

FURTHER PRELIMINARY ISSUE REGARDING ALLEGATION OF COLLUSION

[59] As stated above, in a letter dated January 8, 2015 addressed to the Panel, Mr. Green requested the issuance of a subpoena in respect of the College's investigator, Mr. Taras Hyrb; each of the complainants; and the College's Director of Compliance, Ms. Joëlle Berry. He stated that he required each of the aforementioned persons to "submit to cross-examination by counsel for [the Registrant]". The section of the letter dealing with the cross-examination request concludes with the following paragraph:

> [The Registrant] respectfully submits that he will be unduly prejudiced should the abovementioned individuals fail to attend at the hearing, or cross-examination of them by his counsel be denied. **More specifically, [the Registrant] will be advancing the defence of collusion as a response to the College's use of similar fact evidence in this case**.

(Emphasis added.)

[60] On the second day of hearing, following the conclusion of argument on the issue of whether or not portions of the hearing would be held in private, Ms. Fong addressed the issue of collusion in the course of delivering the College's opening statement by stating that – consistent with the position taken in her letter of January 12, 2015, she would be calling the College's investigators (Ms. Gaffar and Mr. Hryb), and the College's Director of Compliance (Ms. Berry), to provide evidence as to the process of the investigation, given that an allegation of collusion had been raised by the Registrant. She also advised that this would include four volumes of documents related to the investigation, which would be tendered in through Ms. Berry.

[61] Mr. Green objected to the proposed calling of evidence of the investigation, arguing that it was "irrelevant evidence" which would "tread all over collateral matters which are not central to the actual issue" which, he argued, was "did the touching occur, was it intentional". He argued that whether or not collusion would be argued as a defence was "actually a decision that the RMT would make at the close of the case made by the College" and that, as in a criminal case, it was not proper for the College to "anticipate the defences". Mr. Green cited the decision of the Supreme Court of Canada in *R. v. Handy*, 2002 SCC 56, which he described as the "leading case on how similar fact evidence is dealt with". In particular, he drew the Panel's attention to paragraphs 112 and 113 of *Handy*, which state as follows:

> **112** The Court in *Arp*, *supra*, concluded that the test for the admission of similar fact evidence is based on probability rather than reasonable doubt (paras. 65, 66 and 72). Accordingly **where, as here, there is some evidence of actual collusion, or at least an "air of reality" to the allegations, the Crown is required to satisfy the trial judge, on a balance of probabilities, that the evidence of similar facts is not tainted with collusion**. That much would gain admission. It would then be for the jury to make the ultimate determination of its worth.
>
> **113** Here it was not sufficient for the Crown simply to proffer dicey evidence that if believed would have probative value. It was not incumbent on the defence to prove collusion. It was a condition precedent to admissibility that the probative value of the proffered evidence outweigh its prejudicial effect and the onus was on the Crown to satisfy that condition. The trial judge erred in law in deferring the whole issue of collusion to the jury.
>
> (Emphasis added.)

[62] The Panel withdrew and deliberated on the issue. While it considered that there was some merit to Mr. Green's submission that the alleged "collusion" was peripheral to the main issues in the case, it also noted that it was Mr. Green who had initially raised collusion as a possible issue. The Panel did not consider that it would be fair to the College not to know whether or not collusion would be raised as a defence until after the College's case was closed. At the same

time, it appeared that it would be inefficient to hear what could amount to several days of evidence in relation to an issue that might never be raised.

[63] The Panel considered the *Handy* decision and considered that it was distinguishable to the specific issue before it. In *Handy*, there had been a finding of a lower court that there was a factual basis for the collusion allegation:

> **111** Charron J.A. found, and I agree, that there was an issue of potential collusion between the complainant and the ex-wife. **The evidence went beyond mere "opportunity"**, which will be a feature in many cases alleging sexual abuse with multiple complainants.
>
> (Emphasis added.)

[64] The evidence in *Handy* was that, months prior to the alleged sexual assault, the complainant had received information from the accused's ex-wife (the source of the similar fact evidence) as to the accused's alleged sexual proclivities, as well as the fact that the ex-wife had received money from the Criminal Injuries Compensation Board because of her allegations that her husband had abused her, and that the ex-wife had suggested that the complainant could do the same.

[65] In this case, however, the Panel heard no evidence or no specific factual information that would support an allegation of collusion. Collusion seemed rather to be a bare allegation resting upon, in the words of *Handy*, a "mere opportunity" (i.e., the opportunity caused by the meeting of the College's investigator with more than one of the complainants). Even if there had been evidence or an "air of reality" to the Registrant's collusion allegation, the emphasized passage from paragraph 112 of *Handy* (cited above) suggests that the College would then be "required" to satisfy the Panel that the proposed similar fact evidence was "not tainted" by collusion, which would appear to suggest that, contrary to Mr. Green's objection, the College would in fact be obliged to call evidence of its investigation in order to do so.

[66] At the same time, the Panel was mindful of the amount of time that could be spent on an issue that might have no ultimate relevance, since even though collusion had been raised as a possible defence, it was not being actively alleged at that point. It also recognized that, practically speaking, the only way for Mr. Green to determine whether there was any factual basis for the allegation of collusion, if the College witnesses were not to be called, was through cross-examination of the complainants. Weighing all these factors together, the Panel, after deliberation, directed as follows:

> … the panel directs that the first witnesses to be called by the College be the complainants. Once cross-examination of the complainants has been completed, Mr. Green must give notice to the College as to whether or not a defence of collusion will be advanced. Depending on Mr. Green's position, the college may then decide to call evidence regarding the investigative

process.

And the panel is making this direction under section 38(4.2)(c) which states: "The discipline committee may make any other direction it considers appropriate."

[67] The issue of collusion arose again in during the examination in chief of the first witness, V.S. At the outset of questioning, V.S. was asked if she had children, and answered in the affirmative. Ms. Fong then asked "How many?" This drew an objection from Mr. Green, who submitted that the College was seeking to lead inadmissible character evidence. Ms. Fong argued that the question was relevant both to V.S.'s identity and to her credibility, the latter being of especial significance in light of the collusion allegation. This drew the following response from Mr. Green:

> Now, the college suggests I am trying to anticipate an issue of collusion. She doesn't understand what collusion is being referred to in the sense of this hearing. She presents it as people getting together and doctoring testimony. The allegation of collusion doesn't even relate to anyone getting together and improperly doctoring testimony. **It relates to things being planted in the witness's head by an investigator.**
>
> (Emphasis added.)

[68] Mr. Green's comments assisted the Panel in terms of giving it a more specific understanding of what his references to "collusion" referred to and what the allegation of collusion would consist of, were he to make it: not deliberate falsification of evidence, but the influencing of a witness's testimony by means of information "planted" by an investigator (who would likely have spoken to other complainants), even if inadvertently or carelessly. Ms. Fong, in her examination in chief of V.S., dealt directly with this issue:

> Q And did you have a discussion with Mr. Hryb?
> A Yes, yes, we did.
> Q And during that discussion, did Mr. Hryb tell you anything about the details of any other complaint?
> A No, he did not.
> Q When you spoke to Ms. Berry, did she tell you any details of any other complaint?
> A No, she did not.
> Q Or anyone else at the college or related to the College?
> A No. No one gave me information.
> Q And up to this very moment, as you sit here, have you met or spoken with any woman with her own complaint concerning Mr. Martin?
> A No, I have not.

[69] Mr. Green confirmed V.S.'s evidence at the close of her cross-examination:

Q Okay. And I just want to return to -- I'm almost done -- the portion of your testimony where you talk about your interview with Mr. Hryb.
A Yes.
Q And you said that Mr. Hryb did not disclose to you the details of any of the other complainants?
A Correct.
Q So Mr. Hryb didn't tell you any of the facts about any of those other complaints?
A Mr. Hryb did not tell me anything.

[70] The other three complainants – A.W., D.K. and L.T. – were asked questions in cross-examination about aspects of their interviews with College investigators, but no further questions were asked about whether information about other complaints had been shared with them. At the close of the College's case, Mr. Green advised that the Registrant would not be advancing the argument of collusion. Accordingly, the College did not call any evidence as to its investigative process.

ISSUES

[71] The issues for determination before the Panel are as follows:

In respect of the complainant D.K.

1. Whether, during two massage therapy treatment sessions that took place on or about February 1, 2013 and February 12, 2013, the Registrant touched D.K. sexually and without therapeutic purpose a total of three times, and in particular, whether

    a. at the end of the February 1, 2013 treatment session, after D.K. had put on her clothing, the Registrant discussed with her and applied a technique in which D.K. lay on her back with the Registrant pressing her legs to her chest using his shoulder, placing his shoulder under the back of both her knees and her calves over his shoulder, and palm of one hand under her sacrum area at the base of her spine; and whether, as after applying this technique, as the Registrant was lowering D.K.'s legs to the table, he moved his hand between her thighs, and brushed up the length of or part of her anal and genital area;

    b. during and at the end of the February 12, 2013 treatment session, after D.K. had put on her clothing, the Registrant twice applied the same technique described above in relation to the February 1, 2013 treatment session, and on both occasions, as he was lowering D.K.'s legs to the table, moved his hand between her thighs, and brushed up the length of or part of her anal and genital area;

2. Whether, during six of the seven massage therapy treatment sessions that took place between January 16, 2013 and February 12, 2013 – all except the first session – while D.K.'s upper body was unclothed, the Registrant handled the cover sheet in a matter that exposed D.K.'s naked upper body to the Registrant's view, by his holding the sheet up at a distance from her body after she had turned from a face-down to a face-up position, while standing behind her head and adjusting the sheet over her breasts after she turned over; and whether this was done intentionally, and for a sexual and non-therapeutic purpose;

In respect of the complainant V.S.

3. Whether, in a massage therapy treatment session on or about October 17, 2012, the Registrant touched V.S. sexually and without therapeutic purpose, and in particular, whether

    a. while V.S. was face-down on the massage bed, with her brassiere unfastened and her exercise pants lowered past her buttocks, and the Registrant was standing near her head and massaging her on both sides, from her upper back to her mid- and lower back, and while he was massaging her hip, his fingers extended to the underside of her groin area, adjacent to the pubic hairline;

    b. during and near the end of the treatment session, after V.S. had put on her clothing, and without notice to or consent from V.S., the Registrant applied a technique in which V.S. lay on her back with the Registrant pressing her legs to her chest using his shoulder, placing his shoulder under the back of both her knees and her calves over his shoulder, and palm of one hand under her sacrum area at the base of her spine; and whether, as after applying this technique, as the Registrant was lowering V.S.'s legs to the table, he moved his hand between her thighs, and brushed up the length of or part of her anal and genital area.

In respect of the complainant L.T.

4. Whether, in a massage therapy treatment session on or about October 11, 2013, the Registrant touched L.T. sexually and without therapeutic purpose at two points during the session, and in particular, whether

    a. during the initial part of the treatment session, while L.T. was lying face-down on the massage table with her arms at her sides, the Registrant began to lean his pelvis and penis against the side of her arm, eventually becoming semi-erect as he continued to press his penis into her arm, for a total duration of between 5 and 10 minutes;

    b. during the treatment session, while L.T. was lying face-up and receiving a

massage to her neck, the Registrant leaned over her and pressed his groin and his erect penis against the top of her head for a period of time;

5. Whether, during the treatment session, while L.T.'s upper body was unclothed and just after she had turned from a face-down to a face-up position, the Registrant handled the cover sheet with a "wafting" motion that lifted the sheet and exposed L.T.'s naked upper body to the Registrant's view for several seconds, and whether this was done intentionally, and for a sexual and non-therapeutic purpose;

In respect of the complainant A.W.

6. Whether, during a treatment session on or about January 24, 2013, the Registrant

    a. while A.W. was in a face-up position and her upper body, including her breasts, was naked, the Registrant handled the cover sheet in a manner that exposed A.W.'s naked upper body to his view, by lifting and holding up the sheet three or more time at a distance from her body of up to a foot that lifted the sheet and exposed A.W.'s naked upper body to the Registrant's view for several seconds, and whether this was done intentionally, and for a sexual and non-therapeutic purpose;

    b. failure to comply with section 75 of the Bylaws, specifically, section 10(a) of the *Standards of Practice* (being Schedule "D" to the Bylaws), which requires all registrants to "utilize professional oral and written communication".

In respect of all of the complainants

7. Whether, by engaging in any or all of the conduct described above, the Registrant:

    a. engaged in professional misconduct;

    b. failed to comply with section 75 of the Bylaws, and failed to comply with standards, specifically sections 1(2) and 2(a) of the *Code of Ethical Conduct* (Schedule "C" to the Bylaws), which provide as follows:

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

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

[72] The oral evidence at the hearing consisted of the testimony of each of the four complainants, as well as of the Registrant. In addition, the College called Ms. Karen Fleming, a registered massage therapist, to give expert evidence on a number of issues including professional standards regarding draping. Ms. Fleming's qualifications to give opinion evidence were disputed by the Registrant, but the Panel ultimately decided that she could be qualified as an expert, and she gave testimony and spoke to her expert report, which was tendered as an exhibit. The weight given to her evidence by the Panel is addressed below.

Similar fact evidence

[73] The College submitted that evidence of each of the four complainants, in addition being used as evidence of the allegations made in respect of that complainant, could also be used by the Panel as "similar fact" evidence, meaning that the evidence of each individual complainant could be considered probative not only of the allegations made in respect of that complainant, but also of the allegations made in respect of each of the other complainants. In this case, the similar fact issue did not involve any considerations of admissibility, since the evidence of each complainant would at a minimum be admissible in relation to the allegations made respecting that complainant. Whether or not to consider some or all of the complainants' evidence as "similar fact" would therefore be a matter of the Panel's treatment of that evidence, rather than a matter of its admissibility.

[74] The Panel's consideration of the similar fact evidence issue is set out below, following the summary of facts and evidence.

FACTS AND EVIDENCE

The College's case: Evidence of the complainants

[75] The evidence of the witnesses is presented in the order in which the witnesses gave evidence at the hearing.

1. Evidence of the complainant V.S.

a) Examination in chief

[76] V.S. gave evidence on February 24, 2015. On that date, she was years of age. On October 17, 2012, the date of her sole treatment session with the Registrant, she was . She is , a position she has held for the past 10 years.

[77] On October 17, 2012, V.S. attended a massage therapy session with the Registrant at the Victoria Rehab. She had been attending Victoria Rehab for an overall treatment plan, which included physiotherapy, and exercise, which was intended to assist her recovery from an automobile accident. She did not know the Registrant and had not met him previously. She saw

him because he was the only massage therapist practicing at Victoria Rehab. She had had previous experience with massage therapy.

[78] V.S. described the clothing she wore to her treatment session as a t-shirt and "cool down" pants, i.e. elastic-waisted, ankle-length, straight-leg nylon pants. She was also wearing a bra and cotton underpants. Prior to the commencement of treatment, she removed her top, lay face down on the massage table, and covered herself with the sheet.

[79] V.S. testified that when the Registrant entered the room,

> … he pulled the sheet down to my pants and then rolled the sheet, pants, and underpants down to just below my buttocks and unfastened my brassiere. And then from the -- up at the top of the table he massaged down my back evenly, left hand and right hand, his thumbs down the spine and his hands going down my sides massaging. When he reached the waist/hip area, his right hand went under my body into my groin pubic area, and that would be my left side, and then he continued on both hands down to my buttocks and massaged.

[80] V.S. went on to testify that the Registrant lowered her "pants and underpants and sheet at the same time" and that these were "pulled down" to a line just above the base of her buttocks, where the buttocks join the leg. She testified that her pants had been pulled down in front as well, to the top of her pubic area.

[81] The contact that V.S. felt was from the Registrant's right hand, specifically the part of the palm where the fingers join the right part of the hand, and including the flat side of his fingers, the inside of the palm, the base of his fingers and the right side of the palm. She felt a "quick" motion that applied pressure to her groin and pubic area underneath her body, "a motion of going underneath and back up again." She testified that her reaction to this contact was that it "alarmed" her, as she had had "hundreds" of previous massage therapy sessions and had never felt a similar touch before.

[82] This last piece of testimony drew an objection from Mr. Green, who argued that V.S.'s prior experiences with massage therapy were not relevant to the issue of whether or not there had been sexual touching in this case. Ms. Fong argued that V.S.'s reaction was relevant and went to the issue of her credibility. The Panel overruled the objection on the basis that it was not inclined to take a narrow view of relevance, and would deal with evidentiary issues such as this as a matter of weight rather than admissibility.

[83] V.S. testified that at no time before, during or after the treatment did the Registrant discuss with her his touching her on her groin or labial area.

[84] The second alleged sexual and non-therapeutic touching of V.S. by the Registrant occurred subsequently in the session, after the Registrant pulled V.S.'s pants up and re-fastened her

brassiere, and while she was lying on her back with the sheet covering her up to her shoulders. She testified that, while lying on her back,

> [t]he next part of the massage treatment was for me to bend my legs up, and Mr. Martin supported them on his right upper arm and shoulder and he pushed my bent knees into my chest. He did this three or four times. And following that manoeuvre, he lowered my legs, and my left one he let down first and then he lowered my right leg. He stroked with his fingers up my genitalia from the anus to labia.

[85] V.S. testified that this motion was swift, "a matter of seconds", but with a "definite pressure". She felt "the hand and his fingers". She testified that she was "mentally … shocked" and "taken aback". This evidence drew an objection from Mr. Green, who argued that V.S.'s state of mind was irrelevant as being in no way probative of whether or not the alleged touch had occurred. He argued the decision of the Supreme Court of Canada in *R. v. J.A.* (paragraph 44), a case that turned primarily on the question of whether an unconscious victim of sexual assault was capable of providing consent to sexual activity. Ms. Fong cited a decision of the College of Physicians and Surgeons of Ontario, *Li (Re)*, [2002] O.C.P.S.D. No. 45 (Dec. 19, 2002), in which a disciplinary panel heard evidence from a complainant as to her inner reaction upon being touched by Dr. Li. The Panel overruled the objection.

[86] V.S. also testified that she told a number of individuals about what she experienced during her massage session with the Registrant, including her husband, her daughter, Victoria Rehab's owner, her doctor and her counsellor.

b) Cross-examination

[87] On cross-examination, Mr. Green first sought to obtain an admission from V.S. that the Registrant's hand had not touched V.S.'s "pubic hairline", suggesting to her that she had given evidence using this term (she had not). It may be that he was thinking of paragraph 8(c) of the Citation, which does allege that V.S. was touched "at the side of her groin area, *adjacent to* the pubic hairline" (italics added). In any event, V.S. emphasized that her evidence was – as it had been in her examination in chief – that the Registrant's hand went "under [her] body into the groin and pubic area". Later in the cross-examination Mr. Green sought to elicit the admission that the area V.S. had marked as the area of contact on a diagram (entered as Exhibit 3) was actually her hip, although she was firm in saying it was her groin. She did concede, however, that the circle she drew covered both her groin and her hip.

[88] With respect to the second instance of alleged intentional sexual touching by the Registrant, she stated (in response to Mr. Green's questioning) that at the time of the session she weighed approximately 180 pounds, and that she was 5'1'' in height. The session was 45 minutes in length. When the stretch that gave rise to the alleged touch occurred, V.S. was lying on her back, although she did not recall being told by the Registrant to lie on her back. She stated that he did not explain the purpose of the stretch. The movement began with the Registrant at the

foot of the table (i.e. by V.S.'s feet), somewhat to the right. She bent her legs by bending her knees, which were then supported over the Registrant's shoulder and upper arm. The Registrant then pushed against the back of her legs and thighs with his body.

[89] Mr. Green suggested that the Registrant, while performing this maneuver, was supporting "almost all" of V.S.'s 180-pound body weight. She disagreed, stating that he was "supporting my leg from my knees to my feet". He pushed into her body three or four times, for a total duration of between five and 10 minutes. At the end of this part of the treatment, the Registrant lowered V.S.'s legs to the massage therapy table by letting them "slide down his arm". At that time, he "ran his fingers" along and up V.S.'s vagina in a "swift but deliberate" motion, which she also describe as a "swift stroke". In response to Mr. Green, she stated that the touch "felt" deliberate to her, but conceded that she could not say whether it was deliberate or not.

[90] V.S. stated that the Registrant provided her with no instructions or explanation as to what he was doing throughout the session. She conceded that she had suggested to the College's investigators, when interviewed, that the first impugned touch by the Registrant (the reaching under her body when she was lying face-down) could have been a "goof" or a "slip". She also stated that she was "explaining it away" to herself. However, when the second impugned touch occurred (the anal-genital "stroke") she revised her view and concluded that both touches had been intentional.

2. Evidence of the complainant A.W.

a) Examination in chief

[91] A.W. was years of age at the time of her one and only appointment with the Registrant, which took place on January 24, 2013. This appointment occurred at the Victoria Exercise and Rehabilitation Centre ("Victoria Rehab"), which A.W. was attending three times per week for physiotherapy and chiropractic appointments to treat the aftereffects of a car accident. She testified that her physiotherapist referred her to the Registrant for massage therapy to help alleviate the pain she was experiencing as a result of her physiotherapy exercises. A.W. did not know the Registrant and had not met him previously. She had previously received some massage therapy treatments – approximately five treatments, five or more years earlier. She had also received 10 to 15 massage therapy treatments after her session with the Registrant.

[92] A.W. testified that, on January 24, 2013, she filled out an intake form and went over it with the Registrant in the treatment room. They discussed her injuries, and he checked her range of motion. The Registrant then left the treatment room so that she could remove her clothing. She testified that the Registrant

> … said he was going to be leaving the room so I could remove some clothing and I should get on the table, and he would come back in. And he said that I could take off my top and keep my underwear on. Whatever I was comfortable with. It was a little bit unclear. And so I took off my top, bra,

> pants and left my bottom underwear on, got on the table, and put the sheet on.

[93] After putting on the sheet on, which she described as "thin and light", A.W. was lying face down on the massage table.

[94] A.W. then testified that the Registrant

> … was doing a lot of light touching me everywhere, like, all over. There wasn't really any massage. He explained it was … assessing, is what he called it. He just kept touching all over, lightly. And then he had me flip over onto my back. He asked me to bend my leg, the right leg, and then he reached under the sheet and felt under my underwear on my hip flexor. And I started to feel really uncomfortable.

[95] Then, with A.W. lying on her back, the Registrant moved behind her head and, according to A.W.,

> … walked up to the head of the table behind my head and he lifted the sheet way up off of my chest and held it up for quite a while. It seemed like forever. And then he put it back down, and then he lifted it up again. He did this about three or four times.

[96] A.W. testified that she could not see where the Registrant was looking when the sheet was lifted. She stated that he held the sheet up for between three to five seconds. He did not explain to her why he was lifting and lowering the sheet in this manner. A.W. testified that this caused her to feel "so afraid, I didn't even look at him" and to feel that she was "frozen on the table". She testified that the Registrant then asked her to flip over again, and then "continued with the light touching" with a "bit of a massage for about a minute at the very end".

[97] After the session, A.W. told her sisters and her mother the same day, and told some people at work the following day. She also contacted Victoria Rehab's owner, and spoke to him as well as a staff member. She testified that she received a voice mail message from the Registrant, but did not return his call.

[98] At this point, Mr. Green objected on the basis that A.W.'s internal thoughts were "irrelevant to the fact of whether or not [the Registrant] engaged in touching for a sexual purpose." Ms. Fong's response was essentially that the witness's reaction went to her credibility. The Panel ruled against the objection and allowed A.W.'s evidence on this point, stating that it would not take a narrow view of relevance. (The Panel notes, moreover, that the objection mischaracterized the allegation made in the Citation in respect of A.W., which involves the alleged viewing by the Registrant of A.W.'s body for a sexual purpose, not touching).

b) Cross-examination

[99] A.W. was cross-examined by Mr. Green. Under cross-examination, she made the following admissions:

- When she said that the Registrant had lifted the sheet above her body (while standing behind her) "three or four times", she admitted that she could not be certain whether the number of times the sheet was lifted was in fact three or four.

- With respect to the distance the sheet was raised up off of her chest, although she said it "felt like … an arm's distance away", she admitted telling the College's investigator that she estimated that the Registrant had lifted the sheet off of her body a distance of 6 to 12 inches.

[100] In response to question from Mr. Green, she confirmed the evidence given in her examination in chief that she did not see where the Registrant was looking when he raised the sheet over her body.

[101] Mr. Green sought an admission from A.W. that when the Registrant attempted to call her, it was to say that he was sorry that she was unhappy with the session. She said she did not know for sure why he had called. She also stated, in response to another question, that she did not recall the Registrant asking her how she was feeling during the session. Regarding the state of the sheet when it was lifted up from her body, she was clear in her evidence that the sheet was "taut", and that, even prior to being lifted, it was covering her body evenly – that is, it was not to one side or another, and was in no danger of falling off her.

3. Evidence of the complainant D.K.

a) Examination in chief

[102] D.K. gave evidence on February 26, 2015. At that time, she was years of age. On February 1, 2013, the date of the sixth of seven massage therapy treatment sessions she received from the Registrant in January and February 2013, she was . She is employed as a . In January and February 2013, she was a stay-at-home mother. She has one daughter.

[103] In December 2011, D.K. was in a car accident. She began to attend Victoria Rehab and to receive physical and athletic therapy. She was referred by Victoria Rehab for massage therapy with the Registrant – she did not select him. She testified that she had previously received massage therapy, first about 15 years earlier when living in , and also about eight years previously, on two or three occasions, with a male therapist in . Also, since seeing the Registrant, she has received at least 30 massage therapy treatments from two female therapists.

[104] D.K. testified that by the time of her February 1, 2013 treatment session with the Registrant, she had had five previous sessions with him. She described herself as being "fairly comfortable" and even "very comfortable" with the Registrant, to the point where they had conversed about each others' families and children. She had not known him prior to beginning treatment with him in January 2013.

[105] D.K. testified that her attire at massage therapy sessions with the Registrant consisted of black yoga pants made of a thin, stretchy cotton material and an elastic waistband, as well as underwear, a t-shirt, and flip-flops or runners. Her underwear was a "thin cotton panty". D.K. testified that massage therapy session would begin with her and the Registrant having a brief talk. He would then leave the room and she would take off her t-shirt and bra and lie face down on the table, and the Registrant would then re-enter the room. She testified that, about three-quarters of the way through a session, he would leave the room, and D.K. would then get up off the table and put her bra and t-shirt back on. While she was topless during a session, she was covered by a thin sheet and a thin blanket – the sheet next to her skin, and the blanket above it.

[106] Ms. Fong asked D.K. whether anything memorable occurred in relation to the draping of the sheet and blanket. She responded that sessions would always start with her face down on the table, and the Registrant massaging her back. Partway through the session, he would come to D.K.'s side and use both his hands to lift the sheet and blanket so that she could turn over, so that she could be massaged on her head, neck and shoulder area. She stated that, once she had flipped over, the Registrant would come back behind her head and take the sheet and blanket, and would lift them between 6 inches to a foot straight up off her chest, and "pause" for a moment before letting the sheet and blanket back down. He would then fold the sheet over the blanket, and adjust it on her chest. She could not see his face while this was occurring. The duration of the lift was brief – about one second, but with a brief pause at the top. When the Registrant lowered and folded the sheet and blanket, it was just above her breasts. D.K. testified that this raising and lowering of the sheet and blanket took place at each massage therapy session. She also said that she felt that the raising and lowering of the sheet was "higher than that needed to be", a comment which drew an objection from Mr. Green, who said that testimony regarding the appropriate draping height "required an expert".

[107] D.K. also testified that, while standing behind her and lifting and lowering the sheet and blanket in the manner she described, the Registrant did not say anything in any of the treatment sessions about what he was doing. When asked by Ms. Fong why she did not say anything to the Registrant about this, she replied:

> I just chalked it down to really what was he looking at. I was an overweight, middle-age woman who, you know -- nothing to really see. So I just gave him the benefit of the doubt that he didn't realize what he was doing.

[108] Toward the end of the February 1, 2013 session, the Registrant left the treatment room so that D.K. could put her bra and t-shirt back on. He then came back into the room and said he

wanted to try something he called "cupping [her] sacrum". D.K. testified as follows:

> He came back into the room and he said that he would like to try what he called cupping my sacrum. He then began to explain what he would do and where my sacrum was, because it was so close to my genital area. I was visibly nervous, but he assured me that he would not be anywhere near my genital area, so I agreed to the procedure.

[109] The Registrant then asked D.K. to lie on her back, and instructed her to bend her legs, bend her knees, and bring her knees up to her chest. He then put his hand on her sacrum, while pushing her knees to her chest. As he released her legs, D.K. testified that he "pulled his hand from my sacrum and in one steady continuous motion brushed his hand from my sacrum up through my anal and vaginal area". She stated that this motion was "very quick" and "took about a second". She felt a "slight pressure". The Registrant was positioned facing her, near her hip area. D.K. testified that while the Registrant's hand was on her sacrum it was "cupped", but "when he pulled his hand out, it felt like the full flat palm of his hand touched [her] genital area".

[110] D.K. testified that she was "shocked and confused" by this physical contact. She told herself that the Registrant's hand must have slipped, and that she was "an overweight, middle-aged woman, so what possible sexual connotation could there be?" She felt that she did not want to deal with the possibility that it was a sexual touch, so she convinced herself it must have been an accident. The Registrant said nothing to her about the contact, nor did she say anything to him.

[111] D.K. had one further appointment with the Registrant, on February 12, 2013. Toward the end of the session, D.K. was lying on the table, covered by a sheet, wearing her yoga pants, underwear and socks. The Registrant left the room so that she would put her bra and t-shirt back on. He then came back into the room and said he would like to try the sacrum maneuver again. D.K. agreed. She told herself that the prior incident had been accidental, and would not happen again. The Registrant had also promised that he would not put his hand anywhere near her genital area.

[112] D.K. testified that she lay on her back and was asked by the Registrant to bend her knees up to her chest. He then, as previously, put her hand on her sacrum and pushed her knees down onto her chest. Upon completing the maneuver,

> … once again when he was pulling his hand out, he – I raised my knees, he brushed his hand once again steady continuous and slight pressure brushed his hand along my – from my sacrum along my anal and vaginal area.

[113] D.K. testified that after this touch occurred, the Registrant then said he would like to perform the maneuver one more time. She "froze" and allowed him to do it again. The Registrant performed the same maneuver, and as he removed his hand from her sacrum, she

experienced the same contact, a brush "from [her] sacrum along [her] anal and vaginal areas" in a "continuous steady motion with slight pressure". Inwardly, she now considered that the Registrant's action was purposeful, not a slip. Again, she felt "shocked and confused".

[114] D.K. testified that after the second touch, the February 12, 2013 session was over, and the Registrant asked if she wanted to make another appointment. She said yes, because she wanted to avoid any conflict or confrontation – she intended to cancel at a later date. She said the Registrant looked "relieved" when she made the appointment (which she cancelled by phone the following day). Afterwards, she told a number of people what had happened, including her husband, her counsellor, a friend, and a woman at a sexual assault centre.

[115] D.K. was then asked by College counsel, Ms. Fong, if she had had the "sacrum maneuver" performed on her subsequently. This drew an objection from Mr. Green, who argued that any experience D.K. had with a different therapist performing the same maneuver was irrelevant to the question of whether she had been touched inappropriately by the Registrant. Ms. Fong cited a decision of the College of Physicians and Surgeons of Ontario entitled *Li (Re)*, in which a patient who claimed that she had been touched inappropriately by her doctor in the course of a chest wall and breast examination was permitted to give evidence of her prior experience of such examinations. The Panel overruled the objection, and D.K. gave evidence that, after her final treatment session with the Registrant, she had had the same sacrum maneuver performed on her by a certified athletic therapist, and while D.K. was able to feel his hand on her sacrum during the maneuver, there was no contact with her anal or genital area when he withdrew his hand.

b) Cross-examination

[116] In cross-examination, D.K. provided the following evidence:

- She had told the College's investigator, Mr. Taras Hryb, that the Registrant had acted professionally up to the point of the sacrum maneuver or sacrum stretch that he performed at the February 1, 2013 massage therapy session.

- Before performing the sacrum maneuver on her, the Registrant explained that it was designed to stretch her hips, told her where he would be placing his hand, and told her where her legs would be during the stretch.

- The Registrant did not appear to be "getting off" when adjusting the sheet above D.K., and appeared to be acting professionally.

- The contact that D.K. felt on her anal/genital area was a "brush", not a "linger" or a "caress" (words put to her by the Registrant's counsel).

- The Registrant did not penetrate D.K.'s private parts with his fingers. The contact

occurred through her pants, and consisted of a "slight pressure".

- D.K. did not communicate any concerns to the Registrant about the contact anal/genital contact she experienced, even after the February 1, 2013 when she thought it might have been a mistake.

- D.K. weighed between 170 and 180 pounds at the time of her treatment sessions with the Registrant. When he performed the sacrum stretch on her, the Registrant was supporting some of her weight. The sessions tended to occur toward the end of the day. However, D.K. disagreed with Mr. Green's suggestion that what happened was a "mistake" caused by fatigue, stating that "I find it more awkward to do what he did … I just don't see how it could be a mistake."

- Upon completing treatment toward the end of each session, the Registrant would leave the room and D.K. would put her bra and t-shirt back on. He would then re-enter the room.

- The Registrant did not place the crotch of his pants against D.K. in any of their massage therapy sessions, although D.K. did once notice his hips pressing against the table.

4. Evidence of the complainant L.T.

a) Examination in chief

[117] The complainant L.T. gave evidence on February 27, 2015.

[118] L.T. is a professional registered under the . She confirmed that she had requested that her portion of the hearing be held in private.

[119] L.T. testified that, on October 11, 2013, she attended Gordon Head Massage Therapy for a treatment session. On that date, she was years old. That day was a study day, so she was at home. She had decided that she needed a treatment that day, but her regular practitioners had no openings. She found Gordon Head Massage online, and made a booking as they had an opening . She had not attended that clinic previously. She sought treatment for shoulder and muscle tension.

[120] L.T. received massage therapy treatment from the Registrant on October 11, 2013. It was her only session with him. She had not met him previously.

[121] L.T. testified that she arrived at Gordon Head Massage wearing sweatpants, a t-shirt and slip-on shoes. She was wearing underwear, but no bra. When she arrived at the clinic, she filled out a confidential client information form. She gave it to the Registrant, who was working the front desk (he was also the person who had taken her phone call). He took the form from her,

and they entered into the massage room.

[122] Once inside the massage treatment room, the Registrant initially wanted to demonstrate some exercises to L.T., who was suffering from muscle issues caused by studying and looking down at a computer screen. L.T. told him, however, that she did not want to spend the time and money she had invested in the appointment doing exercises, and that she wanted a deep-tissue massage. The Registrant told her that that was fine, and that she should get undressed but leave her underwear on and get on the table, and he would leave the room so that she could do so. He said he would knock before he came back in.

[123] L.T. testified that, because of the clothing she was wearing, she was able to get undressed, onto the table, and under the blanket very quickly – she estimated that this took her about 30 seconds. She stated that the Registrant re-entered the room, without knocking, just after she got under the blanket. She said she was relieved that he did not see her undressed. At this point, she was wearing only underwear, and was lying face down, with one sheet beneath her and one above her. She described the sheet above her as a "thin cotton white sheet".

[124] The Registrant began by massaging L.T.'s back. He then moved to L.T.'s side. She stated that she had her arms extended down her sides. At this point, L.T. testified, the Registrant was "leaned up against [her]":

> And so he's leaned up against my arm, and he is pressing himself against me to get to the other side. He is pressing his crotch, his groin, against my arm.
>
> And about three minutes into that, I noticed that he started developing an erection. And so I was feeling him going from no erection to starting to develop what you would maybe call a semi-erection, and I could feel his penis becoming more full and growing on my arm.

[125] L.T. testified that the duration of the contact between the Registrant's groin and her arm was approximately 10 minutes, and that she could feel him "developing an erection" for about seven of those 10 minutes. The portion of her arm contacted was the outer side of her arm, between the elbow and the shoulder. She was wearing no clothing or jewelry on the arm, and her arm was bare and not covered by the sheet. The contact she felt was continuous, but there was a "slight movement", in which L.T. described the Registrant removing the pressure of his body slightly, then moving toward her more deeply: a "leaning in then release". L.T. stated that as the Registrant did this, "he was getting more of an erection". In response to a question about the level of pressure L.T. felt against her arm, she described the Registrant as "pushing fairly firmly" and said there was "a lot of pressure" from his body against her. The Registrant did not move up and down her arm – the pressure remained at one spot.

[126] L.T. testified that while she had no outward reaction to the contact of the Registrant's penis with her arm, she was inwardly "in a state of shock" and "disbelief", and "almost in a comatose state". She stated that she was "trying to evaluate and assess the situation". The Registrant said nothing to her about the physical contact she experienced.

[127] After the Registrant moved his penis away from L.T.'s arm, he told her it was time to massage her shoulders and neck, and asked her to flip onto her back. He held up the blanket so that L.T. could flip over. She stated that the Registrant then – after she had turned and was lying on her back – "wafted up the blanket and looked at my breasts". L.T. testified as follows:

> I know that he looked at my breasts because I watched him do so. And I was in shock because it was -- it was obviously what he had done. I was in shock. So I looked at him, and then we made eye contact, and it was -- it all happened within about three to five seconds. And then I went like that, and I covered my breasts and made a sound like -- I don't know what the sound was, but it was kind of a gasp, like what's going on here. So I covered myself with my arms, and then he let the blanket down.

[128] When asked about the movement that she made, L.T. stated that she "crossed [her] arms over … to cover her breasts." She also stated that the Registrant was standing to her right, facing her body, when he "wafted" the sheet above her, a motion she described as "lifting the blanket and allowing air to capture the blanket" so that it "moved about one to two feet upward", partly from the air and partly from the lift. The Registrant made no verbal acknowledgement of what had happened; in fact, stated L.T.,

> No words were spoken since the beginning of the appointment at this point. The only time we spoke was at the very beginning of our appointment when he asked me some questions about professionals in my industry. I let him know at that point that I just wasn't interested in having personal communication with him; I preferred to have a quiet session. So we didn't speak again.

[129] After letting the blanket go down, L.T. testified, the Registrant moved behind her head and began to massage her neck and shoulders. At that point, she noticed that he "began pushing himself against [her] again":

> This time he has a full erection, a very firm erection. And I knew it was an erection because I could feel the heat of it, it was shaped like a penis, and it was pressed up against me very firmly, and it was a boner against me. And he was pushing it up very firmly against my head, a lot of pressure, and he did that for about five to ten minutes, approximately ten minutes. Again, the same motion of leaning in towards me and then slightly letting go, but he didn't move out of that position. He just stayed in that one spot and kept the pressure there and pressing into me.

[130] L.T. testified that at this point she was in "absolute shock". Following an objection and some argument about a question asked by College counsel, the following questions were asked and the following response elicited from L.T.

Q: [L.T.], once the sheet was placed on your chest, what happened next in the massage session?

A Once the sheet was placed over my chest – so going back to he came around to the back of my head. At that point he was going to massage my shoulders and my neck. And so at that point he began leaning himself up against me, specifically his penis, which I had noticed at that point was a full erection. And the reason that I knew it was an erection was because it was shaped like a penis, it was firm, and it was warm, and it was pressed up against me. And at that point I was in full high alert awareness mode. I was assessing exactly that. That was the only thing that was on my mind, what was happening to me was the penis on me. So I knew that it was [a] penis because I was evaluating all of the components of it as this was happening. And so he was pushing himself up against me and was also massaging my shoulders and my neck.

Q And can you tell us where on your head you felt his penis push up against you?

A It was right on the crown of my head.

[131] L.T. testified that even at this point, the Registrant said nothing to her, and she did not say anything to him. When asked why not, she replied that the mall in which the clinic was located was a quiet mall, and the clinic was on the upper level. She was alone with the Registrant in the treatment room. At that point, she felt "not only in shock but a little bit scared". She stated that she did not know what the Registrant was capable of and "literally just wanted to disappear with my eyes closed".

[132] After this final portion of the session ended, L.T. testified, the Registrant let her know it was time for her to get dressed and that he would then come back into the room and talk about the session. L.T. recalled the door opening at some point, and becoming aware that there was another man outside, who said he was going home now. She assumed the man was a co-worker of the Registrant, but did not know. The Registrant then left the room, and L.T. got dressed. She did not wait for the Registrant to return, and "bolted" out of the office. She stated that she was partway down the stairs when the Registrant "came after [her]" as she had not paid for the session. She returned and paid, then left.

[133] L.T. testified that after the session, she went straight to her parents' house and told them what had occurred, though not in detail as she did not want to upset them. She told her sister in more detail what had happened, and later told some friends and co-workers, either the same day or the following day. She posted a message on Facebook, and then received a private message from her acupuncturist saying she should probably remove the message and report the incident to the College. She then did so.

b) Cross-examination

[134] On cross-examination, L.T. gave the following evidence:

- Even though she had had acupuncture treatment previously, and the Confidential Patient History Form she filled out at the outset of her session asked whether she had received "other therapy treatment past or present as related to this visit", she did not check off the "Acupuncture" box as she did not think it was relevant. She likewise did not check off any of the other boxes (Chiropractor, Physiotherapy, Naturopath) even though she had had previously received each of these types of treatment.

- She has been in two car accidents: one at age , in which she received a minor whiplash injury, and another at age in which she was "t-boned" by another vehicle and again received a whiplash injury. She received ICBC settlements in both cases.

- She took psychiatric medication for a period at age . However she stopped the medication after one to two months because she did not like how it made her feel. She is not currently taking any medication.

- At the time she saw the Registrant, she recorded the pain she was feeling on the Confidential Patient History Form as being an aching neck, upper back, shoulders and down to her lower back, although her recollection at the time of the hearing was that it was mainly shoulders and upper back.

- She did not recall the details of the weather that day. She went to the clinic by car, and had only a few seconds' walk outdoors to get from her house to the car, and from her car into the mall.

- The Registrant was the only person she saw when she arrived at the Gordon Head Massage office. He was working the front desk, and greeted her when she came in. He acknowledged that they had spoken by phone, and he gave her a form to fill out. She had not been to the clinic before, and did not know who the Registrant was before arriving there.

- The Registrant asked her to get undressed but leave her underwear on. He did not say to her that she could keep whatever she wanted on. When questioned as to how she could remember this detail, L.T. replied that it was because she was shocked when he came in. She wrote down all the details she could remember immediately after the session. However, she was not concerned about being told to wear only her underwear, as she considered this "standard" and "what most massage therapists want … so they can get to all your muscles".

- L.T. did not time the interval between the time the Registrant left the room so that she could get undressed and the time she came back, but she recalls it as "very quick" because she was "moving quickly" to get undressed and "was under there very quickly". There was a double-layered sheet on the table and she took the top sheet off and crawled underneath it. The Registrant did not see her changing.

- L.T. recalled the massage table as "oddly positioned" but stated that she could not be clear about distances and measurements – she did not have a measuring tape, and said that it was not her area of expertise.

- At the point in the massage therapy session when L.T. was lying on her back and the Registrant was massaging her neck and shoulders, the face cradle was no longer there and she was at the edge of the table due to her height. She could not recall whether or not her head was on a pillow. She could not see the Registrant's torso, rib cage, belt or legs, as she kept her eyes closed during the entire treatment session, other than when she turned over and when the Registrant lifted the blanket away from her body.

- L.T. disagreed with the suggestion that the top of her head had been contacted by the Registrant's ribcage rather than by his penis. She also disagreed that the Registrant was seated while massaging her neck and shoulders. She stated, "He was standing up behind me. That's what I know." She stated that she knew this because "he was pressing his crotch up against my head and also because of the change of positions and him moving behind me … There was no chair there."

- By "crotch", L.T. meant "his penis, his erection". It was "a warm penis that was changing in shape and size. It was shaped like a penis and it was pressed up against me and pushing into me and I could feel the dimensions of it just like what a penis would feel like." It was "a flesh part of his body and not a bone or like a ribcage. It had changed shape and it was definitely a fleshy part of the body, like what a penis would feel like."

- L.T stated that at this point she "was not trusting this man" and that "he was not making good decisions". She felt that he "did not care what I felt like, and that was very apparent by his behaviour". When asked how she knew that the Registrant knew there was something wrong if she did not tell him, she replied:

> Well, I knew he knew because he was pushing his penis into me in a rocking motion. I knew what he was doing, and I knew that it was not -- I knew that he was doing something that was, you know, inappropriate and that obviously he knew that he was doing something inappropriate because he was the one who was doing it. I did not trust him, and I was not going to reach out to him at that point and potentially he was unpredictable. I was not going to trust his next

reaction.

- The Registrant was continuing to provide a deep-tissue massage to L.T. throughout the time he was pressing his penis onto the top of her head. L.T. could not tell whether he appeared to be in pain. He was not grunting or making "sex sounds". His movements were not a thrusting moving, but a "rocking" back and forth, a "small movement", but "never fully leaving my body". He was not rubbing his penis up and down her head, nor did he rub his penis up and down her arm. It was "lean in and out".

- L.T. stated that the Registrant's touching began about halfway through the session. The point at which the Registrant's penis – through his pants – touched L.T.'s arm was the first point in the session at which she felt uncomfortable. She did not say anything to him because she "assumed that anyone who was rational-minded would pull themselves off if they were developing an erection and they were a professional."

- In response to a question as to whether the Registrant's penis was "hotter or colder when it touched [her] arm than when it touched [her] head", she stated that she could not recall. She disagreed, however, with the suggestion that what she was feeling was the Registrant's hip on her arm.

- L.T. disagreed that there was a "reason" for the Registrant's rocking motion, namely that he was giving her a massage. She stated that she had had a "hundred or more massages", some with male practitioners, and had never experienced this sensation before.

- The Registrant's "sneak peek" when he lifted the sheet and looked at her breasts was between three and five seconds long. The looking was upsetting to her, but much less upsetting than the touching that occurred. The Registrant did not pull the sheet down to expose L.T.'s breasts.

- L.T. estimated that the sheet had been lifted between one to two feet above her body, but repeated that she was "not comfortable with distances and measurements". She stated that the Registrant was standing upright, and she made eye contact with him and "he knows that I see him". L.T. "watched him look at my breasts". They were in "close proximity" and she could see where he was looking.

- L.T.'s first assumption was that the Registrant's acts were an assault, not that he had made a mistake.

- The Registrant mentioned to L.T. that he knew a number of people in her profession area, and she is not sure why he did so, but she "couldn't help but associate it with his behaviour". She wondered if it was an attempt to intimidate her or suggest that there might be professional repercussions for saying something. However, she conceded that

this was an "assumption" and an "opinion" and she had no idea if it was correct or not. She also conceded that it could simply have been "chatting" or "small talk".

- L.T. did not find the massage to be a good one; it was "a little bit uncomfortable".

- In her complaint to the College, L.T. characterized the Registrant's behaviour as "calculated". She added (on cross-examination) that the Registrant had a "technique" to the lifting of the sheet; she said "it just felt like this was somewhat planned out or something he had done before because it was so smooth". At the time of the complaint, she had no information about other complaints.

- L.T. found the Registrant's standing at her side to massage the opposite side of her body "really an unusual kind of massage move" based on her previous massage therapy experiences. She conceded however that she could not say with certainty that she had never been massaged from that position before, stating "maybe I have been massaged like that, and I just don't recall it because I didn't have a penis on my arm."

- L.T. agreed that she was not certain whether the Registrant was standing on her left or her right side when pressing his groin into her arm.

- In response to the suggestion by Mr. Green that it was "simply not possible" for her to have felt the Registrant's semi-erect penis (through his clothing) pressing against her arms, she replied "I was there, so I know I did." She denied a further suggestion that what she had actually felt was the Registrant's hip or belt:

> Q Okay. And again, I'm going to put to you that what you felt was Mr. Martin's hip or belt.
>
> A I know that that's impossible because they are quite different in shape, and I have never known a belt to grow, and it was fleshy. It was definitely a penis. I know what a penis feels like. So, you know, I was not confused at the moment and in my high -- I was highly alert at this point. I was, like, ping. I was noticing everything, and that was a penis.

- There was no blanket covering L.T.; it was "just a sheet".

5. Evidence of Karen Fleming, RMT

a) Qualification

[135] On March 2, 2015, the College advised that it was seeking to qualify Karen Fleming, a registered massage therapist, as an expert witness "on the standards of practice in massage therapy and specifically standards in relation to contact with a patient's or therapist's sexual bodily parts, draping, and responding to accidental touching or viewing of sexual body parts."

[136] The Registrant's legal counsel, Mr. Green, advised that objection was taken to the qualification of Ms. Fleming as an expert on the basis that her qualifications did not exceed those of the Panel, which he characterized as an "expert panel". Accordingly, it was agreed that counsel would initially proceed with direct and cross-examination on the issue of qualification.

[137] Ms. Fong led Ms. Fleming through her CV, which was appended to her expert report (the "Report"). During her examination in chief on qualifications, Ms. Fleming gave the following evidence:

- She received her massage therapy diploma in 1992 from the West Coast College of Massage Therapy.

- Her studies at the West Coast College of Massage Therapy included "the appropriateness or inappropriateness of touching a patient's sexual body parts"; "how to avoid accidentally touching patients with a massage therapist's sexual body parts"; "what to do if a massage therapist accidentally touched patients with a massage therapist's sexual body parts"; and draping, including "what to do if there was a draping accident where the patient was improperly exposed".

- She has been a member of the Massage Therapists Association since 1990 (when she was still in school) and was registered with the Association of Physiotherapists and Massage Practitioners upon her graduation in 1992, which subsequently became the College.

- She has worked "almost full-time" (four days per week) for her entire career as a massage therapist in a general massage therapy practice. She gives about 650 treatments per year.

- No course available to practicing massage therapists specifically addresses avoidance of touching a patient's sexual body parts or touching of a patient with a therapist's sexual body parts or draping to avoid exposure of a sexual body part. All practical courses available to RMTs include aspects of positioning to avoid such contact and draping to maintain patients' safety and privacy.

- Pages 2 and 3 list the courses taken by Ms. Fleming in a number of areas related to the practice of massage therapy.

- She does not personally or professionally know any of the complainants. She does know the Registrant, as they were in college together. She does not know him otherwise.

[138] Mr. Green then cross-examined on the issue of Ms. Fleming's qualifications. His first

question – asking Ms. Fleming to "describe to me how what you learned at the West Coast College of Massage Therapy makes you better able to answer the questions that Ms. Fong and Ms. Parisotto gave to you than any other massage therapist in British Columbia?" – drew an objection from Ms. Fong on the ground that the question was not relevant to the issue of qualification for two reasons: first, that as an administrative tribunal the Panel was not bound by the court-based law of evidence in relation to experts; and second, that the standard for determining the qualifications of an expert is comparison with an ordinary untrained person, not comparison with others who possess similar expertise. The Panel sustained the objection (which is discussed further below), but indicated that it would permit further questioning in the area if the question were rephrased. Ms. Fleming confirmed that her training at the West Coast College of Massage Therapy did not differ from the training received by other members of her class. She confirmed that her clinic did not have specific procedures or written policies in relation to draping, and relied on the College Bylaws. She had not provided training to the MTA on stretching or draping. She had never taught at a College of Massage Therapy. She conceded that it was possible that not every course that she had taken (as listed on her CV) was relevant to the issues in the hearing, although she said that all the practical courses were "extremely relevant".

[139] After further questioning as to the relevance of Ms. Fleming's coursework, Mr. Green asked a question about the content of the Report, which at that point was not before the Panel. Ms. Fong objected on the basis that this was not relevant to the issue of qualification. Mr. Green then attempted to put the Citation to Ms. Fleming, drawing a further objection, which resulted in further argument. The Panel sustained the objection as follows:

> … the panel is now concerned that cross-examination is straying beyond the boundaries of the issue of qualification and therefore directs that questions regarding the report and/or citation be put to Ms. Fleming only after she has been qualified.

[140] This direction did not resolve the issue, however; counsel continued to argue as to whether cross-examination on the Report or the Citation was necessary on the issue of qualifications. After further argument, the Panel took a break, and ruled Ms. Fleming qualified to give expert evidence upon reconvening. The Panel's reasons for that ruling are set out below in the section entitled "Analysis of Evidence, Findings of Fact and Conclusions".

b) Direct examination

[141] The Report was tendered as an exhibit, and Ms. Fleming confirmed that she had been "asked to opine on whether the conduct set out in the assumed facts was consistent with professional standards". The "assumed facts" were those set out in the Report, as Schedules A, B and C (in relation to the complainants D.K, V.S. and L.T.) to a letter from Ms. Fong to Ms. Fleming dated November 20, 2014, and as Schedule A to a letter from Ms. Fong to Ms. Fleming dated December 15, 2014 (in relation to the complainant A.W.). Ms. Fleming confirmed that she had not been asked to opine on whether any of the Registrant's conduct was accidental, or

whether it amount to professional misconduct.

[142] Ms. Fleming testified that a "professional standard" is:

> … an expected and achievable level of performance against which actual performance can be compared. It is the minimum level of acceptable performance.

[143] She further opined that massage therapists:

> … don't touch a patient's sexual areas. Top of page 3, those areas are particularly labia, vagina, penis, scrotum, anus, breast nipples and the main part of the breast, unless it's for a therapeutic breast massage.

[144] According to Ms. Fleming, the reason for this prohibition is the "inherent" imbalance of power between patient and therapist, and the "vulnerability" of the patient. She explained that RMTs

> … maintain open and clear communication with their patients about the intention of their treatment and what they're doing.
>
> They ask permission to work in areas that are close to or perceived as close to sexual areas: the groin/inguinal area, glute muscles, upper posterior thigh, upper inner thigh, armpit, chest, lateral -- lateral chest or anterior ribs.
>
> RMTs keep awareness when they're working -- of where they're working. They stand far enough away from the side of the table so they don't come in contact with the sexual area of a patient.
>
> RMTs use controlled therapeutic movements when working near tissues that are considered or perceived as sexual. And RMTs use draping as barriers between -- as a barrier between the therapist's hand or their treating body part when they're working close to a sexual area.
>
> And they keep it close -- the sheet or draping material close to their body so the patient is not exposed to the therapist's view.

[145] Ms. Fleming testified that if an RMT accidentally touches a sexual area, he or she

> ceases contact with that body part, addresses the issue with the patient, and obtains consent in some way to continue.

[146] In Ms. Fleming's opinion, there is "no value to sexual contact with a patient, either by the therapist's body or the patient's body".

[147] Ms. Fleming testified that if there were a "draping accident" – that is, if a sexual body part of a patient were accidentally undraped by the RMT – the RMT "moves quickly to cover the patient's body again, and apologizes and obtains consent to move on". Likewise, she stated that there was "no therapeutic value in wafting a sheet".

[148] Ms. Fong questioned Ms. Fleming as to whether, assuming the truth of the allegation there was contact between the Registrant's penis (through clothing) and the top of L.T.'s head, this fact if true would constitute a breach of professional standards. She opined that it would, on the basis that the Registrant would then have "failed to take reasonable measures to ensure he didn't lean against his patient's head with his penis" and that he "did not cease contact and he didn't address the action". She further opined that a "reasonably competent massage therapist would maintain awareness to avoid touching his penis to the top of his patient's head and to keep his body at a reasonable distance from her. Similar evidence was given with respect to the alleged touching of V.S.'s and D.K.'s anal and genital areas by the Registrant's hand, and with respect to the Registrant's alleged handling of the sheet covering his patients D.K., L.T. and A.W. ("draping") allowing him to see their naked upper bodies.

c) Cross-examination

[149] On cross-examination, Ms. Fleming gave the following evidence:

- The College Bylaws do not set a standard for a specific height beyond which a sheet cannot be lifted away from the patient's body, and does not mention a maximum height of one foot.

- In relation to her opinion that the purpose of draping is to maintain the patient's "safety, dignity, privacy", Schedule D to the College Bylaws ("Standards of Practice") states, in paragraph 11(e), that a registrant must "provide non-transparent draping materials, and arrange draping so that only the part of the patient's body that is being assessed or treated is exposed". Schedule C ("Code of Ethical Conduct") requires a registrant to act in the best interests of the patient. Section 1(2) states that a registrant "shall not take advantage of a patient's vulnerabilities for the Registrant's sexual, emotional, social, political, or financial interest or benefit." These, as well as professional practice standards witnessed or practiced over the course of 22 years are what is relied on to support the opinion in paragraph 66 of the Report that lifting the top sheet a foot about the patient's body "is inconsistent with professional standards as it exposes the patient's naked body to the therapist's view".

- She was not able to say where the statement in paragraph 11 of her Report came from (paragraph 11 refers to the "imbalance of power, authority and control" between patient and therapist, the "trust" placed by the patient in the therapist, and the patient being "vulnerable" because "they are often in a state of partial disrobe and being treated alone in a private environment behind a closed door"). She believed it was "from the MTA or the CMT or the health professions proceedings about scope of practice". She was allowed a break to attempt to locate the document, but was unable to do so.

- She agreed that a "boundary violation" could be accidental as well as deliberate.

- Her report did not comment on whether or not the Registrant performed the sacrum stretch or sacrum maneuver (which she described as "sacral rocking") correctly or incorrectly. It related only to the vaginal/anal touch alleged in relation to D.K. and V.S.

- She would usually sit rather than stand when massaging from behind a patient's head, as it is both more comfortable and "biomechanically advantageous".

- When lifting the top sheet so that a patient can turn over, a therapist might do so from the side, in a way that does not expose the patient to the therapist's view. What also matters is that "the patient feels covered, that they perceive that they are being covered".

- In her 22 years of practice, she has not touched a sexual body part of a patient, even inadvertently.

- When asked about her conclusion in paragraph 57 of the Report that the Registrant "did not take reasonable measures to ensure his fingers would not touch the side of [V.S.'s] groin", and asked if that opinion would be altered if the Registrant were unaware that he had touched V.S.'s groin, she replied that she would then believe that "he wasn't taking reasonable measures to avoid touching an area that's perceived as a sexual body part".

[150] The College closed its evidential case following the evidence of Ms. Fleming.

The Registrant's case: Evidence of the Registrant

a) Direct examination

[151] The Registrant gave evidence on March 3, 2015. He was the only witness called on behalf of his case.

[152] The Registrant testified that he is 57 years of age and 5 feet 11 and ¾ inches tall. He has been married 14 and a half years and has a 13-year-old daughter. He has been a member of the College since 1992. He has no criminal convictions for assault or sexual assault and has never been charged with those offences. His wife also practices as a registered massage therapist in Victoria.

[153] The Registrant trained at the West Coast College of Massage Therapy. The course of instruction was approximately two years long. He graduated in 1992. He then worked at a clinic in Vancouver for one year at Bayswater Massage Therapy Clinic. Approximately 85% of his clientele consisted of female patients. After Bayswater, he worked at a massage therapy clinic in Victoria from September 1993 to December 1994. Again, approximately 85% of his clientele consisted of female patients, a ratio he referred to as "fairly consistent across the board". After that he took some "time away" for a few months as a result of a death in the

family.

[154] The Registrant testified that he was subsequently contacted by people he knew at the West Coast College of Massage Therapy, who wanted to know if he was interested in working as a part-time clinical supervisor and TA. He testified that he did this from April to September 1995, commuting to Vancouver two days a week. After that, he went to work as both a therapist and a supervisor of other therapists at the Banff Springs Hotel, from September 1995 to September 1997. He then returned to Vancouver and served as an instructor and clinic director for the West Coast College of Massage Therapy from September 1997 to October 1999. In fall of 1999, he "made the choice to take a pause in massage therapy" and studied for and received an information technology diploma, which took a year of study. He instructed for a time after receiving his diploma, but the school closed in November 2001. He then spent until August 2002 completing a master's degree in adult education.

[155] After receiving his masters degree, the Registrant testified that he secured a position as the director of a school of massage therapy in Fredericton, New Brunswick, a position he held until 2004, when he returned to British Columbia, as the assistant director for the West Coast College of Massage Therapy in Victoria. In 2006, he moved from an administrative to an instructional role. He estimated that he had taught approximately 250 students per year from 2006 to 2014. He estimated that 90% of the student he taught were female. Throughout this period, he also worked at a number of clinics, including Victoria Rehab from April 2011 to March 2013.

[156] The Registrant was asked by his counsel Mr. Green to describe the courses and skills that he taught to students. This led to the following exchange on the meaning of the word "palpate":

> Q When you use the word "palpate," for the laypeople, what does that mean?
>
> A Palpate means to -- with your hands to, in the case of massage therapy, is going to be how to identify bodily structures. Mostly in the scope of what I did was going to be the muscles, bones, joints, tissue -- soft tissues, ligaments, you know, things that involve the musculoskeletal system.
>
> Q And when you palpate a patient, what are you feeling?
>
> A Well, you feel skin. You feel tissue that's immediately beneath the skin. Could be fatty tissues, some degree of fascia you can get a sense of. Then directly below that is most commonly muscles in various different locations. Then we move down to bones and ligaments and bones/ligaments together creating joints. So that's what you palpate.
>
> Q And where is your focus when you are palpating a patient?
>
> A Well, when I'm palpating a patient, my focus is in my hands what I'm doing, what kind of sense that I'm getting from them, what kind of information I

> get. I also check in with them in terms of how they're feeling with it, and, you know, is it painful, is my hand placement okay with them. But primarily, when I'm palpating, is the information that I'm gathering with my hands apply back to what I know about where things are.

[157] Mr. Green then led the Registrant through his evidence as to the description of the tables used with each of the complainants. The Registrant initially stated that D.K. and L.T. had been massaged on the same table, then corrected himself, stated that D.K. (as well as A.W. and V.S.) had been treated on an "older style" metal-framed table that was manually adjustable, but only with difficulty. L.T. was treated on an "adjustable apparatus in that the position of the head could be flexed forward or extended", and which had a removable headrest.

[158] Likewise, the Registrant was asked to and did describe his normal procedures with a new client at the outset of an initial session. He described greeting the patient, escorting them into the massage therapy treatment room, having an initial discussion as to their reasons for seeking therapy, an "ice-breaking" conversation, and then moving to a more specific discussion about the details of the pain or dysfunction for which the patient sought treatment. He stated that "part of the initial visit is going to be some form of physical assessment", which typically would include "range of motion" ("ROM") activities. Reference would also be made to the information on the patient intake form. The patient is clothed during this portion of the session, which lasts on average 15 minutes. The Registrant stated that he went through this process with three of the four complainants – all but L.T., who "wanted to get on with things".

[159] Next, the Registrant testified,

> … my standard practice then would be to instruct them what to do next. So I say, okay, I'm going to leave the room. While I'm gone, I would like you to disrobe up top, if it's female clients, however you feel comfortable. You can leave your undergarment on if you wish; right? And to -- in some cases I would instruct them just to leave any slacks or pants on. Because we're going to be focussing on the upper body, they would not have to remove that.
>
> Or if it was definitely a case where we would be focussing on legs and things where I need to have access to, then I would say, you know, you may take off your slacks, but please leave your undergarments on. And while you're doing that, I'll be out of the room. And I instruct them prior to leaving, I tell them, okay, this is how you get on the table; right? You lay down face down typically is how it starts, head -- you're facing the headrest there, feet at the other end, and to draw the sheet and blanket up over top them as best they can.
>
> So then I -- if -- within initial time for sure, I make it clear that prior to my coming back in, I will knock on the door to make sure that they're ready for me to come back in. At that point I leave, I close the door. They hopefully follow my instructions, and I wait for a period of time during which I do some clinical charting or something else.

[160] The Registrant was then asked by Mr. Green about his "procedure for entering the massage therapy room". In response, he testified as follows:

> Well, my standard practice, as I mentioned, is to knock on the door first, to listen for any kind of vocal response. Sometimes that does that not occur and I wait for a -- pause for a moment just to make sure that my entering the room is going to be okay for them. And then I'll open the door a small amount, again to make sure that my opening the door is okay for them. And no objections, no reason why not to, then I enter the room.

[161] The Registrant further testified that the "vast majority of people" call through the door, letting him know that they are ready. He stated that prior to L.T., he had never had anyone complain, that he was aware of, about how he entered the treatment room. He testified, however, that he recalled the session with L.T., and was then asked by Mr. Green if it was "possible that you didn't knock on the door at that time". He responded as follows:

> My standard practice is to knock the door, but it is possible I did not.

[162] The Registrant was then asked to describe what he saw when he entered the room in the session with L.T., of which he said, "This will be recollection." In the next question, however, Mr. Green did not ask the Registrant about his recollection, but instead asked "… moving forward to your general practice, what's the next thing that happens?" This question elicited a detailed answer, albeit not one that was specific to the session with L.T. With the following question, however, the focus again returned to L.T. The Registrant was asked to describe the plan in relation to her, and responded that it was "fairly straightforward". He described L.T. as "complaining of chronic mid/upper back with a bit of lower back discomfort, history of a whiplash associated disorder diagnosis, a car accident." He added that he was unable to do a typical assessment as she was "emphatically against me doing that" and "very specifically stated just get on with the treatment", which the Registrant proceeded to describe.

[163] Next, the Registrant was asked about the treatment of A.W., in particular "what was the plan at the beginning of the session?" He responded as follows:

> Well, the plan for the beginning of the session was to continue assessment of the state of muscles and tissue, because that's what I was tasked to with [A.W.] to do, to look at continuing my assessments so that -- she complained of a number of things as I recall. Low back pain, there was anterior upper thigh we'll call it hip pain, there was complaint of upper back, neck, and shoulders predominantly on the right side pain.
>
> So my intent was to continue as a -- I'm going to use the word "palpative" assessment of the state of muscles and tissue. Also to determine pain reactivity as I touch these muscles to see if I can elicit a response that might be consistent with her complaint. And to provide a beginning of a therapeutic endeavour to see if I can change it for the better.

[164] He added that the palpative assessment of A.W. was to provide feedback to the physiotherapist at the clinic "because these people were there for typically as a result of a car accident and they're involved in a legal process. So we had to be very specific about the assessment results." He described the specific "sensory observations" that he gathered from palpating A.W.:

> …"tender on palpation" is what the terminology is typically used for muscles of the lower back predominantly of the right side -- as I'm recalling, but I don't have my charts in front of me -- predominantly of the lower right side of the lumbar spine region facing down; right? And we've a tender patient and there might have been some what we call pain referral patterns. But again, I don't have my notes in front of me to recall exactly what I indicated.
>
> Then the upper midthoracic area we started to again experience some hypertonicity and painful response to touch, palpation, for muscles that move the shoulder girdle, muscles that move and support the head and neck facing down. So I don't know if you want me to name all the muscles, but trapezius muscles, levator scapular muscles, and the list would go on. So I would do again a comparison of the right side to the left side, and there was some hypertonicity, painful response to these two muscles.

[165] Next, the Registrant was asked how his session with V.S. began, from a planning perspective. His response was detailed, and appeared to be comprised of a mixture of both specific recollection and evidence as to general practice:

> … I reenter the room and Ms. S is on the table facing down as I instructed. I recall that she had her brassiere on, and I recall that she had left her slacks on as I instructed her to do. And so I again inquire as to her comfort.
>
> And she may have had some low back discomfort as that's what she came in for, so it's possible I might have made an adjustment to put a small pillow underneath her stomach, or something like that, to help alleviate that.
>
> So then typically if a female client has left their brassiere on and it seems possible to do, I ask permission to undo that. And if I get permission, I don't remove it. I just undo the strap. And then move the sheet down again, as I described previously, to about the level of the upper portion of the hip bones, upper portion of the gluteal muscles exposed a bit.
>
> And from there, the typical session for -- particularly with clients with low back pain is to palpate for the muscles of concern as I described.
>
> … Ms. S's primary complaint was low back pain towards the hip and gluteals. So I palpate there.
>
> And then we move up the back a little bit towards the thoracic area to see if that area is affected or not. And then typically, upwards, towards the upper back and maybe the muscles of the trapezius and such. So that's the first step of the process is palpation to get information.

[166] Following this "first step", the Registrant testified that he would move the "second step" in the case of someone like V.S. who had described low back pain, which was "to provide a bit of lumbar traction in a laying-down position". The Registrant described this process as follows:

> I inform them what I'm going to do. I say I'm just going to apply a little bit of traction force into your low back.
>
> Then one of my hands, depending what side I'm on, would then apply force onto the upper portion of the sacrum, force down towards the feet a bit to see if I can determine does that feel better for them; does it alleviate pain; does it produce more pain. It's, again, hopefully to alleviate pain, to have them feel a bit better, but it's information gathering. If it's less painful, good information; if that becomes more painful, that's also information for me.
>
> Q What is the sacrum?
>
> A It's a cornerstone bone that is the juncture at the bottom of the spinal column, and it's also where the hip bone is attached to provide support for the body right at the juncture.

[167] Following the evidence regarding V.S., Mr. Green asked the Registrant the same question regarding D.K.:

> Q Following the physical assessment of [D.K.], what was the plan for treating her?
>
> A Well, her initial complaint was to deal with midback, some mid/lower back, thoracolumbar area, a lot of thoracic discomfort, and upper thoracic/neck pain as well. So the plan was then to address those areas in terms of again the palpation and the treatment of those areas to see if I could gather further information to corroborate and to start the process of trying to create some form of change in how she felt and how things presented.

[168] In respect of L.T., the Registrant testified that she "said that very specifically. … she wanted a deep tissue massage treatment." In response to his inquiry about her experience was with such treatment, the Registrant stated that she told him that "she was very experienced with and was looking for me to apply physical manual treatment into her body." As a result, "it was a simple, fairly straightforward plan for [L.T.] because it was not a complication [*sic*] situation." The Registrant estimated that he would have spent approximately 10 to 12 minutes on each side of L.T. during the portion of the session that L.T. was lying face down. He testified that he would face in the direction he was working, as this would be efficient and not hurt his body. He stated that that was particularly important to him having had a shoulder injury as the result of a scooter accident in 2006 or 2007. He also stated that he suffers from tendonitis, which he attributed to the large number of treatments he gave while working in Banff, and the lack of care he took to avoid repetitive motions.

[169] The Registrant testified that the same principle applied to the orientation of his hips while providing treatment:

> … my pelvis is typically facing in the direction that my force is moving it. And that's the safe, efficient way of doing things, to apply force that's deep enough that I need to do and safe for me to do. So my pelvis faces the [*sic*] direction.

[170] He testified that this also applied to his hips, that "typically" they would not face the patient as he would usually be working up or down the body. He did agree that he would sometimes massage across the body, however. Mr. Green then asked the following question as to what happened during the massage of L.T., and drew the following response from the Registrant:

> Q Okay. Now, is it possible that during the massage of [L.T.], you leaned your hips against portions of her body?
>
> A Well, it's not my standard practice to do so if it's possible.

[171] He added that when doing a deep tissue massage:

> My focus is in my hands how I'm doing that safely, am I making sure that the pressure is okay for them. I continue checking with them regarding pressure, because they ask for it but they may not be used to the amount of force that I can actually apply. So it's how are things feeling, what structures am I accessing, how am I doing that, and also how you're feeling about how things are and is it safe for me to continue.

[172] The Registrant testified that with the other three complainants – V.S., A.W. and D.K. – he would have taken greater pains to do a detailed palpative assessment, and would possibly have applied less pressure as they were experiencing higher pain levels, but that "the physical way of going about doing it is pretty much the same."

[173] Mr. Green then engaged in the following exchange with the Registrant, specifically in relation to L.T.:

> Q Now, you're aware of the allegation made by Ms. T during this portion of massage that you leaned the crotch of your pants up against her upper arm?
>
> A I'm aware of that.
>
> Q Is it possible that your crotch leaned against her upper arm for 10 minutes as she described?
>
> A No, it's not my standard practice to do so, but it's possible it might have

occurred.

Q For 10 minutes?

A 10 minutes? I don't know. You see, I move around. You know, some period of time in one position facing the direction of my forces, then moving to another position, so, you know, I don't typically stand in one place for that length of time.

Q Okay. And did you intend to sexually touch or gratify yourself at Ms. T's expense during that portion of the massage?

A No, I did not intend to do that.

[174] Mr. Green then asked the Registrant to describe his technique at the point in the massage therapy session at which the patient turns from lying on her front to lying on her back:

Q … Can you describe for the panel what your technique is or how you approach that situation when a patient is turning over?

A Okay. My standard way of doing this throughout my practice is to when I'm finished with the treatment for the facing down, so I inform, okay, now it's time to turn over. And I tell them I'm going to do it, particularly for ones that I'm seeing for the very first time.

So I say, you know, I'm going to just draw the sheets up here and I'm going to hold the sheets up in front of me; right? So I grasp onto about the level of the pelvis, I grasp the sheet and blanket, leading on the opposite side, and I grasp again the leading edge on the opposite of the sheet and blanket at about the level of the shoulders. So my arms are long enough that I can actually achieve that for the most -- everybody.

So then I say, okay, now lift this up in front of me and you just turn over facing up, and when you do that, then what I want you to do is to scoot down -- typically my word is to "scoot" down so that your head is off the headrest for me, please.

So I've got the sheet up and it's obscuring my view, I can't see anything; right? And I can see their head, because I want to make sure that they've followed my instructions, that the head was -- the body moves down and the head is off the headrest, and I observe whether that happened or not. Sometimes it doesn't. So then I let the sheet back down.

Sometimes they get tangled up in the sheet a little bit, so just small little motions to get that sheet out from underneath their shoulder, wherever it is, and then back down again. So by this time they're facing up.

[175] While giving the above testimony, the Registrant accompanied it with movements demonstrating reaching across the patient's body from the side, grasping the opposite edge of sheet, and drawing that opposite outer edge of the sheet upward and towards him so that the

sheet would extend out from table level on the side the Registrant was standing, and would be somewhat higher on the opposite side.

[176] He then testified that he would often adjust the sheet again, standing in a different position:

> Very frequently the sheet is -- blankets are kind of disorganized and sheet's all over the place and the like. And I like to have a clean boundary and position of the sheet and blanket.
>
> So at the time, what my practice was, is I would walk around to the head, standing up and you're seeing -- looking down and I would see their head to be -- you know, close to their head. And I would pick the sheet most typically, sometimes bit of the blanket, move it up towards the face a little bit, maybe a couple of inches or so, and fold it over so that I would create not only a clear boundary, but also as a double coverage over -- for females double coverage over their chest.
>
> Q And looking down, what is your -- what are you seeing as the therapist?
>
> A This way here the sheet comes up kind of a little bit over their face slightly here, upper part of their neck and so, and from there then I see their head and neck and the sheet going over top of their chest. And that's all I see.

[177] In response to a question from Mr. Green, the Registrant testified that it was "never [his] intention", when a patient was turning over, to reveal their breasts for the purpose of sexual gratification.

[178] With respect to his neck massage of L.T., the Registrant testified that he was "seated on I believe it was a stool" when this part of the treatment was administered. He went on to state:

> … my usual way of doing that is to come forward so that I can get control over the position of the head and neck. …. So I got the head and neck in one hand, in my left hand, and then with my right hand, then I'm working with the muscles of the posterior neck, and with my thumb typically, and working then down towards the upper fibres of trapezius muscles out towards the side of the shoulder, and continuing, as I mentioned before, deeper, deeper applications. My position is that I'm relatively close to where my patient's head is, and my body is close to the table, and then applying force.
>
> Q Why are you relatively close to your patient at that point?
>
> A Well, again, like with all the other descriptions, the application of force by me, it's safer biomechanically for me and more efficient to apply forces if I'm closer to my centre of gravity.
>
> Also, if I'm looking to determine ability of muscles and -- joints to move

and the state of muscles, if I'm further away, then I have a lot more work to do and I don't get as -- a clarity in terms of what is happening.

So the closer I am, the more control I've got and the more I'm able to pick up the nuances of what's going on in the structures.

[179] The height of the table, the Registrant testified, was such that he could fit his knees underneath it – about the level of his abdomen.

[180] Mr. Green did not ask at that point if the Registrant's crotch or groin or penis (through clothing) in fact made contact with the top of L.T.'s head, as alleged in the Citation. Instead, once he established that the length of the Registrant's erection was "average" and had an "average" backward curvature, the following exchange took place:

> Q. … And from the seated position that you're in, would it be possible for your erection to touch [L.T.'s] head?
>
> A I don't think it would be.

[181] Later in the examination, however, Mr. Green asked whether it was possible that the Registrant had "leaned an erection" against L.T. while providing deep tissue massage to her. From the Registrant's response, it appeared that he understood the question as being in relation to the alleged leaning against L.T.'s arm, and not against the crown of her head. He responded as follows:

> No. I don't recall having an erection during that treatment. And the other part of it is, too, that if you look at 10 minutes static positioning, it's not what I do. I mean, that would be a significant portion -- it was a 45-minute session.
>
> And say, you know, 10 minutes or so for treatment of the head and neck, and 5 minutes for treatment -- discussion around the beginning of the session, you know, bears it down in terms of time.
>
> So standing in one spot, on one side, would have been a significant period of time, 10 minutes for a 45-minute session, and I move around a lot. So I don't think I would stand in one spot for 10 minutes during treatment of -- in that kind of short treatment.

[182] Mr. Green proceeded to ask about the sacrum stretch in relation to the allegations regarding D.K. and V.S. After agreeing that he administered the stretch to both of them, he went on to describe the purpose of the stretch as follows:

> That particular stretch, the focus of it is to very specifically stretch the muscles in the thoracolumbar region.
>
> …
>
> So in therapy that stretch has two purposes: to determine the capacity of the muscles and joints of the thoracolumbar region to come into flexion to see what happens with that. And the basic premise with massage therapy in

general, I would submit, is that treatment -- assessment then becomes the beginning of treatment.

So the idea then is to determine the capacity of those muscles and joints that come into flexion without the hip joints giving false information about movement. Then to provide a stretch, a very specific stretch to those muscles of the area to see how they respond. And that's the nature and purpose of that in a general sense.

[183] The Registrant was then asked how he had administered the stretch to D.K., and he responded as follows:

Well, I'm going to back up a bit. At the beginning of a session -- or at the end of the assessment protocol that leads me to think that I'm going to do that stretch with the client, I inform them -- my standard practice is to say -- inform them before we start the session -- it's likely we're going to have to do some stretching of the low back as well based on what I see. Just, you know, to let them know and see if there's any kind of response or request not to, whatever. From there, then, when it comes time for the stretch, to do that, they're turned over facing up.

…

So then comes time to do the stretch, and then once again I inform them that I'm going to do that now. And I explain very carefully as to what happens. It's my standard protocol to do that. I tell them, okay, so, look, we're going to do this stretch I talked about with your lower back, and what I'm going to do is I'm going to get you to bend your knees towards your chest as far as you can. And the first step is that, to see if they can tolerate just simply having their knees brought to their chest.

If they can tolerate that, then I say, okay, now here's what's going to happen. I'm going to bring your -- I'm going to place your legs over top of my arm, not my shoulder but over top of my forearm, so that their knees are bent over my forearm. And I say to them, now what's going to happen is that I'm going to bring your legs closer towards your chest, and as I do that, I'm going to place my hand onto a bone called the sacrum, which is the bottom of -- and I don't do it at that point. I just show them what's happening; right?

So I'm going to place my hand onto the bone called the sacrum, and that's kind of like your tailbone but it's a little higher up, but it's at the bottom of the spine. And then what I'm going to do is I'm going to rotate your pelvis, bring your knees closer towards your chest to see if we can stretch and see how things feel for you. So then I tell them, now, my hand is going to be underneath here. That's where it's going to be, not anywhere else.

And then I ask very specifically for permission to do so. You okay with that? Can we move forward? That's my standard practice. Of course, if they say no, I don't want that to occur, or whatever, if I get a clear sense that, you know, that's not what they want, then I stop. It's okay, we'll try something else. Permission granted to continue, I then start the process.

So my hand then I lift up the legs a little bit so I can get clear access. So I lift the pelvis up off the table slightly so I can get clear and unfettered access to

the sacrum. It's very clear as to where my hand is going. And I do that motion without messing around. It is very clear and concise. Then I grasp onto where I know where the muscles are, because the basic tenet with stretching is that you anchor one portion of the muscle and move the opposite end away from the other end. So this is what happens. So laying on their back and I move the pelvis in towards their head and their face and their chest up, and then -- for just a few degrees.

And I'm watching their reaction as this happens; right? And checking to make sure that my hand placement is still correct and making sure that I'm okay, that's I'm not starting to give way or that I'm -- you know, no pain for me, it's safe for me.

Then if it's okay, no reasons not to continue, no pain or anything, I'll continue a little bit further, a few degrees more. And this is the very first time to see how things are proceeding. Okay? And I'll take it to what is known in the business as the tissue in feel, where I feel a sense of stretch occurring where that happens. And I'll wait for sometimes upwards of a minute in that position.

…

Your pelvis is typically then up off the table to some degree, and I'm holding that weight up with one arm. And to some degree the other arm -- the other hand as well.

So it's going to vary from person to person as to how far I go depending on their response, and what their girth is as well. So now, then, frequently, I will bring it back down, and if they have a painful response, I'll bring it back down carefully, slowly, and my hand that's supporting the sacrum just comes out.

…

Come back down again, I'm supporting the weight with one hand, the hand goes on the sacrum and just simply comes out and away. Legs come down and back on the table.

…. And I just then check in with them to see how they responded to it, if they have any particular pains or anything like that. Frequently that's the end of the session, and I believe it was with [D.K.], it was the end of the hands-on portion of the session.

[184] The Registrant stated that he had done this stretch "hundreds of times" in his career. The stretch lasts for between five and 10 minutes. The heavier the weight of the patient, the more muscular exertion is required for the stretch.

[185] In response to a question from Mr. Green, the Registrant testified that he "did not sexually gratify [him]self" when lowering D.K. and V.S. after the completion of their sacrum stretches. He stated that his only intent was to

> … slowly and carefully and with support bring everything back down.

[186] The Registrant testified that other than the four complaints that are the subject of the hearing, the College had brought no other complaints to his attention in 22 years.

b) Cross-examination

[187] Ms. Fong commenced cross-examination by tendering Exhibits 12 through 15, being initial assessment forms for each of the complainants, as well as Exhibit 16, a "Glossary of Abbreviated Terms" provided by the Registrant to the College's investigator, explaining the abbreviations used in the initial assessment forms. The Registrant confirmed that the initial assessment forms had been prepared by him. The notations on the forms could be created in part during the treatment session, in part afterwards.

[188] The Registrant gave the following evidence on cross-examination:

- In terms of the sacrum stretch administered to V.S., he "recall[s] the stretch for sure, but not in exact moment-to-moment occurrence from second to second" (in response to previous questions regarding the stretch, he referred twice to his "standard" way of doing the stretch before providing the above answer).

- The massage of V.S. included a massage of the "upper portion" of her buttocks.

- He has a "very good memory of what happened" in the treatment session with V.S., but not an exact "second to second, moment to moment" memory.

- In terms of how he handled the cover sheets during D.K.'s massage, it is not standard practice to record handling of the sheets in the treatment notes, but he actually does recall treating D.K. and recalls how he dealt with her draping. This is not a "moment to moment, second by second" recollection but a "very strong idea".

- He "recall[s] [his] hand coming away" from D.K. following the sacrum stretches he performed on her, but does not have a "second by second" recollection. He does not recall brushing D.K.'s anal and vaginal areas at either the February 1 or February 12, 2013 treatment sessions. He cannot say why she reported feeling this sensation.

- With respect to the alleged contact with D.K.'s anal and genital areas, it is "possible" that this occurred with the Registrant knowing it.

- It is unlikely that the alleged contact with D.K.'s anal and genital areas happened three times without the Registrant knowing it, as it is his practice to take his hand away, but "it's within the realm of possibility".

- If accidental contact with D.K.'s anal and genital area did occur, it was not necessarily with the Registrant's hand or fingers – it could have been the forearm or some other part of his body. It would not be the shoulder or the elbow or the knee, however.

- With respect to V.S. and the alleged touch to her "groin pubic area", the Registrant

recalled palpating that region – the front of the hip bone, on both sides. He denied touching the pubic area. He did not touch the pubic hairline.

- It is "within the realm of possibility" that the top sheet was lifted off D.K.'s chest six inches to a foot during each of her treatment sessions, but there was no reason to do that and the Registrant does not recall doing that.

- Similarly, it is possible that the sheet was lifted off the chests of A.W. and L.T. as alleged, but the Registrant's view was obscured by the sheet and he did not look at their breasts. He cannot account for any reason why L.T. would say that she saw him looking at her breasts. His "normal standard application" or "standard practice" is to "completely obscure [his] view of any private areas of any female clients."

- The cross-examination concluded with a denial that the Registrant had engaged in any of the conduct alleged (questions by Ms. Fong):

> Q So I as understand your position, that you're not aware of any inappropriate touching that you did or exposing their sexual body parts from any of these complainants?
>
> A No, I don't recall any doing any of this alleged touching that's been alleged and/or exposing.
>
> Q So it's just all a mystery to you, isn't it?
>
> A I would not use the word "mystery." I did not do what has been alleged. So I wouldn't describe it as being a mystery.

DOCUMENTARY EVIDENCE

[189] The following documents were admitted into evidence at the hearing:

Exhibit 1:	Second Further Amended Citation to Appear and Schedule ("Citation")
Exhibit 2:	Patient History Form for V.S. dated October 17, 2012
Exhibit 3:	Two standardized drawings of the front and back of a white female body, with line markings and notations added by V.S.
Exhibit 4:	Patient History Form for A.W. dated January 24, 2013
Exhibit 5:	Patient History Form for D.K. dated January 16, 2013
Exhibit 6:	Standardized drawing of the front of a white female body, with marking

and notations added by D.K.

Exhibit 7: Confidential Patient History Form for L.T. dated October 11, 2013

Exhibit 8: Standardized drawing of the back of a white female body, with marking and notation added by L.T.

Exhibit 9: Standardized drawing of the front of a white female body, with markings and notations added by L.T.

Exhibit 10: Standardized drawing of the front of a white female body, with marking and notation added by L.T.

Exhibit 11: Expert report of Karen Fleming, RMT with letter attachments and schedules

Exhibit 12: Initial Assessment Form for V.S.

Exhibit 13: Initial Assessment Form for D.K.

Exhibit 14: Initial Assessment Form for A.W.

Exhibit 15: Assessment and Treatment Form for L.T.

Exhibit 16: Glossary of Abbreviated Terms provided by Registrant

LAW

Conduct subject to discipline under the Act

[190] Section 39(1) of the Act states that the Panel may determine that a respondent has not complied with the Act, a regulation or a bylaw; has not complied with a standard, limit or condition imposed under the Act; or has committed professional misconduct or unprofessional conduct. The term "professional misconduct" is defined in the Act to include "sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession" (Act, section 26). The term "unprofessional conduct" is broader than professional misconduct as it "includes" the latter, but it is not otherwise defined.

[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.

College Bylaws, Code of Conduct and Standards of Practice

[192] Section 19(1) of the Act gives the College the power to make bylaws "consistent with the duties and objects of a college under section 16", including bylaws intended to "establish standards, limits or conditions for the practice of the designated health profession by registrants" (subsection 19(1)(k)). The College's Bylaw 75 requires every registrant to comply both with the College's *Code of Ethical Conduct* ("Code") and its Standards of Practice.

[193] Two sections of the Code are referenced in the Citation. Section 1(2) states as follows:

> *General Duty to Patients*
> A Registrant shall not take advantage of a patient's vulnerabilities for the Registrant's sexual, emotional, social, political or financial interest or benefit.

[194] Section 2(a) states as follows:

> *Sexual Conduct Prohibited*
>
> 2. A Registrant shall not
> (a) engage in sexual conduct with a patient, …

[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.

Proof of conduct of a sexual nature in criminal law

[196] Intent or *mens rea* is an essential element of an offence under the *Criminal Code* of Canada. However, the test is for what constitutes a specifically "sexual" assault is objective: it must be "conduct which objectively viewed is of a sexual nature". The intent or *mens rea* requirement is only the intention to commit the assault, or put differently, to engage in the conduct. Therefore, considerations of the subjective motivation of the person committing the assault, the degree of sexual gratification obtained or not obtain, and so forth are not relevant to

a determination of whether sexual assault occurred: *R. v. Bernard,* [1988] 2 S.C.R. 833.

[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.

Panel's broad discretion to accept evidence

[198] In its initial preliminary application (see Schedule "A"), the College made the submission that administrative tribunals "are not bound by the rules of evidence". It made the same submission at various points during the hearing, during the course of argument on many of the objections that were raised. At one point, it handed up a written submission entitled "Evidence Point: Rules of Evidence Do Not Apply." This submission cited case law as well as a text by Sara Blake entitled *Administrative Law in Canada* (5th ed.).

[199] The Registrant's counsel, Mr. Green, took issue with the College's submission on this point, and characterized the College's argument as being that evidence need not even be relevant to be admitted. He also submitted that the Blake text was not authoritative and that what it said should be verified by reference to the case law cited within it.

[200] The College cited the following paragraph from *Administrative Law in Canada* (at page 60):

> Unless expressly prescribed, court rules of evidence do not apply to proceedings before an administrative tribunal. This reflects the public interest mandate of many tribunals and the fact that tribunal members, being lay people, are not schooled in the rules of evidence and are expected to apply common sense to their consideration of evidence.

[201] The Panel understands the author's contention simply to be that the Panel, like any other administrative tribunal, is not bound by the specific technical rules of evidence that apply to court proceedings. As Ms. Blake goes on to state:

> … the tribunal should maintain control over the admission of evidence. Not all facts are of equal importance. There may be several important facts on which the decision turns. Other facts may provide context or contribute to a deeper understanding. Not all evidence is equally probative and reliable. Essentially, there are two questions that should be asked. First, what evidence should be

> admitted and considered in the fact-finding process? Second, how reliable is it? …
>
> The basic criterion for the admissibility of evidence is relevance. Relevant evidence is admissible; irrelevant evidence is inadmissible.

[202] The Panel considers the above to be a correct statement of the law and consistent with the decision of the B.C. Supreme Court in *Hale v. B.C. (Superintendent of Motor Vehicles)*, 2004 BCSC 1358, in which the court stated as follows (at paragraph 23):

> The general rules regarding evidence before an administrative tribunal have also been considered by this court on numerous occasions and it has been held that a tribunal is entitled to consider any evidence it deems relevant, accepting portions of some and rejecting others as it sees fit.

[203] In its closing submissions, the College referred to numerous additional cases that stand for the same proposition. The Panel is satisfied that, whatever the application of technical rules of evidence to a court proceeding, such rules are not binding on this Panel. Another way to put this is that in the administrative law context, there is no "presumptive inadmissibility" (see e.g. *R. v. Handy*, 2002 SCC 56) of otherwise relevant evidence on the basis of the classification or categorization of that evidence, as there may be in a court proceeding. That said, the Panel also considers that it is governed at all times by its obligation to treat both parties fairly, as well as its overriding obligation to consider whether or not the case before it has been proven on the basis of a sufficiency of "clear, convincing and cogent" evidence, as required by the Supreme Court of Canada's decision in *F.H. v. McDougall*, [2008] 3 S.C.R. 1 (see further discussion on standard of proof, below). Therefore, while it may be technically correct to say that the "rules of evidence do not apply" – if what is meant by "rules of evidence" is "*court* rules of evidence" – the Panel considers that it is nonetheless obligated to consider carefully the relevance, reliability and probative value of any evidence put before it, which it may then consider in the "common sense" manner described by Ms. Blake.

Burden of proof

[204] It is clear that the College bears the burden of proving the Registrant's conduct as alleged in the Citation.

Standard of proof

[205] Counsel for the College submitted that the standard of proof applicable to this proceeding was as set out by the Supreme Court of Canada in *F.H. v. McDougall*, [2008] 3 S.C.R. 1, namely, that the case must be proven on the balance of probabilities on the basis of "clear, convincing and cogent" evidence. In that case, the Court considered the difficulty of applying the civil standard of proof to "cases in which allegations made against a defendant are particularly grave", one example of such a case being (as here) a case involving allegations of

professional misconduct. The Court concluded that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities."

[206] The Registrant's counsel, although not disagreeing with the Supreme Court of Canada's *dicta* in *F.H. v. McDougall*, submitted that the Panel was bound by a test called the "*Bernstein* test", and cited *Law Society of Upper Canada v. Paradiso* (2008 ONLSHP 33) in support of that proposition. However, it appears that the so-called "*Bernstein* test", as subsequently interpreted by the Ontario Court of Appeal in a 2005 decision called *Stetler*, differs little if at all from what the Supreme Court of Canada said in *F.H. v. McDougall*. As noted by the Law Society of Upper Canada hearing panel in *Paradiso*:

> **43** The Court of Appeal for Ontario in *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board* (2005), 76 O.R. (3d) 321, at para. 79, affirmed and clarified the standard of proof as articulated in *Re Bernstein and College of Physicians and Surgeons of Ontario*, 15 O.R. (2d) 447 (Ont. Div. Ct.):
>
> > ...There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, that standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt. The well-established standard articulated in *Bernstein* and numerous subsequent cases is an evidential standard that speaks to the quality of evidence required to prove allegations of misconduct or incompetence against a professional. Thus, within the administrative context, it is accepted that strong and unequivocal evidence within the civil standard of proof is required where either the issues, or the consequences for the individual, are very serious.
>
> **44** The *Bernstein* test requires, within the civil standard of proof, that the proof on a balance of probabilities be clear and convincing based on cogent evidence.

[207] Even if there were a difference between the "*Bernstein* test" and the evidentiary standard articulated in *F.H. v. McDougall*, which there does not appear to be, it is clear that the Supreme Court of Canada's decision would supersede the *Paradiso* decision and its application of the *Bernstein* test, given that *Paradiso* was released on March 27, 2008, prior to *F.H. v. McDougall* being released on October 2, 2008. In 2010, the B.C. Supreme Court recognized, in *Kaminski v. Association of Professional Engineers and Geoscientists of British Columbia*, 2010 BCSC 468, that the civil standard of proof, as articulated in *F.H. v. McDougall*, is the standard to be applied to professional discipline proceedings in British Columbia.

[208] The Panel therefore accepts and finds that *F.H. v. McDougall* sets out the evidentiary standard applicable to this proceeding. It follows that any finding of fact made by the Panel is to be made on a balance of probabilities, and on the basis of "clear, convincing and cogent" evidence that is sufficient to meet the evidentiary threshold.

Similar fact evidence

[209] As stated above, the College gave notice at the time it brought its first pre-hearing preliminary application for consolidation of the three citations that had at that point been issued individually. The issue was addressed by the parties in their submissions on both the first and the second consolidation applications, but was not ruled on by the Panel as the issue was ultimately one to be determined at the hearing. In brief, the College's submission is that the Panel "receive and consider the evidence of all of the four patient witnesses in relation to *each* citation matter" (emphasis in original).

[210] The College submitted that the legal preconditions for the admissibility of similar fact evidence had been met. However, as the *Li* decision demonstrates, the Panel may choose not to make a finding based on the application of similar fact evidence if it decides it is unnecessary to do so, because on a specific point it prefers the evidence of a witness on that point to that of the Registrant. This is so because in this case, all of the potentially "similar fact" evidence will be admissible in any event, if not as similar fact evidence, then at a minimum as evidence given by an individual complainant in relation to allegations made of misconduct in respect of that complainant.

[211] The Registrant's position is that, while resort to similar fact evidence can be made in the appropriate case, this is not such a case because of the *dis*similarity of the evidence as to the alleged sexual misconduct: only two of the four complainants received the sacrum stretch and complained of anal/genital contact made by the Registrant's hand; three of the four complainants complained of the Registrant's handling of the sheet and his viewing of their breasts; and only one of the four complainants (L.T.) complained of contact made by the Registrant's penis with her body.

[212] Save and except for their disagreement on the issue of the presumptive inadmissibility of similar fact evidence (which the Registrant argues for, and which the College says does not apply due to the broader latitude afforded to administrative tribunals regarding the admission of evidence), both parties generally agree that the decision of the Supreme Court of Canada in *R. v. Handy*, 2002 SCC 56, is one of the leading cases on similar fact evidence. In *Handy*, the accused had been charged with sexual assault causing bodily harm. His defence was that the sex was consensual. The complainant said she had consented to vaginal sex, but not hurtful or anal sex. The Crown sought to introduce similar fact evidence from the accused's former wife, to the effect that the accused had a propensity to inflict painful sex, including anal sex, regardless of the lack of consent of his partner. The similar fact evidence concerned seven alleged prior incidents, which the accused denied, as he also denied assaulting the complainant. He also argued that the complainant and his ex-wife had colluded. The ex-wife acknowledged that she had met the complainant a few months before the alleged sexual assault and that she had told the complainant about the accused's criminal record, her allegations of abuse, that she had received $16,500 from the Criminal Injuries Compensation Board, and that all she had to do to collect the

money was say that she had been abused. The trial judge admitted the similar fact evidence and ruled that it was not for him to resolve the possibility of collusion. The jury convicted the accused of sexual assault.

[213] The Supreme Court of Canada held that the similar fact evidence had been wrongly admitted. However, the court also recognized that there were circumstances in which the proposed similar fact evidence *would* be admissible, on the basis that its probative value outweighed its prejudicial effect. After a review of authorities, the Court set out the following framework to be employed in making that determination:

(1) Assessment of the probative value of the evidence.

a. Assessment of the issue of collusion
b. Identification of the "issue in question"
c. Similarities and dissimilarities between the facts charged and the similar fact evidence
    i. proximity in time of similar acts
    ii. extent to which other acts are similar in detail to conduct charged
    iii. number of occurrences of similar acts
    iv. circumstances surrounding or relating to similar acts
    v. any distinctive features unifying the incidents
    vi. intervening events
d. Strength of the evidence that similar acts actually occurred

(2) Assessment of the prejudice
    a. moral prejudice
    b. reasoning prejudice

(3) Weighing probative value versus prejudice

[214] On the basis of the application of the above analysis to the specific facts in *R. v. Handy*, the Court concluded that the trial judge erred in admitting the similar fact evidence and ordered a new trial.

[215] In *R. v. Stewart*, 2004 BCCA 56, the British Columbia Court of Appeal considered the decision in *Handy*, among other cases, in ruling on the appeal of a doctor who had been convicted on ten counts of indecent assault and sexual assault of his patients. In the course of its reasons, the Court provided the following extensive canvassing of the law on similar fact evidence (emphasis in bold added):

> **27** In certain circumstances, notwithstanding the prejudicial tendency of such evidence, similar fact evidence will be allowed if its probative value outweighs its prejudicial effect. …

28 … A case of more recent times wherein evidence of a course of similar acts was admitted as probative of the fraud charged was *R. v. Gregg*, [1965] 3 C.C.C. 203, 49 W.W.R. 732, 44 C.R. 341 (Sask. C.A.) [cited to C.C.C.] in which the accused was charged with defrauding farmers by failing to pay them for grain bought from them. The trial judge convicted the accused in *Gregg*, finding that the proven course of dealings supported a finding that the accused never intended to pay for the grain at the time he entered into purchase agreements with the victims. On appeal, Mr. Gregg argued, *inter alia*, that the trial judge had erred in taking into consideration evidence of similar facts relating to a number of transactions proved in evidence.

29 Culliton C.J.S., in the course of a judgment dismissing the appeal, said this at 207:

> ...In my view such submissions were not well founded. In the charges faced by the appellant the onus rested on the prosecution to establish beyond a reasonable doubt that the appellant never intended to pay for the grain at the time he entered into the respective contracts. **His state of mind was an essential ingredient of the offence and to prove this, evidence of similar acts are admissible.** The principles governing the admissibility of such evidence, in my opinion, are clearly and correctly stated by the learned author of *Phipson on Evidence*, 10th ed., p. 201, para. 460, as follows:
>
> > "After evidence has been given that the accused has committed an act, **similar acts done by him and connected therewith are, where his state of mind is material, admissible to show his state of mind in doing the act**. **Such evidence 'may be relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental** or to rebut a defence which would otherwise be open to the accused' (Lord Herschell in *Makin v. Att.-Gen. for New South Wales* [1894] A.C. 57 at p. 65). **Evidence of similar acts may be proved, not to show that because the accused has committed one crime therefore he would be likely to commit another but to establish the animus of the act and to rebut the obvious defences of ignorance, accident, mistake or other innocent state of mind** (*Makin's case, supra*; *R. v. Bond* [1906] 2 K.B. 389; *R. v. Armstrong* [1922] 2 K.B. 555; *Harris v. D.P.P.* [1952] A.C. 695..."

30 The recent case of *R. v. Handy*, [2002] 2 S.C.R. 908, 213 D.L.R. (4th) 385, 164 C.C.C. (3d) 481, 2002 SCC 56, contains a comprehensive discussion of this subject.

…

Binnie J. goes on to observe that while the general rule is exclusion, evidence of other misconduct may be of sufficient relevance that its probative value in the search for truth can outweigh any potential for misuse by the trier of fact. **Such conditions for admissibility can be met if it would be an affront to common sense to suggest the similarities were due to coincidence**. However, the strength of the evidence must suffice to outweigh reasoning prejudice and moral prejudice. Binnie J. noted in *Handy*, at para. 42, that the inferences sought to be supported by the similar fact evidence adduced "must accord with common sense, intuitive notions of probability and the unlikelihood of coincidence". …

…

35 In *Litchfield*, *supra*, a case of a similar sort to the one at bar, Iacobucci J., commenting on the use of evidence of multiple complainants, said this at 357-58:

> **I am also of the opinion that the evidence of one complainant as regards the severed counts should have been admitted with respect to the counts relating to each of the other complainants.** While this evidence could be characterized as evidence of similar acts or events, the evidence was not tendered solely to show that the respondent was a person of bad character or of a disposition likely to commit the alleged offences. Rather, the evidence provided information highly relevant to understanding the context in which the alleged offences occurred and shed light on the nature of the respondent's relationship with his patients, particularly the standard of medical treatment he provided. The evidence provided a different perspective on the alleged assaults from that afforded by the medical evidence. **The evidence going to the severed counts, if accepted by a jury, would also tend to show a distinct pattern of behaviour engaged in by the respondent. While the probative value of one complainant's evidence with respect to other complainants' allegations is somewhat less than that described above, and the prejudicial effect higher, I would nonetheless find that the probative value outweighs the prejudicial effect.**

[216] The decision of the Supreme Court of Canada in *R. v. Shearing,* 2002 SCC 58, concisely expresses the idea that the significance of similar fact evidence turns on the improbability of coincidence, i.e. the improbability that the allegedly similar facts are similar by chance:

> The theory of similar fact evidence turns largely on the improbability of coincidence. …

[217] In other words, if the facts at issue are *too similar* for that similarity to be plausibly attributed to coincidence, it may be concluded that the more probable explanation for the similarity is intent or design.

[218] On the issue of similar fact evidence, the Panel also considered, and finds instructive, the following passages from the decision of the Ontario Court of Appeal in *R. v. L.B.,* [1997] O.J. No. 3042, a case in which the Court dealt with appeals from two separate trial decisions in which similar fact evidence had been adduced, and upheld the use of such evidence in both cases (emphasis in bold added):

> **37** It is also important to consider which similarities are truly compelling. **In cases of sexual assault, the similarities or dissimilarities between the sexual acts that are alleged are, of course, relevant, but often not as compelling as the circumstances surrounding the incidents.** This stands to reason, particularly where there is nothing unusual about the sexual acts in question. **In most circumstances, the fact that one complainant was kissed as compared to the other being fondled may not have a whole lot of significance. The allegations all pertain to acts of a sexual nature.** …
>
> **38** The question really boils down to one of human experience and common sense. …
>
> ….
>
> **80 Determining what constitutes sufficient similarity to give the evidence corroborative value on the issue of credibility requires a contextual assessment in each particular case**. As stated earlier, there should be a large measure of deference for the judgment of the trial judge who is uniquely well-positioned to make that determination. **In the present case, it was open to the trial judge to find, as he did, that the similar fact allegations spoke to a pattern of conduct that was distinctively similar to that complained of.** In particular, the appellant's relationship with each of the witnesses was a significant feature in defining similarity. …

[219] Finally, the case law provided by the College demonstrates that the similar fact evidence principle has been applied in professional discipline cases, and that a high degree of deference is accorded to a decisionmaker's discretion to admit such evidence, in the absence of a clear error of fact or law: see *Dietel v. College of Physicians of Ontario,* [1997] O.J. No. 1866 (Div. Ct.).

[220] What emerges from the case law is the principle that similar fact evidence is admissible where the similarity of the acts demonstrates a pattern of conduct or behaviour that is unlikely to be attributable to coincidence or accident, and therefore is inferentially probative of intent. In

the words of *Phipson on Evidence* (as cited with approval in the *Stewart* decision, *supra*), similar fact evidence can be used to "establish the animus of the act and to rebut the obvious defences of ignorance, accident, mistake or other innocent state of mind". This is because if, for example, conduct on one occasion is sufficiently or "distinctively" similar to conduct on another occasion, this similarity renders the conduct less likely to be coincidental or accidental and more likely to be intentional. Evidence of similar conduct can establish a "pattern of conduct" or "pattern of behaviour" that is unlikely to have occurred by accident. While the similarities need to be scrutinized carefully, determining what types of similarities may be significant will depend on, as the Ontario Court of Appeal stated in *R. v. L.B.,* a "contextual assessment in each particular case". The surrounding circumstances may be as significant as the specific facts.

Credibility

[221] Credibility is a critical factor such as this, where the outcome may well be depend on whom the Panel considers to be the more credible witness(es). In *Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Ont. HCJ), the court was critical of the Social Assistance Review Board's negative assessment of the appellant's credibility, which was made without providing reasons for that assessment. The court cited a "standard form of instruction [that] a judge of the Supreme Court of Ontario might say to a jury":

> In weighing the testimony of witnesses you are not obliged to decide an issue simply in conformity with the majority of the witnesses. You can, if you see fit, believe one witness against many. The test is not the relative number of witnesses, but in the relative force of their testimony. With respect to the testimony of any witness, you can believe all that that witness has said, part of it, or you may reject it entirely.
>
> Discrepancies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is a fact also that two persons witnessing an incident or transaction often will see or hear it differently. Discrepancies on trivial detail may be unimportant, but a falsehood is always serious.
>
> In determining the credit to be given to the evidence of a witness, you should use your good commonsense and your knowledge of human nature. You might, in assessing credibility, consider the following:
>
> The appearance and demeanour of the witness, and the manner in which he testified. Did the witness appear and conduct himself as an honest and trustworthy person? It may be that he is nervous or confused in circumstances in which he finds himself in the witness box. Is he a man who has a poor or faulty memory, and may that have some

effect on his demeanour on the witness stand, or on the other hand, does he impress you as a witness who is shifty, evasive and unreliable?

The extent of his opportunity to observe the matter about which he testified. What opportunities of observation did he in fact have? What are his powers of perception? You know that some people are very observant while others are not very observant.

Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge or shade his evidence in order to lend support to his cause.

Does the witness exhibit any partisanship, any undue leanings towards the side which called him as a witness? Is he a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his mind and consequently affected the value of his testimony?

It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound commonsense test. Did his evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his testimony?

Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you considered more worthy?

Does the fact that the witness has previously given a statement that is inconsistent with part of his testimony at trial affect the reliability of his evidence?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility or truthfulness of the witness and the weight to be given to the evidence of that witness.

33 It might not be untoward to suggest that board members keep those suggestions in mind.

[222] The Panel adopts the principles set out above and has applied them to its analysis of the evidence, below. In doing so, however, it is also mindful that it must take care not to be solely or unduly influenced by "the personal demeanour of the particular witness" but also to subject the story of that witness "to an examination of its consistency with the probabilities that surround the currently existing conditions" (*Faryna v. Chorney* [1951] B.C.J. No. 152 (BCCA)).

[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.

[224] The Panel accepts that these factors may be relevant in cases of inappropriate touching or sexual misconduct. Their application to the evidence in this case is dealt with below.

ANALYSIS OF EVIDENCE, FINDINGS OF FACT, AND CONCLUSIONS

Qualification and evidence of Karen Fleming, RMT

[225] As soon as the College advised that it was seeking to qualify Karen Fleming, a registered massage therapist (RMT) as an expert witness, it was clear that there would be a dispute as to Ms. Fleming's qualifications as an expert. Ms. Fong advised the Panel that Mr. Green would be challenging qualifications. Mr. Green's initial submission was that "if this panel possesses the qualifications that the expert has, then the expert has nothing to offer the panel. And this is an expert panel." He further submitted that "if the qualifications of an expert panel are the same or exceed that of the expert, then they aren't qualified." Ms. Fong argued that this was an issue of admissibility, not qualification.

[226] It was agreed that counsel would proceed with direct and cross-examination on the issue of qualifications.

[227] Ms. Fong then began to lead Ms. Fleming through her *curriculum vitae*. Mr. Green almost immediately interjected and advised that he was prepared to concede the information on Ms. Fleming's CV, but that his concern was "the qualifications in relation to the questions being asked." However, Ms. Fong continued with direct examination, which was largely focused on the information contained on Ms. Fleming's CV.

[228] On cross-examination on the qualification issue, Mr. Green's first question of Ms. Fleming was, in effect, what made her more qualified to answers the questions posed to her by

College counsel (forming the basis of her opinion) "than any other massage therapist in British Columbia". This prompted an objection and legal argument. Ms. Fong submitted that the legal test on expert qualification, enunciated by the Supreme Court of Canada in *R. v. Marquard*, was whether the expert had expertise "not possessed by the ordinary untrained person" or "not possessed by the layperson". The Court in that decision stated that: "The only requirement for the admission of expert opinion is that the 'expert witness possesses special knowledge and experience going beyond that of the trier of fact'." Ms. Fong also cited the decision of the B.C. Supreme Court in *Lindholm v. Vankouehnett* ([1998] B.C.J. No. 3092), in which the court stated that: **"**An expert … is anyone who, by study or experience, has acquired knowledge of the relevant subject which is significantly greater than that possessed by the ordinary man or woman. The test is not particularly onerous." Ms. Fong further submitted that, as required by the College's Bylaws, one member of the Panel was a not a massage therapist, and therefore not an "expert" as submitted by Mr. Green. She added that although an expert tribunal could rely on its expertise to understand the evidence, it could not supply its own evidence.

[229] Mr. Green argued that the cases cited by Ms. Fong were distinguishable and did not apply to this hearing. He did not, however, cite any case law in support of his submission that an expert, in order to be qualified, was required to have greater expertise than the two RMT members of a three-person tribunal. The objection to the questions as to how Ms. Fleming was more qualified than any other massage therapist was therefore sustained.

[230] Mr. Green continued with cross-examination on Ms. Fleming's education and post-graduation training. At one point, in response to a question about an April 1998 patient/therapist boundaries workshop, Ms. Fleming referred in her answer to one purpose of the workshop being "how not to invade [patients'] privacy verbally", which led Mr. Green to ask:

> Q You're aware there's no allegation that [the Registrant] invaded a patient's privacy verbally in this case?

[231] That question was withdrawn following an objection. Not long afterwards, however, Mr. Green asked a question about the content of Ms. Fleming's expert report (the "Report"), which had not yet been tendered into evidence. That led to an objection by Ms. Fong on the basis that it was not appropriate to question on the content of the Report during cross-examination on the issue of qualifications. The question was withdrawn by Mr. Green. However, further argument then ensued about whether questions on the Citation could be put to Ms. Fleming. Mr. Green was permitted to cross-examine on the standards alleged in the Citation, but then asked a question that appeared to confuse the witness. The Panel decided to recess, and issued the following direction upon its return (emphasis in bold added):

> Just to review: Ms. Fong made an objection to the effect that Ms. Fleming should not be asked about the content of the report prior to the report being tendered as evidence. Mr. Green was asking the question.
>
> Mr. Green then asked Ms. Fleming about her knowledge of college standards as set out in the citation. Ms. Fong objected on the basis that the

college standards were not within the scope of what Ms. Fleming had been asked to opine upon.

Ms. Fong also stated that Mr. Green was asking questions of a legal nature. The panel overruled the objection and allowed Mr. Green to continue his cross-examination, but only on the basis that his questions clearly related to the witness's qualifications as an expert.

Having heard a further question, **the panel is now concerned that cross-examination is straying beyond the boundaries of the issue of qualification and therefore directs that questions regarding the report and/or citation be put to Ms. Fleming only after she has been qualified**.

Objection sustained.

[232] Following that direction and ruling, however, there was continuing argument about whether or not Mr. Green could ask the witness questions about standards as alleged in the Citation, on the basis that – as he argued – "the standard is her qualifications to answer the questions that this panel must answer against [the Registrant] for the college … she may be perfectly qualified to do many things out in the world, but totally incompetent to answer the questions before the panel."

[233] The Panel withdrew again to deliberate, and on its return announced that it had decided to qualify Ms. Fleming, without further submissions from either party. The Panel took this step for the following reasons:

1. The Panel had issued a clear direction that cross-examination was to be contained to the issue of qualifications, and should not extend to the content of the Report unless and until Ms. Fleming had been qualified, and her Report entered into evidence.

2. Notwithstanding that direction, Mr. Green persisted, in the Panel's view, in asking questions which, while ostensibly about Ms. Fleming's qualifications, Ms. Fleming would not be able to answer with making reference to the contents of the Report. The Panel considered that it was being put in the difficult position of having to listen to Mr. Green attempt to examine Ms. Fleming on the Report without the Panel actually having the Report before it.

3. The legal positions of both parties as to appropriate test to be applied to the issue of Ms. Fleming's qualifications had already been clearly articulated in argument by counsel. It was evident to the Panel both from Mr. Green's submissions and from the questions he was continuing to attempt to put to Ms. Fleming that he was maintaining his position that Ms. Fleming was required to demonstrate a greater level of expertise than that of an average member of the massage therapy profession and/or the massage therapist members of the Panel. The Panel was satisfied based on the College's submissions that the Registrant's position was incorrect in law. Also, the Panel considered that (1) the specific level of expertise of the RMT members of the Panel (or indeed of the professional members sitting on any professional disciplinary panel) should not be a

matter of debate or evidence in a hearing; and (2) if the criterion for qualification were the expertise of an expert relative to the expertise of an "average" member of the profession, it was not clear how an "average" level of expertise should be established.

4. Finally, the Panel considered that, as an administrative tribunal, it had a broad discretion to admit evidence, and decided that it would deal with the content of the Report as a matter of weight following the submissions of both parties on the contents of the Report.

[234] In the Panel's view, for the above reasons, there was no question that Ms. Fleming should be qualified as an expert, and while it appreciated that its action in qualifying Ms. Fleming without concluding submissions on qualification might appear unusual, it was simply not prepared to spend further time on a matter that it considered had been established.

Consideration of weight to be given to Ms. Fleming's evidence

[235] Having qualified Ms. Fleming, however, and having received the Report into evidence and having heard her testimony, the Panel is of the view that, with the specific exceptions set out below, it can give no weight to the evidence provided by Ms. Fleming in her Report insofar as that evidence relates to or discusses the specific allegations made against the Registrant. This is not intended as a negative reflection on Ms. Fleming or her evidence. Rather, it is a consequence of what appears to the Panel to be a disjunction between the questions put to her by the College, and addressed in the Report, and the specific allegations made against the Registrant in the Citation.

[236] Essentially, there are two main types of allegation in the Citation: (1) that the Registrant touched three of the four complainants (V.S., D.K and L.T.) "sexually, and without therapeutic purpose"; and (2) that the Registrant "act[ed] intentionally to view a patient's breasts for a sexual purpose" (D.K, L.T. and A.W.).

[237] With respect to the alleged viewing of the patients' breasts, it is clear from the use of the word "intentionally" in the Citation that the Registrant's intention to commit the act "for a sexual purpose" is an essential element of the alleged conduct – i.e., the allegation is not simply that the Registrant was careless or negligent, or that he either was unaware of proper draping protocols or did not pay sufficient attention to them.

[238] The allegations of sexual touching in the Citation, however, do not use the words "intent" or "intentionally." While the requirement of intentionality might reasonably be inferred from the use of the word "sexual"; it appeared to the Panel that, in relation to the "sexual touching" allegations, there was at least an element of ambiguity as to whether what was alleged was deliberate and intentional conduct on the part of the Registrant. The alternative possibility was that these allegations related to conduct which had occurred accidentally, but which nonetheless fell sufficiently far below a professional standard to be deserving of sanction. For this reason, the Panel's ILC sought to clarify this point with College counsel on the final day of hearing,

March 6, 2015:

> [ILC]: Broadly speaking, there are two main allegations: one is acting intentionally to view female patients' breasts for a sexual purpose. From the wording of that allegation, it appears to be entirely clear that the intent to perform the alleged act is an element of the offence, but there doesn't seem to be any question about that, and I will advise the panel accordingly. However, there is an element of ambiguity in terms of another offence, which is touching the patient sexually.
>
> What I have advised the panel is that when I read each paragraph where the allegations are set out in its totality, including the reference to the *Code of Ethical Conduct* that prohibits sexual contact, it appears to me that … it is necessary for the panel to find intentional conduct in respect of the touching allegation in order to find professional misconduct in this case. That's my understanding and that's the advice I have given.
>
> If that is not the case, I think it needs to be clarified to the panel because otherwise that is what the panel is going to take away.
>
> MS. FONG: The College can clarify that you are correct.

[239] In summary, then, all of the conduct alleged in the Citation to have been committed by the Registrant is alleged to have been deliberate and intentional conduct on the Registrant's part. For this reason, it is not open to the Panel to find, for example, professional misconduct on the basis that the Registrant accidentally or inadvertently brushed his hand against a patient's anal and vaginal area, or that he accidentally or inadvertently pressed his penis against a patient's arm or head, or that he accidentally or inadvertently lifted a sheet too high and caught a glimpse of a patient's exposed breasts. The College could have made these allegations, but chose not to do so. The Panel therefore concludes that it can only make a finding of professional misconduct against the Registrant if it finds that he both committed, and intended to commit, one or more of the acts set out in the Citation. If the Panel concludes that the touching alleged by the complainants did occur, or that the Registrant lifted top sheet high enough off a patient's body to view her breasts, but that these were accidents on his part, it cannot make a finding of professional misconduct on the basis of the Citation.

[240] The inclusion of intention as a component of all the conduct alleged in the Citation has implications for the relevance of the evidence provided by Ms. Fleming in her Report and in her examination in chief. That evidence has already been summarized above, and will not be repeated here at length. In very broad summary, however, Ms. Fleming opined that:

- A massage therapist should take care to avoid touching any "sexual" area of a patient's body: the "groin/inguinal area, glute muscles, upper posterior thigh, upper inner thigh, armpit, chest, lateral -- lateral chest or anterior ribs";

- A massage therapist should maintain awareness of what parts of the patient's body are being touched;

- A massage therapist should maintain draping in a manner so as not to expose a patient's sexual body parts of view;

- There is no therapeutic value in making sexual contact with a patient or in "wafting" a sheet;

- Based on the assumed truth of the factual allegations made in the Citation, the Registrant's conduct fell below the professional standard.

[241] Mr. Green challenged Ms. Fleming's evidence on cross-examination, with some success. She was not clear about the basis for her assertion that a key element of the patient/therapist relationship was an "imbalance of power, authority and control". She could not identify a specific standard for draping height. She agreed that a "boundary violation" could be accidental. (It should be noted, however, that although Mr. Green took issue with notion that there was any vulnerability or imbalance inherent in the patient-therapist relationship, he relied in closing argument on the case named *R. v. Stewart*, 2001 BCSC 1890, in which Mr. Justice Vickers observed that "a woman is in the most vulnerable of all situations when she is lying naked before her examining physician." It was not clear to the Panel why a woman lying nearly naked on a table with only a massage therapist in the room with her should not likewise be considered to be "vulnerable".)

[242] Perhaps more importantly, however, a fundamental issue appears to have been overlooked both by the College and by the Registrant, namely, that the College had taken the position, and drafted its Citation, on the basis that all of the Registrant's conduct was intentional and done for a sexual purpose. For the most part, the Panel considered that Ms. Fleming's evidence on such matters as the proper procedures and precautions to be taken by RMTs with respect to such matters as draping, and to the avoidance of contact with sexual body parts, and to what to do if such contact occurs, were not likely controversial in themselves and could well have been highly relevant if the conduct at issue had been alleged to be accidental but still constitute professional misconduct. The issue is whether that evidence was applicable in this case.

[243] The language used in the Report is telling, in that it either explicitly or implicitly assumes "accidental" contact with a sexual body part of the patient or therapist and speaks to what should be done if this occurs (see paragraphs 18, 23, 24, 27, 32, 44, 49, 57 for uses of the word "accident" and/or "accidentally"; see also paragraphs 30, 38, 47, 53, 59 and 65 for references either to "mistake" or "fail[ure] to take reasonable measures"). Ms. Fleming's opinions in this regard may be entirely correct. However, they are also of little assistance to the Panel, as on the wording of this specific Citation, the Panel has concluded that it cannot find professional misconduct on the basis of accidental or inadvertent behaviour – the behaviour must be intentional.

[244] With respect to sexual touching of patients, the Report says the following (in paragraph 19 and 28):

> [19] In Massage Therapy there is no therapeutic value in an RMT having contact with a patient's sexual body parts, (except for therapeutic breast massage). Touching a patient's sexual parts (labia, vagina, penis, scrotum, breast nipples and the main part of the breast tissue) falls below the minimum standard of practice for RMTs.
>
> …
>
> [28] There is no therapeutic value in contact by an RMT's sexual body part against the patient's body. As massage therapy treatment is all about helping the patient therapeutically, any touching of the RMT's sexual body part against the patient's body is below professional massage therapy standards of practice followed by any reasonably competent massage therapist.

[245] The Panel accepts the first sentence of both of the above paragraphs as correct, though it would not appear to be a matter at issue in this proceeding, nor a matter on which a Panel would be likely to require expert testimony. It therefore follows, as Ms. Fleming opines, that working at minimum standards of practice means that a therapist will neither make contact with any sexual part of a patient's body, nor will the therapist touch any of his/her sexual body parts to a patient's body. However, even if the Panel accepts this opinion, which it does, this does not assist the Panel in terms of making a determination of professional misconduct in this case, for the reasons set out above. This is illustrated by the paragraphs that precede the paragraphs quoted above, i.e. paragraphs 18 and 27, which speak to what a therapist should do if such contact is made "accidentally", either with a patient's or the therapist's sexual body part. Essentially, in Ms. Fleming's view, the procedure is to cease contact, acknowledge and apologize for the contact, and seek consent to continue treatment.

[246] The Panel accepts Ms. Fleming's evidence on this point. The purpose for the suggested procedure is clear: there should be no doubt left in the patient's mind regarding whether or not the contact with the therapist was accidental or deliberate on the part of the therapist, as such doubt could be uncomfortable to, or even perceived as threatening by, the patient.

[247] However, the Panel also notes that a therapist is only able to follow the steps recommended in the Report if he or she is *aware* of the sexual contact to begin with. What is a therapist makes contact with a sexual body part, but is unaware that such contact occurred? Ms. Fleming addresses this issue at paragraphs 21 and 26 of the Report, stating that therapists should "consciously" avoid sexual contact by, among other things, "maintaining open and clear communication with the patient about the intention of the treatment"; "keeping their awareness present" when working close to a sexual part of the patient's body, or to a part of the patient's body that would bring a therapist's sexual area into close proximity to it; asking permission to

work in areas that are close to a patient's sexual body parts; and by making appropriate use of draping.

[248] The Panel accepts Ms. Fleming's evidence on this point as well. It seems to the Panel undeniably correct that a therapist should proceed in the manner proposed by Ms. Fleming in the event of accidental sexual contact between a patient and a therapist, both in order to reassure the patient should any contact inadvertently by made with a sexual body part of the patient or therapist, as well as, of course, to take conscious steps avoid such contact in the first place.

[249] The above issues, however, are matters of general professional practice standards, and would appear to be more relevant to a scenario in which a therapist had, through inadvertence or accident or carelessness, caused some form of contact with a sexual body part of either the patient or the therapist, and realized that such contact had taken place. To repeat, the premise underlying the Report appears to be that the therapist is aware of the contact, or he/she would not be able to follow the procedure that is recommended following such contact. It seems to the Panel that it would not, in this case, be able to find professional misconduct on the basis that, for example, the Registrant had not been sufficiently "conscious" or aware of the treatment he was performing, or the contact that may have occurred between his own body and that of the patient.

[250] Ms. Fleming then applies her opinion regarding the professional standard of practice as it relates to accidental sexual body-part contact to the allegations in the Citation, and opines as follows with respect to the alleged sexual touching of D.K.:

> [47] Assuming what [D.K.] says is true, [the Registrant] failed to take reasonable measures to ensure that he did not brush his fingers or hand along any part of her anal and genital area or to address his touching a sexual body part.
>
> [48] Any reasonably competent Massage Therapist would have removed their hand from the hold on the patient's sacrum in a horizontal direction, along the table, while the patient's hips were still bent and their buttocks and upper legs not yet on the table.
>
> [49] If he accidentally touched [D.K.'s] anal and genital area any reasonably competent RMT would have acknowledged the accidental contact, and addressed it in accordance with professional standards.

[251] The corresponding opinion is given with respect to the sacrum stretch maneuver on V.S. at paragraphs 59 to 61 of the Report.

[252] Paragraphs 47 and 49 (and 59 and 61) illustrate the point made above: even if those opinions are accepted by the Panel, they do not directly address the allegations made in the Citation, which require a finding of intent. However, the Panel does accept Ms. Fleming's opinion as stated in paragraphs 48 and 60, which will be considered further below in

conjunction with the evidence given by the Registrant.

[253] The same problem arises with respect to the Registrant allegedly pressing his semi-erect or erect penis either against the arm or the top of the head of the complainant L.T., which is discussed at paragraph 40 to 45 of the Report. One paragraph will illustrate the issue:

> [44] If [the Registrant] accidentally leaned against [L.T.] a reasonably competent RMT would have been aware of the accidental contact by his own sexual body part, immediately ceased contact and apologized and addressed the issue. Treatment could have continued only if the patient gave consent.

[254] The Panel agrees with the opinion quoted above. The question remains as to how Ms. Fleming's opinion on "accidental" sexual contact relates to the allegations against the Registrant. If the Citation had alleged that the contact with sexual body parts (both the complainants' and the Registrant's) had been accidental but nonetheless fell below a professional standard of practice, Ms. Fleming's Report would be of some assistance to the Panel as evidence it could choose to rely on at least for the initial part of making a finding of professional misconduct. However, as explained above, the College's allegation is that the Registrant's conduct was intentional. The Registrant's evidence (discussed further below) is that any alleged sexual body-part contact, if it occurred, was both unintended and unconscious on his part (the alleged vaginal-anal touching of V.S. and D.K.), or that the patient was mistaken as to what it was that was actually making contact with her body (the alleged touching of the Registrant's penis to L.T.'s arm and head, which it was suggested was either a belt buckle, a hipbone or part of his abdomen, possibly a rib).

[255] Finally, Ms. Fleming opines that, in respect of three of the four complainants (D.K., A.W. and L.T.), the Registrant's conduct in lifting the sheet covering the patient approximately one foot above the patient's body was "inconsistent with professional standards as it exposes the patient's naked body to the therapist's view" (see paragraphs 64-69 of the Report in relation to A.W.; see also paragraphs 52-55 in relation to D.K; and paragraphs 34-39 in relation to L.T.). Again, however, the Report does not deal with the question of intent in relation to the alleged conduct. In cross-examination, Mr. Green challenged Ms. Fleming on the basis of her opinion that lifting or "wafting" a sheet six inches to a foot above a patient's body is "inconsistent with professional behaviour by any reasonably competent RMT". In the Panel's view, however, to attempt to define a specific height at which lifting a sheet becomes "unprofessional" would only be relevant if the allegation were one of careless or inadvertent behaviour by the Registrant. It is not. The Registrant is alleged to have "act[ed] intentionally to view a female patient's breasts for a sexual purpose". If that allegation is accepted by the Panel as being proved, in other words, if the Panel finds as a fact that the Registrant lifted the sheet for the specific purpose of viewing the complainants' naked breasts, there can be little doubt that such conduct would fall below a professional standard of practice and would constitute professional misconduct. In this case, the issue is neither the lack of due care nor the specific height of the sheet, but rather the presence or absence of the therapist's intent to view the patient for a sexual purpose.

[256] Ms. Fleming's evidence, while accepted by the Panel to the extent set out above, does not directly address the Registrant's intention or lack of intention behind any contact that occurred between the complainants and the Registrant. However, the Panel does find Ms. Fleming's evidence helpful as it relates to the general standards of practice in terms of avoiding inadvertent sexual contact, and in addressing it if it does occur. In this regard, the Panel considers the Report useful in terms of highlighting the question of whether the Registrant was aware of any contact that took place, and how such awareness (or lack of awareness) might bear on the question of the Registrant's intent. Ms. Fleming's Report speaks to what a therapist should do in any case of accidental patient/therapist sexual contact, and implicit in her opinion is the assumption that the therapist will be aware of such contact. But what if the therapist is not aware? And further: how credible is it that a therapist would be unaware of contact either with a patient's sexual body part, or between the therapist's sexual body part (specifically, his penis) and any part of the patient's body?

[257] To summarize, then, the Panel finds as follows in respect of Ms. Fleming's report:

1. It accepts Ms. Fleming's evidence on the general background and evolution of professional standards in the massage therapy profession (paragraphs 7 to 14 of the Report). These paragraphs do not speak directly to the conduct alleged against the Registrant, but provide helpful background and context.

2. It accepts Ms. Fleming's evidence on the professional standard of practice in relation to the avoidance of accidental contact between a sexual body part of a patient or therapist and the body of the other, the addressing of such contact if it accidentally occurs, the importance of proper draping, and addressing of "draping accidents" if they occur (paragraphs 15 to 28 of the Report). Because the Panel considers these paragraphs to set out an opinion as to a professional standard in relation to accidental sexual body-part contact, or accidental mishandling of a patient's draping, they would appear to be not directly relevant to the conduct alleged against the Registrant. However, they are nonetheless relevant, at least indirectly, as they provide an additional evidentiary basis upon which to assess the probabilities of the Registrant accidentally making contact of the nature alleged in the Citation, or of the Registrant accidentally mishandling the draping.

3. It accepts Ms. Fleming's opinion as to the correct technique to be used by a massage therapist in relation to the sacrum stretch performed by the Registrant on D.K. and V.S. (paragraphs 48 and 60 of the Report).

4. With the exception of paragraphs 48 and 60, the Panel declines to accept or rely the evidence contained in paragraphs 46 to 67 of the Report, as those paragraphs opine on professional standards, and on the Registrant's failure to meet professional standards on the basis of assumed facts, in a manner that the Panel considers would only have been relevant if the Registrant's conduct had been alleged to be accidental or negligent, but

nonetheless culpable.

[258] The application of the portions of Ms. Fleming's evidence accepted by the Panel to the evidence of the Registrant is found further below.

Analysis of complainants' and Registrant's evidence and findings of fact

a) Alleged inappropriate physical contact

[259] L.T.'s evidence as to the Registrant's penis pressing into her was clear and specific. In the initial part of the treatment, when the Registrant was standing at her side and was "leaned up against [her]" and was "pressing himself up against [her]" so he could reach the other side of her back, L.T. described the contact between her (bare) arm and the Registrant's body as being with "his crotch, his groin". She then described him as "develop[ing] what you would maybe call a semi-erection" and stated, "I could feel his penis become more full and growing on my arm." She testified that the Registrant stood in one position and maintained steady contact against her arm for approximately 10 minutes, with a slight in and out rocking motion, and that she could feel that the Registrant's penis was "semi-erect" for about seven of those 10 minutes. She said nothing because she was inwardly in a "state of shock".

[260] After L.T. had turned to lie on her back so that the Registrant could massage her neck and shoulders, she noticed that he was "pushing himself up against [her] again" and that he now had a "full erection, a very firm erection". She says she knew what it was because she "could feel the heat of it, it was shaped like a penis, and it was pressed up against me very firmly", i.e. against the top of her head. She repeated, "I knew it was an erection was because it was shaped like a penis, it was firm, and it was warm, and it was pressed up against me." This again lasted for five to 10 minutes. At this point, L.T. described herself as being in "full high alert awareness mode". She was very aware of what was happening and was sure it was the Registrant's penis. She had her eyes closed, and did not say anything or react because at this point she not only "in a state of disbelief and shock" but also "in fear": the mall in which the clinic was located was a quiet one, and she had not seen anyone else when she checked in. She felt that she did not trust the Registrant, and that saying anything to him would put her at "further risk". Likewise, the Registrant had not said anything to her after their initial discussion at the outset of the session. At the end of the session, she "bolted" and was pursued out the door by the Registrant, who wanted payment.

[261] L.T.'s evidence was challenged but was not shaken on cross-examination. In response to Mr. Green's questions, L.T. testified that she had had "many" massage therapy sessions, and goes once to twice a month. She had also received treatment from a number of other practitioners – acupuncturist, physiotherapist, chiropractor, a naturopath – that she did not disclose on her intake form, but the Panel did not attach significance to this. L.T. had testified that she was simply looking for treatment for shoulder pain and was not interested in reviewing her prior treatment history with the Registrant. Likewise she was not interested in having

stretches demonstrated to her. She rejected any suggestion that what she had felt was any part of the Registrant's clothing or of his anatomy, such as his hip or ribcage other than his penis:

> Q Okay. And again, I'm going to put to you that what you felt was Mr. Martin's hip or belt.
>
> A I know that that's impossible because they are quite different in shape, and I have never known a belt to grow, and it was fleshy. It was definitely a penis. I know what a penis feels like. So, you know, I was not confused at the moment and in my high -- I was highly alert at this point. I was, like, ping. I was noticing everything, and that was a penis.
>
> Q Can you agree that Mr. Martin's hip is fleshy? In fact there is flesh on the outside of his hip?
>
> A I think a hip is more of a bony part of the body unless you're quite overweight.
>
> Q Consistent with an erection?
>
> A No. An erection to me is not bony; it's still fleshy. It gets hard, but it's a hard, fleshy area. Like a bone is much more sharp and rigid.

[262] L.T. also described the sensation of the penis, even through the Registrant's clothing, as "warm", which she said was another reason she realized that what she was feeling was the Registrant's penis:

> Q You could feel the heat of his penis on your head through his underwear and through his pants through your hair on the top of your head? That's your evidence?
>
> A I could feel the fleshiness of his warm penis that was erect against my head.
>
> Q So you could feel the fleshiness of his warm penis even though there was no flesh on your head?
>
> A I could tell that it was a flesh part of his body and not a bone or like a ribcage. It had changed shape and it was definitely a fleshy part of the body, like what a penis would feel like.

[263] D.K. gave the following evidence about the alleging touch of her anal and genital area on February 1, 2013, towards the end of the session after she had gotten dressed again:

> Q Okay. So what happened next in [the February 1, 2013] session?

A [The Registrant] had left the room to allow me to get dressed. So I put my bra and T-shirt back on. Then he came back into the room and he said that he would like to try what he called cupping my sacrum. **He then began to explain what he would do and where my sacrum was, because it was so close to my genital area. I was visibly nervous, but he assured me that he would not be anywhere near my genital area, so I agreed to the procedure.**

He then asked me to lay on my back. He then instructed me to bend my legs, bend my knees and bring my legs up to my chest. He then put his hand where my sacrum was, pushing my knees towards my chest. He -- when he performed the manoeuvre when he was finished as he was -- **as he released my legs, he pulled his hand from my sacrum and in one steady continuous motion brushed his hand from my sacrum up through my anal and vaginal genital area.**

[Emphasis added.]

[264] The Registrant repeated the sacrum maneuver on February 12, 2013. D.K. testified as follows in her examination in chief (emphasis in bold added):

Q So at that February 12th session what happened next?

A Once again, Mr. Martin left the room to allow me to put my bra and T-shirt back on. He then came back into the room and said he would like to try to do the sacrum manoeuvre again. **I agreed, as I convinced myself it was a hand slip and it wouldn't happen again. As well, he had promised me that he wouldn't put his hand anywhere near my genital area.**

So I lay back down on the bed facing up with my knees -- again, my bum was in the middle of the massage table and my knees were bent with my feet on the bottom of the massage table. Again, [the Registrant] was by my hip area and asked me to bend my knees to my chest. And then once again puts his hand on my sacrum and pushed my knees down onto my chest.

He did the manoeuvre, then once again when he was pulling his hand out, he -- I raised my knees, **he brushed his hand once again steady continuous and slight pressure brushed his hand along my -- from my sacrum along my anal and vaginal area.**

He then -- once he released my knees, he then said he was going to do it -- he would like to do it one more time. By this time, **I froze and allowed him to do it again.** And once again he pressed my bent knees against my chest and put his hand and cupped my sacrum. He did the manoeuvre **once the manoeuvre was finished as he was pulling his hand from my sacrum, he brushed it – and basically the same way as the last two times -- from my**

sacrum along my anal and vaginal areas. With, again, slow -- sorry, continuous steady motion with slight pressure.

Q What, if any, difference was there between how Mr. Martin touched your anus and vaginal area on February 1st and the two times on February 12th?

A Sorry. Can you repeat the question?

Q What, if any, difference was there between how Mr. Martin touched your anus and vaginal area on February 1st and on the two times of February 12th?

A I didn't notice any difference. …

[265] D.K. testified that she was inwardly "shocked and confused" by this contact. The Registrant said nothing to her about it, nor did she say anything to him. She made another appointment in order to "avoid conflict", but subsequently cancelled it. Approximately a week after her final session with the Registrant, D.K. had the same sacrum stretch maneuver performed on her by a male certified athletic therapist at Victoria Rehab, and felt no contact with her anal or vaginal area when he removed his hand: "I felt his hand on my sacrum, and then I just didn't feel his hand anymore."

[266] The evidence of V.S. regarding the alleged anal/genital contact made by the Registrant's hand was similar to that of D.K. In her examination in chief, V.S. testified as follows:

Q So what happened next in the massage treatment?

A The next part of the massage treatment was for me to bend my legs up, and Mr. Martin supported them on his right upper arm and shoulder and he pushed my bent knees into my chest. He did this three or four times. And following that manoeuvre, he lowered my legs, and my left one he let down first and then he lowered my right leg. He stroked with his fingers up my genitalia from the anus to labia.

[267] She stated that this contact "had the pressure of a stroke" and was "very swift … a matter of seconds". She testified that she was "mentally … shocked" and "taken aback". She did not say anything about it to the Registrant, nor did he say anything to her about the contact.

[268] The Panel finds it significant that the Registrant did not appear to take issue that physical contact did occur between the Registrant's hand or arm and the anal and genital areas of D.K. and V.S, or between the Registrant's body and/or clothing and the arm and head of L.T. However, the Registrant's evidence is that, in the former case, the contact was accidental. In the case of L.T., Mr. Green submitted in closing that while there was contact between the Registrant's body or clothing and L.T.'s arm and head, it was not his erect or semi-erect penis that she felt, but rather his body and his clothing. During the Registrant's examination in chief,

however, he himself conceded that contact might have occurred between his "crotch" and L.T.'s upper arm:

> Q Is it possible that your crotch leaned against her upper arm for 10 minutes as she described?
>
> A No, it's not my standard practice to do so, but it's possible it might have occurred.
>
> Q For 10 minutes?
>
> A 10 minutes? I don't know. You see, I move around. You know, some period of time in one position facing the direction of my forces, then moving to another position, so, you know, I don't typically stand in one place for that length of time.

[269] Earlier in the Registrant's examination in chief, he was asked if he recalled the session with L.T.:

> Q And stepping back just for one moment, do you recall the session with Ms. T?
>
> A I recall the session, yes.

[270] The Registrant demonstrated his own specific recall of the session by testifying that, in contrast to the other complainants, L.T. had declined the range of motion (ROM) assessment at the beginning of the session:

> A The one complainant that I initially attempted to start that with, but the complainant specifically indicated to me that she did not wish to me to do that, was Ms. T.
>
> Q Okay. And why didn't she want go through range of motion?
>
> A I don't know what her motivations were. I can assume.
>
> Q Don't assume.
>
> A Okay. Well, I don't know what her motivations were. She just indicated to me that she wanted to get on with things.

[271] He also appeared to have a clear and specific recollection of L.T.'s plan of treatment:

> … with Ms. T the plan was fairly straightforward. She came complaining of chronic mid/upper back with a bit of lower back discomfort, history of a whiplash associated disorder diagnosis, a car accident. She -- I was not able

to get information regarding the typical assessment protocol because she made it -- she was emphatically against me doing that. So she very specifically stated just get on with the treatment.

So the plan was just to provide -- she wanted specifically a deep tissue massage treatment. She was quite used to that and that's what she sought from me. So the plan was to provide that. …

[272] However, despite the Registrant's own testimony about recalling the session with L.T., and despite his apparently clear recollection of the beginning of the session with L.T., his memory seemed to become less clear from that point forward, and he either could not recall what had happened, or repeatedly answered questions by reference to his "typical" or "standard" practice:

Q … do you recall the allegation of Ms. T that you did not knock on the door?

A I recall the allegation.

Q Okay. And is it possible that you didn't knock on the door at that time?

A My standard practice is to knock the door, but it is possible I did not.

[273] With the next question, however, the Registrant returned to having a specific recollection:

Q Okay. And when you entered the room, in the session with Ms. T, can you describe what you saw?

A This will be recollection. Ms. T laying face down on the table with the sheet and blanket pulled up over her body as best as she could accommodate.

[274] When the questioning returned to an area that was problematic, the Registrant again answered not with a specific recollection and a clear denial, but with evidence of his general practice, and an equivocal denial (emphasis in bold added):

Q … I just want to go back to a question I asked you before, and it relates to when you were providing the deep tissue massage to Ms. T. Is it possible that you leaned an erection against her for upwards of 10 minutes as she alleges?

A No. I don't recall having an erection during that treatment. And the other part of it is, too, that if you look at 10 minutes static positioning, **it's not what I do**. I mean, that would be a significant portion -- it was a 45-minute session. And say, you know, 10 minutes or so for treatment of the head and neck, and 5 minutes for treatment -- discussion around the beginning of the session, you know, bears it down in terms of time.

So standing in one spot, on one side, would have been a significant period of time, 10 minutes for a 45-minute session, and I move around a lot. So **I don't think I would stand in one spot for 10 minutes during treatment of -- in that kind of short treatment**.

[275] With respect to the alleged improper touching of V.S. and D.K, the Registrant neither admitted nor denied in his testimony in chief that his hand made contact with D.K.'s and V.S.'s anal and genital areas, as alleged in the Citation. However, in response to Mr. Green's questions, he provided a lengthy description of the sacrum stretch maneuver. That description ended with the following exchange:

> Q Did you sexually gratify yourself when you lowered them to the ground, that portion of the stretch?
>
> A No, I did not.
>
> Q What was your intent by lowering them to the ground?
>
> A The intent is simple, just simply to bring the legs back down to a neutral position. And that's the only intention, is to slowly and carefully and with support bring everything back down.

[276] It is not clear whether the Panel is intended to infer from this evidence that the anal/genital contact alleged by V.S. and D.K. never occurred, or that it might have occurred but was unintended by the Registrant. If the latter contention was the intent of the Registrant's evidence, however, it could have been expressed more clearly. In this context, it was not clear what the phrase "sexually gratify yourself" was intended to mean or how specifically it applied to the alleged intentional conduct. The same issue arose in the course of the Registrant's examination in chief regarding his treatment of L.T., specifically the portion of the session during which it was alleged that he was standing to her side and pressing (through his clothing) his semi-erect penis against her arm:

> Q … did you intend to sexually touch or gratify yourself at Ms. T's expense during that portion of the massage?
>
> A No, I did not intend to do that.
>
> Q Have you ever intended to sexually touch or gratify any of your patients during that portion of the massage?
>
> A No, I have never intended that at all.

[277] The Panel found the wording of these questions left a lack of clarity about what the answers were intended to mean. With respect to the first question, namely whether the Registrant intended to sexually touch himself "during that portion of the massage", the wording

did not appear to the Panel to clearly address the allegation against the Registrant. Likewise, the Panel was left to wonder what the Registrant meant by saying he did not intend to "gratify" himself. The repetition of the phrase "during that portion of the massage" for both of the above questions also seemed unnecessarily specific. For example, the Panel noted that the same questions were not asked of the portion of the massage during which the Registrant allegedly pressed his fully-erect penis against the top of L.T.'s head.

[278] Return to the alleging inappropriate touching in relation to V.S. and D.K., the Registrant gave a lengthy and detailed explanation in his examination in chief of the sacrum stretch maneuver he performed on both of them. The Panel reproduces a substantial part of this explanation, for reasons which are set out below (emphasis in bold added):

> So then comes time to do the stretch, and then once again **I inform them that I'm going to do that now. And I explain very carefully as to what happens.** It's my standard protocol to do that. I tell them, okay, so, look, we're going to do this stretch I talked about with your lower back, and what I'm going to do is I'm going to get you to bend your knees towards your chest as far as you can. And the first step is that, to see if they can tolerate just simply having their knees brought to their chest.
>
> **If they can tolerate that, then I say, okay, now here's what's going to happen**. I'm going to bring your -- I'm going to place your legs over top of my arm, not my shoulder but over top of my forearm, so that their knees are bent over my forearm. And I say to them, now what's going to happen is that I'm going to bring your legs closer towards your chest, and as I do that, I'm going to place my hand onto a bone called the sacrum, which is the bottom of -- and I don't do it at that point. I just show them what's happening; right?
>
> So I'm going to place my hand onto the bone called the sacrum, and that's kind of like your tailbone but it's a little higher up, but it's at the bottom of the spine. And then what I'm going to do is I'm going to rotate your pelvis, bring your knees closer towards your chest to see if we can stretch and see how things feel for you. **So then I tell them, now, my hand is going to be underneath here. That's where it's going to be, not anywhere else.**
>
> **And then I ask very specifically for permission to do so**. You okay with that? Can we move forward? That's my standard practice. Of course, if they say no, I don't want that to occur, or whatever, if I get a clear sense that, you know, that's not what they want, then I stop. It's okay, we'll try something else. Permission granted to continue, I then start the process.
>
> **So my hand then I lift up the legs a little bit so I can get clear access. So I lift the pelvis up off the table slightly so I can get clear and unfettered access to the sacrum. It's very clear as to where my hand is going. And I do that motion without messing around. It is very clear and concise.** Then I grasp onto where I know where the muscles are, because the basic tenet with stretching is that you anchor one portion of the muscle and move the opposite end away from the other end. So this is what happens. So laying on their back and I move the pelvis in towards their head and their face and their chest up, and then -- for just a few degrees.

And I'm watching their reaction as this happens; right? And checking to make sure that my hand placement is still correct and making sure that I'm okay, that's I'm not starting to give way or that I'm -- you know, no pain for me, it's safe for me.

Then if it's okay, no reasons not to continue, no pain or anything, I'll continue a little bit further, a few degrees more. And this is the very first time to see how things are proceeding. Okay? And **I'll take it to what is known in the business as the tissue in feel, where I feel a sense of stretch occurring where that happens**. And I'll wait for sometimes upwards of a minute in that position. The understanding in our profession is that over a period of time connective tissues and muscles will allow for the stretch. And that's the position I hold.

[279] The purpose of reproducing the Registrant's own explanation of the sacrum stretch at some length is that it demonstrates, in the Registrant's own words, the level of focus and attention that the Registrant stated he would apply to this procedure.

[280] Despite this level of focus and attention, however, the Registrant testified on cross-examination that while he had no recollection of it happening, it was "possible" that he had accidentally brushed D.K.'s genital and anal area upon removing his hand from her sacrum (emphasis in bold added):

Q Okay. Thank you. Would you agree that you might have brushed her anal and vaginal [*sic*] through her pants accidentally without knowing at that time?

A Without knowing?

Q That's what I asked you.

A Yeah, **it's possible it may have occurred without my knowing it**.

Q And would you agree that it's possible that it happened three times without your knowing it?

A **It's unlikely it occurred so many times, as it's my practice to take the hand away. But I suppose it's within the realm of possibility.**

Q And would you agree that if you did accidently brush her anal and genital area through her pants during that supine MET maneuver it would have been with your hand or your fingers and not any other part of your body?

A No, I wouldn't agree with that.

Q Okay.

A It could have been my forearm or something, I don't know. I don't know

what happened. **I don't know that it actually occurred** …

Q Would you agree it would be, given the maneuver itself, it wouldn't be your elbow, or your shoulder, or your knee?

A No, it wouldn't be my shoulder, or my elbow, or my knee, no.

[281] The Registrant's evidence above is that he had no knowledge or awareness of any contact with D.K.'s or V.S.'s anal or vaginal area at the end of the sacrum stretch. He does not deny that such contact may have occurred; his evidence is simply that he does not know if it occurred. If the Panel were to accept the Registrant's evidence that any contact that occurred was not only accidental but also occurred without the Registrant being aware of it, it would necessarily follow that any contact between the Registrant's hand and either V.S.'s or D.K.'s anal and vaginal areas contact cannot have been intentional.

[282] At a different point in his cross-examination, the Registrant denied making any contact with V.S.'s and D.K.'s anal and vaginal areas, even though at the same time he also maintained that he had no recollection of such contact, and that if it occurred he was unaware of it (emphasis in bold added):

Q I'm going to suggest to you that you knew that you touched Ms. K and Ms. S in their anal and vaginal areas through their clothes, that you knew that?

A My standard practice is to take my hand away. And I do not recall doing it. **I did not do that**. And I did not know that I did that.

Q Well, you do know that the anus and vaginal area feels quite different from the gluteal muscles around it; right?

A **I didn't touch the areas**. And I wouldn't know -- I would have felt anything.

Q Well, you know they feel different --

A I've never actually -- on my clients, I've never actually had occurrence to touch the anal and vaginal regions. I don't know what they would feel like through clothing.

[283] Finally, one further instance of alleged sexual touching is the allegation in relation to V.S. that while she was was face-down on the massage table, and the Registrant was massaging her hip on the left side, "his fingers extended to her underside, and touched the side of her groin area, adjacent to the pubic hairline" (Citation, paragraph 8(d)).

[284] V.S.'s evidence on this alleged touch has been quoted above; the key point is V.S.'s testimony that the Registrant was massaging down the sides of her back, and "when he reached

the waist/hip area, his right hand went under my body into my groin pubic area". She testified that the contact was with the Registrant's right hand only, and that what she felt specifically were "his fingers and the -- would be the part of his palm hand where the fingers join down the right side of his hand." In examination in chief, she gave the following further evidence about the touch:

> Q And what, if any, pressure did you feel when his hand touched your groin area?
>
> A It was pressure. It was similar to his massage that was on the left side. It was consistent with the massage pressure he had been using.
>
> Q Okay. And what, if any, motion did you feel?
>
> A Just a motion of going underneath and back up again.
>
> Q And are you able to tell us the duration of when you felt the contact of the groin pubic area?
>
> A It was very quick, just a matter of seconds.
>
> Q Okay. And the place where you felt the contact, was it covered by clothing?
>
> A No.
>
> Q When you felt the contact, did you react?
>
> A Not physically, but certainly mentally I became alarmed.
>
> Q Why was that?
>
> A Well, I had hundreds of massages, and I have never had a massage therapist touch that part of my body before.

[285] In his cross-examination of V.S., Mr. Green asserted – mistakenly – that V.S. had testified that the Registrant had touched her pubic hairline. She had not – the words she used were "groin pubic area"; she confirmed that the pubic hairline itself had not been touched. She agreed that the contact only happened once, and stated that it had lasted for a few seconds.

[286] The Registrant, when questioned by Ms. Fong during his cross-examination, stated that he had touched "the very front of the hip bone". He marked Exhibit 3 at the point at which he said the touch occurred, which, although within the circle drawn by V.S., was further up and toward the outside of the torso than V.S.'s oral evidence would indicate. In his examination in chief, the Registrant gave a considerable amount of evidence about palpation and performing "palpative assessment" of three of the four complainants (V.S., D.K. and A.W.); it appeared that

the Registrant's touch on the underside of V.S.'s body – whether it was nearer the hip or the groin – was being stated or implied to be part of this "palpative assessment". At one point in his examination in chief, after being asked by his counsel how the session began with V.S. "from a planning perspective", but after the initial discussion and assessment, the Registrant gave a lengthy answer that began with his demonstrating specific recall of the session:

> … So I reenter the room and Ms. S is on the table facing down as I instructed. I recall that she had her brassiere on, and I recall that she had left her slacks on as I instructed her to do. And so I again inquire as to her comfort.

[287] He then gave evidence that appeared to be partly as to what his "typical" practice would be in the case of someone who was complaining of lower back pain; this included a relatively detailed explanation of palpation and his typical purpose in palpating a patient. He then returned to V.S. and related this topic specifically to her (emphasis in bold added):

> And from there, the typical session for -- particularly with clients with low back pain is to palpate for the muscles of concern as I described. So that's going to be muscles of the -- that move and support the lower back and the pelvis in combination. They're called the erector grouping. Okay? Palpate muscles that are closer in to the spine; paraspinal muscles they're known as, as a collective unit. Palpate for muscles on the side of the lower portion. And that's a very common area to palpate for to assess, and that's known as quadratus lumborum muscle, and the superficial structure is called the abdominal muscles as well that are in the area.
>
> So I palpate for those. And I do a comparison of one side versus the other. And **typically, you do the unaffected side first to get a bit of a baseline**, and then you palpate the affected side to see how that compares to other side. So that's what I typically do for low back pain. **And Ms. S's primary complaint was low back pain towards the hip and gluteals. So I palpate there**.

[288] That the Registrant's stated purpose for the "underside" touch was a palpative assessment was confirmed on cross-examination, where the following exchange occurred between Ms. Fong and the Registrant:

> Q I just want to know if you have any specific recollection about whether you slipped your hand under her [V.S.'s] body into her groin, pubic area?
>
> A What I can say is I recall part of my palpative assessment palpating muscles along the – what we'll call the iliac crest, the hip bone. She complained of pain on the right side, lower right side of her lumbar spine to pelvic area. And what I always do is palpate the opposite side first, get a base line, see how things feel, and that area is a front of the hip bone, which is the ilium. **And I recall palpating that region.** The front of the hip bone, the ilium. On the left side, as well as, the right side.

[289] The Registrant's evidence was therefore that his touching the underside of V.S.'s left hip was intentional. The reason he advanced for the touch, however, was that the touch was part of his "palpative assessment" of V.S., and that the left side was palpated to give a "baseline" for the right hip and lower back, which is where V.S. reported feeling pain. However, despite the Registrant's evidence that he palpated both sides, V.S. testified that the "underside" touch only occurred on one side of her body, the left. It is also noteworthy that, in the case, the allegedly palpative touch took only "seconds", and was done in the midst of V.S. described as the Registrant massaging down her back evenly on both sides, using both hands; interrupting this massage briefly to reach down under her hip on one side and with one hand, and then continuing on to massage her buttocks. This brief touch seems at odds with the "focus" the Registrant said he brought to his palpative assessments; noteworthy also is the fact that there was no communication between him and V.S. regarding this touch, even though the Registrant had testified that that was, for him, a part of the palpative assessment process (emphasis in bold added):

> Q And where is your focus when you are palpating a patient?
>
> A Well, when I'm palpating a patient, **my focus is in my hands** what I'm doing, what kind of sense that I'm getting from them, what kind of information I get**. I also check in with them in terms of how they're feeling with it, and, you know, is it painful, is my hand placement okay with them**. But primarily, when I'm palpating, is the information that I'm gathering with my hands apply back to what I know about where things are.

[290] During cross-examination, the Registrant also admitted that he had made no note in his records of the alleged palpative touch.

b) Alleged intentional viewing of complainants' breasts for a sexual purpose

[291] This allegation was made in respect of three of the complainants: L.T., A.W. and D.K.

[292] L.T.'s evidence was that after the initial portion of the massage session, the Registrant was at her side. He lifted the sheet covering her so she could turn over. After she had turned onto her back, the Registrant "wafted" the sheet or blanket covering her – L.T. described this as "lifting the blanket and allowing air to capture the blanket so that it moves upward more or allows air to capture so it can kind of move upward." She stated that the blanket moved up one to two feet. She testified as follows in her examination in chief:

> … after I was on my back, he wafted up the blankets and looked at my breasts. And I know that he looked at my breasts because I watched him do so. And I was in shock because it was -- it was obviously what he had done. I was in shock. So I looked at him, and then we made eye contact, and it was -- it all happened within about three to five seconds. And then I went like that, and I covered my breasts and made a sound like -- I don't know what the

sound was, but it was kind of a gasp, like what's going on here. So I covered myself with my arms, and then he let the blanket down.

Q You made a movement. Can you please describe the movement that you made to cover your breasts.

A I crossed my arms over like this to cover my breasts. …

[293] L.T. testified that after letting the blanket down, he moved behind her head and began to massage her neck and shoulders.

[294] The Registrant testified that he did not view L.T.'s breasts, though he could provide no explanation as to why she said that he did:

Q Okay. Okay. You're not aware of any fact that would explain why Ms. T would remember you wafting the sheet off her chest?

A She may have felt me move the sheet enough to have it unencumbered to take it slightly out from underneath her shoulder because frequently clients, when they turn over, the sheet gets stuck under the shoulder on the side that I'm on. So potentially I may have lifted the sheet up slightly to free the sheet somewhat before I put it down.

Q And you're not of [*sic*] aware of any fact why Ms. T would say that she saw you looking at her breasts?

A I did not look at her breasts. My view is always obscured by the way I hold the sheet up. I don't know why she thought that I did. I never see that. And my practice is to ensure that I don't.

Q Would you agree that you might have adjusted Ms. T's sheet from a position at the side without realizing that you were exposing her breasts to your view?

A I think that if I did expose her breasts to my view, I would have clearly remembered doing so. That would be a significant event. I absolutely do not recall that happening in that treatment. I always -- the normal process -- normal standard application or standard practice is what I did in that case, and that's to completely obscure my view of any private areas of any female clients. And that's what I did.

Q I understand that you say you don't recall, but again my question is: Might it have happened?

A I would have recalled if it did. And it did not happen.

[295] On its face, the Registrant's evidence is unambiguous. The difficulty is that L.T. did not

merely testify that the Registrant saw her breasts. She also testified that: (1) she saw him looking at her breasts; (2) she made direct eye contact with him; (3) she gasped or made a similar sound; and (4) she crossed her arms across her chest to cover her breasts. On cross-examination, the Registrant denied seeing L.T. cross her arms, albeit in a less than definitive manner (e.g. saying "would not" rather than "did not"):

> No, I think that would be difficult to see if I am obscuring her chest area, only seeing her head and possibly her neck. I wouldn't be able to see that because her arms would be below the level at which I -- everything's obscured from the upper chest -- or neck area, all the way down. I would not see that.

[296] Essentially, the Registrant's evidence that he could not see L.T. cross her arms because the sheet, even though he was holding it above her, completely obscured his view of L.T.'s upper body. The difficulty is that the Registrant also denied "wafting" the sheet, and in response to a question by Ms. Fong as to what would account for L.T. remembering the Registrant wafting the sheet off her chest, conceded only that she "may have felt me move the sheet enough to have it unencumbered to take it slightly out from underneath her shoulder". L.T., however, is six feet tall and has long arms. If the sheet had in fact been as close to her chest as the Registrant testified, it is difficult to understand how he could not have perceived her crossing her arms across her chest to cover her breasts (ending with each hand on the opposite shoulder), as this motion would at a minimum have disturbed the sheet enough for the Registrant to notice. The Registrant was not asked in cross-examination about the eye contact and the "gasp" that L.T. says she made. Neither was he asked to address this evidence in his examination in chief.

[297] Unlike L.T., A.W. did not testify that she saw the Registrant looking at her breasts. She testified that the initial portion of the session with the Registrant consisted of him:

> … doing a lot of light touching me everywhere, like, all over. There wasn't really any massage. He explained it was -- he was going -- it wasn't -- you know, he was assessing, is what he called it. He just kept touching all over, lightly. And then he had me flip over onto my back.

[298] The Registrant's own description of his practices regarding "palpative assessment," both in general and with respect to A.W., correspond to A.W.'s testimony regarding this portion of the session. It was following the point at which the Registrant had A.W. "flip over onto [her] back" that her concerns arose. It appears that the Registrant had been at her side when he lifted the sheet so that she could turn over. A.W. then described his next action:

> He asked me to bend my leg, the right leg, and then he reached under the sheet and felt under my underwear on my hip flexor. And I started to feel really uncomfortable.

[299] However, although this action made A.W. uncomfortable, it was not alleged by the

College that it was an inappropriate touch. What happened next, however, made A.W. feel "frozen" and "afraid":

Q What happened after that?

A Then he walked up to the head of the table behind my head and he lifted the sheet way up off of my chest and held it up for quite a while. It seemed like forever. And then he put it back down, and then he lifted it up again. He did this about three or four times.

Q Now, you said that he was behind your head. How do you know that?

A Well, I could hear him. And I could see him lifting his arms. He was lifting the sheet up above me.

Q When Mr. Martin was lifting the sheet, could you see where he was looking?

A No.

Q Now, you said that when he lifted the sheet up, he held it up for quite a while. How long is – can you tell us a duration of what you mean by "quite a while"?

A It felt like forever, but I'm guessing about three to five seconds.

Q And when you say "he held it up," at what point of the motion did he hold it up?

A Well, he lifted it up slowly and held it up at the top, like way up, way up there.

Q And you said he "held it way up there." Are you able to tell us approximately how far "way up there" is in measurements?

A It felt like an arm's distance. It might be close to a foot.

Q What difference was there, if any, between each of the times Mr. Martin lifted the sheet up in the air?

A No difference.

Q At any time did he explain or discuss with you what he was doing in lifting and lowering the sheet in that manner?

A No, he didn't.

Q So while the sheet was being lifted and lowered by Mr. Martin in that manner, did you react?

A Inside I reacted.

Q Can you tell us how you reacted inside?

A I was afraid. I wanted to run out of the room and leave. I didn't know what to do, and I was frozen on the table. I was so afraid, I didn't even look at him.

[300] On cross-examination, A.W. testified that the sheet was "taut" and that it was "not on one side or the other" and that there was no question of the sheet falling off her. She conceded that she had told the College's investigator that her estimate of the height of the lifted sheet was six inches to a foot (which, however, seemed consistent with her answer at the hearing: "an arm's distance … might be close to a foot"). She also stated that it might be "this far away" and made the motion of extending her arm away from her body. She admitted that the lifting of the sheet could have occurred either three or four times – she was not sure which.

[301] The Registrant, on cross-examination, appeared to have a less than clear recollection of the lifting of the sheet (emphasis in bold added):

Q … So are you aware of any fact that would explain why Ms. W would remember you lifting the sheet high off her chest three or four times?

A I don't know why she thought that. I would have no occurrence to in simply adjusting the sheet to do -- attempt to do that three or four times.

There would be no practical reason to do that. And **I certainly don't recall doing that. And it is it not part of what I normally do. Just move one -- one move and that's it.** I don't know why she thought that.

Q Okay. So would you agree that you might have done that, though? That you might have adjusted the sheet from behind her and lifted it without realizing how high it went?

A I disagree that I would do that three or four times in a row to do a simple adjustment. And again, **there'd be no reason for me to lift it the amount that has been alleged with the simple adjustment to be done**. So --

Q Okay. Mr. Martin, my question --

A Sorry. I don't mean to be argumentative.

Q No, no, and I appreciate that. Thank you very much. I know it's a long day. It's a long day. But my question, Mr. Martin, was: You know, would you

agree that you might have adjusted the sheet from behind her, lifted it without realizing how high it went those three or four times? Might you have done it?

A Would I have done it three or four times?

Q Might you have done it?

A **I don't think I would have done it three or four times, no.**

Q So might you have done it one or two times?

A Well, **I would have adjusted the sheet once. And only as high enough to -- for it to be adjusted.**
So again, if we were looking into the area of speculation, realm of possibility, I suppose -- you know, potentially. But I certainly do not recall doing that. And it would have been once, I adjust the sheet once.

Q So potentially you might have done this once, lifted it as high as Ms. W described it?

A **I don't recall doing that.** And again we're, you know, speculating. Many things are possible, but **I don't recall that happening. It's not my standard practice to do that.**

[302] The Registrant did not, however, speak to why the sheet needed to be adjusted at all. From A.W.'s testimony, it is clear that the Registrant had already lowered the sheet back onto A.W. after she turned over. He had also performed one maneuver on her, namely, the touch to her hip that had made A.W. "uncomfortable". A.W.'s description of the sheet as "taut" and "not on one side or the other" and as being not in danger of falling off her made it unclear why the sheet needed to be adjusted at all by raising it away from A.W.'s body, whether this occurred once or three or four times.

[303] D.K. testified that during her massage therapy sessions with the Registrant, she was covered both by a sheet and a blanket. D.K. lay on her chest during the initial part of the session, and then turned onto her back, as was the case with the other three complainants. The Registrant lifted the top sheet and blanket to enable her to turn over:

Q Now, what, if anything, occurred in relation to the draping of the sheet and blanket that you found memorable?

A Partway through the session, after [the Registrant] was done, I would always start face down and he would massage my back area, and usually partway through the session he would come to my side and using both of his hands lift the sheet up, pull the sheet and the blanket up so I could turn over onto my back so he could massage my neck and chest area, shoulder chest area.

Then once I had flipped over, [the Registrant] would come to behind me where my head is and reach over with both hands and take both the sheet and the blanket, he would lift it up between 6 inches to a foot above my chest and pause for a brief moment and then put the sheet back down, the sheet and blanket back down, and fold the sheet over the blanket and adjust it to where he wanted the sheet and blanket to be on my chest.

Q Now, you said that [the Registrant] was behind you. Why did you think that?

A Because when I was lying there I could see part of his arm and his hand when he reached over to adjust the sheet and blanket.

Q Could you see [the Registrant's] face when he lifted the sheet and blanket up from behind you?

A No, I could not.

Q Are you able to tell us what the complete duration was of the time period it took to lift and to lower the sheet?

A It was approximately a second. He would just lift it up, pause for a brief moment and then put it back down.

Q Can you describe the trajectory of the sheet and the blanket when it was lifted and lowered?

A He would just lift it straight up and straight down. Straight down.

Q When the sheet was lifted and there was the brief pause at the top, could you describe what, if anything, you could see?

A I could just feel the sheet lifting up off my upper body. I could just see his hands and part of his arm and just the top of the sheet as it came above my line of sight.

Q And when Mr. Martin lowered the sheet and the blanket back down on your body, can you tell us where he lowered it to on your body?

A Yeah. Just above my breasts.

Q Okay. Now, you have told us that you had a total of seven sessions with [the Registrant]. At which session or sessions did [the Registrant] lift the sheet and blanket above your body in the manner that you described?

A All of them.

Q And at one session how many times did Mr. Martin handle the sheet and blanket in this fashion?

A Just once. He lifted twice, once on my side and once when he was behind me.

Q As between the times that [the Registrant] lifted the sheet and blanket in the manner which you have described, above your upper body from behind, were there any differences in how the sheet and blanket was handled?

A Sorry. Can you repeat the question?

Q Sorry. As between the times that [the Registrant] lifted the sheet and blanket from behind, were there any differences between them?

A No. That was the same every time.

Q And did you ever react to Mr. Martin lifting the sheet and blanket above your upper body in that fashion?

A I don't know if physically outward I did, but inwardly, yes, I was -- I just kind of pause for a second and thought, oh, that was higher than that needed to be. So, yeah.

[304] D.K. testified that no other massage therapist she had seen had lifted the sheet from behind in the manner the Registrant did. She also testified, however, that despite her inward reaction she gave him the "benefit of the doubt" because she was an "overweight, middle-age woman … nothing to really see". (She gave similar evidence regarding the anal/vaginal touching: "I was an overweight, middle-aged woman, so what possible sexual connotation could there be. … So I had convinced myself that … his hand must have just slipped".) No words were exchanged between D.K. and the Registrant about the lifting of the sheet.

Credibility, similar facts and findings of fact

a) Credibility

[305] The Panel preferred the evidence of the four complainants to the evidence of the Registrant where the evidence was in conflict on the matters alleged in the Citation. The evidence of the complainants was uniformly clear and cogent, and appeared to the Panel to be based on a clear and specific recollection of their perceptions while in the treatment room, and of their emotional reaction at the time to those perceptions.

[306] L.T., for example, had no doubt that she felt first the Registrant's "groin" or "crotch", and then after a few minutes, his "semi-erect" penis pressing against her bare upper arm through his pants. She gave clear testimony that the Registrant was working across her back to the other

side of her body, that he was not moving up and down her body but was remaining in one spot, and that he maintained steady contact but that the pressure varied slightly with a slight back and forth "rocking" motion. Her evidence as to the contact she felt was detailed and precise. She felt the "heat, the shape … the dimension, the fleshiness of it. She felt it "growing on [her]". She was "sure" it was a penis and not some other part of the Registrant's body, such as his hip or abdomen. L.T. also described the later contact between the Registrant's "full erection" and the top of her head in similar detail: she said she could feel the "heat of it" and that "it was shaped like a penis". She could feel the "fleshiness" of it. She described a similar "rocking" motion to the one that had occurred at her side. Her evidence was not shaken on cross-examination. She was not challenged as to her general knowledge of or ability to perceive what a penis would feel like. She provided a plausible explanation for not saying anything to the Registrant about what she perceived was happening:

> I assumed that anyone who was rational-minded would pull themselves off if they were developing an erection and they were a professional. I would just assume he would lean -- not push harder and lean up against me further. So of course I was not trusting him. I did not say anything.

[307] L.T. had no previous knowledge of the Registrant and had no motivation to be untruthful. She had been to massage therapy many times previously, including with male practitioners. She made the appointment with the Registrant over the phone, so she knew she would be seeing a male practitioner. There was no suggestion that L.T. was uncomfortable or predisposed to be anxious simply because the Registrant was male. L.T. did not exaggerate, and conceded any gaps in her testimony. For example, she admitted that her eyes were closed for most of the session, except when she turned over. She did not speculate as to the Registrant's motivations.

[308] The Registrant's evidence regarding contact between his body and the Registrant's arm and head was both less clear and more tentative than that of L.T. To the question asked in cross-examination, "… did your lower body region come into contact with any part of [L.T.'s] body?", the Registrant answered:

> I don't know if it did. I don't specifically recall if it happened.

[309] The Registrant suggested that he was seated, rather than standing as stated by L.T., and stated that:

> When I am treating somebody's neck in the standard position where I am seated there may well be contact with my abdomen.

[310] He added:

> It's possible I made some contact with her, my abdomen on her head.

[311] The following exchange then occurred between Ms. Fong and the Registrant:

> Q Okay. And then is it also your evidence that it's possible that you were in contact with Ms. T's head with your abdomen for a period of about 10 minutes without your noticing?
>
> A I would notice if my abdomen makes fleeting contact, there may be some stretching, a little bit of movement involved, some contact. I don't think I would press my abdomen firmly to her head for a total of 10 minutes.

[312] It is not believable to the Panel that the Registrant "would notice" a "fleeting contact" between his abdomen and L.T.'s head, but does "not specifically recall" any contact between his "lower body region" and L.T. His evidence on that point struck the Panel as evasive and improbable. He was hesitant and appeared to be taking considerable care with the wording of his answers. L.T.'s evidence, by contrast, was given in a clear, forthright and straightforward manner. She appeared to be recounting her actual memories. Her evidence had the ring of truth.

[313] The Panel makes the same observations regarding L.T.'s evidence about the lifting of the sheet and the Registrant's viewing of her breasts. L.T.'s evidence was clear, detailed and precise. She described looking the Registrant in the eye while the sheet was lifted, even looking at his "pupil". She described making a sound, "kind of a gasp". She crossed her arms across her chest. She was certain that she saw the Registrant looking at her breasts. While giving this evidence, L.T. clearly felt some emotion. She paused briefly to compose herself. She struck the Panel as sincere and truthful.

[314] The Registrant denied looking at L.T.'s breasts, but in addition to a clear denial did what he did at various points in his testimony, which was to make reference to his standard or usual practice. An example is the following exchange, which occurred during the Registrant's cross-examination by Ms. Fong:

> Q And you're not of any aware of any fact why Ms. T would say that she saw you looking at her breasts?
>
> A I did not look at her breasts. My view is always obscured by the way I hold the sheet up. I don't know why she thought that I did. I never see that. And my practice is to ensure that I don't.

[315] He went on to testify that

> I think that if I did expose her breasts to my view, I would have clearly remembered doing so.

[316] While this is a denial, it seemed to the Panel to be an equivocal, uncertain denial, again in contrast to L.T.'s evidence, which was clear, forceful and unequivocal.

[317] V.S.'s evidence, like L.T.'s, was clear and convincing. It was obviously given as a matter

of specific recollection of the occurrences and of V.S.'s inward reaction to those occurrences. Like L.T., she had not known the Registrant prior to her first (and only) session with him. She had had considerable previous experience with massage therapy. She testified that the Registrant had unfastened her brassiere and had pulled down the sheet as well as her pants and underpants to just below her buttocks so that most of her buttocks were uncovered. In front, V.S.'s pants were pulled down to the "top of [her] pubic area". Her evidence was clear that while massaging steadily down her back, the Registrant reached under her left hip with his right hand and touched her somewhere near her "groin pubic area", though not actually on her vagina or in contact with her pubic hairline. V.S. testified that she was "alarmed" by the conduct as she had had "hundreds" of massages, and had never been touched by a massage therapist on that part of her body before.

[318] V.S. then testified as follows about the Registrant touching her genitalia (emphasis in bold added):

> Q So what happened next in the massage treatment?
>
> A The next part of the massage treatment was for me to bend my legs up, and Mr. Martin supported them on his right upper arm and shoulder and he pushed my bent knees into my chest. He did this three or four times. And following that manoeuvre, he lowered my legs, and my left one he let down first and then he lowered my right leg. He stroked with his fingers up my genitalia from the anus to labia.

[319] She described feeling his "hand and fingers" and the "pressure of a stroke" and said the duration was "a matter of seconds". Although she felt "mentally … shocked", no words were exchanged with the Registrant. Prior to the maneuver, the Registrant had not said anything to her about where his hands would be. She got dressed and left shortly after.

[320] The Registrant's evidence as to the alleged touch of her genitalia was again somewhat unclear and ambiguous. The following exchange occurred during the course of his cross-examination by Ms. Fong:

> Q I'm going to suggest to you that you knew that you touched Ms. K and Ms. S in their anal and vaginal areas through their clothes, that you knew that?
>
> A My standard practice is to take my hand away. And I do not recall doing it. I did not do that. And I did not know that I did that.
>
> Q Well, you do know that the anus and vaginal area feels quite different from the gluteal muscles around it; right?
>
> A I didn't touch the areas. And I wouldn't know -- I would have felt anything.
>
> Q Well, you know they feel different --

> A I've never actually -- on my clients, I've never actually had occurrence to touch the anal and vaginal regions. I don't know what they would feel like through clothing.

[321] The Respondent's evidence that he would not be aware of how a female patient's anal and vaginal regions would feel through clothing, because he does not touch those parts of his clients, struck the Panel as evasive. When performing the sacrum stretch maneuver, a patient is on her back with her buttocks and lower back curved upward off the massage table, as the therapist presses her knees toward her chest and places one hand on the sacrum. When concluding the maneuver, the hand underneath the patient, touching her sacrum, is pulled away and then the patient's legs are lowered back down. If this is done, a direct removal of the hand without physical contact should occur, consistent with the Registrant's own evidence that his "standard practice is to take [his] hand away". If the therapist's arm is pulled away while the lower part of the back is still in the air, then any contact with the patient's anus and vagina could only occur if (1) the arm were pulled upward, rather than straight back, or (2) the patient's legs had been released and her lower back lowered onto the therapist's hand. In this latter event, however, it is probable that the sensation of contact would be much more pronounced than the "stroke" or "brush" that V.S. and D.K. reported experiencing. Further, if the either V.S.'s or D.K.'s lower back had been lowered onto the Registrant's hand, it is difficult to imagine how the Registrant could have been unaware of any physical contact, as he stated.

[322] It should be noted that the Registrant was not unaware or unconscious of the proximity of the sacrum to the anus and the genitals: before performing the maneuver on D.K., she testified that he had to address her "visible" nervousness by reassuring her that he would be nowhere near her genitalia. Whatever the Registrant's awareness or lack of awareness of the feel of the vagina or anus through clothing, it was clear that he was aware that any contact between his hand and the patient's body as his hand was being removed from the sacrum would most likely be to those areas. Therefore, for the Registrant to testify that he would not have known what they felt like, or could not recall that touch occurring, or had no knowledge of the touch, is not evidence the Panel finds credible.

[323] D.K.'s evidence was likewise clear and cogent. She had already had five treatment sessions with the Registrant prior to the touching of her anal and vaginal area on February 1, 2013. She admitted that she told the College's investigator that up to that point, the Registrant had acted professionally with her. This would appear to represent a small inconsistency in her evidence, given that she had also testified that she felt a some awareness that the Registrant's lifting of the sheet when she turned over was "higher than that needed to be". However, she also gave evidence that she was discounting the possibility of a sexual component to the Registrant's behaviour, essentially because of what she perceived as her own unattractiveness ("overweight and middle-aged").

[324] D.K.'s evidence of the touch that occurred at the February 1, 2013 session was clear and precise:

Q Okay. And can you describe, again, before the manoeuvre happened, where your legs were?

A They were bent on the table, and my knees were bent with my feet laying flat on the table.

Q When your knees were being pushed up against your chest, can you describe where Mr. Martin was positioned in relation to you?

A He was positioned facing me near my hip area.

Q Okay. You said that Mr. Martin had his hand on your sacrum. Can you tell us what part or parts of [the Registrant's] hand you felt on your sacrum?

A He was -- it was, from what I recall, it was cupped, and then when he pulled his hand out, it felt like the full flat palm of his hand touched my genital area.

Q When your legs were released and they were coming down -- so this was after the manoeuvre – what was the position of your knees relative to each other?

A They were approximately shoulder width apart.

Q Can you describe what the contact felt like in your anal/vaginal area?

A It was just that continuous steady brushing.

Q Was there any pressure? Was there any pressure?

A Just a slight pressure.

Q Did you react when you felt the contact on your anus and vaginal area?

A I did. I was shocked and confused. I didn't understand why he did it. I just thought he must have -- his hand must have slipped or something. I just was maybe shocked, confused.

[325] D.K. testified further that because she had mentally attributed the Registrant's touch of her anal and vaginal area as a "slip" on his part, she allowed the Registrant to perform the same maneuver when he proposed it at their next session on February 12, 2013. She gave clear and specific evidence as to what she was wearing, her communication with the Registrant (in particular the fact that he made the suggestion about repeating the sacrum procedure), and that when the Registrant was pulling his hand out from under her back, he "brushed his hand once again steady continuous and slight pressure brushed his hand along my -- from my sacrum along

my anal and vaginal area". He then proposed repeating the procedure, and D.K. said she "froze" and "allowed him to do it again". He did so, and again on pulling back his hand on the completion of the procedure, he "brushed it – and basically the same way as the last two times -- from my sacrum along my anal and vaginal areas. With, again, slow -- sorry, continuous steady motion with slight pressure". D.K. testified that each of the three instances of the anal/vaginal "brushing" (the first on February 1, 2013 and the second and third on February 12, 2013) felt the same. No words were exchanged between her and the Registrant regarding these touches.

[326] The Panel found D.K.'s evidence with respect to the Registrant's touching of her anal and vaginal area to be clear, consistent and credible. D.K.'s evidence was internally consistent. She showed some emotion while giving her testimony, but remained contained. The Panel found her to be a truthful and forthright witness. She was clear about what she did not see – for example, that she did not see the Registrant's hand coming away from her sacrum. Her evidence was not shaken on cross-examination. When comparing D.K.'s clear, forthright testimony to the testimony of the Registrant regarding the three alleged sexual touching incidents on February 1 and February 12, 2013, the Panel found D.K.'s evidence more credible than that of the Registrant.

[327] With respect to D.K.'s evidence regarding the handling of the sheet and blanket covering her naked upper body, the Panel likewise found D.K.'s evidence clear and convincing. One factor to consider, which distinguishes D.K.'s case from those of A.W. and L.T., is that in D.K.'s case the sheet was lifted above her body in each of the seven sessions she attended. Even if D.K. had, as she testified, a perception that the sheet had been lifted higher off her body than necessary, this by itself was not enough to prevent her from returning for subsequent sessions, or to prevent her from telling the College's investigator, when she was interviewed, that the Registrant had acted professionally for the first five sessions. However, if – as Mr. Green strenuously argued in the course of a number of objections – D.K.'s conclusory statements that the Registrant's conduct was "calculating" and "deliberate" and amounted to (in her mind) "sexual assault" should be given no weight by the Panel as they went to the ultimate issue to be decided by the Panel, the same logic must apply to her statements that the Registrant had been "professional" for the first few sessions, or that she had initially put down the first touch on February 1, 2013 as a "slip" or a "goof". It was clear from D.K.'s testimony that she was reluctant to come to any conclusion that the Registrant had done anything inappropriate, and that it took a repeated occurrence of the touch on February 12, 2013 to bring her to that conclusion, which she subsequently also applied to the lifting of the blanket. The Panel understands that it is required to come to its own conclusion about the Registrant's intentions and state of mind, and gives weight to D.K.'s statements about the Registrant's intent or lack thereof only insofar as they shed light on D.K.'s state of mind, not on the Registrant's intentions.

[328] On the facts of the lifting of the sheet, the Registrant's evidence does not differ markedly from that of D.K., except that he did not testify as to lifting the sheet above the patient's body. He testified that, after turning from lying on their front to lying on their back,

> Sometimes they get tangled up in the sheet a little bit, so just small little motions to get that sheet out from underneath their shoulder, wherever it is, and then back down again. So by this time they're facing up.
>
> Very frequently the sheet is -- blankets are kind of disorganized and sheet's all over the place and the like. And I like to have a clean boundary and position of the sheet and blanket.
>
> So at the time, what my practice was, is I would walk around to the head, standing up and you're seeing -- looking down and I would see their head to be -- you know, close to their head. And I would pick the sheet most typically, sometimes bit of the blanket, move it up towards the face a little bit, maybe a couple of inches or so, and fold it over so that I would create not only a clear boundary, but also as a double coverage over -- for females double coverage over their chest.

[329] As was often the case with the Registrant's testimony on contentious points, he testified as to his "practice" or what he would "typically" do, despite the fact that on less contentious matters he appeared to have a clear memory of the massage therapy sessions at issue. His evidence, and the evidence of the complainants D.K. and A.W. (L.T.'s testimony was slightly different as she described the "wafting" or raising of the sheet as occurring from the side rather than from the back) was that the turning over of the patient would happen in two steps: (1) the Registrant would lift the sheet from the side, and have the patient turn over; and (2) the Registrant would then move behind the patient's head and adjust the sheet to cover the patient evenly. However, the need for this adjustment was unclear: although the Registrant testified that "blankets are kind of disorganized and the sheet's all over the place and the like", this was specifically contradicted by A.W.'s testimony that the sheet was "taut" when the Registrant lifted it, and that it was covering her evenly on both sides. Likewise, neither L.T. nor D.K. testified that the raising or wafting of the sheet was necessitated by the sheet being "all over the place". Even if it had been "all over the place" – which the evidence did not establish – it was the Registrant who had lifted and the lowered the sheet initially, and the Panel finds that it is unlikely that in each case that, even after the sheet was lowered onto a patient, it was sufficiently "disorganized" that it had to be raised above her body again to a distance that each of L.T., D.K. and A.W. testified to be between six and 12 inches. The Registrant's evidence (see above) does not specifically address the height of the sheet.

[330] On the issue of the lifting of the sheet above her body, the Panel, for the reasons given above, found the evidence of D.K. more credible than that of the Registrant.

[331] Finally, A.W.'s evidence regarding the lifting of the sheet was similar to that of D.K. in that she testified that the Registrant initially lifted the sheet from her side, allowed her to turn over (from lying on her front to lying on her back), and then moved to stand behind her head where he lifted the sheet again:

> … he walked up to the head of the table behind my head and he lifted the sheet way up off of my chest and held it up for quite a while. It seemed like forever. And then he put it back down, and then he lifted it up again. He did

this about three or four times.

[332] What was distinctive about A.W.'s testimony, however, was the detail that the Registrant lifted the sheet, when standing behind her, "three or four" times, as well as her subsequent evidence that the sheet was "taut" when lifted, and that it already covered her evenly. Even the Registrant's own testimony was that his practice was to adjust the sheet once when standing behind the patient, and that there would have been no reason for him to do it three or four times. He could not say with certainty that he had not done so, however.

[333] A.W. gave clear testimony but did not embellish or exaggerate. She admitted that she did not see the Registrant looking at her breasts. Her estimate of the time the sheet was held up was an estimate: "I'm guessing three to five seconds". She testified that he lifted it up "slowly" and "held it up at the top, like way up, way up there" and stated that Registrant did not explain what he was doing. She had not met the Registrant prior to her massage therapy session with him and had no reason to be distrustful or suspicious of him. There was no suggestion in cross-examination that she had any motivation to be untruthful. She was clear that she did not perceive any reason for the Registrant's repeated lifting of the sheet. By contrast, the Registrant's testimony – as quoted above – was replete with conditional or equivocal statements: "I don't think I would have done it [lifted the sheet] three or four times, no"; "I certainly don't recall doing that … it is not part of what I normally do"; "… there'd be no reason for me to lift it the amount that has been alleged". His evidence was equivocal, and there was no clear denial of the alleged conduct. For this reason, therefore, the Panel prefers the evidence of A.W. to the evidence of the Registrant on those points where their evidence is in conflict.

b) Application of similar fact evidence and findings of fact

[334] As set out above, the evidence of the Registrant during the hearing was often unclear, ambiguous or equivocal as to whether the acts as alleged in the Citation even took place. Even where the Registrant made what appeared to be a clear denial that a particular act had taken place, that denial was often accompanied by additional testimony from the Registrant that he did not recall the alleged event, or was uncertain as to whether or not the alleged event had taken place.

[335] However, as set out above, the Registrant's intention is an essential element of each act of alleged misconduct set out in the Citation. Before making any determination of misconduct under section 39(1) of the Act, the Panel must find not only that the acts set out in the Citation occurred as alleged, but also that they were intended by the Registrant. In order to do so, the Panel must find, on a balance of probabilities, and on the basis of "clear, convincing and cogent" evidence, that the acts in question were less likely to be attributable to accident or inadvertence on the part of the Registrant than to the Registrant's intent to perform or commit those acts.

[336] In the Panel's view, at least some of the physical contact that is alleged to have taken place is contact which, if it occurred, is highly unlikely to have been contact that the Registrant

was unaware of. If the Registrant pressed his erect or semi-erect penis against L.T.'s body for several minutes, while performing massage therapy, it defies reason and common sense to suggest that he would be unaware of that contact. Even if the Registrant did have an erection, and even if any initial contact was inadvertent, any contact sustained beyond the initial instant can only have been intentional. The Panel has already found L.T.'s account of feeling the Registrant's penis pressing against her arm, and later against her head, to be convincing and credible. The sustained duration of the contact, the rocking motion described by L.T., and the specific details of the touch perceived and testified to by L.T., are clear and cogent evidence that the contact occurred as described. That evidence is simply not consistent with any profferred defence of accident, uncertainty, or the contact having occurred with a different part of the Registrant's body. On the basis of the Panel's assessment of L.T.'s credibility as compared to the credibility of the Registrant's testimony in relation to the above conduct, the Panel finds that the conduct occurred as alleged, and that it was intentional and of a sexual nature. The Panel did not find it necessary to consider any similar fact evidence in making this finding.

[337] The "brush" or "stroke" along the anal and vaginal region that was described by V.S. as having occurred on one occasion, and by D.K. as having occurred three times in two sessions, was contact of a different nature and duration, lasting seconds rather than minutes. The Panel has found that the contact occurred as alleged. The contact was associated with a maneuver – the sacrum stretch – that had a therapeutic purpose. It was suggested on behalf of the Registrant that the contact, if it occurred – his evidence was unclear on whether it had or had not – was accidental. The fact of V.S. and D.K. being perhaps heavier than average was advanced as a potential explanation for why the Registrant might have been unable to withdraw his hand from the sacrum without making incidental contact with V.S.'s and D.K.'s anal and genital regions. It was suggested that the Registrant's fatigue might have been a factor. On the other side, however, are the facts that: (1) the contact with D.K. occurred three times over two sessions, and felt the same to her each time; (2) the Registrant specifically told D.K. before initially performing the sacrum maneuver on her that he would be staying away from her genitals; (3) the athletic therapist who performed the maneuver on D.K. did not make contact of the kind made by the Registrant; (4) Ms. Fleming's opinion, in paragraph 48 of her Report, was that a reasonably competent massage therapist would remove his/her hand from the patient's sacrum, horizontally along the table, while the patient's hips were still bent and their buttocks and upper legs not yet on the table. When one adds to this the distinctive similarity of the touch as experienced by V.S. and D.K. – the same sensation, the same duration, the same body parts, and at the same point in the same maneuver – the likelihood of these touches having occurred by accident or coincidence is minimal. On the basis of the Panel's assessment of the credibility of V.S. and D.K. as individual witnesses, as compared to the credibility of the Registrant's testimony in relation to the above conduct, the Panel finds that the conduct occurred as alleged, and that it was intentional and of a sexual nature. The Panel would have been prepared to make this finding solely on the basis of its assessment of the credibility of the evidence given by V.S. and D.K. as individual complainants, but did find that the similarity between their accounts lent additional weight to the Panel's finding.

[338] The touch of V.S.'s groin "adjacent to the pubic hairline" (Citation, subparagraph 8 c.) was the only such touch alleged in the Citation to be misconduct: a similar touch was testified to by A.W., but was not alleged as misconduct in the Citation. The Registrant agreed that this touch was intentional, though he denied sexual intent or that he had touched V.S. close to the pubic area. Rather, he said the touch of the underside of her hip was part of his palpative assessment of V.S. Even though the touch occurred on the side she was not feeling pain, the Registrant said that it was done to establish a "baseline" for treatment of her opposite hip. The following facts, however, lessen the credibility of the Registrant's account: (1) there was no corresponding touch or treatment on the right underside of the hip; (2) the allegedly palpative touch was done in the course of a massage of V.S.'s back and not part of an overall palpative procedure, contrary to the Registrant's own evidence of how he palpates a patient; and (3) the Registrant said nothing to V.S. about the touch, contrary to his evidence that he "checks in" with a patient when palpating, to see how they are feeling. While the evidence for sexual intent in relation to this touch is not as strong or compelling as in the instances above, the Panel does not accept the Registrant's explanation that the touch was palpative, for the reasons set out above. On the basis of the Panel's assessment of V.S.'s credibility as compared to the credibility of the Registrant's testimony in relation to the touching of her groin, the Panel finds that the contact occurred as alleged, and that it this contact was intentional and of a sexual nature. The Panel did not find it necessary to consider similar fact evidence in making this finding.

[339] With respect to the Registrant's alleged viewing of patients' breasts for a sexual purpose, the Panel found the evidence of L.T. to be the most clear and compelling of the three complainants in respect of whom this allegation was made (the other two being A.W. and D.K.). L.T. testified that she looked into the Registrant's eyes, saw him looking at her breasts, made a gasping sound, and crossed her arms across her chest. The Panel has found that evidence to be credible, and finds it improbable that the Registrant failed to perceive these actions. The Registrant denied having seen L.T.'s breasts by accident or at all. The Registrant did not behave consistently with his having seen or uncovered L.T.'s breasts by accident, which would be to acknowledge and apologize for the event. The further evidence of "sexual purpose" on the part of the Registrant consists of the absence of any therapeutic purpose for the Registrant to look at L.T.'s breasts, supported by L.T.'s evidence that the Registrant had a "full" and "firm" erection immediately after the viewing of her breasts took place. On the basis of the Panel's assessment of L.T.'s credibility as compared to the credibility of the Registrant's testimony in relation to the alleged lifting of the sheet for a sexual purpose, the Panel finds that this conduct occurred as alleged, and that it was done intentionally and for a sexual purpose by the Registrant. The Panel did not find it necessary to consider similar fact evidence in making this finding.

[340] With respect to A.W., in the Panel's view, the Registrant's lifting of the sheet three or four times, and holding it up for a few seconds each time, while standing behind A.W., is inconsistent with any innocent explanation for his conduct. The Registrant's testimony itself downplayed the possibility of accident. The condition of the sheet was, according to A.W., not such that that amount of adjustment could have been considered necessary. Although A.W. did not directly see the Registrant looking at her breasts, she became uncomfortable because she

could find no other explanation for his conduct in repeatedly raising the sheet above her body. Neither can the Panel. On a balance of probabilities, therefore, it must find that the Registrant's purpose in doing so was sexual in nature. The Panel did not find it necessary to consider similar fact evidence in making this finding, although it considered that the similar conduct of the Registrant testified to by L.T. and by D.K. lent additional weight to its finding.

[341] The evidence for the Registrant's alleged viewing of D.K.'s breasts for a sexual purpose is more difficult to weigh. She did give testimony about the Registrant's lifting of the sheet from the side and then again lifting and adjusting the sheet from behind her that was consistent with the Registrant's own evidence of his practice. The difference was that D.K. testified that the second lift of the sheet – i.e. the one that occurred when the Registrant was behind her – was "higher than [it] needed to be". However, the Panel must also take into account the fact that D.K. did, despite her internal misgivings, return to see the Registrant for a total of seven times, and told the College's investigator that the Registrant had acted professionally for the first five sessions. The Panel finds, however, that this is accounted for by D.K.'s own desire not to believe that anything inappropriate had occurred, and her own rationalization that it could not have occurred because she was not attractive enough for someone like the Registrant to take a sexual interest in her. In relation to all the evidence, including the evidence of the Registrant as to his usual practice (which did not refer to lifting the sheet even when behind the patient), the Panel found it necessary, in relation to this allegation, to take into account the pattern of conduct displayed by the Registrant's similar conduct with L.T. and A.W., in making the findings set out below. This allegation was therefore the only one in respect of which the application of similar fact evidence had a determinative effect on the Panel's finding.

c) Summary of findings of fact

[342] For the reasons set out above, the Panel has made the following findings of fact:

In relation to L.T.:

- That on October 11, 2013, the Registrant touched L.T. sexually and without therapeutic purpose by pressing his erect or semi-erect penis, through his clothing, against L.T.'s bare upper arm for between five and ten minutes during the provision of massage therapy services;

- That on October 11, 2013, the Registrant touched L.T. sexually and without therapeutic purpose by pressing his erect penis, through his clothing, against the top of L.T.'s head for between five and ten minutes during the provision of massage therapy services;

- That on October 11, 2013, the Registrant, after lifting the sheet so that L.T. could turn over, intentionally raised or "wafted" the sheet covering L.T. so he could view her breasts, which he did sexually and without therapeutic purpose;

In relation to D.K.:

- That the Registrant, in administering the sacrum maneuver on one occasion on February 1, 2013 and on two occasions on February 12, 2013, during the provision of massage therapy services, on each such occasion touched D.K. sexually and without therapeutic purpose by brushing his hand against her anal and genital region while withdrawing his hand from her sacrum;

- That the Registrant acted intentionally to view D.K.'s breasts sexually and without therapeutic purpose during seven massage therapy sessions in January and February 2013 by holding the sheet covering her away from her body after she had turned over on the massage table;

In relation to V.S.

- That the Registrant, in administering the sacrum maneuver on October 17, 2012, during the provision of massage therapy services, touched V.S. sexually and without therapeutic purpose by brushing his hand against her anal and genital region while withdrawing his hand from her sacrum;

- That the Registrant, while providing massage therapy services on October 17, 2012, touched V.S. sexually and without therapeutic purpose while massaging her hip, but reaching underneath her and touching her adjacent to her groin area;

In relation to A.W.

- That the Registrant acted intentionally to view A.W.'s breasts for a sexual purpose while providing massage therapy services during a massage therapy session on January 24, 2013 by raising the sheet covering A.W. three to four times after she had turned over on the table, and holding the sheet away from her body for three to five seconds each time.

DETERMINATION OF THE PANEL

[343] For the reasons and on the basis of the findings set out above, the Panel finds that the Registrant has committed professional misconduct in respect of all allegations set out in paragraphs 5, 9, 14 and 19 of the Citation.

[344] The Panel also finds that the Registrant's conduct was a breach of both section 1(2) and section 2(a) of the *Code of Ethical Conduct*. The complainants were vulnerable to the Registrant's conduct. The Registrant's conduct, viewed objectively, was of a sexual nature.

[345] For the reasons set out above, the Panel determines, pursuant to sections 39(1)(a), (b) and (c) of the Act, that:

1. The Registrant has failed to comply with the College's Bylaw 75, which requires each registrant to adhere to the College's *Code of Ethical Conduct*;

2. The Registrant has failed to comply with the professional standards set out in the *Code of Ethical Conduct*, specifically sections 1(2) and 2(a).

3. The Registrant has committed professional misconduct

The Panel is prepared to receive submissions as to the appropriate order to be made under section 39(2) of the Act, as well as on publication and costs, at a time and in manner agreed to by the parties.

REASONS FOR DECISION AND DETERMINATION of the Panel:

Abbotsford, BC June 26, 2015

Lynne Harris (Chair) Place Reissue Date

North Vancouver, BC June 26, 2015

Wendy Sanders, RMT Place Reissue Date

Vancouver, BC June 26, 2015

Rachel Shiu, RMT Place Reissue Date

Decision and Order Released: December 5, 2014

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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Donald Martin, RMT

(the "Registrant")

DECISION AND ORDER

(Preliminary applications of the College for orders pursuant to section 38(8) of the *Health Professions Act* and section 67(1) of the Bylaws)

APPLICATIONS HEARD IN WRITING

Counsel for the College:

Lisa C. Fong

Counsel for the Registrant:

John M. Green

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

Lynne Harris (Chair)
Wendy Sanders, RMT
Rachel Shiu, RMT

PROCEDURAL BACKGROUND

Registrant

The Registrant was issued certificate number 03114 on August 25, 1992.

Complaints

The applications before the Panel involve three matters arising from complaints made by or in relation to three female patients regarding the Registrant in 2013. Following consideration of each matter by the Inquiry Committee of the College, a Citation to Appear was issued against Mr. Martin in each of the three matters. The three matters are:

1. Complaint of and citation re D. [redacted] File No. 03114-01;
2. Complaint of and citation re V. [redacted] File No. 03114-02;
3. Investigation initiated by Inquiry Committee and citation re L. [redacted] File No. 03114-03.

(The citations in the above matters are collectively referred to as the "Citations").

Extraordinary action by Inquiry Committee in 2013

On August 16, 2013, a panel of the Inquiry Committee conducted an extraordinary oral hearing to determine whether it should take extraordinary action under section 35(1) of the *Health Professions Act* (the "Act") in relation to two complaints against the Registrant, namely, the [redacted] and [redacted] complaints. It decided not to do so, and that decision was communicated to the parties by letter on August 27, 2013. Subsequently, on October 21, 2013, the Inquiry Committee issued its formal written decision to take no action in relation to the [redacted] and [redacted] complaints.

On October 18, 2013, the College was contacted by a third individual (Ms. [redacted]) who alleged that the Registrant had engaged in sexual misconduct and threatening behaviour toward her. On November 14, 2013, the Inquiry Committee initiated an investigation pursuant to section 33(4) of the Act. On December 12, 2013, the Inquiry Committee issued a decision in relation to the [redacted] matter imposing conditions and restrictions on the Registrant's practice pursuant to section 35(1) of the Act (the conditions and restrictions imposed on December 12, 2013 are referred to as the "Practice Conditions", and are discussed further below).

Application for consolidation of citations

Citations in the three above-referenced matters were first issued by the College on August 28, 2014, and were subsequently issued in amended form (with new hearing dates in February and March 2015) on September 16, 2014. On September 3, 2014, counsel for the College, Lisa C. Fong, sent to the Registrant's counsel, John M. Green, a letter which dealt with a number of

hearing-related issues. Among other things, Ms. Fong advised that the College intended to apply for an order consolidating the three matters into a single citation for hearing, and sought the Registrant's consent to that application.

On September 4, 2014, Mr. Green replied to Ms. Fong's letter and advised, among other things, that the Registrant would not consent to consolidation. He also requested that submissions regarding the matter be heard orally. Attempts were made to find a date for hearing of the College's consolidation application on which legal counsel and each Panel member was available, but it proved to be difficult to find a date.

On September 23, 2014, the Panel issued a direction pursuant to s. 38(4.2)(c) of the Act stating that the consolidation application would be heard in writing, and setting out a timetable for the exchange for written submissions. The timetable provided that:

1. The College's application materials would be delivered by September 26, 2014;

2. The Registrant's responding materials would be delivered by October 16, 2014;

3. The College's Reply materials would be delivered by October 23, 2014.

The Panel's direction also stated that, should the Panel have questions arising from the written submissions, the Panel could convene in person or by teleconference in order to direct those questions to counsel; or, alternatively, the Panel could choose to direct questions to counsel in writing.

Written submissions were delivered in accordance with the September 23 direction and timetable. On October 23, 2014, after receiving the College's reply submissions, the Registrant's counsel advised by email that the Registrant "require[d]" a sur-reply of approximately three pages to address what were characterized as "new cases, arguments, and facts" set out in the College's reply submission. In a responding email, Ms. Fong cited *Strata Plan LMS 1816 v. British Columbia Hydro and Power Authority*, 2002 BCSC 313 for the proposition that sur-reply should only be permitted in "rare circumstances", and submitted that the Registrant had not raised any new or unanticipated legal issues that would justify granting permission to permit a sur-reply.

The Panel considered the sur-reply issue, and on November 4, 2014 caused a letter to issue to the parties advising of its decision to grant the Registrant leave to deliver a sur-reply. The Panel noted that, although it considered that the Registrant's request for sur-reply could have been articulated with greater specificity as to what allegedly constituted the "new cases, arguments, and facts" in the College's reply, in the interest of being as fair as possible to the Registrant, sur-reply would nonetheless be permitted. A sur-reply submission was subsequently delivered by Mr. Green on November 12, 2014.

The Panel met on Monday, November 17, 2014 in order to deliberate on the consolidation application, and had before it all materials referred to above, including all case law and other

authorities referred to in the written submissions, as well as the three Citations.

Reconsideration by Inquiry Committee/Extraordinary action by Discipline Committee

On September 23, 2014, Mr. Green applied to the Inquiry Committee pursuant to s. 35(4) of the Act for reconsideration of the Practice Conditions imposed on the Registrant on December 12, 2013. By letter dated October 23, 2014 from the College's Director of Compliance, Joëlle Berry, Mr. Green was advised of the Inquiry Committee's decision to reject the reconsideration request on the basis that there was "no new information ... indicating that the Order dated December 12, 2013 is no longer necessary to protect the public."

In the interim, however, on October 7, 2014 counsel for the College, Ms. Fong, had made application pursuant to s. 38(8) of the Act for an order of the Discipline Committee imposing the same Practice Restrictions as those imposed by the Inquiry Committee by its order of December 12, 2013. Ms. Fong asked that the Practice Conditions continue in effect until such time as any order was made under s. 39(2) of the Act. The specific wording of the two extraordinary action sections of the Act – s. 35(1) and s. 38(8) – and the implications of that wording, are analyzed below. For the moment, it is sufficient to note that it is implicit in the College's s. 38(8) application that the phrase in that subsection, "the time a hearing is commenced", applies to the Panel's consideration of a preliminary application such as the College's application for consolidation. In other words, it is the College's position that the hearing has been commenced by virtue of the Panel having convened to deliberate on the preliminary application to consolidate the citations; otherwise, and that this provides the Panel with jurisdiction to make an order under s. 38(8) at this time. It would also appear to be implicit in the College's position that the "commencement" of the hearing necessarily means that the Inquiry Committee's order made pursuant to s. 35(1) of the Act is no longer of any force or effect.

ISSUES

The issues for determination by the Panel on the two preliminary applications before it are as follows:

1. Whether the Practice Conditions imposed by order of the Inquiry Committee under s. 35(1) of the Act should be continued by this Panel under s. 38(8) of the Act, pending either a dismissal of the matter(s) under s. 39(1), or an order or orders under s. 39(2) of the Act, as the case may be;

2. Whether the Citations (as defined above) should be consolidated and joined into a single citation.

ORDER AND DIRECTION OF THE PANEL

For the reasons set out below, the Panel hereby orders that:

1. The Practice Conditions ordered by the Inquiry Committee on December 12, 2013 be and hereby are continued pursuant to s. 38(8) of the Act, effective as of the date of release of this Decision and Order (see Schedule "A" hereto for the specific restrictions and conditions imposed on the Registrant by this Order);

2. The Citations be and hereby are consolidated and joined into one single citation.

Pursuant to the order in paragraph 2, above, the Registrar of the College is hereby directed to join the citations in matters 03114-01, 03114-02 and 03114-03 into a single citation.

REASONS FOR DECISION

A: Section 38(8) application for continuation of Practice Conditions

The Act has two sections that deal with "extraordinary actions," which can consist of either a pre-hearing suspension of a registrant, or the imposition of limits or conditions on a registrant's practice. Extraordinary action can be taken either by the Inquiry Committee during the investigation of a complaint or pending a hearing (section 35), or by the Discipline Committee between the time a hearing has commenced and the making of an order under section 39(2) (section 38(8) of the Act).

Section 35(1) provides as follows:

> **35** (1) If the inquiry committee considers the action necessary to protect the public during the investigation of a registrant or pending a hearing of the discipline committee, it may, by order,
>
> (a) impose limits or conditions on the practice of the designated health profession by the registrant, or
>
> (b) suspend the registration of the registrant.

The Practice Conditions were imposed on the Registrant by the Inquiry Committee by order dated December 12, 2013, in reliance on section 35(1) of the Act. At the request of the Registrant's counsel, that order was reconsidered and reconsideration decision (upholding the original order) was communicated by letter dated October 23, 2014. This was done pursuant to section 35(4) of the Act, which provides that

> (4) If the inquiry committee determines that action taken under subsection (1) is no longer necessary to protect the public, it must cancel the limits, conditions or suspension and must notify the registrant in writing of the cancellation as soon as possible.

Once a discipline hearing has commenced, extraordinary action is governed by s. 38(8) of the

Act, which states as follows:

> (8) If the discipline committee considers the action necessary to protect the public between the time a hearing is commenced and the time it makes an order under section 39 (2), the discipline committee may impose limits or conditions on the practice of the designated health profession by the registrant or may suspend the registration of the registrant and, for those purposes, section 35 applies.

On October 7, 2014, counsel for the College delivered a written application and submission asking that the Panel continue the existing Practice Conditions under s. 38(8) of the Act, and proposing terms of a new section 38(8) Order that duplicate the terms of the existing Practice Conditions. The terms proposed are as follows:

a. The Registrant will notify the College immediately if at any time he changes the location of his practice of massage therapy between the time the hearing is commenced and pending any order of the College's Discipline Committee under section 39(2) of the Act;

b. The Respondent will post notices, at least 8 ½ by 11" in size, to be approved by the Registrar, in a prominent and unobstructed place in each treatment room he practices massage therapy in, specifying that a chaperone will be present for all visits with female patients and will keep those notices displayed permanently between the time the hearing is commenced and pending any order of the College's Discipline Committee under section 39(2) of the Act;

c. The Respondent will have up to three chaperones, such chaperones to be approved in writing in advance by the Registrar, and ensure that one of the three approved chaperones is present at all times during each visit with a female patient between the time the hearing is commenced and pending any order of the College's Discipline Committee under section 39(2) of the Act and that the cost of having an approved chaperone is his sole responsibility;

d. The Respondent will require the approved chaperone(s) to provide reports to the Registrar every two weeks, which will list the names of all female patients he has seen in the preceding two weeks, the condition that they were seen and treated for, and their contact information (including telephone number). The Respondent will require the approved chaperone(s) to provide these reports starting the first Monday after the date of this Order and every second Monday thereafter between the time the hearing is commenced and pending any order of the College's Discipline Committee under section 39(2) of the Act;

e. The Respondent will also require the chaperone(s) to report any sexual misconduct by him immediately to the College between the time the hearing is commenced and pending any order of the College's Discipline Committee under section 39(2) of the Act.

Attached to Ms. Fong's 3-page application for a section 38(8) order were the following additional materials in support of the application, all of which were reviewed by the Panel:

- Chaperone Reporting forms for various reporting periods between February 3, 2014 and August 11, 2014;

- Decision and Order of the Inquiry Committee dated October 21, 2013;

- Decision and Order of the Inquiry Committee dated December 12, 2013.

In essence, Ms. Fong's submission was that, despite the lack of any reported sexual misconduct by the Registrant's chaperones in 2014, there has been "no material change in circumstances" since the Inquiry Committee's order of December 12, 2013, and that the action taken by that order "continues to be necessary to protect the public", for the reasons set out in the December 12, 2013 reasons for decision. On the basis of the materials submitted to it, the Panel agrees.

The Registrant made no response to the College's application for an order under s. 38(8). However, as stated above, the Registrant's counsel Mr. Green had asked the Inquiry Committee on September 23, 2014 to reconsider the Practice Conditions under s. 35(4) of the Act. Mr. Green was subsequently advised by letter dated October 23, 2014 that the Inquiry Committee had considered the request for reconsideration and had determined to reject it on the basis that "no new information has been placed before the [committee] indicating that the Order dated December 12, 2013 is no longer necessary to protect the public."

The Decision and Order dated December 12, 2013 is some 19 pages long and deals primarily with allegations of sexual misconduct and threatening behaviour on the part of the Registrant in relation to Ms. [redacted] It also appears that evidence taken at a prior extraordinary hearing held on August 16, 2013, which involved allegations of sexual misconduct made against the Registrant by Ms. [redacted] and Ms. [redacted] was admitted on the basis of the "similar fact evidence" doctrine. Although the August 2013 hearing (which resulted in the Decision and Order of October 21, 2013) did not lead to extraordinary action being taken, the December hearing (which appears to have been conducted in writing) did.

The current application by the College for an order under section 38(8) continuing the Practice Conditions is unopposed. For this reason, the Panel does not find it necessary to set out, in this decision, the evidence presented to the Inquiry Committee in 2013. Having reviewed both the October and December 2013 decisions, Panel agrees with the December 2013 finding of the Inquiry Committee that the evidence presented to that committee did establish a *prima facie* case of inappropriate conduct on the part of the Registrant and a consequent risk to public safety. It also agrees that the *prima facie* standard (as opposed to the finding of a "strong" *prima facie* case or some other standard) was and is the appropriate standard to apply, and further agrees that the Practice Conditions represent the "least severe" possible restriction that will still safeguard the public. For these reasons, the Panel has made the order sought by the College pursuant to section 38(8) of the Act. Because that section provides that "section 35 applies" to this further Order of the Panel, the Registrant continues to have the ability to seek a further reconsideration under section 35 (4) should there be new information or circumstances that could lead the Panel to determine that the Practice Conditions are no longer required.

B. Application of the College for consolidation of the Citations

Jurisdiction

As pointed out in the College's Submissions on Application to Join Citations Under Bylaw S. 67(1) (the "College Submissions"), section 19 of the Act authorizes the board of a health professions college to make bylaws. The Panel further takes notice that subsection 19(1)(u)(iii) allows bylaws to be made that "provide for ... the duties and powers of the committee or a panel of the committee". (A "committee" is defined as any "committee established under paragraph (t)", which includes the Discipline Committee.) Section 38(4.2)(c) allows the Discipline Committee, in connection with a hearing, to make any direction it considers appropriate.

Section 67(1) of the College Bylaws state that:

> On the direction of the Discipline Committee, the Registrar may join one or more complaints or other matters which are to be the subject of a discipline hearing in one citation as appropriate in the circumstances.

The jurisdiction of the College to join the three Citations, if appropriate, is clearly established. This jurisdiction is not contested by the Registrant: in the Registrant's responding submissions entitled "Martin – College Joinder Application" (the "Registrant's Response" or "Response"), at page 3, it is conceded that "[a] professional college or law society can hold multiple charges together in one hearing." The issue, therefore, is not whether the Panel has the ability to order joinder or consolidation (the two terms are treated herein as interchangeable and synonymous). It is, rather, whether it is appropriate to make such an order in these circumstances.

Positions of the parties

The College's position

The College submits that the joining of the three complaint matters involving the Registrant would be appropriate, and further submits that, in this case, a single hearing (rather than three separate hearings) would be efficient and would not prejudice the Registrant. Part of the reason for the College wishing to join the Citations is that, as disclosed in the College Submissions (see paras. 42 and following), it intends to bring a preliminary application for a direction "expressly permitting the College to introduce the evidence of each complainant not only for her own matter, but also in relation to the two other complaint matters."

The College does not seek leave to introduce similar fact evidence on this application, although it clearly intends to do in the future. It submits that the issues of consolidation and similar fact evidence are related:

> ... given that the issue of similar fact evidence remains to be resolved, the extent to which

> a single hearing will be *more efficient* than three separate hearings is increased by the likelihood that, if matters are not joined in one citation, all three complainants will then have to testify in three different hearings.
>
> [College Submissions, para. 48, emphasis in original]

The College submits that the three complaints raise common issues and are likely to elicit common responses from the Registrant, "such that they are most efficiently and justly considered by a single panel in a single hearing." It further submits that the Panel may consider such factors as delay, inconvenience and the length of proceedings, and that these proceedings would be "unduly protracted" if three separate hearings were to be held, in that the complainants and any expert witnesses could be required to repeat their testimony on more than one occasion.

The College also submits that holding three separate hearings raises the possibility of inconsistent findings by different panels on the same facts, thereby bringing the administration of justice into disrepute, and adversely impacting the public's perception of the ability of the Discipline Committee to make fair and just decisions.

Finally, the College submits that the nature of this proceeding – i.e. the fact that this a professional disciplinary proceeding rather than a criminal proceeding – must be borne in mind, and that the Panel must apply administrative law rather than criminal principles in deciding what is or is not fair and appropriate in the circumstances.

The legal authorities relied on by the College will be addressed below.

The Registrant's position

The Registrant objects to an order joining the Citations on the basis that "holding these three hearings together will deny the [Registrant] the right to a fair and impartial hearing where each of the complaints can be tried on their own merits" (Registrant's Response, page 1). He also argues that the Panel should not join the three citations into one, since if this "is eventually found by a court to violate natural justice or procedural fairness, as has been found in other cases, the result could mean holding three hearings again – with the attendant massive cost to all RMTs" (Registrant's Response, page 3).

The Registrant submits that the College's Submissions suffer from "at least three main flaws", which are said to be: (1) a failure to cite the proper legal test for whether joining the Citations is appropriate; (2) "speculative guesses" on what evidence will be led at the hearing(s); and (3) the application of administrative law principles "to a case which is already governed by a specific case in British Columbia (*Hirt*)".

The Registrant follows this overview with submissions on the standard of proof that he says will apply at the disciplinary hearing. This argument is addressed in the College's Reply Submissions On Application to Join Citations under Bylaw 67(1) ("College's Reply") by the citation of the

Supreme Court of Canada's decision in *F.H. v. McDougall* (2008), 297 DLR (4th) 193 and the submission that the Registrant has incorrectly asserted a pre-*McDougall* standard of proof as being applicable. While the Panel accepts the College's position on this point as correct, it does not find the issue of standard or burden of proof to be helpful in determining the appropriateness of joining the Citations, and will therefore not address the point further in these Reasons.

The Registrant places considerable reliance on a case called *Hirt v. College of Physicians and Surgeons of B.C.*, 1985 CanLII 462 (BCSC), and the appeal of that case, reported as *Hirt v. College of Physicians and Surgeons of B.C.*, 1986 CanLII 746 (BCCA). He asserts that *Hirt* is "the leading case in British Columbia on the issues before this Panel" and also "a leading case on the matter of similar fact evidence and its use in College disciplinary proceedings in British Columbia." He further asserts that *Hirt* "governs the circumstances of this case" and that the Panel "must follow the leading decision [in] BC, and that is the Hirt decision." The applicability of the *Hirt* cases is discussed below.

The Registrant also places substantial reliance on a Supreme Court of Canada decision called *R. v. Last*, [2002] S.C.R. 146, submitting that this case provides a "framework" for considering whether it is just to combine the three complaints in this case into a single hearing, and arguing that the College's Submissions do not meet the requirements set out in *Last*. This case will also be discussed below.

Additional submission of the Registrant

As stated above, the College's Reply was delivered on October 23, 2014. Upon receipt of that document, the Registrant's counsel sought and was granted leave to deliver a brief sur-reply, which he did by letter dated November 12, 2014 (the "Sur-reply").

Reasons of the Panel

Factors to be considered in determining whether consolidation/joinder is appropriate

It appears to the Panel that the initial questions it must ask itself are:

1. What factors should be considered in determining whether or not joining the Citations is appropriate?

2. Are those factors present in this case?

In terms of question 1, above, the College's submissions set out the following factors:

1. The similarity of the charges or allegations made against the Registrant;
2. The presence or absence of manifest prejudice to the Registrant;
3. The greater efficiency of a single hearing;
4. The public interest in avoiding the delay that would be incurred by three separate

hearings;

5. The possibility of inconsistent findings (e.g. regarding credibility) if three separate hearings are held.

The Registrant's Response does not appear to disagree in substance that the above factors are the relevant ones, although it of course disagrees as to the conclusion they point to. The Response uses slightly different language to characterize the factors, citing the following paragraph from *R. v. Last*:

> [18] The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. Factors rightly used include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons ...

Some of these factors mentioned in *Last* either do not arise on the facts of the case before the Panel (there is no "co-accused" in the case before the Panel, for example), or are much more likely to arise in a criminal proceeding such as *West* (for example, the "accused" testifying on one count but not another) than in an professional discipline proceeding, which has a different standard of proof and no *Charter* right against self-incrimination. Also, a number of the factors mentioned in *West* would appear to argue in favour of consolidation, at least to some degree, even without considering the similarity of the allegations, such as the desire to avoid a multiplicity of proceedings, the length of the trial (hearing, in this case), and even the Registrant's right to have the allegations against him determined within a reasonable period of time (a factor which is omitted from the table at pages 6 and 7 of the Response).

The factors that appear to the Panel to be the most relevant will now be discussed.

Similarity of allegations/legal and factual nexus: The issue of the similarity between allegations is raised at paragraphs 5-8 and 34-36 of the College's Submissions. It is also raised in the Registrant's Response, although it is referred to there, following *West*, as "the legal and factual nexus between the counts" (and it is denied that such nexus exists). The College's argument is that the similarity of the allegations is established by the fact that they all involve the Registrant, and they involve similar and overlapping allegations of the same or very similar types of sexual misconduct in relation to the three complainants, both in terms of improper touching and improperly looking at unclothed areas of the body. The Registrant denies that there is any similarity among the allegations made in the three Citations (his specific submission is that there "is no factual nexus between the counts"), but provides no argument as to why the allegations against the Registrant should be considered dissimilar.

The Panel agrees with the submissions made on behalf of the College that there is a strong or

striking similarity between the conduct alleged in the Citations. In respect of two of the three complainants (Ms. [redacted] and Ms. [redacted], it is alleged that the Registrant ran his hand or fingers up their anal and genital areas. In respect of Ms [redacted] and Ms [redacted] the allegation is made that the Registrant lifted the sheet and looked at their naked breasts while they were turning from a face-down to a face-up position. In respect of Ms. [redacted] it alleged that the Registrant pressed his semi-erect penis against her arm and against the top of her head, which, if it occurred, is similar to the other touching allegations as it involves sexual contact between the Registrant and a patient. Finally, a key and inherent point of similarity – which does not arise in the criminal law cases dealing with joining or severing matters and with similar fact evidence – is that all of the alleged conduct occurred while the Registrant was providing treatment to the complainants in a professional context.

The Panel is aware that the hearing of similar evidence from different complainants in a single hearing gives rise the possibility that the evidence of one witness could impermissibly be used as corroboration of another witness's testimony, in the event that the introduction of similar fact evidence is not permitted. If this were to occur, it could create the type of "manifest prejudice or injustice" referred to in the case law (see for example *Deitel v. College of Physicians and Surgeons of Ontario* (1997) O.A.C. 241 (Div. Ct.) and *Re Stone and Law Society of Upper Canada*, [1979] O.J. No. 4376 (Div. Ct.)). At the same time, should the College seek and be granted permission to introduce similar fact evidence at the hearing, there is no question that the introduction of such evidence, and the ability of the Panel to consider it, would be facilitated by having all evidence heard at the same hearing, rather than three separate hearings.

Finally, the Panel reiterates that it is aware that, should it decide that similar fact evidence will not be admitted at the hearing, it will be necessary for the Panel to be scrupulous to apply the evidence in respect of each complaint only to the determination of that complaint, and not to the determination of the other matters heard. However, the Panel agrees with the College's submission that there are cases demonstrating that this can be done, and that it should not be presumed that the Panel will inevitably be unable to act appropriately. In *Re Stone*, *supra*, the Ontario Divisional Court ruled on an argument made by a lawyer that the counts against him in a Law Society hearing should have been dealt with by separate committees in separate hearings, rather than in one hearing. The court concluded as follows:

> 15 The record indicates that the Committee was careful to keep separate notes on each count or group of counts and to consider each separately. There is no overt conclusion appearing in the reasons given by the Committee to suggest any bias on their part.
>
> ...
>
> 17 In our view, the Committee was within its rights in directing the hearing to proceed as they did. We see no manifest prejudice or injustice to the solicitor.

Although the reasoning in *Stone* was based in part on the fact that two members of the original panel were legally trained, this Panel accepts the submission made at paragraph 35 of the College Submissions, citing the text *Administrative Law in Canada*, that the same principle can apply to an administrative hearing, provided the tribunal takes care to consider the evidence appropriately.

Efficiency/length of hearing and related factors: Common sense indicates that one hearing at which three complainants give evidence will almost certainly be shorter than three individual hearings. When one adds the possibility that there will be other witnesses, and the possibility that similar fact evidence could be admitted in relation to each of the three Citations (meaning that each of the three complainants might be required to testify at each of the three hearings), a single hearing could be substantially more efficient.

Counsel for the College and counsel for the Registrant have provided substantially different estimates of the overall length required for a hearing or hearings. The College has estimated that a combined hearing would require three weeks, and that holding individual hearings would require approximately the same amount of time per hearing. Presumably this estimate is based on the assumption that the same witnesses would be testifying at each hearing, that is, that similar fact evidence would be admitted. By contrast, the Registrant estimates that three days per hearing would be required for each of three individual hearings. Presumably, this estimate is based on the assumption that similar fact evidence would *not* be admitted.

The Panel is not in a position to decide which of the two estimates is more accurate. However, it is obligated to consider whether holding three separate hearings would unduly protract the proceedings. In the Panel's view, it would. Irrespective of what evidence may or may not ultimately be admitted, there are a number of procedural steps that would have to be repeated for each of three individual hearings, from pre-hearing matters to the panels' final deliberations and preparation of a decision on verdict, and (if applicable) decisions on sanction, costs and publication. When one adds the possibility that similar fact evidence could be admitted, the potential efficiency gains that arise from holding a single hearing are even greater.

There is, in the Panel's view, another consideration of efficiency to be considered in the context of a regulatory proceeding, governed by a statutory public interest mandate under the Act, a consideration does not arise in the criminal law severance cases cited by the Registrant. The College's resources and even its pool of available adjudicators is not unlimited, and an order that the hearings proceed separately would necessarily mean that a final determination of all matter set out in the Citations would take considerably longer to achieve than would be the case with a single hearing. As the College submits, the stress on complainants would be greater, particularly for those complainants whose matters were delayed. And if separate hearings are held, and similar fact evidence is permitted, the stress and inconvenience to the complainants, who would now be asked to testify as to the same matters in three separate proceedings, would be substantially greater.

Re Stone, supra, indicates that it is relevant in a professional disciplinary matter to consider these types of public interest factors when deciding whether or not consolidation is appropriate:

> **16** It should be remembered as well that the "ends of justice" here include not only the interest of the solicitor, but also the interest of the public and the society whose duty it is to safeguard the public. Here the interest of the public requires that the

> investigation into the solicitor's alleged misconduct be carried out expeditiously. If six separate committees were struck involving 18 different Benchers with the evidence to be heard by each one after the other, the proceedings would, in our view, be unduly protracted. ...

Another factor related to efficiency cited in *Re Stone* is the desire to avoid a multiplicity of proceedings. The Registrant concedes that the desire to avoid multiple proceedings is a relevant factor, but states (correctly, in the Panel's view) that this factor is always present and "must be balanced against the other factors". The Panel agrees that it must balance all relevant factors in arriving at its decision, and that the desire to avoid multiple proceedings, while an important factor, is only one of many.

Prejudice to the Registrant: The Panel is aware of its obligation to conduct this proceeding in a manner that is procedurally fair to the Registrant. The efficiency and other considerations discussed above should not trump the Registrant's right to fairness. At the same time, the Panel accepts the College's submission that fairness in the professional disciplinary context is not necessarily the same as fairness in a criminal trial (*Latulippe c. Collège des médecins*, 1998 CanLII 12943 (QCCA)). If joining the Citations would cause "clear" or "manifest" prejudice to the accused or be otherwise unjust, it would be unfair and should not be done.

The Panel has carefully reviewed both the Registrant's Response and the Sur-reply and finds no compelling argument demonstrating how joining the Citations would be unfair or cause prejudice to the Registrant. In the Response (at page 3), the Registrant states that

> ... if [a ruling is made] that three complaints can be considered in a single hearing, and holding them together is eventually found by a court to violate natural justice or procedural fairness, as has been found in other cases, the result could mean holding three hearings again – with the attendant massive cost to all RMTs.

The difficulty with this argument is that it is both speculative and does not clearly demonstrate what actual prejudice to the Registrant would result from joining the Citations. The College has submitted that procedural fairness does not require separate hearings, and has cited numerous professional disciplinary cases involving more than one allegation against a professional (College Submissions, paragraphs 31 and 32). Even the Supreme Court of Canada's decision in *R. v. Last*, a case relied on by the Registrant, makes it clear that there is no absolute rule requiring separate hearings in all cases, and that the interests of justice may even require the opposite:

> Courts have given shape to the broad criteria established in s. 591(3) and have identified factors that can be weighed when deciding whether to sever or not. The weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial. ***It is important to recall that the interests of justice often call for a joint trial.*** ... Severance can impair not only efficiency but the truth-seeking function of the trial.
>
> [*R. v. Last, supra*, at para.17 – emphasis added]

The Panel concludes that there is no manifest or unfair prejudice to the Registrant that would result from the Citations being joined.

The *Hirt* case: is there an absolute rule against hearing matters together?

The Registrant's argument, both in the Response and the Sur-reply, places substantial reliance on the upper and lower court decisions in *Hirt v. College of Physicians and Surgeons of British Columbia* (*supra*). He argues that *Hirt* is the "leading case in British Columbia on the issues before this Panel" and that "governs the circumstances of this case". He further submits that "It is also a leading decision on the matters of similar fact evidence and its use in College disciplinary proceedings in British Columbia." (In that regard, he cites as an example the decision of the Real Estate Council of British Columbia in *Canosa (Re),* 2012 CanLII 39550.) Finally, he says that "the Supreme Court of British Columbia decision in *Hirt* suggests that the similar fact evidence rule is a rule which the Panel is bound by" and that the Panel "must follow" *Hirt.*

The Panel does not accept these submissions, for the reasons set out below.

In *Hirt*, a doctor had been found by the College of Physicians and Surgeons of British Columbia ("CPSBC") to have been guilty of "infamous conduct" by having sexual relations with two women while they were still his patients. It ordered that his name be struck from the register.

Dr. Hirt appealed that decision to the BC Supreme Court on two broad grounds: (1) the sufficiency or cogency of the evidence used by the CPSBC committee that heard the case, and (2) alleged breaches of procedural fairness, including the allegation that the CPSBC erred in hearing the evidence of both female complainants in one hearing. On the first ground, there was also a subsidiary issue as to whether, in the case of one of the women ("Dr. A"), a doctor-patient relationship existed at the time of the sexual conduct. Dr. A had been a psychiatric resident who had received treatment from Dr. Hirt. Although their professional relationship had ended before any sexual contact occurred between them, the CPSBC found that there had been a "continuing professional influence" and found Dr. Hirt guilty on that basis. The court rejected this finding on the basis of Dr. A's evidence that she considered the therapeutic relationship to be over well before she had any sexual contact with Dr. Hirt. The court therefore concluded that the CPSBC committee conducting the hearing had erred by failing to consider evidence that "strongly negates the existence of a continuing professional relationship" (para. 23).

In the case of the second woman ("Mrs. A"), the court found that there was a serious inconsistency in her evidence regarding the dates (of the alleged sexual intimacy) between herself and Dr. Hirt that she provided in her complaint, as opposed to the dates she testified to at the hearing, and that it had been a "grave omission" for the committee not to have considered that inconsistency in assessing Mrs. A's credibility.

In the case of both Dr. A and Mrs. A, the court found that there had insufficient evidence present to the hearing committee to justify the verdict rendered by the CPSBC.

The court's consideration of the similar fact evidence issue is relatively brief – approximately two pages of a 20-page decision – and concludes that:

> ... there can be little doubt that the inquiry committee [of the CPSBC] reached its decision on each case or charge influenced by the evidence of the other.

It does not appear, however, that consideration of the potential admissibility of similar fact evidence was argued or considered at the original CPSBC hearing, either before or after the introduction of the evidence, or that any specific ruling was made on that issue. Rather, it appears that prosecuting counsel simply submitted that each woman's evidence could be taken as corroborative of the other without having provided the hearing committee with the legal basis for making such a ruling. That alone would appear to distinguish *Hirt* from the present case before the Panel, where it is clear that the use of similar fact evidence will be a contested issue at the hearing, and that the Panel will be provided with submissions and authorities on that issue.

Another difficulty with the BC Supreme Court's decision in *Hirt* lies in what appears to be a suggestion that there is an absolute rule against the use of such evidence at all time and in all circumstances. For example, citing a 1919 case called *Rex. v. King*, 2 WWR 877, *Hirt* states that "The practice of mixing up trials is condemned in all the cases as objectionable." However, there is in fact no rule that applies to "all" the cases", as been made clear by the Supreme Court of Canada (see quote from *R. v. Last*, above), by the many professional discipline cases in which multiple allegations have been combined, and by the Registrant's own admission that "[a] professional college or law society can hold multiple charges together in one hearing." The Registrant is correct to say that similar fact evidence is "presumptively inadmissible", but this only means that the party seeking to introduce such evidence bears the burden of demonstrating that the use of similar fact evidence is appropriate in a given case. On that point, there appears to be no actual disagreement between the College and the Registrant.

When the British Columbia Court of Appeal heard the College's appeal from Justice Gibbs' ruling in *Hirt*, it expressly chose not to address the alleged procedural unfairness caused by hearing both complainants' evidence together in one hearing. The deciding issue on the appeal was whether Dr. Hirt still held a "professional influence" over Dr. A at the time of their sexual relationship. On that point, the Court of Appeal agreed with the lower court's finding that there had been insufficient evidence to justify arriving at that conclusion. It therefore stated that it was "unnecessary to consider the remaining grounds" advanced on the appeal. The Court of Appeal's decision does not discuss similar fact evidence at all, nor does it address the lower court's reasoning on that issue.

The *Hirt* cases, taken together, clearly stand for the proposition that a professional should not be found guilty of misconduct on insufficient evidence, but they say little if anything about the use of similar fact evidence that is generalizable to other cases. Whether or not the lower court decision in *Hirt* on the similar fact issue was correct, *Hirt* cannot be read as setting out a general and inflexible rule to be applied in all cases. It therefore follows that the Panel retains discretion

to balance the relevant factors in a manner that is appropriate to the case before it, and is not "bound" by the result in *Hirt* in the manner suggested by the Registrant.

The Panel also wishes to address the Registrant's submission that *Hirt* "is also a leading decision on the matters of similar fact evidence and its use in College disciplinary proceedings in British Columbia." Cited in support of that assertion is a decision of the Real Estate Council of British Columbia, namely *Canosa (Re),* 2012 CanLII 39550. A review of the *Canosa* decision is instructive: the mention of *Hirt* in that decision occurs through a citation from another case, *Jory v. College of Physicians and Surgeons of British Columbia* ([1985] B.C.J. No. 320, BCSC, in which *Hirt* is cited for the proposition that "the evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community." In other words, the only reference to *Hirt* in *Canosa* relates to the issue of sufficiency of evidence – it does not say anything about the use similar fact evidence. (In fact, at the very end of the *Canosa* decision, under the heading "List of Exhibits", Exhibit 1 is entitled "Waiver by Mr. Canosa agreeing that all matters can be heard together".) It would appear that the *Canosa* decision does not support the proposition for which it is cited by the Registrant.

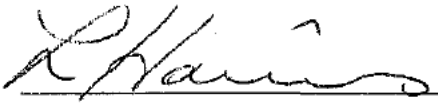
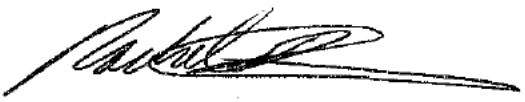
Finally, the Panel notes that one of the cases that was relied on in *Hirt*, namely *Kerster v. College of Physicians and Surgeons of Saskatchewan* (1970) 72 WWR 321, was expressly disapproved of in the Ontario Court of Appeal's decision in *Re College of Physicians and Surgeons of Ontario v. K.* [1987] O.J. No. 168. (at paras. 43-44), which held that the court in *Kerster* had misapprehended the test for the admissibility of similar fact evidence.

C. Conclusion and applicability of the "rules of evidence"

Both parties devoted portions of their argument to the question of whether and to what extent this Panel is bound to apply "court rules of evidence", the Registrant arguing for a stricter standard of admissibility, the College taking the position that, as an administrative decision-making body, the Panel is not bound by formal rules of evidence.

Because the issue of joining the Citations was a pure legal issue and was decided on the basis of the allegations in the Citations and the applicable law, the Panel did not find it necessary, for the purposes of deciding the application, to decide whether different evidentiary standards apply to administrative law proceedings and court proceedings. In the Panel's view, the principles set out in the court decisions cited by both parties provide a sufficient basis for concluding that there will be a genuine issue at the hearing as to the admissibility of similar fact evidence. The matter of the evidentiary standard to be applied to professional disciplinary proceedings is one that may be more appropriately addressed at that time.

REASONS FOR DECISION AND ORDER of the Panel:

	Vancouver, BC	December 4, 2014
Lynne Harris (Chair)	Place	Date
	North Vancouver, BC	December 4, 2014
Wendy Sanders, RMT	Place	Date
	Vancouver, BC	December 5, 2014
Rachel Shiu, RMT	Place	Date

SCHEDULE "A"

Terms of Order made by Panel pursuant to section 38(8) of the Act

a. The Registrant will notify the College immediately if at any time he changes the location of his practice of massage therapy pending any order of the College's Discipline Committee under section 39(2) of the Act;

b. The Registrant will post notices, at least 8 ½ by 11" in size, to be approved by the Registrar, in a prominent and unobstructed place in each treatment room he practices massage therapy in, specifying that a chaperone will be present for all visits with female patients and will keep those notices displayed permanently pending any order of the College's Discipline Committee under section 39(2) of the Act;

c. The Registrant will have up to three chaperones, such chaperones to be approved in writing in advance by the Registrar, and ensure that one of the three approved chaperones is present at all times during each visit with a female patient pending any order of the College's Discipline Committee under section 39(2) of the Act and that the cost of having an approved chaperone is his sole responsibility;

d. The Registrant will require the approved chaperone(s) to provide reports to the Registrar every two weeks, which will list the names of all female patients he has seen in the preceding two weeks, the condition that they were seen and treated for, and their contact information (including telephone number). The Registrant will require the approved chaperone(s) to provide these reports starting the first Monday after the date of this Order and every second Monday thereafter pending any order of the College's Discipline Committee under section 39(2) of the Act;

e. The Registrant will also require the chaperone(s) to report any sexual misconduct by him immediately to the College pending any order of the College's Discipline Committee under section 39(2) of the Act.

Decision and Order Released: January 14, 2015

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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Donald Martin, RMT

(the "Registrant")

DECISION AND ORDER

(Preliminary application of the College for order pursuant to section 67(1) of the Bylaws, and other preliminary relief sought by both parties)

APPLICATIONS HEARD IN WRITING

Counsel for the College:

Lisa C. Fong

Counsel for the Registrant:

John M. Green

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

Lynne Harris (Chair)
Wendy Sanders, RMT
Rachel Shiu, RMT

PROCEDURAL BACKGROUND

Previous citations and consolidation order released December 5, 2014

On December 5, 2014, the Panel released a Decision and Order (the "December 5 Order"), which among other things directed the College's Registrar to join the following three citations that had been issued against the Registrant into a single citation:

1. Citation re [redacted]
2. Citation re [redacted]
3. Citation re [redacted]

The December 5 Order was made pursuant to section 67(1) of the College Bylaws, and in response to an application by the College dated September 26, 2014. That application, which was contested, was dealt with by way of written submissions delivered in accordance with a schedule set out in a procedural direction of the Panel dated September 23, 2014, with an additional and final submission being a sur-reply submission of the Registrant delivered on November 12, 2014.

The above citations, which were consolidated pursuant to the December 5 Order, are referred to below as the "Consolidated Citations".

New complaint and citation

On November 10, 2014, a further complaint regarding the Registrant was filed with the College by [redacted]. A citation alleging misconduct by the Registrant in relation to Ms. [redacted] was subsequently issued on December 12, 2014 (the "[redacted] Citation").

Application for further consolidation of citations and other relief sought by College

On December 15, 2014, the College applied for an order joining the [redacted] Citation to the Consolidated Citations pursuant to section 67(1) of the Bylaws, as well as an order directing the Registrar to issue a Further Amended Citation in the form attached to the College's application materials (apart from the substantive relief sought, the Further Amended Citation makes what might be described as some minor administrative or "housekeeping" changes and corrections).

By email dated December 18, 2014, the Registrant's counsel Mr. Green advised that he had received the December 15 application and submission from Ms. Fong, and that his client took the following position:

> Mr. Martin objects to the consolidation of the [redacted] complaint with the others, and on the same basis as in his prior submissions in response to the consolidation of those matters. The facts of Ms. [redacted] [*sic*] case do not resemble the facts of the others and its addition only enhances the unfairness of holding these hearings together.

There was no indication from Mr. Green as to whether the Registrant intended to deliver a more formal responding submission to the second consolidation application. On December 22, 2014, the Panel issued a direction pursuant to section 38(4.2)(c) of the *Health Professions Act* (the "Act"), stating that the Registrant could deliver a responding submission by January 7, 2015, failing which Mr. Green's email of December 18, 2015 (the relevant portion of which is quoted above) would be treated as the Registrant's response. No further submission was received from the Registrant in relation to the new application.

In her letter of December 15, 2014, Ms. Fong advised that the College also sought an order directing the Registrant to "provide, by Friday, January 9, 2015, written notice of any preliminary applications that he intends to make." That matter is also addressed below.

Letter of January 8, 2015 on behalf of Registrant and College's response of January 12, 2015

On January 12, 2015, when the Panel met to deliberate on the College's application to consolidate the [redacted] Citation and the Consolidated Citations, it was also presented with a letter from Mr. Green dated January 8, 2015, and Ms. Fong's response dated January 12, 2015.

Mr. Green's letter requests that the Panel order that the Panel "issue a subpoena" requiring the following individuals "to submit to cross-examination by counsel for Mr. Martin":

- Mr. Taras Hyrb (investigator)
- "All complainants" (the names are not specified by Mr. Green but the Panel's assumption is that this is intended to refer both to three complainants whose complaints gave rise to the Consolidated Citations as well as to Ms. [redacted])
- Ms. Joëlle Berry (the College's Director of Compliance)
- Ms. Karen Fleming, the College's proposed expert witness (as an alternative to other relief sought)

The letter also requests that any documents "made, received or obtained" by the above individuals "be provided to [the Registrant's] counsel no later than 14 days before the start of the hearing."

In relation to the above, the Registrant's submission is that "he will be unduly prejudiced should the abovementioned individuals fail to attend at the hearing, or cross-examination of them by his counsel be denied". Mr. Green's letter further states that the Registrant "will be advancing the defense of collusion as a response to the College's use of similar fact evidence in this case."

Finally, the Registrant objects to the qualifications of the College's proposed expert, Ms. Fleming, and to the admissibility of her report into evidence.

Ms. Fong's letter of January 12, 2015 responds to Mr. Green's letter of January 8, 2015 by stating that each of the individuals whose attendance at the hearing is sought by Mr. Green will be called as witnesses by the College, meaning that they will be available for cross-examination by the

Registrant's counsel following their evidence in chief. Ms. Fong also submits that document disclosure at least 14 days in advance of the hearing, as required by section 38(4.1) of the Act, has already been provided by the College, and that this requirement does not apply to any witness summoned under section 38(6). With respect to Mr. Hyrb and Ms. Berry, Ms. Fong, on behalf of the College, reserves the right, if the proposed "collusion" defence appears to have no factual foundation, to address the calling of these two witnesses in particular as a matter of costs.

ISSUES

The issues for preliminary determination by the Panel are as follows:

1. Whether the [redacted] Citation (as defined above) and the Consolidated Citations (as defined above) should be consolidated and joined into a single citation.

2. Whether a procedural direction should issue requiring the Registrant to give notice of any preliminary applications he intends to make (by a date to be fixed by the Panel).

3. Whether the complainants (i.e. Ms. [redacted], Ms. [redacted], Ms. [redacted], and Ms. [redacted]) as well as Ms. Berry, Mr. Hyrb and Ms. Fleming should be summonsed "to submit to cross-examination by counsel to Mr. Martin".

4. Whether an order should issue to the effect that Ms. Fleming is not qualified as an expert and/or that her report is inadmissible on the grounds set out in Mr. Green's letter of January 12, 2015.

ORDER AND DIRECTION OF THE PANEL

For the reasons set out below, the Panel hereby orders that:

1. The Consolidated Citations and the [redacted] Citation be and hereby are consolidated and joined into one single citation, in the form of the draft Further Amended Citation attached to the College's application dated December 15, 2014.

The Registrar of the College is hereby directed to join the citations referred to in paragraph 1, above, into a single citation.

Save for the above order and direction, the Panel has determined not to make any further order on the matters before it at this time. The reasons for that decision are also set out below.

REASONS FOR DECISION

A. Application of the College for consolidation of the Consolidated Citations and the [redacted] Citation

Jurisdiction

As discussed in the December 5 Order, section 67(1) of the College Bylaws state that:

> On the direction of the Discipline Committee, the Registrar may join one or more complaints or other matters which are to be the subject of a discipline hearing in one citation as appropriate in the circumstances.

The jurisdiction of the College to join Citations, where appropriate, is not in dispute. As in the case of the College's previous application, the issue is whether it is appropriate to make such an order in these circumstances.

Positions of the parties

The College's position

Although the College provided a written submission in support of its application to join the [redacted] Citation to the Consolidated Citations, those submissions are relatively brief given that they adopt by reference the College's previous written submissions in relation to the citations that became the Consolidated Citations. The legal issues are clearly the same as between the prior and the current application.

The College's position, in summary, is that the joining of the [redacted] Citation and the Consolidated Citations is appropriate on the same grounds argued by the College, and accepted by the Panel, on the application to join the three citations that became the Consolidated Citations.

The College submits that having a single hearing rather than separate hearings would be efficient, particularly given that it "still intends to apply for the hearing panel(s) to consider the evidence of each of the four complainants ... as *similar fact evidence* so that the panel(s) may consider all of their evidence in relation to each matter" (December 15, 2014 Submissions, para. 26, italics in original). Particularly if the Panel does decide to treat the testimony of more than one complainant as similar fact evidence, a substantial gain in efficiency is achieved as compared to requiring each complainant to offer the same testimony in multiple proceedings. As the College stated in paragraph 48 of its prior submissions (incorporated by reference):

> … given that the issue of similar fact evidence remains to be resolved, the extent to which a single hearing will be *more efficient* than three separate hearings is increased by the likelihood that, if matters are not joined in one citation, all three complainants will then have to testify in three different hearings.

The College submits that the allegations in all citations raise common issues and are likely to elicit common responses from the Registrant, and for that reason that "[o]ne hearing for all four complaint matters is efficient and in the public interest." In that regard, the College submits that the Panel may consider such factors as delay, inconvenience and the length of proceedings, and that these proceedings would be "unduly protracted" if separate hearings were to be held.

The College also submits that holding separate hearings raises the possibility of inconsistent findings by different panels on the same facts, thereby bringing the administration of justice into disrepute, and adversely impacting the public's perception of the ability of the Discipline Committee to make fair and just decisions.

Finally, the College continued submission is that the nature of this proceeding – i.e. the fact that this a professional disciplinary proceeding rather than a criminal proceeding – must be borne in mind, and that the Panel must apply administrative law rather than criminal principles in deciding what is or is not fair and appropriate in the circumstances.

The Registrant's position

As set out above, the Registrant did not provide a formal written submission in response to the College's application. The only expression of his position appears to be contained in Mr. Green's email of December 18, 2014. For convenience, the relevant paragraph from that email is repeated here:

> Mr. Martin objects to the consolidation of the [redacted] complaint with the others, and on the same basis as in his prior submissions in response to the consolidation of those matters. The facts of Ms. [redacted] [*sic*] case do not resemble the facts of the others and its addition only enhances the unfairness of holding these hearings together.

The above paragraph appears to express the intention that the Registrant's entire previous written submission be considered by the Panel in relation to the current application. However, given the Panel's previous decision, as set out in the December 5 Order, it appears that the only basis on which the Panel could reach a different conclusion on this application would be if it were to accept the submission made on behalf of the Registrant that the factual allegations set out in the [redacted] Citation "do not resemble the facts of the others."

Factors to be considered in determining whether consolidation/joinder is appropriate

In the December 5 Order, the Panel reasoned as follows with respect to the factors to be considered in determined with consolidation/joinder of citations was appropriate:

> It appears to the Panel that the initial questions it must ask itself are:
>
> 1. What factors should be considered in determining whether or not joining the Citations is appropriate?

2. Are those factors present in this case?

In terms of question 1, above, the College's submissions set out the following factors:

1. The similarity of the charges or allegations made against the Registrant;
2. The presence or absence of manifest prejudice to the Registrant;
3. The greater efficiency of a single hearing;
4. The public interest in avoiding the delay that would be incurred by three separate hearings;
5. The possibility of inconsistent findings (e.g. regarding credibility) if three separate hearings are held.

The Panel went on to observe that, at least with respect to what the relevant legal factors were, there appeared to be substantial agreement between the College's and the Registrant's positions:

> The Registrant's Response does not appear to disagree in substance that the above factors are the relevant ones, although it of course disagrees as to the conclusion they point to. The Response uses slightly different language to characterize the factors, citing the following paragraph from *R. v. Last*:
>
> > [18] The factors identified by the courts are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice. Factors rightly used include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons …

On the issue of the similarity of factual allegations, the Panel reasoned and concluded as follows:

> *Similarity of allegations/legal and factual nexus*: The issue of the similarity between allegations is raised at paragraphs 5-8 and 34-36 of the College's Submissions. It is also raised in the Registrant's Response, although it is referred to there, following *West*, as "the legal and factual nexus between the counts" (and it is denied that such nexus exists). The College's argument is that the similarity of the allegations is established by the fact that they all involve the Registrant, and they involve similar and overlapping allegations of the same or very similar types of sexual misconduct in relation to the three complainants, both in terms of improper touching and improperly looking at unclothed areas of the body. The Registrant denies that there is any similarity among the allegations made in the three Citations (his specific submission is that there "is no factual nexus between the counts"), but provides no argument as to why the allegations against the Registrant should be considered dissimilar.
>
> The Panel agrees with the submissions made on behalf of the College that there is a

> strong or striking similarity between the conduct alleged in the Citations. ...

The issue for the Panel on this application, then, is likewise whether there is a "strong or striking similarity" between the conduct alleged in the [redacted] Citation and that alleged in the Consolidated Citations.

The allegation in the [redacted] Citation is that:

> During the Treatment Session, while Ms. [redacted] was in a face-up position and her upper body, including her breasts, was naked, the [Registrant] handled the cover sheet in a manner that exposed her naked upper body to the [Registrant's] view, by his lifting and holding the sheet up 3 or more times at a distance from her upper body of up to a foot.

It is further alleged that this conduct occurred:

> … intentionally, and for a sexual and non-therapeutic related purpose.

In the Consolidated Citations, virtually the identical allegations are made in respect of the Registrant's conduct in relation to Ms. [redacted] and Ms. [redacted] (see paragraphs 4 and 12, respectively, in the draft Further Amended Citation). Specifically, the allegation in relation to Ms. [redacted] is that:

> During all of the Treatment Sessions except the first … while Ms. [redacted]'s upper body was unclothed, the [Registrant] handled the cover sheet in a manner that exposed her naked upper body to the [Registrant's] view, by his holding the sheet up at a distance from her body after she had turned from a face-down to a face-up position. At these times, the [Registrant] stood behind her head and was adjusting the sheet over her breasts after she turned over. The [Registrant's] handling of the cover sheet to expose Ms. [redacted]'s upper body was done intentionally, and for a sexual and non-therapeutic purpose.

The corresponding allegation in relation to Ms. [redacted] is that:

> During the Treatment Session, while Ms. [redacted] s upper body was unclothed, and just after Ms. [redacted] had turned from a face-down position to a face-up position, the [Registrant] handled the cover sheet using a "wafting" motion that caused the sheet to lift and float upwards in the air, above a foot above her body, and exposed her naked upper body to the [Registrant's] view for several seconds. At this time the [Registrant] stood behind Ms. [redacted]'s head. Ms. [redacted], seeing the [Registrant] look at her breasts, tried to cover her breasts with her arms, after which the [Registrant] placed the sheet back down. The [Registrant] handling of the sheet to expose Ms. [redacted] s upper body was done intentionally, and for a sexual and non-therapeutic purpose.

It is true that, in the Consolidated Citations, there are additional allegations of sexual touching made against the Registrant, whereas the allegation in the [redacted] Citation is confined to that of the improper viewing of a patient's breasts for a sexual and non-therapeutic purpose. However, it

is clear to the Panel that that specific alleged behaviour in relation to Ms. [redacted] is strongly or strikingly similar to the corresponding behaviour alleged in relation to Ms. [redacted] and Ms. [redacted].

The Panel further observes that, as in the previous consolidation application, it is a "key and inherent point of similarity" that all of the alleged conduct occurred while the Registrant was providing treatment to the complainants in a professional context.

For the above reasons, the Panel concludes that there is a sufficiently strong or striking similarity between the allegations made in relation to Ms. [redacted] and the allegations made in the Consolidated Citations that the joinder/consolidation order sought by the College is warranted.

Finally, the Panel adopts its previous reasons on the issues of efficiency, length of hearing and public interest. The Panel also sees no reason to depart from its previous finding that "there is no manifest or unfair prejudice to the Registrant that would result from the Citations being joined."

B. College's request for written notice of Registrant's preliminary applications

In her letter of December 15, 2014, Ms. Fong requests an order directing the Registrant to "provide, by Friday, January 9, 2015, written notice of any preliminary applications that he intends to make." It is not clear whether Mr. Green's letter of January 8, 2015 (which is dealt with below) was intended as a response to that request. In any event, the Panel is not inclined to make a specific order or direction at this time. While it understands that Ms. Fong wishes to clarify certain comments made in correspondence by Mr. Green about preliminary applications, it is now just over one month until the commencement of hearing, and it does not appear that setting an arbitrary date for notice of further preliminary applications by the Registrant (if any) is likely to be helpful.

At this point, should any further preliminary application be brought by either party, the Panel would have to consider whether it is able to deal with such matter in advance of the hearing, or whether it would consider such application, if made, at the outset of the hearing itself. This decision would depend on a number of factors, and the Panel does not consider that it is properly able to determine such issues in advance of any application actually being brought.

C. Registrant's request for issuance of subpoenas and orders for production of documents

As described above, the letter from the Registrant's counsel dated January 8, 2015 asks that subpoenas be issued to a number of named individuals "to submit to cross-examination by counsel for Mr. Martin". Ms. Fong letter of January 12, 2015, responds that each of the individuals named in Mr. Green's letter will be called as a witness by the College, and will therefore be available for cross-examination in the ordinary course.

Section 38(6) of the Act states as follows:

> The discipline committee may order a person to attend at a hearing to give evidence and to produce records in the possession of or under the control of the person.

A summons or order to attend issued pursuant to section 38(6) does two things: it requires a person (1) to appear to give evidence at a hearing, and (2) to produce records in the possession of or under the control of the person. The second requirement, however, may or may not be applicable, depending on whether the person summoned actually possesses or has control over any relevant records, and also depending on whether or not such records have already been gathered during the course of the College's investigation and provided to the Registrant by way of disclosure.

With respect to the requirement to appear, the Panel considers that Ms. Fong's letter of January 12, 2015 is a full response to Mr. Green's request that each of the individuals named by him be available to him for cross-examination. Ms. Fong has made a commitment to call each of the individuals named by Mr. Green as witnesses for the College, which means they will be available for cross-examination by counsel for the Registrant. That being the case, there appears to be no reason for the Panel to make the orders sought by Mr. Green.

With respect to Mr. Green's request that each of the named individuals be required to provide documents at least 14 days in advance of the hearing, the Panel accepts Ms. Fong's submission that the plain and obvious meaning of section 38(6) of the Act is that an Order to Attend issued by the Discipline Committee (or the Panel, acting as a subset and with the authority of the Discipline Committee) cannot require witnesses to provide documents in their possession or control in advance of the hearing. The further difficulty with the requested order is that it is not at all clear that the witnesses will in fact have any relevant documents not already disclosed to the Registrant.

That said, if it should occur that a witness produces a previously unknown document and the College seeks to rely on that document, there might be an issue as to how best to deal with any such document. It may be that fairness would require that an adjournment be granted. It may be that the document would not be admitted into evidence. There may be other possible ways in which such a scenario could be dealt with. In the Panel's view, such an eventuality is best dealt with if and when it arises, rather than by issuing a preliminary order in the absence of any concrete information (and contrary to the wording of the Act).

D. Registrant's Submission on College's Expert Evidence

In Mr. Green's letter of January 8, 2015, it is stated that "Mr. Martin objects to the Report of Ms. Karen Fleming". A number of bases are provided for this objection, including Ms. Fleming's alleged lack of qualification as an expert, her alleged advancing of an opinion that usurps the role of the trier of fact, and the allegedly prejudicial, unreliable and unnecessary nature of the Report.

In the Panel's view, this is a matter to be dealt with at the hearing. The Panel has neither Ms. Fleming nor her Report before it, and therefore has no evidence upon which it can make a proper

decision at this time. As Ms. Fong's letter of January 12, 2015 states, "Ms. Fleming will be made available for cross-examination." Presumably this will include cross-examination on her qualifications as well as on the admissibility of her Report, and presumably there will be legal argument from both parties on these issues. The Panel will be better equipped to make an appropriate decision at the hearing, and therefore declines to make a decision at this time.

E. College's position on costs relating to calling of specific witnesses

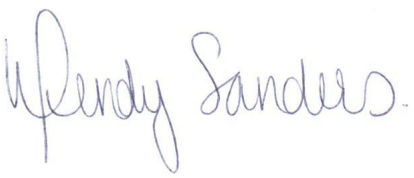
In her letter of January 12, 2015, Ms. Fong states that "unless Mr. Green should, before the hearing, withdraw his demand that [Ms. Berry and Mr. Hyrb] attend to give evidence relating to collusion, the College reserves the right to address, as a matter of costs, both his demanding that they appear without any foundation for his calling to testify to collusion, and also any additional hearing time spent on their being questioned by the parties in relation to collusion."

The Panel has taken note of Ms. Fong's comments, but as the hearing has not commenced and no evidence has yet been led, including evidence of Mr. Hyrb and/or Ms. Berry, the Panel is clearly in no position at this time to consider any matter relating to costs. These matters will be dealt with at the appropriate time.

REASONS FOR DECISION AND ORDER of the Panel:

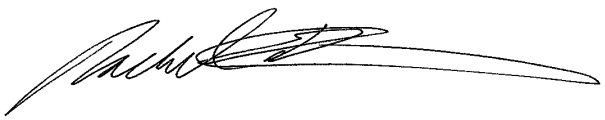
January 14, 2015

Lynne Harris (Chair) Date



January 13, 2015

Wendy Sanders, RMT Date



January 13, 2015

Rachel Shiu, RMT Date

Decision and Order Released: February 25, 2015

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

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Donald Martin, RMT

(the "Registrant")

INTERLOCUTORY DECISION AND ORDER

(Application of the College made pursuant to section 38(3) of the *Health Professions Act*)

Date and Place of Hearing

Application heard February 17, 19 and 20, 2015

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

Counsel for the College: Lisa C. Fong

Counsel for the Registrant: John M. Green

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

Lynne Harris (Chair)
Wendy Sanders, RMT
Rachel Shiu, RMT

Introduction

At the outset of this hearing on Tuesday, February 17, 2015, before the Citation was filed, the College brought three preliminary applications, one of which was for an order that the portions of the hearing dealing with the evidence of two of the four complainants (D.K. and L.T.) be heard in private, pursuant to section 38(3) of the *Health Professions Act* (the "Act").

The Registrant opposed this application. His counsel, Mr. Green, made an initial objection, stating that the application had not been brought in a timely manner, that the letters of D.K. and L.T. filed in support of the application were prejudicial to Mr. Martin, and that the letters were unsworn evidence that the Registrant should have the ability to test through cross-examination. He said he was concerned that the Panel was being asked, through the letters, to draw inferences as to Mr. Martin's conduct and character, specifically that he had engaged in sexual touching of the complainants, which is the very matter at issue in this hearing.

Both parties were given ample time to speak to the application and the Panel has considered all submissions carefully and fully.

Decision and Directions

The Panel has decided to grant the application and hereby orders that the evidence given by the complainants identified as D.K. and L.T. be heard in private. The Panel also directs that the transcripts of the closed portion of this hearing be made available to the public, at the expense of the person wishing to purchase such transcripts, in redacted form with the names and any information that could reasonably be expected to identify D.K. and/or L.T. withheld.

With respect to L.T., the Panel directs College counsel to ask L.T. to confirm, at the outset of direct examination, that she did in fact request that the portion of the hearing during which her evidence will be heard be held in private.

The Panel's reasons follow.

Reasons

In acting as a Panel of the College's Discipline Committee, the Panel is exercising duties and discharging responsibilities imposed by the Act. The discipline process forms part of the general duty imposed by the Act to act in the public interest. The Panel's discharge of its responsibilities in relation to that process serves a number of the Act's statutory objects, including the enforcement of standards of professional practice and professional ethics by means of a discipline process that is "transparent, objective, impartial and fair" (Act, section 16(2)(i.1)).

One of Mr. Green's objections to the letters of D.K. and L.T. was that they were unsworn, untested by cross-examination, and (in the case of L.T.'s email) unsigned. He argued that he

should be entitled to cross-examine both D.K. and L.T. on their letters before the Panel made its decision under section 38(3) of the Act.

Section 38(3) of the Act states as follows:

> (3) A hearing of the discipline committee must be in public unless
>
> > (a) the complainant, the respondent or a witness requests the discipline committee to hold all or any part of the hearing in private, and
> >
> > (b) the discipline committee is satisfied that holding all or any part of the hearing in private would be appropriate in the circumstances.

The Panel's initial task was therefore to decide whether each of the letters was in fact a "request" from the complainant, a matter that Mr. Green submitted he was entitled to test through cross-examination. The Panel disagrees.

In the case of D.K., the Panel was shown a copy of a letter purporting to be signed by her, with a signature on the letter. The Panel accepts and finds that this letter is a "request" made by D.K. The letter is signed. From a common-sense perspective, the Panel finds it improbable that the College would put a false letter before it, as the College has nothing to gain by doing so, nor does its counsel. The request is an understandable one for a complainant in D.K.'s position to make.

In the case of L.T., the Panel was shown an unsigned email making the same request as the one in D.K.'s letter. The Panel has no reason to doubt that this email was in fact from L.T. However, because the email is unsigned, and because the authenticity of the email is questioned by Mr. Green, the Panel chose to make the direction set out above, namely, that Ms. Fong ask L.T. to confirm on the record that she has in fact requested that the portion of the hearing at which her evidence is heard be held in private.

The Panel is given a broad discretion under section 38(3) of the Act to decide whether closing all or any part of a hearing is "appropriate in the circumstances". The Act does not provide any specific criteria by which appropriateness is to be determined. In looking at the circumstances, the Panel begins by noting that both D.K.'s and L.T.'s letter speak to an expectation that health-related matters and health history (possibly including sexual history) are inherently private matters. The Panel agrees that there is a public interest in maintaining the confidentiality of health information (*McInerney v. MacDonald*, [1992] 2 SCR 138. The Panel also accepts the characterization of the impacts on D.K. and L.T. as summarized at paragraphs 2 and 3 of the College's written submissions:

> 2. Ms. K has requested that her testimony be held in private due to:
>
> > a. her desire to maintain her privacy over her private health matters;

b. the sexual nature of the allegations, which she has kept private, to avoid impacts on herself, her child and her husband.

Her request arises from her concerns about the violation of her personal privacy, and potential hardship to her and her family following public disclosure.

3. Ms. T has requested that her testimony be held in private due to:

a. her desire to maintain her privacy over her private health matters;

b. the sexual nature of the allegations, and the possibility of the hearing dealing with her sexual history, all of which are private matters; and

c. her being a [redacted] professional, and the possible impacts that a public hearing could have on her professional reputation.

Her request arises from her concerns about the violation of her personal privacy, and potential injury to her professional relationships.

The Panel is also mindful of a number of cases that have found that there is a "superordinate social importance" in protecting victims of sexual assault from further injury or harm (see for example *CW v. LGM*, 2004 BCSC 1499) and in providing anonymity to those alleging the commission of sexual offences, in order both to encourage the reporting of such offences, and to avoid causing further harm as a result of the court process: *Canadian Newspapers Co. v. Canada (Attorney-General)*, [1988] 2 SCR 122; *CW v. LGM*, 2004 BCSC 1499; *Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2013 NSSC 32.

The primary issue in this case is whether or not the Registrant committed any of the conduct alleged in the Citation. That alleged conduct is referred to, at least to a degree, in the letters delivered by D.K. and L.T. If that were not so, as the College's counsel Ms. Fong pointed out, there would be no basis for the Panel to determine whether or not it would be "appropriate" to grant a private hearing. The Panel does not agree with the Registrant's submission that the validity of D.K.'s and L.T.'s assertions as to the harm they would suffer if required to testify in public should be tested by cross-examination *before* the Panel makes a discretionary decision under section 38(3) of the Act. One consequence of doing so, in the Panel's view, would be to cause exactly the situation the Registrant's counsel said he wishes to avoid: namely, a consideration of the letters for the truth (or otherwise) of the sexual conduct allegations referred to in them – which the Panel considers to be a matter that is appropriately determined only by means of direct witness testimony and cross-examination, and not by means of the contents of the letters.

The Panel gave careful consideration to the Registrant's arguments concerning the public interest in, and the importance of, the "open court" principle, including the argument that the Panel's discretion should be exercised narrowly. The Panel agrees that the open court principle is an important one, although it was not satisfied that the cases cited to it applied without modification

to administrative tribunals. The Registrant referred to it as "trite law" that "the open court principle applies to quasi-judicial tribunals," and cited the Supreme Court of Canada's decision in *Vancouver Sun (Re),* 2004 SCC 43, in particular paragraphs 23 and 25. The difficulty with this submission is that those paragraphs refer to courts, not to administrative tribunals. In fact, the intervening paragraph 24 states that the open court principle "has long been recognized as a cornerstone *of the common law*" (emphasis added). However, as the Registrant himself conceded in his submissions, the Panel must follow its statute before looking to the common law. In *Davidge v. Fairholm* (2014 BCSC 2150), Justice Griffin summarized one aspect of the common law position by stating that: "The open court principle offers a strong presumption against anonymizing a judgment", although she went to add that this can still be done where necessary to protect a vulnerable person or a vulnerable litigant. By contrast, in the Act, section 39.3(3)(b) states that "the complainant ... or another person, **other than the registrant**, affected by the matter" (emphasis added) may request that all identifying information be withheld from the public notification of a disciplinary outcome. This anonymization "must" be done upon such request, and no assessment of vulnerability is required. Clearly, the legislature has chosen, in the Act, to make the "strong" common law presumption of full publication secondary to protection of the complainant's privacy, at least insofar as publication is concerned. This is one example of how case law dealing with the general importance of the "open court" principle in the common law context offers little assistance to the Panel, which must operate within the specific statutory context of the Act.

The same applies to the case law submitted by both parties with respect to the considerations involved in the granting of publication bans under the *Criminal Code*, in particular, section 486.4. Both parties devoted extensive argument to this issue. However, as Ms. Fong correctly pointed out, this Panel has no power to impose a publication ban. Accordingly, while the cases on publication bans discuss some factors that could be considered relevant in terms of the Panel's exercise of discretion, they also discuss matters – such as, for example, consideration of the impact on constitutionally-protected rights of freedom of expression arising from a publication ban – that are not at all relevant to the decision the Panel was asked to make.

In reviewing the *Criminal Code*, however, the Panel took notice of section 486, a section the Panel considered to more closely parallel section 38(3) of the Act than the section dealing with publication bans. Section 486(1) of the *Code* provides as follows:

> **486.** (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may order the exclusion of all or any members of the public from the court room for all or part of the proceedings if the judge or justice is of the opinion that such an order is in the interest of ... the proper administration of justice ....

Subsection (2) goes on to define the "proper administration of justice" as including ensuring that:

> *(a)* the interests of witnesses under the age of eighteen years are safeguarded in all proceedings; and
>
> *(b)* justice system participants who are involved in the proceedings are protected.

The term "justice system participants" receives an extensive definition in section 2 of the *Code*, and includes "a prospective witness, a witness under subpoena and a witness who has testified".

It would appear, therefore, that a judge presiding over a criminal matter has a very similar discretion to the one the Panel has under section 38(8) of the Act, even if the discretion in section 486 of the *Criminal Code* is one which can be exercised for a broader range of circumstances. This similarity suggests that an exercise of the discretion conferred by either enactment is not inherently contrary to the proper administration of justice.

Finally, the Panel does not consider that allowing D.K. and L.T. to give their testimony in private is contrary to the Registrant's right to procedural fairness. There is no question that the Registrant is entitled to a fair hearing. The Panel does not consider that this right is compromised by the Panel's exercise of discretion to allow a portion of the hearing to occur in private, as permitted by the Act. The Registrant will be able to hear the evidence of all complainants directly, including D.K. and L.T., will be entitled to test and challenge that evidence through cross-examination, and will be entitled to make submissions to the Panel regarding both the complainants' evidence, and his own. These rights are unaffected by whether or not a particular portion of the hearing is public or in private.

If necessary, counsel for the parties may address the Panel regarding any further direction(s) that may be required to give effect to this decision.

REASONS FOR DECISION AND ORDER of the Panel:

L Harris	Vancouver	Feb. 25/15
Lynne Harris (Chair)	Place	Date
Wendy Sanders	Vancouver	Feb 25, 2015
Wendy Sanders, RMT	Place	Date
	Vancouver	Feb 25, 2015
Rachel Shiu, RMT	Place	Date