

NOTICE OF PUBLICATION BAN

This is notice that the Discipline Committee ordered that no person shall publish, broadcast or otherwise disclose the name of the client referred to during the hearing or in documents filed at the hearing that commenced on February 22, 2022, or any information that would disclose the identity of the client. This order was made pursuant to section 47 of the Health Professions Procedural Code (the “Code”) being Schedule 2 to the Regulated Health Professions Act, 1991.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, provides that: Every person who contravenes an order made under section 45 or section 47 is guilty of an offence and on conviction is liable,

- (a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or
- (b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

DISCIPLINE COMMITTEE OF THE COLLEGE OF HOMEOPATHS OF ONTARIO

IN THE MATTER OF a hearing directed
by the Inquiries, Complaints and Reports Committee of
the College of Homeopaths of Ontario
pursuant to Section 26(1) of the Health Professions Procedural Code
being Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.

B E T W E E N:

COLLEGE OF HOMEOPATHS OF ONTARIO

- and -

JOHN SOMERTON

DECISION AND REASONS

A panel of the Discipline Committee of the College of Homeopaths of Ontario (**the “Panel”**) held a hearing on February 22, 2022. The hearing proceeded electronically pursuant to the *Regulated Health Professions Act, 1991* - Health Professions Procedural Code, the *Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020* and the Discipline Committee Rules.

Rebecca Durcan was counsel to the College of Homeopaths of Ontario (**the “College”**). Basil Ziv, Registrar, attended on behalf of the College. John Somerton (**the “Registrant”**) did not attend

but was represented by Cal Rumeo. Elyse Sunshine acted as independent legal counsel (“ILC”) to the Panel.

ALLEGATIONS

The Notice of Hearing was filed as Exhibit 1 and set out the following:

The Registrant

1. The Registrant registered with the College on or about May 16, 2016.

Lymphatic Drainage Massage

2. On or about March 24, 2021, a Client attended the Registrant’s clinic for a lymphatic drainage massage.
3. It is alleged that lymphatic drainage massage is not within the scope of practice of a homeopath.
4. It is alleged that the Registrant did not have sufficient training and/or competency to provide lymphatic drainage massage.
5. It is alleged that the Registrant did not obtain the Client’s health history.
6. It is alleged that the Registrant did not obtain sufficient consent from the Client.
7. It is alleged that during the lymphatic drainage massage, the Registrant exposed and/or touched and/or massaged the Client’s breasts without her consent.

Acts of Professional Misconduct

8. It is alleged that the above noted conduct constitutes professional misconduct pursuant to section 51(1)(b.1) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991 (the “Code”)* as the Registrant sexually abused the Client, more specifically he touched the Client in a sexual nature.
9. It is also alleged that the above noted conduct constitutes professional misconduct pursuant to section 51(1)(c) of the Code as set out in one or more of the following paragraphs of section 1 of Ontario Regulation 315/12 made under the *Homeopathy Act, 2007 (the “Act”)*:
 - a. **Paragraph 1** – Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession;
 - b. **Paragraph 3** – 3. Doing anything to a patient for a therapeutic, preventative, palliative, diagnostic or other health-related purpose except,

- i. with the informed consent of the patient or the patient's authorized representative, or
- ii. as required or authorized by law;
- c. **Paragraph 8.** Attempting to treat a condition that the member knows or ought to know he or she does not have the knowledge, skills or judgment to treat;
- d. **Paragraph 9** - Failing to advise a patient or the patient's authorized representative to consult another member of a health profession within the meaning of the *Regulated Health Professions Act, 1991*, where the member knows or ought to know that the patient requires a service that the member does not have the knowledge, skills or judgment to offer or is beyond his or her scope of practice;
- e. **Paragraph 48** - Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and/or
- f. **Paragraph 49** - Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

AGREED STATEMENT OF FACTS

The College advised the Panel that the evidence would be provided by way of an Agreed Statement of Facts, which was filed as Exhibit 2 and set out the following:

The Registrant

1. The Registrant registered with the College on or about May 16, 2016.
2. The Registrant's Clinic is in his home.
3. The Registrant did not receive any formal training, evaluation, or certification in lymphatic drainage massage (LDM). His only training was approximately ten to fifteen years ago from a woman who performed LDM. The Registrant acknowledges that he does not have sufficient training or competency to provide LDM and that it is not within the scope of homeopathy.

The Client

4. The Client learned of the Registrant through a friend who saw the Registrant for homeopathic services.
5. The Client was seeking a LDM. She had never received a LDM but had been advised that it would help relieve her current symptoms. The Registrant's website did not indicate that he provided this service.
6. When the Client emailed the Registrant, she asked if he provided LDM. The Registrant advised that he did and that her first LDM would be free. The Registrant now acknowledges

that he ought to have referred the Client to another practitioner for this treatment.

7. The Client proceeded to make an appointment with the Registrant, via email, for a LDM.

Prior to Commencing Treatment on March 24, 2021

8. When the Client arrived at the Clinic on March 24, 2021, she met the Registrant in the waiting area. He then led her into the treatment room.
9. Prior to commencing treatment, the Registrant had a discussion with the Client about:
 - a) All the homeopathic services he offered;
 - b) His fee schedule for those services; and
 - c) The lymphatic system.
10. The Registrant asked the Client to sign a fee schedule form. Other than this form he did not provide the Client any other documents to sign.
11. During his discussion about the lymphatic system, he showed the Client a diagram of the lymphatic system. He explained that there were lymph nodes throughout the body, including the breasts, and that females had extra lymph nodes in the breasts.
12. If he were to testify, the Registrant would state that he thought that his discussion with the Client was sufficient to obtain informed consent. The Registrant now realizes that he was incorrect and that he did not obtain informed consent to perform the LDM. The Registrant has now created a detailed consent form and asks clients to sign it before any treatment is provided to the breast area.
13. Before providing the LDM to the Client, the Registrant did not:
 - a. alert the Client which body parts or in what order he would touch during the LDM;
 - b. inform the Client that the LDM that he intended to provide would involve exposing and massaging her breasts;
 - c. offer the Client options as to how he could perform the lymphatic drainage massage;
 - d. obtain the Client's health history prior to commencing treatment;
 - e. seek further information from the Client when she alerted the Registrant that a recent biofeedback report indicated her lymph nodes "were sluggish"; and
 - f. maintain appropriate records of the Client's appointment.

During Treatment on March 24, 2021

14. During the course of the treatment, the Registrant decided to massage both the Client's breasts. He lowered the draping to expose her entire upper body down to the top of her underwear. He asked the Client to put her arms behind her head so that her elbows were bent out to the sides. He massaged both of her entire breasts including her nipples and areolae.
15. The Registrant massaged both of the Client's breasts at the same time and used his hands to trace a figure eight pattern in a manner that circled and connected both the Client's breasts.
16. Both the Client and the Registrant were silent during the entire massage.

Sexual Abuse

17. It is agreed that "sexual abuse" of a client by a registrant includes touching of a sexual nature of the Client by the Registrant as a result of s. 1(3)(b) of the Code:

1 (3) In this Code, "sexual abuse" of a patient by a member means,

(b) Touching, of a sexual nature, of the patient by the member;

18. It is agreed that for the purposes of the definition of "sexual abuse" under s. 1(3)(b) of the Code, "sexual nature" does not include touching for a clinical purpose:

1 (4) "sexual nature" does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided.

19. The Registrant acknowledges that the touching of the Client's breasts were not of a clinical nature appropriate to the service provided.

College Standards

20. The College's *Professional Code of Ethics for the Homeopathy Profession* requires registrants to provide ethical and competent patient-centered care.
21. The College's *Homeopathic Scope of Practice Standard* does not include LDM.
22. The College's *Therapeutic Relationships and Professional Boundaries Standard* advises registrants to be cognizant of clients' vulnerabilities and advises against any form of abuse including sexual abuse.

Admission of Professional Misconduct

23. It is agreed that the Registrant sexually abused the Client specifically by touching the Client's breasts in a sexual nature, and that the above conduct constitutes professional misconduct pursuant to section 51(1)(b.1) of the Code.
24. It is also agreed that the above conduct constitutes professional misconduct pursuant to section 51(1)(c) of the Code as set out in the following paragraphs of section 1 of Ontario Regulation 315/12 made under the Act:
- a) **Paragraph 1** – Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession;
 - b) **Paragraph 3** – Doing anything to a patient for a therapeutic, preventative, palliative, diagnostic or other health-related purpose except,
 - i) with the informed consent of the patient or the patient's authorized representative, and
 - ii) as required or authorized by law;
 - c) **Paragraph 8** – Attempting to treat a condition that the member knows or ought to know he or she does not have the knowledge, skills or judgment treat;
 - d) **Paragraph 9** – Failing to advise a patient or the patient's authorized representative to consult another member of a health profession within the meaning of the *Regulated Health Professions Act, 1991*, where the member knows or ought to know that the patient requires a service that the member does not have the knowledge, skills or judgment to offer or is beyond his or her scope of practice;
 - e) **Paragraph 48** – Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and
 - f) **Paragraph 49** – Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

Admission of Facts

25. By this document, the Registrant admits to the truth of the facts referred to in paragraphs 1 to 22 above (the "Agreed Facts").
26. By this document, the Registrant states that:
- a) he understands that by signing this document he is consenting to the evidence as set out in the Agreed Facts being presented to the Discipline Committee;

- b) he understands that any decision of the Discipline Committee and a summary of its reasons, including reference to his name, will be published in the College's annual report and any other publication or website of the College;
- c) he understands that any agreement between himself and the College with respect to any penalty proposed does not bind the Discipline Committee; and
- d) he understands and acknowledges that he is executing this document voluntarily, unequivocally, free of duress, free of bribe, and that he has been advised of his right to seek legal advice.

ADMISSION AND PLEA INQUIRY

The Registrant admitted to the allegations of professional misconduct set out the Notice of Hearing and the Agreed Statement of Facts. The Panel received a written plea inquiry which was signed by the Registrant.

SUBMISSIONS OF THE PARTIES ON LIABILITY

The College submitted that the evidence contained in the Agreed Statement of Facts made out all of the acts of professional misconduct alleged in the Notice of Hearing.

Regarding the allegations of sexual abuse, the College relied on the following admissions of the Registrant to argue that his actions amounted to sexual abuse of the Client: (a) that he exposed her breasts; (b) that he massaged both of her entire breasts including her nipples and areolae; (c) that he used his hands to trace a figure eight pattern in a manner that circled and connected both the Client's breasts, and (d) that this touching and behaviour was done without the Client's and consent and was sexual in nature and not of a clinical nature appropriate to the service provided.

The College also made other submissions related to the remaining allegations of misconduct, including that by engaging in sexual abuse of a client, the Registrant's conduct fell below the standard expected of a registrant and must necessarily amount to a contravention of the standard of practice of the profession. The Registrant did not have the expertise to perform LDM and did not obtain the Client's informed consent. All of this conduct would reasonably be regarded by other members of this profession as disgraceful, dishonourable and unprofessional, and conduct unbecoming.

Counsel for the Registrant made no submissions on liability.

DECISION AND REASONS ON LIABILITY

The Panel accepted as correct all of the facts set out in the Agreed Statement of Facts. The Panel found that the evidence contained in that document proved, on a balance of probabilities, the allegations alleged in the Notice of Hearing and admitted to in the Agreed Statement of Facts.

By touching the Client's breasts in a sexual nature without any clinical purpose, the Registrant engaged in sexual abuse. Such conduct would also be inherently a contravention of the standards of practice.

The Registrant performed a LDM which is outside the scope of practice of a homeopath and which he did not have sufficient training and/or competency to perform. He did not obtain the Client's medical history and did not obtain sufficient consent. This is a breach of standards and an independent act of misconduct as well.

By discussing and offering a procedure that he was not appropriately qualified to perform and not disclosing this to the Client, the Registrant attempted to treat a condition that he knew or ought to have known he did not have the knowledge, skills or judgment to treat and offered a service that was beyond his scope of practice.

All of this conduct would be reasonably be regarded by members as disgraceful, dishonourable and conduct unbecoming a member of the profession.

POSITION OF THE PARTIES ON PENALTY AND COSTS

The parties made a joint submission as to an appropriate order for penalty and costs (the "Proposed Order"), which was filed as Exhibit 3 and included the following:

1. The Registrant is required to appear before a panel of the Discipline Committee for a reprimand following the hearing;
2. The Registrar is directed to revoke the Registrant's Certificate of Registration, effective immediately;
3. The Registrant is required to reimburse the College for funding provided to the Client under the Program required under section 85.7 of the Code in the amount of \$3000 within one month of the date of the order.

SUBMISSIONS OF THE PARTIES ON PENALTY AND COSTS

The College submitted that two of the components of the Proposed Order (the reprimand and revocation) were mandatory because of the findings of sexual abuse made. The College submitted that the proposed partial repayment for funding for therapy was in the public interest. The College noted that the fact that the Registrant agreed to this joint submission was a mitigating factor that should be considered.

The College submitted that it would normally seek costs, but in this particular case, costs were not being sought because of the Registrant's financial circumstances.

The College reminded the Panel of the law on joint submissions and that joint submission may only be rejected if it is truly unreasonable or unconscionable.

Counsel for the Registrant echoed the submissions made by College counsel and noted that by entering into the joint submission, the Registrant saved the College the time and expense of a contested hearing.

DECISION AND REASONS ON PENALTY AND COSTS

The Panel ordered the proposed penalty, finding it to be in the public interest.

While it was mandatorily required, the Panel also found that public protection would be achieved by the revocation of the Registrant's certificate of registration. This ensures that the Registrant is no longer part of the profession and is deprived of future opportunities to place the public at risk while practising. Removing the Registrant from the profession would also enhance public confidence in the ability of the College to regulate the profession. It would also achieve general deterrence by demonstrating to other registrants that conduct of this nature will warrant removal from the profession.

The reprimand, which was legislatively required given the finding of sexual abuse, would provide an opportunity for the Panel to publicly denounce the Registrant's misconduct and send a message to the general membership of the profession that the Discipline Committee finds sexual abuse completely unacceptable.

The Panel also ordered the Registrant to reimburse the College, in part, for funding provided for counselling and therapy for the Client. This order would further the goals of public protection and general deterrence by sending a clear message to the public and the profession that if a registrant is found to have sexually abused a client, the Discipline Committee may hold that registrant financially responsible for therapy sought by the client in connection with the sexual abuse. This also will instill public confidence in the College's ability to regulate the profession in the public interest.

The Panel accepted the submissions of counsel and the advice of ILC regarding the law on joint submissions and accepted that a joint submission may only be rejected if it would be contrary to the public interest or would bring the Discipline Committee's proceedings into disrepute. This high threshold for departing from the parties' joint submission was not met in this case.

ORDER

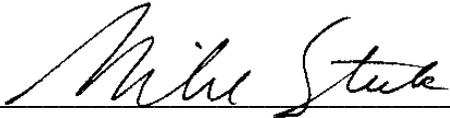
The Panel stated its findings in its written order of February 22, 2022 (the "Order"), in which the Panel directed as follows on the matter of penalty:

1. The Registrant is required to appear before a panel of the Discipline Committee for a reprimand following the hearing;
2. The Registrar is directed to revoke the Registrant's Certificate of Registration, effective immediately;
3. The Registrant is required to reimburse the College for funding provided to the Client under the Program required under section 85.7 of the Code in the amount of \$3000 within one month of the date of this Order.

Dated in Ontario on February 23, 2022

DISCIPLINE PANEL

Mike Steele, Public Member
Heather Broadhead, Public Member
Anna Cardozo, Professional Member

Signed: 
Mike Steele, Chair