

**IN THE MATTER OF A HEARING BEFORE THE HEARING TRIBUNAL
OF PHYSIOTHERAPY ALBERTA - COLLEGE + ASSOCIATION
INTO THE CONDUCT OF AN INVESTIGATED MEMBER
PURSUANT TO THE *HEALTH PROFESSIONS ACT*, RSA 2000, c. H-7**

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I. Introduction

- [1] A hearing of a matter by the Hearing Tribunal of Physiotherapy Alberta - College + Association (the "College") was conducted at the offices of Field LLP, #2500, 10175 - 101 Street NW, Edmonton, Alberta on October 7, 8, 9 and November 10 and 11, 2020 with the following individuals present:

Hearing Tribunal:

Sharla Butler, Chair
Robert Sydenham
Simone Hunter
James Clover, Public Member

Also present were:

Moyra McAllister, Complaints Director
Katrina Haymond, Legal Counsel for the Complaints Director
SD, Investigated Member
Naeem Rauf, Legal Counsel for the Investigated Member
Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal

II. Preliminary Matters

- [2] The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 ("HPA"). There was no objection to the composition of the Hearing Tribunal or its jurisdiction to hear the matter.
- [3] An Agreed Exhibit Book was marked at the outset of the hearing as Exhibit 1.
- [4] Katrina Haymond ("Ms. Haymond"), legal counsel for the Complaints Director made an application to have the testimony of the Complainant heard in a closed portion of the hearing. Ms. Haymond also asked the Hearing Tribunal to direct that any reference to the Complainant in the hearing and in the transcript be done using initials rather than the Complainant's full name. Naeem Rauf ("Mr. Rauf"), legal counsel for the Investigated Member, advised that there was no objection to the applications.
- [5] The Hearing Tribunal considered that a hearing is presumptively open to the public under the HPA, and should only be closed in certain specific circumstances. In this case, the application was made on the basis of not disclosing the Complainant's personal

information and on the basis that having the public present could compromise the ability of the witness to testify. Given the nature of the allegation, the Hearing Tribunal found that this was an appropriate case to have the Complainant's evidence be given in a closed portion of the hearing. The Hearing Tribunal determined that, given the nature of the allegation, the testimony that the Complainant was expected to give would be very private and there was a compelling argument to close that portion of the hearing in order to protect the personal information of the Complainant.

- [6] The Hearing Tribunal directed that the hearing would be in private for the testimony of the Complainant. In addition, the Hearing Tribunal directed that the Complainant would be referred to using her initials and that if there was an inadvertent slip during the hearing where the Complainant's name was used, that the court reporter would replace the name using the Complainant's initials in the transcript.
- [7] In addition, Mr. Rauf requested a direction that all witnesses be excluded from the hearing until after they give their evidence. One potential witness was present and voluntarily left the room prior to the opening submission being made.
- [8] No other preliminary applications were made.
- [9] During the hearing, TS, legal counsel to the Complainant in a civil action, was called as a reply witness by the Complaints Director. An application was made by Ms. Haymond to close the hearing for TS's evidence. The basis was to protect solicitor and client privilege and litigation privilege. Ms. Haymond noted that the Complainant waived privilege over a very narrow portion of the proceedings. Ms. Haymond pointed to HPA section 78(1)(iii) that "not disclosing a person's confidential personal, health, property or financial information outweighs the desirability of having the hearing open to the public." The personal information in this case being the narrow portion of the communications the Complainant had with her lawyer. Ms. Haymond also pointed to HPA section 78(1)(v), "because of other reasons satisfactory to the hearing tribunal."
- [10] Mr. Rauf objected to the closing of the hearing. He pointed to the principle of an open hearing and the need for transparency of the proceedings and maintaining the public's confidence in the integrity of the proceedings. Mr. Rauf also took the position that once something privileged is said in public, the privilege is waived.
- [11] The Hearing Tribunal determined that the evidence of TS would be given in a closed portion of the hearing. The Hearing Tribunal considered that it was unusual to have a lawyer give evidence during an ongoing process of litigation. The Hearing Tribunal also considered the very sensitive nature of the Complainant's evidence, which was given in a closed portion of the hearing and determined that it was appropriate to also close the hearing for the evidence given by her lawyer.

[12] The Hearing Tribunal considered its direction to close certain portions of the hearing in order to protect the personal information of the Complainant and protect privileged communications. Given the nature of the allegation, much of the findings made by the Hearing Tribunal arise from the testimony of the witnesses, in particular the Complainant and SD. Details of the Complainant's evidence must necessarily form part of this written decision. As such, in order to protect the personal information of the Complainant, including the Complainant's identity, the Hearing Tribunal has determined that individuals, including the Investigated Member will not be named in the written decision. Similarly, the name of the clinic where the incident leading to the allegation occurred (the "Clinic") is not provided in the Hearing Tribunal's written decision, in order to preserve the confidentiality of the Complainant's identity.

III. Allegation

[13] The allegation that appears in the Notice of Hearing (Exhibit #1, Tab 1) are that SD:

1. On or about November 25, 2019, while providing physiotherapy treatment to [the Complainant], you did one or more of the following to [the Complainant]:
 - a. Massaged her mid-thigh;
 - b. Told her that her skin was very smooth and that you wanted to bite it, or words to that effect;
 - c. Touched one or more of the following: her urethral opening, labia majora, labia minora, hymen, vestibule, clitoris or the edges of her inner vagina;
 - d. Told her "you are so wet" after touching her;
 - e. Kissed her buttocks;
 - f. Grabbed her breast; and
 - g. Picked her up and placed her onto your lap.

It is further alleged that your conduct constitutes "unprofessional conduct" as defined in s. 1(1)(pp)(i)(ii)(xii) of the HPA, in particular:

1. Your conduct constitutes "sexual abuse" as defined in s. 1(1)(nn.1) of the HPA and contravenes Physiotherapy Alberta's Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct.
2. Further or in the alternative, your conduct breaches one or more of the following:

- a. Code of Ethical Conduct for Alberta Physiotherapists: Responsibilities to the Client (A4, A12); Responsibilities to the Public (B1); and Responsibilities to Self and the Profession (C1); and
- b. Standards of Practice for Physiotherapists in Alberta: Professional Boundaries.

IV. Exhibits

[14] The following were entered as exhibits during the hearing:

Exhibit #1 – Agreed Exhibit Book

Tab 1 Notice of Hearing and Notice to Attend as Witness, dated September 3, 2020

Tab 2 Email from co-owner of the Clinic to the College, dated December 2, 2019

Tab 3 Transcript of recording of phone call between the Complainant and GS, dated November 26, 2019

Tab 4 Email from SD, dated November 26, 2019

Tab 5 Transcript of meeting with the Complainant, TS, GS and another co-owner of the Clinic, dated November 26, 2019

Tab 6 Typed Statement of the Complainant, dated December 4, 2019

Tab 7 Statement of SD regarding description of treatment to the Complainant, undated

Tab 8 Transcript of interview by B. Acton of the Complainant, January 14, 2020

Tab 9 Transcript of interview by B. Acton of SD, January 14, 2020

Tab 10 Employee information regarding the Complainant

Tab 11 Text messages and information regarding alternate employment for the Complainant, November, 2019

Tab 12 Text message from the Complainant to GS, November, 2019

Tab 13 Diagram of vagina

Tab 14 Curriculum Vitae for SD

Tab 15 Google reviews for the Clinic

Tab 16 Character Letters re: SD

Tab 17 Excerpt from the HPA

Tab 18 Code of Ethical Conduct for Alberta Physiotherapists

Tab 19 Standards of Practice for Physiotherapists in Alberta: Professional Boundaries and Sexual Abuse and Sexual Misconduct

Exhibit #2 – Photograph of M2T blade

Exhibit #3 – Complainant's LinkedIn Profile

Exhibit #4 – Recording of phone call and meeting November 26, 2019

Exhibit #5 – Statement of Claim filed January 7, 2020

Exhibit #6 – Emails between GS and TS

Exhibit #7 – GS LinkedIn Account

Exhibit #8 - Physiotherapy Clinic website profile

V. Witnesses

[15] The Complainant was called as a witness for the Complaints Director.

[16] The following individuals were called as witnesses for the Investigated Member:

SD, Investigated Member
GS, co-owner of the Clinic

[17] TS, legal counsel for the Complainant in the civil action, was called as a reply witness by the Complaints Director.

Summary of Witness Testimony

[18] The following is a summary of the testimony given by each witness. The summaries are meant to highlight the main aspects of each witness's evidence. The hearing was lengthy, with witness evidence lasting for four days. The witness summaries do not address all points raised in the testimony, however, the entirety of the testimony of each witness was considered by the Hearing Tribunal.

The Complainant

[19] The Complainant was employed as a part-time receptionist at a physiotherapy clinic (previously identified as the Clinic). She made a complaint to her employer regarding the conduct of SD, a physical therapist who worked at the Clinic. The incident occurred on November 25, 2019.

[20] The Complainant reported the incident to the College on December 3, 2019 and spoke to the Complaints Director. She subsequently submitted a written statement dated December 4, 2019 (Exhibit 1, Tab 6). The Complainant participated in an interview with B. Acton, an investigator appointed by the Complaints Director. A transcript of that interview is at Exhibit 1, Tab 8.

[21] The Complainant was 21 at the time of the incident. She was also an employee in two retail stores at the time. She had started with another physiotherapy clinic owned by GS in April 2019 and after about 3 months, the clinic was closed. However, GS contacted her to see if she was interested in working at the Clinic, which he co-owned.

[22] The Complainant started at the Clinic in early September 2019. She signed some documentation (Exhibit 1, Tab 10), which included a harassment prevention policy. Her probationary period ended October 22, 2019. She described one performance issue she had involving a workshop in the Clinic. GS spoke to her about it on the telephone. He was upset and did not give her a chance to explain. The Complainant described that GS was screaming at her and hung up the phone on her. She initially had concerns that she might lose her job, but by the end of November 2019, she was no longer concerned.

- [23] She worked as a part-time receptionist at the Clinic and would process insurance claims, book patients, take payments and clean. She was a key holder and would close the Clinic. She normally worked 3 p.m. to 8 p.m. from Monday to Friday.
- [24] The Complainant indicated that on November 13 she called GS because she wanted to resign, since she had other job offers, but he asked her to reconsider and stated that he wanted her to stay with the company. She reconsidered and texted him saying that she would stay.
- [25] One day, a female came to the Clinic saying she was there for training as evening receptionist and the Complainant was confused because she was the evening receptionist. The Complainant was then worried about her hours but she was told by GS that the other individual was hired as a floater to cover vacation and sick days.
- [26] The other employees of the Clinic were the morning receptionist, three physiotherapists, including SD and a massage therapist. She worked with SD, who worked Mondays, Wednesdays and Fridays. She had no personal relationship with SD. They did not socialize outside of work.
- [27] The Complainant received physiotherapy treatment from SD before November 25. The first time she received physiotherapy treatment was at the end of September or early October. She was having pain in her neck. He said he could check it out for her. She asked if he would do it at no cost, and he confirmed he would. He used interferential current ("IFC") and hot packs. He also used his hands to treat her neck. She was wearing scrub pants, had removed her shirt and bra and was wearing a gown. She did not sign a consent form and she did not see him taking any notes.
- [28] She received treatment approximately five to eight times from SD. Prior to November 25, the treatments were similar. He would always use equipment, either IFC, ultrasound, hot packs, cold packs. The treatment was always done after hours. She was never charged a fee for the treatment. She considered herself to be his patient.
- [29] The Complainant indicated that the treatment area is divided with curtains. There is one physiotherapy bed and one chair in each cubicle.
- [30] On Monday November 25, she was working a 3 p.m. to 8 p.m. shift. SD was working as well. She had moved over the weekend and thought she sprained her shoulder when she picked up a heavy box. She told SD her shoulder was hurting and asked if he was available to treat her shoulder. He indicated he had to pick up his wife from her work, but had time to treat her.
- [31] She finished her closing duties and went into the treatment area around 8 p.m. She took off her shirt and bra and put on a gown. She put a face cover on the bed and laid face down on the bed and told him she was ready.

- [32] This treatment was different because he only used lotion. He did not use any equipment. He went to see if there was massage therapy oil but did not find any. He used a lot of Lubriderm lotion throughout the process. The Complainant described that he probably used the entire bottle.
- [33] He was treating her shoulder and she asked him if he could also treat her lower back. He pulled her pants and underwear halfway down her buttock and he started using a generous amount of lotion and massaging her whole lower back. While he was massaging, he would go lower and lower and her scrub pants also moved with his downward motion. While he was massaging her, she brought up a comment to be funny and asked if he had ever treated someone with a hairy back. He said no and went on to say that her skin was actually very smooth and soft and that he just wanted to bite it. She was very confused and did not really know what to say or do.
- [34] He continued to massage her and was massaging close to her armpits. She had told him previously that she was ticklish. She asked him if he was trying to tickle her on purpose. He said no and then said "this is on purpose" and began tickling her. She flinched and moved. He then spanked her buttock.
- [35] He then continued to massage her and was using a lot of lotion and a downward motion. The Complainant believes that her pants were moving down to the end of her buttocks while he was massaging her. There was lotion everywhere and she was really uncomfortable, so she pulled her pants closer towards her mid-thighs. He continued to massage her buttocks and was also massaging her mid-thigh. He went inward and then began to touch her vagina. Her hands and underwear were positioned close towards her mid-thighs. She had moved her underwear and pants lower because he was using so much lotion and she thought he needed more room to work. SD was standing beside her, although she could not remember if it was on the right or left side. She stated that he touched her clitoris, her labia minora, the outside edges of the vagina entrance, the labia majora, the hymen, the vestibule and the urethra opening. He was rubbing his hand back and forth." He did this for one or two minutes. He made a comment that she was "so wet".
- [36] She did not know what to do. She replied "is it the lotion?" He grabbed her right breast and kissed her right buttock. The Complainant stated she froze and did not know what to say. She could not believe this was happening to her. No one else was in the Clinic at the time.
- [37] He told her to sit up. She sat up and he put one arm underneath her leg and the other one on her back and scooped her up. She described this as similar to a "classic wedding movie." He sat on the chair with her on his lap. She struggled to get away and her gown accidentally slipped off and revealed her breast. She was lying face down looking at the floor the whole time, until she sat up.

- [38] She got up and he left the room. She changed into her bra and scrub top. She went into the break room to get her backpack and her purse. She set the alarm code and left in her car and went home. She did not have any discussion with SD about what happened. The incident lasted approximately one hour.
- [39] SD had treated her lower back before. The treatment on November 25 was different, because SD did not use any equipment, just lotion and his hands. The Complainant was shown an image of an M2T blade (Exhibit 2) and stated that SD did not use an M2T blade on November 25 or during any of the previous treatments.
- [40] The Complainant told her boyfriend the next morning what had happened. She also reported the incident to GS. She sent him a text message at about 1 a.m. on November 26 and asked if he could call her (Exhibit 1, Tab 12). He called her at around 5:45 or 6 a.m. that morning. She told him what had happened.
- [41] The Complainant stated that GS was not happy about what happened. The Complainant stated that she did not discuss the matter with anyone else, except for her discussion with her boyfriend before talking to GS on the telephone. She decided to record the call with GS for her records. The Complainant stated that GS did not believe her. He said to her that SD was "a gem of a guy" and that he had known him for a long time.
- [42] Later that day, there was a meeting with GS, another physiotherapist who is part-owner of the Clinic and TS, the Complainant's lawyer. She first contacted her lawyer the morning of November 26. She knew him because she had completed a practicum as a legal assistant at the law office where he practices. She wanted him to come to the meeting for support. The meeting of November 26 was recorded. After the recording stopped, there was a discussion of whether she was going to get paid for her time off. GS agreed to pay her from November 25 to 29.
- [43] The morning of November 26, SD sent her a text message and asked what happened. She did not respond to it.
- [44] She reported the incident to the police on December 3, 2019. GS said not to fill out a police report until he had completed his report. She indicated that one day she was driving to the police station and she got a call from TS saying that GS did not want her to fill out a police report yet. GS wanted to keep it internal until his report was done so she had to turn around.
- [45] There was some confusion about her providing a written statement. She thought that GS would send her a form to fill out and she waited a couple of days, but GS then told her to type out her statement.
- [46] The Complainant decided to file a civil claim after the conclusion from GS that rejected her version of events. She denied suggesting she would refrain from going to the police if she was paid a monetary settlement. She did not hear TS make any statements on

November 26 to suggest she would not go to the police or file a civil claim if she was paid a monetary settlement.

- [47] The Complainant was taken through the written statement of SD. She disagreed with many of the statements made. She stated there were more than four treatments. There were around five to eight. She stated some stretching happened on the physio bed. At one point he asked her to stand up and touch her toes. Another time he put his arms underneath her armpit and then lifted her up and cracked her back. She stated that she moved in by herself, not with her boyfriend. With respect to November 25, she stated that she was lying face down when he came in, she was not asked to sit on the table at the beginning as indicated in SD's statement. She denied SD's version of events.

Cross-Examination of the Complainant

- [48] The Complainant was asked about her practicum at the law firm where TS works. She was questioned about the dates on her LinkedIn profile.
- [49] The Complainant denied making up the allegations to extort money from the owners of the Clinic and SD. The Complainant was questioned about an email from GS to her lawyer which stated: "Nor we accede to the suggestion laid by you at our initial meeting that further steps by you and your client can be avoided to our company and [SD] by some form of settlement by which we take you to mean payment of money." (Exhibit 6). The Statement of Claim was filed on January 7, 2020 (Exhibit 5).
- [50] The Complainant indicated that the pain she was experiencing on November 25 was at the back of her right shoulder. She was asked at length about the allegations and asked what she said to him, or why she did not say something to stop him. She stated that she believed he was on her right side when he was treating her. She indicated that there are curtains but that you can move around between the beds. She stated that he grabbed her breast with his right hand. She denied telling SD on November 25 that she had been injured when her boyfriend had pulled her arm. She told SD she had cracked her shoulder over the weekend.
- [51] The Complainant described the treatment on November 25 as a more intense massage and that SD was putting a lot of pressure over all the areas.
- [52] The recording of the telephone conversation between the Complainant and GS was played. (Exhibit 1, Tab 3). She was asked about laughing during the telephone call and she noted it was a nervous laugh.
- [53] The Clinic is in a strip mall. After the incident, she went about with her regular closing duties. She set the alarm and SD locked the doors. She believes the doors were unlocked when she was in the treatment area with SD. She was uncertain if the sign for the Clinic was turned to "Closed".

- [54] The Complainant was asked extensively about the amounts she claimed in the Statement of Claim. An objection was made to this line of questioning. The Hearing Tribunal determined that it would allow questions to the extent that they were to establish issues of credibility.
- [55] The Complainant was directed by the Chair to answer a question regarding whether someone had provided her housekeeping services. She indicated her sister had provided housekeeping services and that she had paid her sister close to \$250,000, the amount claimed in the Statement of Claim for special damages, including loss of housekeeping capacity.
- [56] The Complainant confirmed that previously a female physiotherapist, and co-owner of the Clinic, had offered to provide a pelvic floor assessment on her.
- [57] The Complainant was cross-examined extensively about her interview with Mr. Acton and it was suggested by Mr. Rauf that he asked several leading questions.
- [58] The Complainant was cross-examined about her working relationship with GS and the statements she had made about GS.
- [59] The Complainant was asked about SD "cracking" her back on a previous occasion and being asked by SD to touch her toes. She stated did not know if being asked to touch her toes was relevant to the treatment she was getting. She was wearing a gown, it was open and he told her to stand up and touch her toes. She stated that whenever he would treat her lower back, he would always pull down her pants and her underwear.
- [60] She was asked about her evidence in direct that SD had spanked her buttock. She did not mention it in her written statement. However, she did mention it to Mr. Acton during the interview on January 14, 2020. She typed the written statement on December 4, 2019, but stated she type it out at school and had to type it "really fast" because she did not have any other time. She acknowledged the written statement was important.
- [61] The Complainant indicated that when he placed her on his lap, SD was holding on to her pretty tightly and because she is small, she does not have a lot of strength, but he was not squishing her or anything. She managed to put her feet on the floor and get up. She agreed that it was when she was sitting on his lap that he had his hands wrapped around her legs. One hand was under her leg and the other was across her back and under her armpit.
- [62] She confirmed that she asked if he had just kissed "her butt cheek". However, she did not say anything when he rubbed her vagina or made the comment. She did not say anything when he grabbed her breast. Nothing like that had ever happened to her and she did not know what to say.

[63] The Complainant confirmed that she has received approximately 28 counselling sessions since the incident.

Re-examination and Questions from the Hearing Tribunal

[64] The Complainant clarified that when she was employed at the first clinic, she had never seen GS, except when he interviewed her. GS yelled at her once because of the workshop incident. She stated that GS had mood swings.

[65] The Complainant was asked to clarify the chronology of her legal assistant course and practicum.

[66] The Complainant described the layout of the Clinic. She indicated that the treatment area was fairly far from the front door.

[67] The Complainant indicated that her answer in cross-examination regarding the amount of \$250,000 she paid to her sister for housekeeping services was not accurate. She stated she was extremely nervous and feeling pressure from SD's counsel. She felt intimidated when the Chair directed her to answer the question. She indicated it was not her intention to lie, but because of the setting and the environment and that this was her first hearing, she did not know how to respond to the Chair and she just wanted to move onto the next question.

[68] The Complainant demonstrated on the Complaints Director how SD touched her on November 25. The Complainant stated that SD was on her right side. Her feet were facing the wall, and her head was facing the hallway. She demonstrated how SD scooped her up with his left arm under her armpit to the back. There was a chair next to the physio bed and he lifted her up and sat down and placed her on his lap. The chair was against the wall. He picked her up and turned around with his back to the wall.

[69] The Complainant also described and demonstrated how SD adjusted her back.

SD

[70] SD is from India. He studied physical therapy in India. He completed the course and obtained a bachelor's degree in 2010. He then completed a master's degree in sports medicine. He worked in India until coming to Canada in 2015. He needed to go through the process of credentialing and so he got a job at a Cash Money store. He volunteered at a physical therapy clinic owned by GS between approximately April and October 2018. He worked at the Cash Money for about 4 ½ years until he got his job at the Clinic. He was the manager of the Cash Money store when he left. His wife came to join him from India in 2018 and she works at a Cash Money store, although at a different location from where he worked.

- [71] The Clinic was new and SD was offered a position there. He started work at the Clinic on September 4, 2019.
- [72] SD confirmed that the written examination to become registered as a physical therapist has a component on ethics and professionalism. He was not successful on his first attempt at the written examination. He was successful on his second attempt. He then needed to be supervised under a supervisor agreement and complete the clinical component. His supervisor was one of the co-owners of the Clinic.
- [73] SD met the Complainant when he started working at the Clinic. He described their relationship as work colleagues and work friends. He provided treatment to her. He did not consider her to be his patient. The first time, she told him her upper back was really sore. He told her that she spent most of her time sitting and her back might go stiff. He believes this was the first week of October. She asked if he would be able to check her upper back once the patients were done and he said okay. SD palpated the area, mobilized the joints and gave her a hot pack and IFC. SD did not recall the specific details of the second or third session. At some point she asked him to treat her because her whole back was stiff. SD indicated that he had three sessions with the Complainant before November 25.
- [74] On November 25, SD was working. The Complainant had mentioned earlier in the shift that her shoulder was hurting. She asked if he could treat her. His wife was working until 9 p.m. that evening. Generally, he would go home and take a break before going to pick up his wife. It was approximately 7:30 or 7:45 p.m. and he told the Complainant that once she was done her duties, he could check. Around 8:00 or 8:15 p.m. she indicated she was done and asked him to check her shoulder.
- [75] SD does not recall if the Complainant was sitting or lying down when he went into the treatment area, but he either asked her to sit or she was already sitting, so he could check her shoulder. SD is certain the Complainant's pain was in the left shoulder. He asked her to lift up her shoulder and raise her arm. He asked her which movement was painful. He assessed that her shoulder blade was not moving properly. He palpated the shoulder blade. He said he would go get lotion and try to relax her muscles. He also got the M2T blade. He told her he would use the blade. She acknowledged that she was comfortable.
- [76] A few weeks before, SD learned some massage therapy techniques from the massage therapist at the Clinic and they discussed this. SD denied leaving to get the massage therapist's oil.
- [77] The Complainant then told him that she was also having pain in her lower back. She was pointing to the area and asked if she should pull her pants down. SD denied ever pulling the Complainant's pants down. He was palpating the area and asking her if it was painful. She said yes. He could feel that it was really stiff so he said he would relax the muscles. He applied lotion and used the M2T blade to try to relax the muscles. He told her that she should start doing exercises.

- [78] The Complainant brought up the topic of whether he had ever treated a hairy patient and then she asked if she was hairy and he said no that she was not. SD denied ever saying that her skin was very smooth and soft.
- [79] SD said that the lotion was getting in her pants or underpants and she said she could just pull them down. She brought her underwear to almost halfway down her buttocks. She pointed to her left hip area and indicated it was also painful there. He asked her how she was feeling and she said, "Don't blame me if I fall asleep."
- [80] He concluded the treatment and wanted to see how she was doing. He asked her to sit so he could see if her back was okay. While she was coming up from the lying down position to sitting up, she almost lost her balance and he supported her on her shoulder. She told him that she was feeling very good and he took the M2T blade that he had placed on the stool and the lotion that was on the ground. When she stood up she asked if there were any lines on her face because of the face cloth and he said yes, as there were creases on her face from lying face down.
- [81] He left. She went to the washroom and came back and put the gown in the basket. She was telling him that she missed a few calls from her friend that she was supposed to meet. She mentioned that it was almost 9 p.m. SD believes she was also talking to her boyfriend on the phone at that time. She then went to get her things. She asked him to put on the alarm and they both went out. They said goodnight. She went to her car and he went to his car.
- [82] SD denied all the allegations, including that he kissed her buttock, that he rubbed her vagina, that he said "you are so wet", that he grabbed, squeezed or touched her breast, or picked her up and put her on his lap. He denied ever tickling her, although stated that she previously mentioned a tickling sensation. She never asked him if he was tickling her on purpose.
- [83] SD described the treatment area and indicated there is a curtain, a wall and an aisle and the chair is with the wall. There is also a stool.
- [84] He indicated he never charged fees for the treatment and that he never charted the treatment. He never considered the Complainant to be a formal patient. She simply had asked him for a favour and the treatment was at her request. He denied locking the Clinic door during her treatment. He did not turn the Clinic sign from "Open" to "Closed".
- [85] SD first heard of the complaint on November 26. There was a WhatsApp message on the group text from GS asking if something had happened at the Clinic the night before. He saw the message at approximately 6:15 a.m. He texted the Complainant out of concern to ask if she was okay but received no response.
- [86] He received a call from GS around 9 a.m. GS asked him if anything happened with the Complainant. SD responded that no, everything was normal; they had closed the Clinic

properly and everything was okay. GS asked if SD had treated the Complainant and SD confirmed he had. GS asked for a report of what happened. SD emailed him within 30 to 60 minutes about the treatment.

- [87] SD could not recall when he found out that there were allegations of sexual misconduct. He thought there may have been a second call when GS asked him to meet with him in his office and that it may have been during one of these calls.

Cross-Examination

- [88] SD confirmed he has been registered with the College on the provisional register as of May 29, 2019. He acknowledged that he is required to practice under supervision.

- [89] SD was asked questions about his supervision. He confirmed that he did not work very many overlapping shifts with his supervisor.

- [90] On November 26, SD first spoke to GS when GS called the Clinic, between 8 and 10 a.m. SD was questioned about the statement made by GS to the Complainant in the phone call transcript for November 26 (Exhibit 1, Tab 3) where GS says that he spoke to SD. SD stated that GS did not call him around 6 a.m.

- [91] SD met with GS the evening of November 26. It was an interview in GS's office.

- [92] SD acknowledged being shocked that he was accused of sexual assault and that this was the first time he was accused of such conduct. However, he could not recall at what point GS told him about the sexual nature of the allegations. SD was told in the interview on the evening of November 26 that the employer would investigate. However, SD could not recall being told about the conclusions reached in the investigation. He never received an investigation report from the employer.

- [93] SD could not recall what information he was provided before his interview with Mr. Acton.

- [94] With respect to the treatment provided to the Complainant, SD indicated that he did not conduct a formal assessment as he would for a patient. However, he conducted a general assessment to get an idea of what he was treating and what treatment he needed to do. He provided manual therapy. SD stated that the Complainant provided consent for the treatment.

- [95] SD confirmed that he is required to follow the regulatory requirements of the College. He acknowledged that it never occurred to him to document the treatment he was providing for the Complainant. He agreed that he has a requirement to chart treatment. He was asked about recent changes to the HPA and indicated he had not reviewed the changes to the legislation in the recent months. SD was questioned about whether he was permitted by the College to use the M2T blade and he stated that he was aware he could use it, but was not aware if there was anything additional that he needed to do to enhance that.

- [96] SD stated that he had not provided treatment to any other staff members at the Clinic. SD was unaware if the Clinic had any policies about providing treatment to staff members. He did not disclose to his supervisor that he was providing treatment to the Complainant alone after hours.
- [97] SD indicated that he treated an average of approximately 50 patients per week. He acknowledged that one purpose of charting is to document the treatment, because it would be difficult to remember what he did for each patient. It would be difficult to reconstruct after the fact what treatment was provided. However, with respect to the Complainant, he prepared his statement (Exhibit 1, Tab 7) from memory. He did not recall when the document was prepared but thought it was end of November or early December. He stated that the information in his statement was accurate.
- [98] With respect to the first treatment, SD stated his clear recollection that the treatment was for pain in the upper back, even though the Complainant indicated it was for neck pain. SD stated that for the second treatment, the Complainant stated that her back was stiff and that she was mainly on the computer. He recalled that the first few treatments were for back pain because he taught her a few exercises on the bed, which he demonstrated to her.
- [99] SD recalled that the third visit was in late October or the beginning of November, after she had moved. He was certain of this because one of his friends was also moving and he and the Complainant talked about this. SD also recalled that on the third visit he provided ultrasound for 4 minutes. The machine is set up for 4 minutes. He gave her a towel which she adjusted with her scrubs. He recalled that the Complainant indicated that she was supposed to go to a restaurant with her boyfriend, and so she was in a rush. He indicated he had a clear memory of this.
- [100] He recalls four treatments. He indicated there may have been five treatments, but he could only remember four.
- [101] SD indicated he had a good working relationship with the Complainant. He has been married three years. He was asked if he found the Complainant to be attractive and indicated that it never "clicked" for him that she was more attractive than anyone else.
- [102] SD was asked about the layout of the Clinic.
- [103] SD was questioned about the treatment on November 25. His evidence in direct examination was that the Complainant stated that her shoulder was hurting. However, in his interview with Mr. Acton (Exhibit 1, Tab 9, page 46), he indicated that that the Complainant stated that her back was very sore. He stated that the back was also in pain, in addition to her shoulder. This was the first time he used the M2T blade on the Complainant.

- [104] SD was asked about inconsistencies in his statements and evidence. He indicated that there were some things he forgot to put in his written statement that he recalled at a later point in time. There were also things he forgot to tell Mr. Acton and in his direct examination, for example the Complainant asking who was his favourite patient.
- [105] In writing his statement for GS, SD stated that there were a lot of things going through his mind. He stated there were things that he forgot to write down. In the moment, he was not sure what was going on. He acknowledged that leaving out the information about the M2T blade was an important detail. He acknowledged that he did not mention in his statement (Exhibit 1, Tab 7) that he discussed with the Complainant exercises that she should be doing.
- [106] SD denied leaving the treatment room to go check that no one else was in the Clinic. He denied that his claim of using the M2T blade was a fabrication.
- [107] SD indicated that during the treatment, while he was treating her lower back, the Complainant's pants and underwear were halfway down her buttocks. He used the lotion during the manual therapy and with the M2T blade. He denied using the amount of lotion described by the Complainant. He indicated that he used only the amount of lotion required. He did not recall if he gave her a towel to wipe off any excess lotion. However, in his interview with Mr. Acton he indicated he cleaned off the lotion (Exhibit 1, Tab 9, page 61)
- [108] SD confirmed that the curtains were closed around the treatment table and that no one else was in the Clinic. SD denied telling the Complainant not to tell anyone about the treatment.
- [109] SD indicated he was suspended from the Clinic. He is not currently working as a physical therapist. The College has put a practice restriction on his practice permit that he is to treat under supervision, with an open curtain. He has been charged criminally.
- [110] During cross-examination, SD noted that English is not his first language.

Re-Examination and Questions from the Hearing Tribunal

- [111] SD confirmed that the last time he treated a patient as a physical therapist was in January 2020. He indicated that no other staff member from the Clinic had asked him for treatment, although one of the front office staff did talk about issues with her wrist. He told her to use tape, but did not treat her.
- [112] SD spoke about his religion and upbringing.
- [113] In response to a question from the Hearing Tribunal regarding the treatment area, SD indicated that there is an aisle, the bed is on the right side. The chair is kept against the wall. There are linings (tracks) on which the curtains run, which almost touch the bed. The curtains are adjacent to the bed. All the cubicles are laid out in the same manner. The

head of the bed is facing the aisle. The physical therapist will stand on the patient's left side. It would be possible to adjust the bed or ask the patient to put their head on the opposite side (of the bed). There are also beds on the other side (of the aisle). SD indicated that he would need room to treat and if he was on the right side of the bed, the curtain would literally be on his back. You can have the patient put their head up or head down on the bed, depending which side you are treating.

- [114] SD did recall asking the Complainant to bend and touch her toes. He denied using the manipulation as described by the Complainant. He described the exercises that he asked her to do.
- [115] SD confirmed that he did not recall when he found out the allegations were sexual in nature. GS called in the morning. It may have been in the telephone call or in the meeting in the evening.

GS

- [116] GS is part owner of the Clinic. He is a physical therapist and is registered with the College. He is owner or part owner of 12 physiotherapy clinics, managing 70 employees.
- [117] SD volunteered at one of the clinics starting in 2019 for approximately 6 or 7 months. He was hired when the Clinic was opened. He started in September 2019. GS indicated that SD was hired because of his reputation, his work ethic and his punctuality. He received a lot of good reviews and the staff were happy with him. He was a great team member and everyone like him at the Clinic.
- [118] The Complainant was hired at another clinic initially and worked there for one or two months before the clinic closed. GS told her that if other opportunities came up, he would let her know. When he opened the Clinic, he contacted her and asked if she wanted to join them.
- [119] GS indicated that the feedback from her initial training was not great but she received additional training. The Complainant reported to the office manager. He stated he spoke to her a few times about her performance. He thought with additional training she would be a good asset for the Clinic. However, at the beginning of November he decided to let her go. Another individual was interviewed and was hired and they started training her. At one point the Complainant told him she was looking for another job and he asked if she could stay on a bit longer.
- [120] GS was asked about the events of November 26. He had a call with the Complainant around 6:30 a.m. and then a meeting with her and her lawyer in the afternoon. He was not aware at the time that the Complainant had recorded the phone call. He was aware of the meeting in the afternoon being recorded. After the recording was stopped, the Complainant's lawyer stated to him that he was a successful businessman, that with the MeToo movement this was a big deal right now but they could deal with it in another

way. The lawyer said they could settle it out of court. GS believes the lawyer also raised the issue of criminal charges.

- [121] GS indicated that he had not yet interviewed the other party, SD, and he still had to meet with D to investigate. He wanted to hear from both parties and see what had to be done. GS stated that the lawyer called him the next day to ask what he had decided. He said he was still investigating and consulting his legal counsel.
- [122] GS stated that he never said anything to the Complainant or her lawyer about not going to the police. He said the lawyer was telling his client not to complain to the police until he got an answer on whether they would settle out of court or not.
- [123] GS reviewed the email he sent of December 2, 2019 (Exhibit 6), expressing his understanding that the lawyer was making a suggestion that it could be settled by payment of money. GS never received a response to the email.
- [124] GS indicated that they reported the matter to the College.
- [125] GS denied yelling at the Complainant following the workshop incident.

Cross-Examination

- [126] GS was questioned about his workplace policies, including the Harassment Prevention Policy. GS stated that it was not acceptable to provide treatment to colleagues and not make a patient chart. GS stated that this may not have been discussed specifically with SD but this is the normal practice in the Clinic because everyone needs to go through the patient charting system and schedule. GS stated that if treatment is provided to a colleague, it should be charted.
- [127] GS was asked about a telephone interview with Mr. Acton, where the transcript indicates that GS stated: "In the clinic it is normal not to chart if you are treating other person at the clinic, other staff member." GS indicated that he did not remember this conversation.
- [128] GS confirmed that the Complainant was kept on after her probationary period was over. GS then determined he would terminate her employment. However, when she indicated she was looking for other opportunities, he asked her to stay on because he did not have her replacement trained yet. GS did not tell the Complainant she would be fired at that point in time even though he had hired someone to replace her.
- [129] GS confirmed that the first he heard of the incident was in the morning on November 26, when he heard a message that the Complainant had left for him during the night. Text messages between GS and the Complainant were reviewed (Exhibit 1, Tab 12).
- [130] GS denied contacting SD before calling the Complainant. He asked in the WhatsApp if anybody knew what was going on because the Complainant said something was wrong. He then called her. The first time he spoke to SD was after this when GS called him while

driving to work. He asked SD to come in to the office because there were complaints against him. He could not recall if he told SD on the phone that morning that there were allegations of sexual assault but did not believe so. He asked SD to provide an incident report.

- [131] He investigated the complaint as an employer. He did not advise the Complainant to go to the police since she had her lawyer with her.
- [132] GS recorded the meeting with the Complainant on his phone but did not record the interview with SD because his phone died. He stated he did not recall what he told SD. He confirmed that he did not prepare an investigation report. An email was sent to the College regarding the incident (Exhibit 1, Tab 2).
- [133] GS confirmed that if SD was found guilty, it could impact the liability of the Clinic toward the Complainant in the civil action.

Re-Examination and Questions from the Hearing Tribunal

- [134] GS stated that after he interviewed the Complainant and SD, he contacted his legal counsel who suggested that an independent investigation be done. GS clarified that a third-party investigation was organized but the Complainant declined to be interviewed.

TS

- [135] TS confirmed that he had met the Complainant through the legal assistant program. She did a practicum at the law firm where TS practices. They maintained contact after she was done her practicum.
- [136] The Complainant contacted TS the morning of November 26. She told him what had happened and asked him to come to the meeting with her employer.
- [137] During the meeting, after the recording was turned off, there was a brief conversation in passing that GS would have his lawyer contact him. They were going to do an investigation. He told GS that he would have to do some research, because GS had been discussing that he wanted to keep the matter private.
- [138] TS denied ever suggesting that the Complainant would refrain from reporting the sexual assault to the police or filing a civil claim in exchange for a settlement. He was asked about the December 2 email and indicated that he did not really think of responding to the statement that he had suggested a payment of monies.
- [139] TS confirmed that he prepared the Statement of Claim. He was retained at some point in the process, after the meeting.
- [140] When TS found out that the employer did not believe the Complainant, he had to call her and tell her they did not believe her and to go to the police. TS stated that the

Complainant waited to go to the police because they had asked to keep it private and internal.

Cross-Examination

[141] TS indicated that the Complainant did her practicum in December 2018 and early January 2019.

[142] He denied having a telephone conversation with the Complainant when she was on her way to the police station and telling her not to make a police report. He stated: "I have a distinct recollection that I didn't say to her don't make a statement to the police when she was on her way to the police station."

Re-Examination

[143] TS clarified that there were discussions with the Complainant about delaying the police report.

VI. Closing Submissions

Closing Submissions on behalf of the Complaints Director

[144] Ms. Haymond noted that the onus of proof is on the balance of probabilities. Ms. Haymond reviewed the evidence of the Complainant and SD in detail, and noted that there were some consistencies in the facts but that their evidence diverged significantly with respect to other facts.

[145] The evidence diverged with respect to the total number of times SD provided treatment. The Complainant recalls she was first treated for pain in her neck, whereas SD recalls treating her initially for her upper back. The Complainant says that she sought treatment on November 25 because she cracked her right shoulder after she was moving boxes. SD testified that the injury was caused by her boyfriend pulling or shaking her left arm. SD testified he used the M2T blade, which was denied by the Complainant.

[146] The Complainant testified that SD massaged her thigh and told her that her skin was smooth and he wanted to bite it, touched her vagina, tickled her, told her "you are so wet", kissed her buttock, grabbed her breast and scooped her onto his lap. SD denied each of these.

[147] Ms. Haymond reviewed principles relating to the assessment of witness credibility and reliability. Ms. Haymond noted that there was a lot of extraneous evidence that had been presented during the hearing, including evidence about the civil claim.

[148] Ms. Haymond reviewed the evidence of the Complainant in detail. She noted that there were some small discrepancies but the major things that the Complainant complains about are consistent on each of the five times she spoke about the incident (the phone

call, the interview with GS and others, her written statement, her interview with Mr. Acton and her testimony). While the order of whether SD kissed her buttock or grabbed her breast changed in one of the meetings, she was consistent with the order of the chronology in all her other statements. Ms. Haymond also noted that the spanking of her buttock was a new detail, not in her prior statements, which has to be considered.

- [149] Ms. Haymond noted that the Complainant was subjected to extensive cross-examination, for eight hours. She reviewed case law regarding how inconsistencies in testimony should be addressed.
- [150] Ms. Haymond addressed the Complainant's evidence that she was not truthful in answering a question about how much her sister had been paid in housekeeping costs and indicated the Hearing Tribunal would have to assess whether her explanation affected her credibility.
- [151] Ms. Haymond emphasized that a victim of a sexual assault has the right to file a civil claim. The Hearing Tribunal will need to determine whether the Complainant had a motivation to lie and whether she fabricated the events. Ms. Haymond reviewed case law on this point. Ms. Haymond reviewed case law regarding myths and stereotypes about victims of sexual assault and the cautions of the courts regarding these.
- [152] The Complainant contacted TS to come to the meeting with her employer. It is very clear from the transcript of the call between the Complainant and GS that GS did not have an open mind. In the recording, GS immediately discounts what the Complainant says and believes SD.
- [153] Ms. Haymond reviewed the evidence of GS and suggested that his evidence was not credible. She reviewed the evidence of TS.
- [154] With respect to the evidence of SD, Ms. Haymond noted that his written statement (Exhibit 2, Tab 7) was prepared not based on his usual practice but based on his independent recollection of the treatment he provided. She submitted this was not plausible. Ms. Haymond submitted that SD provided so much detail of the prior treatments to bolster his evidence about what happened on November 25, to add legitimacy. The email statement on November 26 does not indicate he used the M2T blade. The first mention of the M2T blade is in his written summary (Exhibit 1, Tab 7) which was prepared several weeks later. Ms. Haymond suggested that he added the detail of the M2T blade after the fact to legitimize the treatment provided. She noted his attitude was cavalier about whether he was actually authorized to use the M2T blade.
- [155] Ms. Haymond also noted that no mention is made in the written statement about using a towel to wipe lotion off of the Complainant's buttocks on November 25, but SD says he used a towel to wipe lotion off in his interview with Mr. Acton.

- [156] Ms. Haymond noted that if the Hearing Tribunal finds the allegation is factually proven, then it is clearly unprofessional conduct and the conduct meets the definition of sexual abuse and that the Complainant meets the definition of a patient.
- [157] Ms. Haymond noted that if proven, the conduct is contrary to the Standard of Practice regarding sexual abuse and contravenes HPA section 1(1)(pp) (i) conduct that displays a lack of knowledge, skill or judgment in the provision of professional services; (ii) contravention of the HPA, code of ethics and standards of practice and (xii) conduct that harms the integrity of the profession.
- [158] Ms. Haymond provided written submissions following the hearing regarding the character letters put into evidence by SD.

Closing Submissions on behalf of the Investigated Member

- [159] Mr. Rauf noted the enormity of what was at stake for SD.
- [160] With respect to the Complainant, Mr. Rauf noted that the cross-examination was long because the Complainant refused to answer simple questions and evaded them. Mr. Rauf stated that his position was that her allegations are simply false.
- [161] SD called evidence of good character and no evidence of bad character was called by the College against SD. SD is a man of excellent character. Mr. Rauf reviewed character letters entered as Exhibit 16.
- [162] Mr. Rauf reviewed principles of assessing credibility. He submitted that the Complainant has the most powerful motives of self-interest. The Hearing Tribunal should apply common sense to the steps taken by the Complainant. He noted the significant discrepancy between her testimony and TS's evidence. The Complainant stated that she was driving to the police station and TS told her on the phone to wait to report to the police. TS denied this. The Complainant is motivated by money and her civil claim is evidence of this.
- [163] Mr. Rauf noted that if the Hearing Tribunal cannot determine where the trust lies, given the conflicting testimony, the allegation should be dismissed.
- [164] Mr. Rauf reviewed in detail the Complainant's testimony. He noted that it was ridiculous that she forgot to mention on at least two occasions that SD had spanked her buttock. Mr. Rauf made submissions regarding the Complainant's response at the time of the incident, including that she did not ask SD to stop. Mr. Rauf took the position that some of the allegations, such as touching her breast while she was lying on the bed, could not have happened. He noted that the Complainant was argumentative and exaggerated in her evidence.

[165] Mr. Rauf noted that there was no suggestion that SD was sneaking around asking her to keep his treatment a secret. The evidence was that another co-owner herself had offered to do a pelvic assessment for the Complainant.

VII. Decision of the Hearing Tribunal

[166] The Hearing Tribunal applied the standard of proof of the balance of probabilities in determining if the Allegation was proven. The burden is on the Complaints Director to prove the allegation.

[167] The Hearing Tribunal finds that the Allegation is not proven. The reasons of the Hearing Tribunal are set out below.

VIII. Findings and Reasons of the Hearing Tribunal

[168] The Hearing Tribunal carefully considered all the evidence, including the testimony of the witnesses and the documents entered as exhibits. The Hearing Tribunal also carefully considered the submissions of the parties.

[169] SD provided treatment to the Complainant. The Complainant was an employee at the Clinic. However, for the purposes of receiving treatment, the Hearing Tribunal finds that the Complainant was a patient, as defined within the College Standards of Practice for Physiotherapists in Alberta (Exhibit 1, Tab 19), and SD was in the position of providing professional services, as defined in the HPA. The fact that the Complainant did not pay for treatment or that SD did not chart the treatment does not affect whether she was a patient receiving professional services.

[170] The Hearing Tribunal considered that there were some similarities between the evidence of the Complainant and SD. SD provided physiotherapy treatment to the Complainant on a number of occasions prior to November 25. SD provided a combination of manual therapy and other modalities but never used an M2T blade before November 25. The Complainant did not pay for treatment. It was done as a favour by SD. SD did not make any notes at the time he provided treatment.

[171] On November 25 the Complainant sought treatment from SD following a shoulder injury. She was wearing a gown and scrub pants, underwear and no bra. During the treatment, she lay face down on the treatment table with the gown open in the back. SD used manual therapy on November 25 but not ultrasound, heat or IFC. Both agree that the Complainant made a comment about whether SD had treated hairy patients previously. SD used lotion while performing the treatment. He treated her shoulder and her lower back and at some point her pants and underwear were lowered at least partway down her buttocks. The treatment was provided after hours when the Clinic was closed. The Complainant and SD were alone in the Clinic at the time. When the treatment ended, the Complainant and SD closed the Clinic by setting the alarm and locking the door and left at the same time.

- [172] The Hearing Tribunal accepts the above facts regarding the events of November 25, 2019. The evidence of the Complainant and SD, the only two individuals present at the time of the incident, is consistent on these points.
- [173] The Hearing Tribunal also considered the significant discrepancies in the evidence of the witnesses. In determining its findings of fact, the Hearing Tribunal considered whether the evidence of each witness was credible.

Witness Credibility

- [174] In determining credibility of each witness, the Hearing Tribunal considered the following factors:
- a. Witness's ability to perceive
 - b. Witness's ability to recall
 - c. Any motivation on the part of the witness
 - d. Whether the witness's evidence accords with common sense/probability or plausibility of the witness's story
 - e. Whether the witness's evidence was consistent with other evidence
 - f. Whether the witness's evidence was internally consistent
 - g. The appearance and demeanour of the witness

The Complainant

- [175] The Complainant was relatively consistent in her specific recollection of certain allegations (the touching of the mid-thigh and the vagina, kissing buttock, grabbing her breast and the comments made by SD about her skin being smooth and wanting to bite it and that she was "so wet"). Given the stress that would be expected to occur in the moment of such an incident, her evidence that she froze in the moment, and the lengthy and repetitive nature of the testimony and more specifically the questions on cross-examination, some confusion over the exact sequence of events is understandable.
- [176] However, the Hearing Tribunal considered that the Complainant was not consistent in mentioning the spank. She did not mention it in the initial phone call with GS, the interview with GS and her lawyer and her written statement of December 4, 2019. It was mentioned for the first time in her interview with Mr. Acton and again at the hearing. The Hearing Tribunal considered this inconsistency. Although the Complainant stated that she was in a rush to prepare the witness statement, she acknowledged knowing that the written statement was important.
- [177] The Hearing Tribunal also considered that the Complainant mentioned several times that SD used an excessive amount of lotion, including on her buttocks and thighs as well as asking if that was why SD said she was "so wet." However, in her testimony, she did not mention the consequences of this when she sat up on the bed. If there was the amount

of lotion described, the Hearing Tribunal would expect there would be evidence of lotion on the bed that would require wiping up and also on SD's pant legs when he placed her on his lap. The Complainant does not mention any evidence of this. There is no mention by SD or the Complainant of cleaning the bed. Also, the Complainant does not mention any attempts to clean up or wipe the excessive lotion off herself prior to pulling up her underwear and pants.

- [178] Both the Complainant and SD described that the chair in the cubicle was against the wall. Both agreed that her head was towards the aisle and her feet were closest to the wall. Both agree that she was face down during the treatment. The Complainant described and demonstrated SD being on the right side of the bed. SD described and demonstrated that he was on the left side of the bed. SD described the treatment cubicle as having a curtain on the right of the physio bed, very close to the bed. The Hearing Tribunal did not find that it was probable that SD picked up the Complainant and sat in the chair in the manner that described by the Complainant. The description and demonstration by the Complainant does not accord with the layout of the cubicle.
- [179] The Hearing Tribunal also considered that the Complainant's explanation and answers regarding the specific allegations were very consistent and used the same terminology or descriptions. However, at times during her testimony and most notably throughout the cross-examination, the Complainant was defensive and argumentative, and it appeared that she restricted her answers, or refused to answer, when her credibility or reliability was potentially being explored. The Complainant frequently was not forthcoming with seemingly simple answers to questions put to her. She would fail to answer the question, try to avoid the question, be argumentative, or justify why she would not answer or have difficulty answering due to the perceived abuse and threatening demeanor in which she was cross-examined. The Hearing Tribunal did consider this in assessing her credibility.
- [180] On one occasion and on the record, with respect to a prior question that the Complainant was directed to answer by the Chair regarding the amount she had paid her sister for housekeeping services, the Complainant advised to the Hearing Tribunal that she had lied in her earlier testimony and cited she felt pressure to answer that question. The Hearing Tribunal found this to be important in assessing the credibility of her evidence.
- [181] Another issue the Hearing Tribunal considered in the assessment of credibility was the discrepancy in the evidence of the Complainant and TS about whether TS told her to wait to report to the police. The Complainant testified that TS called her while she was driving, on her way to going to report to the police and told her that the employer did not want her to fill out a police report yet. She stated that she "had to turn around". TS was clear in his testimony that this did not occur. This conflict in testimony raised concerns about the reliability of NA's recollection and her credibility.
- [182] The Hearing Tribunal placed no weight on the LinkedIn page of the Complainant regarding the timing of her employment or whether this had any effect on her credibility. The

Hearing Tribunal accepted the Complainant's explanation that her LinkedIn page had not been updated.

- [183] The Hearing Tribunal did not find that the filing of the Statement of Claim affected the Complainant's credibility. A victim of sexual assault has the right to file a Statement of Claim.

SD

- [184] The Hearing Tribunal considered the evidence of SD. His answers were straight forward, and when he did not remember something, he said so rather than try to suppose or fill gaps. SD was open with respect to the status of the Complainant as a patient or colleague.

- [185] However, the Hearing Tribunal did consider that when SD prepared the email statement of events on November 26, 2019, he did not mention the M2T blade. This was an important detail, considering that he had not used it previously. The Hearing Tribunal also considered that SD was very specific in his recollection of treatments, but could not recall other events, such as when he first learned that the allegations were sexual in nature.

GS

- [186] With respect to the evidence of GS, the Hearing Tribunal found that he was restrictive in his answers. He was unable to answer, or chose not to answer questions that the Hearing Tribunal would expect the director and owner of 12 clinics with 70 employees to be well versed in. He did not follow the policies established for his clinic. The Hearing Tribunal did not find his evidence to be reliable.

TS

- [187] The evidence of TS was relatively straightforward, although the Hearing Tribunal found that it was not able to determine when his role as a lawyer for the Complainant became official. However, the Hearing Tribunal found his evidence reliable.

Findings by the Hearing Tribunal

- [188] In considering credibility in relation to the allegation, the evidence of GS and TS was of limited value, given that they were not present for the incident. The Hearing Tribunal placed limited weight on their evidence.

- [189] In weighing the evidence of the Complainant, the Hearing Tribunal determined that there were sufficient concerns regarding the evidence of the Complainant as outlined above that affected her credibility.

- [190] Mr. Rauf presented a theory that the Complainant's motivation in this matter was financial, and that the alleged conduct never occurred. The Complainant has the right,

like anyone, to commence a civil action. The Hearing Tribunal found that the fact that a civil action was filed in this case does not, in itself, prove a motivation on the part of the Complainant to fabricate the allegations.

- [191] The Hearing Tribunal also considered that the Complainant did not immediately report the event to the police. After reviewing the testimony, it appeared that none of the parties, including the Complainant, had an immediate intention to report this matter to the police and so little weight was placed on this factor.
- [192] After examining the evidence provided by GS, and considering his conflicting testimony before the Hearing Tribunal about whether his clinics allow treatment of friends and colleagues without documentation, the Hearing Tribunal finds there were instances in the clinic(s) of providing treatment to friends and colleagues without fee or documentation. This aligns with the testimony of the Complainant that another co-owner offered to provide a pelvic floor assessment.
- [193] The Hearing Tribunal did not find that SD willfully chose not to document or chart his treatment to the Complainant as a means to cover up or disguise his intent to assault her, or that the conduct by SD to not chart his treatment was a gross departure from the normal practices that occurred at the Clinic. SD stated he did not prepare charts or notes because the Complainant was a peer and not a patient, and he did not view her as a formal patient. The Hearing Tribunal accepted that this explanation was plausible. The Hearing Tribunal also disagreed with the suggestion that SD was cavalier about his attitude of whether he was permitted by the College to use the M2T blade.
- [194] The Complainant testified that the treatment provided on November 25 was different than previous treatments. The Complainant testified that SD did not use any machines that he normally would, that he utilized a significant amount of lotion, and that the massage was more intense than previous treatments. The Hearing Tribunal finds that the treatment conditions the Complainant described supports SD's evidence that the M2T blade was used on November 25. The Complainant testified that she was face down before SD would have entered the room, so it is reasonable that she may have not observed the instrument. The use of the M2T blade does not negate the allegations made by the Complainant but does support the reliability of testimony provided by SD and addresses the different treatment as described by the Complainant. The Hearing Tribunal did not find that the proposed use of the M2T blade, as described by SD, was fabricated or a distraction to whether the alleged conduct occurred.
- [195] The Complaints Director did not establish that SD locked the Clinic door, left to confirm there was no one else present or took advantage of the fact that the Complainant and SD were the only parties present at the Clinic. Neither the Complainant nor SD described any marked departure from the regular routines in closing the Clinic. Testimony by both parties supports a finding that the door to the Clinic remained unlocked and the 'open' sign remained in place during the time the alleged conduct took place.

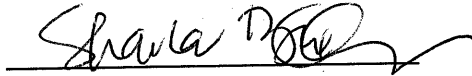
- [196] Neither SD nor GS could provide evidence of when SD was made aware that this was a sexual assault complaint. SD's email statement, dated November 26 at 10:21 a.m., has certain consistencies to NA's testimony, but does not document the use of the M2T blade nor does SD directly address any allegation of sexual abuse. A second written statement was produced by SD after request by his employer, and does appear to respond to certain content contained within the written statement provided by the Complainant on December 4, 2019. For example, SD in his second statement appears to be defending his choice of using the M2T blade rather than using the same modalities as previous. The second written statement by SD does include evidence of using the M2T blade, but again fails to respond to any allegation of sexual abuse.
- [197] The Hearing Tribunal placed little weight on the character references provided in support of SD. The nature of sexual abuse allegations is that they happen in private when there are no witnesses, so the types of character references provided do not assist in determining whether the allegations occurred.
- [198] The way the Complainant's employer handled this matter appears to be unsympathetic and less than responsible. GS was very clear in his testimony that he was only keeping the Complainant employed as long as it took to get her replacement trained, and there is some suggestion that the Complainant knew that she might lose her job in the immediate future. But more concerning was the response of GS after an employee brought forward a serious allegation against an intern physiotherapist. However, the Hearing Tribunal is not being asked to adjudicate the conduct of GS, the practices at the clinics, or how GS responded to the allegations made by the Complainant.
- [199] The Hearing Tribunal's role is to decide if the Complaints Director has proven, on a balance of probabilities, whether the allegation of unprofessional conduct occurred. Without any secondary evidence, such as a witness or video evidence, the Hearing Tribunal is left to consider the reliability and credibility of the witnesses and the totality of their evidence given.
- [200] As noted previously, the Hearing Tribunal took great caution in not placing weight on the fact that the Complainant initiated a civil action related to this matter. Rather, the Hearing Tribunal focused its assessment on the reliability and credibility of all witness evidence and found that the Complaints Director failed to prove, on a balance of probabilities, the allegation against SD.

IX. Conclusion

[201] The Hearing Tribunal finds that the allegation in the Notice of Hearing has not been proven. The allegation in the Notice of Hearing is hereby dismissed.

Dated this 23 day of March, 2021.

Signed on behalf of the Hearing Tribunal

A handwritten signature in cursive script, appearing to read "Sharla Butler", written over a horizontal line.

Sharla Butler, Chair