

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

DECISION OF THE HEARING TRIBUNAL

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I. Introduction

- [1] A hearing of a matter by the Hearing Tribunal of Physiotherapy Alberta College and Association (“PACA” or “College”) was conducted at the offices of the College and Association of Registered Nurses of Alberta, 11120 – 178 Street NW, Edmonton, Alberta on August 8, 9, and 30, 2019 with the following individuals present:

Hearing Tribunal:

Margaret Hayne, Public Member, Chair
Todd Wolansky
Sharla Butler

Also present were:

Moyra McAllister, Complaints Director
Gregory Sim, Legal Counsel for the Complaints Director
Rachel Weary, Student-at-Law, present as an observer with Mr. Sim
Eran Gilboa, Investigated Member
Taryn Burnett, Legal Counsel for the Investigated Member
Shayla Stein, Legal Counsel for the Investigated Member
Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal
Emma Banfield, Student-at-Law, present as an observer with Ms. Gagnon

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”). Although there were no initial objections to the composition of the Hearing Tribunal or its jurisdiction over the matter, Robert Sydenham, the first individual appointed as Chair of the Hearing Tribunal, raised a concern early on the first day of the hearing after reviewing documents presented in an Exhibit that his spouse appeared to be involved in the matter in some fashion.
- [3] Ms. Burnett, counsel for Mr. Gilboa, took the position that this raised a reasonable apprehension of bias, and submitted that the Chair should recuse himself and that the matter should proceed with the remaining three Hearing Tribunal members.
- [4] Mr. Sim, counsel for the Complaints Director did not agree that this necessarily raised a reasonable apprehension of bias, but because Mr. Sydenham’s spouse’s name appeared

in the materials, Mr. Sim submitted that for the process to be efficient and fair, it would be most appropriate for Mr. Sydenham to recuse himself. Mr. Sim also asked the remaining Hearing Tribunal members to continue, as even without Mr. Sydenham the required two regulated members and one public member would be present. Following a short break, Mr. Sydenham recused himself as Chair. Ms. Hayne, the public member, was appointed as Chair.

III. Allegations

[5] The allegations that appear in the Notice of Hearing (Exhibit #1) are that Mr. Gilboa:

1. On or about September 14, 2018, while fully clothed, inadvertently and inappropriately allowed his penis to come into contact with client CT's hand while he was providing physiotherapy treatment to her, particulars of which include one or more of the following:
 - a. While providing treatment to CT, he failed to recognize that he had developed an erection; and
 - b. He failed to take adequate steps to position himself or CT in a manner that minimized or prevented contact between his penis and CT.
2. In the alternative to allegation #1, on or about September 14, 2018, while fully clothed, he inappropriately and purposefully allowed his penis to come into contact with client CT's hand while he was providing physiotherapy treatment to her.
3. On or about December 13, 2018, December 18, 2018 and/or December 21, 2018, while fully clothed, he inadvertently and inappropriately allowed his penis to come into contact with client JH's hand while he was providing physiotherapy treatment to her, particulars of which include one or more of the following:
 - a. Despite having received a prior complaint alleging inappropriate touching, and despite having previous discussions with his employer regarding how to avoid similar complaints in the future, he failed to take adequate steps to maintain appropriate physical boundaries with JH while treating her in order to minimize the potential for inadvertent contact;
 - b. He failed to recognize on one or more occasions that while he was treating JH he had developed an erection; and
 - c. He failed to take adequate steps to position himself or JH in a manner that minimized or prevented contact between his penis and JH.
4. In the alternative to allegation #3, on or about December 13, 2018, December 18, 2018 and/or December 21, 2018, while fully clothed, inappropriately and purposefully allowed his penis to come into contact with client JH's hand while he was providing physiotherapy treatment to her.

[6] It is further alleged that the above-referenced conduct constitutes unprofessional conduct pursuant to s 1(1)(pp) of the HPA. In particular, it is alleged that Mr. Gilboa's conduct breaches one or more of the following statutes or provisions:

- Sections 1(1)(pp)(i)(ii)(xii) of the HPA.
- 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).
- Standards of Practice: Professional Boundaries.

IV. Exhibits

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

- Exhibit #1 – Notice of Hearing
- Exhibit #2 – Agreed Statement of Facts
- Exhibit #3 – Patient Intake Form of C.T. dated September 14, 2018 (redacted)
- Exhibit #4 – Photographs of treatment area at Sunpark Lifemark in Calgary, Alberta
- Exhibit #5 – Emails between Kerry Statham and Gaye Sydenham dated September 15, 2018
- Exhibit #6 – Handwritten notes made by Kerry Statham of his discussion with Eran Gilboa dated September 17, 2018
- Exhibit #7 – Letter from Kerry Statham to Eran Gilboa dated September 18, 2018
- Exhibit #8 – Patient Intake Form of C.T. dated September 14, 2018 (unredacted), physiotherapy assessment, and handwritten notes
- Exhibit #9 – Letter from Kerry Statham to Eran Gilboa dated October 1, 2018
- Exhibit #10 – Kerry Statham's notes from meetings with Eran Gilboa in October and November, 2018
- Exhibit #11 – Handwritten notes made by Kerry Statham of his discussion with J.H. dated January 3, 2019
- Exhibit #12 – Email from J.H. to Kerry Statham dated January 3, 2019
- Exhibit #13 – Letter from Kerry Statham to Eran Gilboa dated January 3, 2019
- Exhibit #14 – Emails between J.H. and Kerry Statham dated January 4-5, 2019
- Exhibit #15 – Patient Intake Form of J.H. dated November 5, 2018 and treatment notes for J.H. dated November 12, 2018, November 15, 2018, November 19, 2018, November 26, 2018, November 30, 2018, December 11, 2018, December 13, 2018, December 18, 2018, and December 21, 2018
- Exhibit #16 – Letter from Kerry Statham to Eran Gilboa dated January 7, 2019
- Exhibit #17 – Email from Diane Reino to Kerry Statham and others dated September 27, 2018
- Exhibit #18 – Email from Eran Gilboa to Kerry Statham dated 17 September, 2018
- Exhibit #19 – Facebook messages between Eran Gilboa and J.H. between December 1, 2018 and January 3, 2019
- Exhibit #20 – Curriculum Vitae of Eran Gilboa (no handwriting)

Exhibit #21 – Curriculum Vitae of Eran Gilboa (handwriting)

Exhibit #22 – Photographs of a reflex hammer

Exhibit #23 – Letter from Eran Gilboa to Diane Reino (undated, with handwriting)

Exhibit #24 – Email from Eran Gilboa to Kerry Statham dated January 3, 2019

Exhibit #25 – Collection of Documents detailing Eran Gilboa Remedial Steps

V. Witnesses

[8] The following individuals were called as witnesses for the Complaints Director (“CD”) during the Hearing:

C.T.

Kerry Statham

J.H.

[9] The following individuals were called as witnesses for the Investigated Member during the Hearing:

Nancy Thiessen

Eran Gilboa

Summary of Witness Testimony

[10] The following is a summary of the testimony given by each witness.

C.T.

[11] C.T. is 30 years old, married and holds a diploma in hospitality. She lives in Calgary and went to see a physiotherapist because she was experiencing neck pain. She had been given pain medication, but wanted to get to the root cause of what was causing the pain in her body. She chose Lifemark because it was close to her house and she was assigned to Eran Gilboa (“Mr. Gilboa”). She had been to see a physiotherapist when she was 16 for back pain, but not since then.

[12] C.T. testified that she had only one appointment with Mr. Gilboa on September 14, 2018. Her appointment time was around 5:30 p.m. Mr. Gilboa came to meet her in the waiting room and led her to the back corner of the treatment area. The room was fairly empty, although a few other physiotherapists were treating other patients in the room. She and Mr. Gilboa were the only people in the back area of the clinic. C.T. thought that Mr. Gilboa was wearing jeans and a plaid shirt.

[13] C.T. testified that when Mr. Gilboa first led her to the back area, they sat down and she told him about her neck and he did some testing and stretches on her head and reflexes. She stated that he then decided to do massage therapy so he asked her to lie down on the massage table and put her head in the table hole. When she did this, he pulled the

curtain closed. C.T. stated that she was wearing a hoodie which made it hard for Mr. Gilboa to massage her neck, so he asked her if she could take it off. She agreed, and he left while she removed her hoodie. He returned, but she was wearing a tank top with a high collar and he asked her to change into a hospital gown. C.T. agreed, and Mr. Gilboa left while she took off her tank top. When he returned, C.T. was only wearing a hospital gown and leggings. She lay face down on the table with the gown open at the back. C.T. testified that she had not worn a bra to the appointment because she expected the use of electrodes hooked up to her neck.

- [14] C.T. testified that after she lay down on the table, Mr. Gilboa started massaging her neck, shoulders, back, and buttocks area. Then he concentrated on the right side of her body, which confused her, because her neck pain was on her left side. He spent the remainder of the treatment at her right side. She remembers Mr. Gilboa adjusting the table after he moved to her right side, but could not recall if he adjusted it up or down. He then asked her to move closer to the right hand side of the table. She remained lying face down, with her hands palm up at her sides. Mr. Gilboa did not suggest to her that she should or could tuck her hands under her thighs during their treatment session.
- [15] C.T. testified that she felt something brush against her hand, and her original thought was "oh, my god, was that his penis" but then she was not sure if that was what it was. The treatment continued, and eventually she felt certain that what was in her hand was an erect penis, and it stayed in her hand. Then Mr. Gilboa started moving her shoulder so that her hand moved and rubbed against his erect penis on her hand. C.T. testified that this was when she was sure that what she was feeling was his erect penis in her hand. She stated that she tensed up and her shoulders froze up and she did not know what to do. She testified that Mr. Gilboa told her to stop tensing up, but she could not.
- [16] C.T. testified that Mr. Gilboa then stopped the procedure and told her to get her clothes back on and that he would meet her outside the treatment area. She put her clothes back on and then met him in the exercise room where he showed her a few exercises on a machine. Then he booked her another appointment as they were walking out. He then left her to go talk to some other physiotherapists, and she walked out of the clinic.
- [17] C.T. testified that after she left the office she was crying and she called her best friend. When C.T. arrived home, she told her husband, who went to talk to the receptionist at the Lifemark front desk, and the receptionist gave him the email address of the manager at Lifemark. When she and her husband returned home, he sent an email to Lifemark. When they got back to him, he corresponded by email with Lifemark, until Diane from Toronto came out to meet with C.T.
- [18] C.T. testified that Mr. Gilboa did not discuss the treatment he would be doing on her apart from telling her that he would be doing massage therapy. She stated that he did not tell her why he was treating the right side of her body, which left her confused. She testified that she was uncertain whether the table height was adjusted before or after she first felt his penis. She stated that he did not tell her why he was going to adjust the table or why

he asked her to move over. She testified that when he was standing at her right side it was toward her hip area.

- [19] C.T. testified that while he was massaging her, they chatted. He asked her whether she was married, and she reciprocated. He told her about his wife and kid and how they had recently moved to Canada and how his child was struggling at school and just about to start kindergarten. She testified that the communication changed, and Mr. Gilboa started saying things like “does that feel good, does that feel nice”. She stated that this made her uncomfortable, and she did not feel that these types of comments were professional. She testified that there was not much conversation after she felt his penis because by then she had tensed up.
- [20] C.T. stated that she tried to move her hand under her leg after she felt his penis, but in moving her hand, she felt it made the situation worse, so she just tensed up and did not know what else to do. She testified that she did not lift her head to look and see if what she was feeling was his penis because she was having neck pain, and in the position she was lying in, she could not really lift and turn her head. C.T. testified that while this was happening, she felt anxious, extremely stressed out, did not know what to do, and just wanted it to be over so she could leave.
- [21] C.T. testified that she was certain she was feeling his erect penis because she is a married woman and knows what an erect penis feels like. She testified that what she felt in her hand was the same width and “type of shape” as a penis. She had been asked by the investigator if it could have been a pen or cell phone, but she knows that is not what she felt in her hand. She also testified that she had seen pictures of a reflex hammer, and had also been asked if it could be that, but she testified that in her mind, it could not have been that.
- [22] C.T. testified that the physiotherapy she had received at 16 was very different from the treatment she received from Mr. Gilboa. Her previous treatment involved electrodes hooked up to her back, acupuncture, and maybe very brief massage. She testified that she thought her insurance had paid for the treatment by Mr. Gilboa. She said nothing to the receptionist as she departed because she was conflicted about what to do: she was uneasy about how a complaint would affect Mr. Gilboa’s family and worried about how long the complaint process might take. C.T. testified that she also went to the police about the incident. She thinks she met with them about a week after she contacted them, and she believes that they interviewed both her and Mr. Gilboa, but did not have enough evidence to go forward.
- [23] Regarding the impact of the incident, C.T. testified that she was really stressed out at the time, and that she is angry that Mr. Gilboa would put his life at risk and hurt his family with his choices. She also stated that she felt like she had to speak her truth according to her moral conscience.

- [24] In cross-examination, C.T. agreed that she had filled out an intake form. She recognized photographs of the treatment area and pointed to the table where she had received treatment. She did not recall if there was a window in the area, but agreed that a curtain would extend around the treatment area.
- [25] C.T. agreed that she was initially seated in a chair when Mr. Gilboa took her history, and she told him about the pain in her neck. She told him she had suffered from pain in her neck and shoulders for a few months. She also told Mr. Gilboa about a snowboarding accident about six months earlier when he asked her about prior accidents. She did not recall whether she told Mr. Gilboa that she also had low back pain, but agreed she could have. C.T. recalled Mr. Gilboa using a tool to conduct reflex testing, and that the initial history and assessment probably took about five minutes, but could not recall the length of the entire appointment.
- [26] C.T. confirmed that the room had a chair, table, and curtain, but could not remember if there was a stool. She recalled a hole in the table for the patient's head. She remembered sitting in the chair and that he stood behind her to do some of the testing, and beside her for some of the reflex testing.
- [27] C.T. confirmed that Mr. Gilboa asked her to lie on the table and that she lay with her head in the hole until he asked her to remove her hoodie. She then lay on the table wearing a tank top and leggings with her head in the hole until he asked her to remove the tank top. She could not recall where he was standing at this time.
- [28] C.T. testified that Mr. Gilboa left the room while she changed into a hospital gown, and then she lay back on the table with her head facing down. She thought about 10 minutes had passed at about this time. She stated that she thought he was on the right side, but could not be certain. She confirmed that the right side was a guess. She also estimated that the table was about four feet off the ground, or a "regular height".
- [29] After C.T. changed into the gown, Mr. Gilboa started treatment on her neck, and she believed he was standing on her right. She also confirmed that he checked in with her about whether the treatment hurt. She thought he treated her neck for five minutes or less. Then he moved to her right side and worked on her lower back and buttocks. She did not recall Mr. Gilboa commenting on tense spots or trigger points or telling her he was going to work to relieve those areas. She testified that he worked on those areas for five minutes or less. She testified that she thought he was standing at her hip area because of where he was reaching and where she could hear his voice.
- [30] C.T. testified Mr. Gilboa massaged her back, up and down the muscles along her spine and then started rotating her shoulder. He adjusted the table at some point after he massaged her buttock area but before he worked on her shoulder. She could not recall if he adjusted it up or down. She confirmed that he was wearing jeans and that she did not see him unzip his pants. She agreed that she did not feel any skin-on-skin contact or secretions, nor did she see his erection, if he had one. She agreed that penises can vary

in size, and did not think she felt his testicles. She testified that her arm was fully covered by the gown and the object lay on top of her gown. She thought his penis was about two inches in width and assumed he was facing toward her head at this time. She believed his penis was in her hand for a minute or two. She did not recoil her hand because she did not have much room to move her hand. She did not say anything, but tensed up. She recalled him telling her to relax, but did not understand that some trigger points were noted in her shoulder. She testified that she could not have been mistaken about what she felt in her hand.

- [31] C.T. testified that Mr. Gilboa left the treatment area while she changed and then he asked her to come to the exercise station, which she did. She testified that she was at the exercise station for about two minutes, where he showed her a few exercises, but she was not paying attention. She recalled Mr. Gilboa booking her another appointment for massage.
- [32] On re-examination, C.T. recalled that the clinic was on the second floor, and did not recall the window or whether it had blinds. She further stated that the height of the table changed after the treatment started.

Kerry Statham

- [33] Kerry Statham ("Mr. Statham") is the clinic director of Lifemark's clinic at Sunpark Plaza in Calgary. He has been practicing there since 1993 and has been in various management roles for Lifemark since 2004. He started managing the Sunpark location in May 2005. He had an active caseload until the winter of 2013, at which point he took on a second location in Calgary, which prevented him from actively maintaining his caseload.
- [34] Mr. Statham testified that Mr. Gilboa worked at the Sunpark Plaza clinic from May 2018 to January 2019. An initial complaint about Mr. Gilboa came to his attention on Saturday, September 15, 2018, when he saw he had an email from C.T.'s husband and one from his customer service representative. He confirmed that Lifemark conducted an investigation into the complaint, and that he had very little involvement in the investigation, which was largely conducted by Diane Reino.
- [35] Mr. Statham stated that Mr. Gilboa was suspended during the investigation. He met with Mr. Gilboa on September 17, 2018. During that meeting, Mr. Statham asked about the email from C.T.'s husband and Mr. Gilboa told him that when he was working with a client prone, especially a female, he would typically request the client to tuck their hands under their thighs. Mr. Statham provided Mr. Gilboa with a letter of suspension on September 18, 2018. The investigation ultimately determined that there had been a misunderstanding and that Mr. Gilboa could return to work. Mr. Statham issued a warning letter to Mr. Gilboa on October 1, 2018 that was drafted by Diane Reino.
- [36] Mr. Statham also confirmed that he sat down to discuss the contents of the letter with Mr. Gilboa, who seemed excited to return to work. Mr. Statham also stated that he

provided Mr. Gilboa with modules from the standards of practice, which he asked Mr. Gilboa to read and return to him initialed, which Mr. Gilboa did.

- [37] Mr. Statham continued to have regular meetings with Mr. Gilboa during which they focused on mitigating and minimizing the risk of a similar situation happening. He used the word “hyper-vigilant” frequently. In his notes from the meeting, Mr. Statham said he noted that Mr. Gilboa should treat female patients with open curtains, or with a female physical therapy assistant (“PTA”) present if the curtains were closed. Mr. Statham believed he had communicated that this was a requirement. During his testimony Mr. Statham reviewed notes from several meetings in which he and Mr. Gilboa discussed the need to note patient consent, and more details about the actual treatment details, client positioning, response to treatment, etc. particularly with regard to female patients. He noted that some records did not indicate whether the curtains were open or closed.
- [38] Mr. Statham received a second complaint about Mr. Gilboa on January 3, 2019. He testified that he was amazed at how similar the second complaint was to the first. The description of events was almost word for word with regard to body positioning, contact and the client’s experience. He spoke to J.H. on January 3, and she told him that she was not wearing a gown, that there was no third party, that she had a massage for about 30 minutes, and that Mr. Gilboa had placed his genitals in her hand when she was face down on the bed. She sent an email to Mr. Statham later that day. Lifemark did very little investigation and terminated Mr. Gilboa the following Monday. Mr. Statham spoke to Mr. Gilboa and later provided him with the notice of termination. J.H. later sent another email with information about her Facebook contact with Mr. Gilboa.
- [39] On cross-examination, Mr. Statham testified that Diane Reino had been engaged by Lifemark to conduct the investigation into Mr. Gilboa. He confirmed that she had concluded that there was no intentional sexual misconduct by Mr. Gilboa toward C.T. She also provided some recommendations, which appeared in the October 1 letter. Mr. Statham agreed that the contents of the letter came from Ms. Reino, although it was signed by him.
- [40] Mr. Statham agreed that the letter should have clearly articulated the conditions and requirements Mr. Gilboa needed to comply with going forward. He agreed that the letter did not state that having a PTA present was a requirement when treating female patients.
- [41] Mr. Statham agreed that there was no intentional sexual misconduct finding by Lifemark against Mr. Gilboa resulting from the complaint by J.H. He agreed that the decision to terminate was because of the previous warning and subsequent complaint.
- [42] Mr. Statham explained the role of a PTA in a clinic, which includes wiping down beds, applying ultrasounds, and monitoring patients in the exercise area. He confirmed that in the evening there were fewer physiotherapists and only one PTA. He confirmed that PTAs are not trained chaperones, and that Lifemark did not supply Mr. Gilboa with a trained chaperone.

[43] On re-examination, Mr. Statham confirmed that at the time Mr. Gilboa received the October 1, 2018 warning letter, he was not treating female patients. At the conclusion of the police investigation, Mr. Gilboa was not provided with another letter, but merely had a verbal discussion with Mr. Statham.

[44] In response to questions from the Hearing Tribunal, Mr. Statham indicated that despite the verbal recommendation that a PTA be present when Mr. Gilboa was treating female patients with closed curtains, he never saw in the chart notes that Mr. Gilboa had used a PTA in this capacity. However, he also noted that most of the meetings when they conducted chart reviews were in October, when Mr. Gilboa was temporarily not seeing female patients.

J.H.

[45] J.H. is 30 years old, married, and a stay-at-home mom who runs her own business selling t-shirts. She is also very religious. J.H. was in a motor vehicle accident in April 2018, and her insurer referred her to Lifemark because of pain in her neck and lower back. Lifemark contacted her and assigned her to Mr. Gilboa. She had appointments with Mr. Gilboa from October to December 2018, but could not recall the date of her first appointment. She had never had physiotherapy before seeing Mr. Gilboa, but had been for massage therapy.

[46] J.H. testified that she initially felt uneasy about Mr. Gilboa because she was nervous about men treating her in such a vulnerable situation. However, she brushed off her uneasiness because he was a medical professional. Mr. Gilboa treated her in one of the treatment areas identified in the photographs (Exhibit 4). She was treated in different places at different appointments. Her appointments were always in the evening when her husband was available to take care of their children.

[47] J.H. testified that when she arrived for an appointment, Mr. Gilboa would lead her to one of the treatment areas and she would lie down and he would massage. She testified that he closed the curtains and that no-one other than the two of them was ever in the treatment area inside the curtain. He mainly did massage therapy with her but occasionally showed her some exercises in the gym area. She recalled that he usually wore slacks and a polo or button down shirt. She testified that he never offered her a gown to wear, and that she would usually arrive in athletic clothing, like leggings and a t-shirt. Although she initially wore a bra, he asked her to unhook it so he could massage better, and at the last few appointments, she thinks she took it off to start. J.H. testified that she lay face down for the appointments, with her bare chest on the table, with her arms at her side, palms up. J.H. testified that Mr. Gilboa never told her she could tuck her hands under her body.

[48] J.H. testified that Mr. Gilboa did use a TENS machine or heat on her, usually at the end of an appointment. She recalled that they did have discussions about her symptoms and

what might be causing it, but could not recall if he talked to her about how physiotherapy might help.

- [49] In the last three appointments, while she was lying face down, Mr. Gilboa would adjust the bed height, ask her to move her pelvis closer to him, and stay in one spot to massage her, and she felt like his penis was in her hand, although his clothes were still on. He would talk to her about how happy he was that she was his client, how he looked forward to her coming, and how he felt like they had really great chemistry. J.H. testified that she froze when she felt his penis, but that she considered that she might be feeling something else. She had ruled out this possibility by the last visit, when she had convinced herself it was his phone, but then she felt him take his phone out of his pocket, and heard the click of him turning it on. She testified that Mr. Gilboa stopped the massage, did something on his phone, clicked it off, put it back in his pocket. During the time Mr. Gilboa was on his phone, J.H. testified that she still felt Mr. Gilboa's penis in her hand.
- [50] J.H. testified that during the last three appointments Mr. Gilboa stayed at her right side and did not move around. By the last appointment, she had deduced that it was his penis she was feeling because she had ruled out anything else. She indicated that when an investigator showed her pictures of tools physiotherapists carry with them, they were all too small for what she felt in her hand. She testified that she never lifted her head to see if what she was feeling was his penis because she was terrified.
- [51] J.H. stated that when Mr. Gilboa asked her to move closer to him, it would be at the beginning of the appointment, and that he never explained why. She believes he repositioned the table height during the last few appointments, but does not remember if he told her why he was doing this.
- [52] During the first two of the last three appointments, J.H. was in disbelief about what was happening and doubted herself. When she finally concluded that it was his penis, she was shocked, nervous, and did not know what to do. She continued to go because she doubted herself and told herself that she was just jumping to conclusions. At her last appointment on December 21, 2018, she decided not to go back and cancelled her further booked appointments. She told her husband and sister what happened after the appointment on December 21. A week later, she complained to the office manager, who escalated the complaint to Kerry Statham or Kris Head. She believes she spoke to both of them. She also put the complaint in an email to Mr. Statham at his request. She testified that the email was an accurate description of events except that it said there were two appointments, and after thinking about it, it was the last three appointments. J.H. testified that it took her a few days to write the email because she did not take her accusations lightly and wanted to make sure it was accurate.
- [53] Since making the complaint, J.H. stated that she has had contact from Mr. Gilboa. He messaged her on Facebook. She had given him her business card so he could order a custom t-shirt from her. She replied to his text message on December 21 as a reflex, while still trying to process what was going on.

- [54] J.H. testified that the incidents have had a lasting effect on her. She was anxious that he would show up at her house, and convinced her husband to buy a video doorbell so she could see who was there. She was scared to run into him in public, and started to see a therapist. The massages from Mr. Gilboa did not help her physical symptoms, and she has since seen another physiotherapist who has given her lots of exercises, and used needling and a TENS machine.
- [55] In cross-examination, J.H. testified that she is 5 feet, 7 inches tall, and weighed approximately 160 pounds in the fall of 2018. J.H. agreed that her treatment took place in different places in the clinic depending on availability. She testified that her hands stayed on the table during treatments, and did not fall off the table.
- [56] J.H. testified that she filled out a patient intake form at her first appointment. J.H. testified that she had presented with neck, lower back, and upper back problems stemming from her motor vehicle accident. She initially attended at the clinic on November 5, when she completed her initial assessment and Mr. Gilboa took a history from her. She agreed that he did an assessment to determine which areas she had pain, and that he would press on certain areas to ask if they were painful, and that he assessed her range of motion. She testified that Mr. Gilboa never offered her a gown, and did not recall telling the investigator that he had offered her a gown and she had declined.
- [57] J.H. testified about her uneasiness on meeting Mr. Gilboa, and felt this was probably just because he was a man. She believed that the bed height was below her waist and did not recall whether Mr. Gilboa adjusted the bed height during the first treatment, or any other subsequent appointments, except the last three, when she was certain that he did.
- [58] J.H. testified that Mr. Gilboa checked in with her throughout the appointments to assess whether she was comfortable or in pain. She recalled some reflex testing at the initial assessment with a reflex hammer, but told Mr. Acton that the hammer was too small. She confirmed that the investigator only showed her a picture of the hammers rather than the actual object.
- [59] J.H. did not specifically recall what Mr. Gilboa was wearing at each appointment, but was certain it was not sweatpants. She agreed that she did not see or hear Mr. Gilboa unzip his pants, and that he was fully clothed at all their appointments.
- [60] Regarding the text messages that Mr. Gilboa and J.H. exchanged, she testified that they were about a t-shirt he paid her to make. She confirmed that on December 13, 2018, she had an appointment at 1810h for 30 minutes. Then he initiated a text message exchange around 2039h. On December 18, 2018, she had an appointment at 1830h for 30 minutes. He prescribed squats and lunges. And then at 1953h, Mr. Gilboa messaged her and she provided her email address. He also asked her how she felt, and she replied "K. Thanks. Feeling good! Neck is still tight, though." J.H. testified that this was an accurate description of how she felt, and that she was doubtful about what she had experienced during the appointment. On December 21, 2018, starting at 1942h, Mr. Gilboa asked J.H.

for suggestions of things he could do with his child over the winter break. This exchange took place after the visit when she stated she was terrified. Regarding the final text exchange on January 3, 2019, J.H. stated that he did not specifically ask her not to report him. Rather, he apologized for making her feel uncomfortable.

- [61] In her email to Mr. Statham, J.H. testified that it took her a few days to write because she wanted it to be accurate. She agreed that the number of sessions during which she felt uncomfortable was a significant detail. She testified that between January 3 when she sent the email and when the investigator came to her home in February, she realized it had to be three events, not two. She agreed that her memory in January would have been better than her memory in February.
- [62] J.H. indicated that she knew Mr. Gilboa was from Israel and that there might be some cultural barriers. She understood that his use of “good chemistry” might have a different meaning in Israel than in Canada.
- [63] J.H. testified that she was certain at the last appointment that she felt Mr. Gilboa’s penis. She agreed that his clothes were on at all times, that there was no skin-on-skin contact with any part of Mr. Gilboa’s groin, testicles, or penis, that she felt no secretions, and never saw an erection at any appointment. She could not say how long the object was that she felt, but estimated the length of her fingers and a couple of inches wide. She said it was hard, but not poking her. She stated that the object was around her hips and in her right hand on all three occasions, but she only deduced it was his penis on the last occasion. She thought he was wearing either jeans or slacks, and could not be more specific regarding the type of fabric. On all three occasions, Mr. Gilboa was near her hips on her right side. She gauged his position because she could see his feet through the face hole in the table. She testified that he was working all over her back. She agreed that she could have been mistaken about what she felt in her right hand.

Nancy Thiessen

- [64] Nancy Thiessen spoke to the Hearing Tribunal by phone from Jerusalem, Israel, but ordinarily resides in Calgary. She is 55 years old and works as a physiotherapist. Ms. Thiessen currently works at the Midnapore location of Age Care Investments in Calgary. She testified that she knows Mr. Gilboa and is aware of the nature of the allegations against him.
- [65] Ms. Thiessen testified that she met Mr. Gilboa at a three-day vestibular course in November of 2018. At the end of the first day of the course, Mr. Gilboa asked the group if anyone could give him a ride to the south end of the city, and Ms. Thiessen volunteered. They struck up a friendship and decided to study together. The course was primarily theory, but she and Mr. Gilboa practiced on each other. Ms. Thiessen testified that the practice sessions usually lasted a couple of hours and took place at her home or his. Ms. Thiessen described some of the techniques they practiced. Ms. Thiessen testified that when the practice sessions were at her house, they were completely alone, and that when

they were at Mr. Gilboa's house, his wife was upstairs, and Ms. Thiessen and Mr. Gilboa practiced in the living room. Ms. Thiessen testified that she felt completely comfortable with Mr. Gilboa. Had she felt threatened or uneasy, she would not have invited him to her home, or gone to his. After the course, Ms. Thiessen and Mr. Gilboa met for practice sessions on Hebrew, which she was learning.

- [66] Ms. Thiessen stated that Mr. Gilboa got a position at Age Care on her recommendation. He had inquired if there were any openings around the city, and she told him there was one where she worked. He gave her a resume, but the interviewers told him it did not have enough information. She helped him edit his resume into a more Canadian resume, which he submitted. He interviewed, was offered the position, and accepted it. He was still in the orientation process when this issue came to light, and then the position ended. Ms. Thiessen testified that she recommended Mr. Gilboa because she thought he would be fun to work with, he is a very good therapist, and she thought he would bring good energy, creativity, and positivity to the work place. Mr. Gilboa was hired in March or April as a physiotherapist into a position he shared with her and another physiotherapist. There are also four therapy assistants – three women and one man.
- [67] When Mr. Gilboa first started working, Ms. Thiessen spent a lot of time with him, just showing him the computer program, and how to access and document information in that particular system. Apart from the odd occasion, or someone showing him where to go, physiotherapists saw patients on their own. She did not often have the opportunity to observe Mr. Gilboa with clients. She did occasionally walk by a room and see he was discussing something with someone. She once saw him working with a patient he was treating for back pain, and Ms. Thiessen saw Mr. Gilboa give the patient some exercises. Ms. Thiessen had no concerns about Mr. Gilboa's treatment.
- [68] Ms. Thiessen stated that she only worked with Mr. Gilboa for a few weeks. The only concern raised during his time at Age Care was the investigation into these allegations. She testified that she was not aware of any complaints or concerns raised by any of the other therapists or therapy assistants. Some of his former patients have since asked about Mr. Gilboa and requested his services.
- [69] Ms. Thiessen testified that she has met his family who seemed relaxed and happy. She never witnessed any distress in the home. Ms. Thiessen also stated she has never been uneasy around Mr. Gilboa, and would have no concerns recommending him to any of his friends. She stated that she was stunned, shocked, and horrified by the seriousness of the allegations against Mr. Gilboa, and her initial thought was that people must have misinterpreted his body positioning, or that it is part of the #MeToo movement.
- [70] On cross-examination, Ms. Thiessen stated the Hebrew lessons were not formal, just informal practices, and these sessions are ongoing. She agreed that the residents at Age Care are elderly, and that there are no women in their 20s or 30s. Ms. Thiessen confirmed that she had helped Mr. Gilboa get his position at Age Care, and that her experience

observing him with patients was limited. Ms. Thiessen admitted that she never saw Mr. Gilboa with a patient on a physiotherapy table, as there was no table at Age Care.

- [71] Ms. Thiessen stated that she was not present during any appointments with either C.T. or J.H. Ms. Thiessen asked to add some comments at the end of her testimony about how although the patients were elderly, the therapy assistants were younger, and they had worked with a sexual predator in the past, and so were highly attuned to that. Ms. Thiessen emphasized that none of those individuals were uncomfortable with Mr. Gilboa.

Eran Gilboa

- [72] Eran Gilboa ("Mr. Gilboa") is 38 years old, resides in Calgary and moved there from Israel in April 2018. His first language is Hebrew, and he sometimes has difficulties understanding English, especially if people talk too quickly. Mr. Gilboa finished a bachelor degree in physiotherapy in Israel in 2010 and then worked in several clinics in Tel Aviv, Rehovot, and Yvane, mostly on orthopaedic disabilities and sports injuries. He also worked as a lecturer on sports injuries and had private clients he treated in his home or in theirs. Mr. Gilboa started work at the Sunpark Plaza Lifemark clinic in Calgary when he moved to Canada. Mr. Gilboa stated that he is married with two children and that his wife is aware of the allegations against him.
- [73] Mr. Gilboa typically worked a 1 p.m. to 7 p.m. shift at the Lifemark clinic. He stated that there were usually two more physiotherapists, one PTA, and a receptionist working at the same time. Mr. Gilboa testified that the clinic has a treatment area, several rooms for more private treatments, and a big hall for exercises. Mr. Gilboa stated that he treated mostly orthopedic-oriented clients. Some were referred by insurers or WCB, while others were private clients. Mr. Gilboa described the treatment area as rows of beds, five of which were adjustable tables. Mr. Gilboa was not assigned to a particular room. Mr. Gilboa preferred the adjustable tables so that he could adjust the height to accommodate his own back pain.
- [74] Mr. Gilboa described his standard practice on meeting a new patient. He would escort the patient from the front desk area to any table that was available. Then he would interview the patient for details on age, work, type of work, and the chief complaint that brought them to physiotherapy, including a history of that injury. Then he started his physical examination. He would then explain to the patient what he thought the best course of action would be. It is his standard practice to ask permission before exposing or touching parts of a patient's body. Mr. Gilboa testified that it is his standard practice to offer a gown if he is working on bare skin and that he always exits the treatment area and closes the curtain to give the patient privacy. He tells them to call him when they are face down and ready.
- [75] Mr. Gilboa testified that he remembered treating C.T. because she made a complaint against him. He stated that she was assigned to him by the front desk because of his availability. He did not remember what time he saw her. Mr. Gilboa testified that prior to

meeting C.T. he would not have had any information about her. He also stated that he would not usually have seen the intake form. Mr. Gilboa stated that he went to the front desk area and called C.T. and escorted her to the nearest treatment table. He seated her on a chair and sat in front of her on a stool for the subjective examination. Mr. Gilboa testified that C.T. told him that she suffered from neck and shoulder pain. She did not know what aggravated or eased her pain but mentioned a snowboard accident six months earlier in which she hurt her neck and back. She agreed with Mr. Gilboa that her current pain felt like that injury. Mr. Gilboa stated that this part of the appointment took about ten minutes.

- [76] After Mr. Gilboa took C.T.'s history, he had her move her neck and shoulders to see where she felt pain, and tested her range of motion and reflexes. He concluded that C.T. had tension in her muscles, and that he would try to ease that tension with manual therapy, as he usually does with patients initially. He requested that C.T. lie face down. He requested that she take her hoodie off so he could get a better feeling of the tissues involved. She agreed, and he closed the curtains for privacy and requested that she call him when she was lying face down. When he returned, he continued palpating her muscles but it was difficult to get a sensation of the relevant tissues so he asked if she would be comfortable exposing her back. When she agreed, he gave her a gown, and he stepped out, closed the curtain and asked her to call him when she was ready with her gown on, facing down, on her stomach, with her head in the hole in the table. Mr. Gilboa remembered that C.T.'s hands were at the side of her body, but could not recall if he had instructed her on how to place her hands on the table.
- [77] Mr. Gilboa testified that he continued to do soft tissue mobilization. He testified that sometimes with patients he uses the layman term "massage", which is how he translates it in his head into Hebrew as well. Mr. Gilboa stated that he would have confirmed for C.T. how she felt in certain areas, and that the treatment was quite painful. He also testified that he would have asked her if she was okay, or if she felt comfortable, and that he would have told her to let him know if it was too painful or uncomfortable.
- [78] Mr. Gilboa stated that the treatment space was very narrow. He stated that he tries to choose work areas that have more room to move around. He recalled that there were two physiotherapists, one physiotherapy assistant, and a front desk receptionist working that evening. Regarding the table, Mr. Gilboa recalled that he moves the height up and down all the time for his convenience. He stated that when he does soft tissue mobilization, he typically puts the bed at the height of his pelvic bone, and that this would have been the height of the bed when he was working on C.T. He testified that he would not have been standing at her hips as this would have been uncomfortable for him. Mr. Gilboa agreed that he treated C.T.'s right shoulder.
- [79] Mr. Gilboa recalled that he was wearing jeans and a belt on September 14, 2018. He also testified that he would have had his phone and car keys, his reflex gavel, and a pen in his pockets. Mr. Gilboa stated that a reflex hammer is about 5 centimetres by 4 centimetres.

He usually had his reflex hammer in his pocket with the head facing up. His keys were a remote car starter with a key attached. Mr. Gilboa said his phone was a Samsung. He stated that he never used his phone when treating patients.

- [80] Mr. Gilboa testified that he would have had a conversation with C.T. while treating her. He stated that because he knew she skied, he would have asked about skiing. He stated that his standard practice is to talk to patients to try to lighten the mood. Mr. Gilboa indicated that he would have constantly checked in with C.T. during the treatment process, to reassure her and to make sure that he is doing something good, "in a good direction". Mr. Gilboa stated that it is normal for patients to tense their muscles up as a response to pain, and he asks to get them to relax so he can gain better motion. Mr. Gilboa recalled that the last area he would have worked on was C.T.'s shoulder. Mr. Gilboa stated that he usually ends a session when he has accomplished what he planned, or the scheduled time has elapsed. He stepped outside to give C.T. privacy and asked her to open the curtains when she was dressed. Then he asked her to do some functional movements. Mr. Gilboa testified that C.T. was pleased and felt much less pain. He escorted her to the exercise area where they talked about the movements she needed to gain, but he told her that he would reassess at her next session and continue the soft tissue mobilizations. If it was better, they could progress to strengthening exercises. Mr. Gilboa testified that he then escorted C.T. to the computer to schedule another appointment after which she left. She appeared pleased, and he did not sense that she was uncomfortable or uneasy.
- [81] Mr. Gilboa recalled that he asked C.T. to move her body closer to him during the treatment so that he would not have to bend over so much. He stated that during the treatment of C.T. he did not remove his belt, unzip his pants, or remove his penis from his pants. He stated that his pelvis and groin area did not come into contact with C.T.'s body or hand at any time. He stated that he was not sexually aroused while treating C.T.
- [82] Mr. Gilboa learned about C.T.'s complaint when Mr. Statham called Mr. Gilboa to his office the next day. Mr. Gilboa understood that C.T. claimed that his groin came into contact with her hand. He recalled being shocked because this could not have happened. He stated that he did not intentionally bring his penis into contact with C.T.'s body or hand.
- [83] Mr. Gilboa stated that Lifemark suspended him and started an investigation. As part of this process, Mr. Statham advised Mr. Gilboa to write out a detailed version of his recollection of the treatment while it was still in his mind. The purpose of the document was to give a detailed recollection of the events that happened in that specific treatment. He stated that he had reviewed the document and that it was an accurate description of the chain of events with C.T.
- [84] Mr. Gilboa testified that C.T. also filed a police complaint, and that he was contacted by a police detective, who did his own investigation. A week and a half later, the police officer told him he did not have the evidence to press charges.

- [85] Mr. Gilboa was advised by Mr. Statham and Diane Reino that they had concluded their investigation and concluded that no inappropriate sexual behaviour had occurred, and that his treatment plan was appropriate. Mr. Gilboa understood the “resolution strategies” in the letter from Lifemark were to prevent these events from reoccurring, and to give him a better understanding of what is expected of him. Mr. Gilboa testified that he was not allowed to receive female patients until the police investigation was done, that he was obliged to meet regularly with the clinic manager, and that he was obliged to state in the chart whether there was a need for exposure and if a patient consented to any treatment he proposed. He confirmed that Mr. Statham had spoken to him about using a female PTA when treating female patients behind closed curtains, but that no PTA was specifically assigned to him. He understood that the PTA had a lot of work to do, and that he was never advised that it was mandatory for him to have a female PTA present when he was treating patients. He was never offered a trained chaperone.
- [86] Mr. Gilboa stated that once the police investigation concluded, he could start receiving female patients again. He recalled that J.H. was assigned to him the same way as every patient: based on availability. She had been in a motor vehicle accident and was experiencing neck, shoulder and low back pain as a result. Prior massage therapy and chiropractic treatment had resulted in no significant improvement. Mr. Gilboa identified a Form AB-2 as a document he completed (Exhibit 15).
- [87] Mr. Gilboa testified that he prepared subjective, objective, analysis, and plan (SOAP) notes for J.H. on November 12, 2018, and treated her spine and buttocks area with soft tissue mobilization. On November 15, 2018, he stated that J.H. felt much better, and he focused mostly on her lower back. Mr. Gilboa stated that he would have been standing in the same position he used for every low back pain patient, relative to whichever part of the back he was working on. On November 19, 2018, J.H. did not report any pain in her low back, but her neck was sore, so he focused on her upper back. He also showed her some exercises.
- [88] Mr. Gilboa recalled that at her appointment on November 12, 2018, he thought that the best course of action would be to massage the relevant areas. He asked if it would be okay by her to expose her upper back. He offered her a gown, and she refused. He stepped outside the treatment area and asked J.H. to call him when she was ready, face down on the bed with her head in the hole. When he came back, she was wearing a bra and when this interfered with his motion, he asked if she would unclip her bra. She did, and he continued with the treatment. Mr. Gilboa testified that J.H. never requested a gown, and that when he offered a gown at the first appointment, she said she did not need it. Mr. Gilboa stated that he never got the feeling that J.H. was uncomfortable. He stated that he repeatedly asked her to inform him if she was uncomfortable, and that she told him not to worry, and that she would tell him if she was uncomfortable.
- [89] On November 30, 2018, J.H. said that she felt some pain while doing her exercises, and he observed some stiffness in her low back area, so he worked on the soft tissue in her

back and buttocks. On December 11, 2018, he saw less soreness than previously, so he continued to work on the same area, and gave her more exercises, which were typically performed in the exercise area. On December 13, 2018, Mr. Gilboa said that J.H. said she was much better, and requested that he focus on her low back pain. He again worked on her low back and buttock area. While he was doing this work, he would have been standing parallel to the area he was working on, in the sacral and lumbar area. He stated that he would not have been standing at J.H.'s hips, as this would have been uncomfortable for him. He recalled nothing unusual about this appointment, and understood that J.H. felt better, more relaxed, and in less pain after her treatment.

- [90] On December 18, 2018, Mr. Gilboa stated that J.H. said she was very sore after her exercises, so he reassessed to see if he had missed anything. He recalled that he would have adjusted the table height up and down during the appointment. He recalled that J.H. felt much more relaxed and in less pain after the treatment. He did not recall J.H. looking uncomfortable or uneasy during the appointment.
- [91] On December 21, 2018, J.H. reported aggravation of pain in her neck and back. Mr. Gilboa testified that he focused on her spine. He recalled that he would have adjusted the table according to his body mechanic, which is why he chose a bed that could go up and down.
- [92] Mr. Gilboa testified that during the last three appointments, he would have been dressed in dress pants. He testified that he was allowed to wear jeans in the clinic on Fridays, but never wore sweat pants. He testified that he would have been wearing underwear at all the appointments and was always clothed. He testified that during his appointment with J.H. he did not remove his pants, or expose his underwear, his penis, or his groin area.
- [93] Mr. Gilboa stated that he interacted with J.H. outside appointments. He was participating in a gift exchange at work and contacted her to make a t-shirt. He paid her by e-Transfer. On December 13, 2018, he contacted her over Facebook to discuss the fit and he asked her to wrap it. On December 18, he asked about how to pay her and she provided an email for the e-Transfer, which is how he paid her. Also on December 18, he asked her how she felt, which he meant in connection to her neck. On December 21, 2018, he asked her advice on what to do with kids over the holidays. She replied with some ideas.
- [94] Mr. Gilboa first learned of J.H.'s complaint when he returned from holidays. He contacted J.H. over Facebook because he was in emotional distress and takes it seriously when anyone is offended by him. He wanted to give a sincere apology. He recognized that he should not have done it.
- [95] Mr. Gilboa testified that what C.T. alleged could not have happened because he did not have an erection at that time, and his pelvis was nowhere near her hand because of the way his body was positioned.
- [96] Regarding J.H., Mr. Gilboa wrote a letter to Mr. Statham describing the events in relation to J.H. He testified that he did not give J.H. instructions on how to position her hands on

the table. Mr. Gilboa stated that the table was wide enough to accommodate J.H.'s body and hands. He would have had his phone, reflex gavel, and car keys in his pocket when he treated her. His phone is a Samsung, which does not make noise when he presses a button. The button on the bed however, would have made noises. Mr. Gilboa testified that he never takes his phone out of his pocket when treating patients.

- [97] Mr. Gilboa stated that it would be impossible for him to treat a patient's shoulders, neck, and lower back while standing at their hips because it would put tension and stress on his back. He testified that it is possible he used the phrase "good chemistry" when speaking to J.H. In his view, "good chemistry" is a good connection between a patient and their therapist and is important to outcomes. Mr. Gilboa stated that his pelvis, groin, and penis did not come into contact with J.H.'s body or hands at any time, and that he was never sexually aroused while treating her. He constantly checked in with her during their appointments as this is his standard practice.
- [98] During their last appointment on December 21, 2018, they had a nice conversation. It was very fluent. She voiced no concerns to him about the treatment he provided. He did not intentionally bring his penis or groin into contact with her body during the treatment.
- [99] Mr. Gilboa stated that he knows Ms. Thiessen from a vestibular course they did together in October or November. They had a good connection. She brought a friend to some of their practice sessions and recommended him for a job when he was looking for one.
- [100] Mr. Gilboa stated that about 60% of his clients are female and that prior to the complaint from C.T.'s husband, there were no concerns regarding his treatment and care of female patients at Lifemark or in Israel. Regarding the allegations at issue in this hearing, he stated that they did not happen.
- [101] Mr. Gilboa testified that he has lost his job and that his financial status has been limited. He has tried to find anything that fits his limited budget, including attending Sexaholics Anonymous meetings, completing a professional boundaries course, reading articles, and going for counselling provided by Alberta Health Care and the Jewish Community. He is currently working in construction and makes \$18 per hour. He attended Sexaholics Anonymous because he was looking for something approachable and free. He attended a few meetings.
- [102] In cross-examination, Mr. Gilboa stated that he has been a physiotherapist since 2010, during which time he has treated many people, including many women. Some of his patients have been attractive, but he does not choose his patients by their attractiveness. He stated that years ago, in his first year of being a physiotherapist, he had been sexually aroused when working with patients. Mr. Gilboa maintained that his penis did not come into contact with either C.T.'s or J.H.'s hand. Mr. Gilboa stated that he attended more than one Sexaholics Anonymous meeting because he was trying to do "whatever it takes" to be a physiotherapist, but that it had nothing to do with him. He denied that he recognized he had a problem.

- [103] Mr. Gilboa stated that he remembered treating C.T. because of her complaint. He was certain that he did not become aroused when treating C.T. and denied that he could not remember.
- [104] Mr. Sim asked Mr. Gilboa if he remembered telling the investigators that he did not know whether he was sexually aroused with C.T. and did not pay attention to whether he was sexually aroused with patients. Mr. Gilboa responded that he was shocked at the things he said yes to, and was under a lot of stress at the time of the investigation. He considered it weird that he said that. Mr. Gilboa agreed that he had participated in an interview with Mr. Acton and Mr. Hamer on February 8, 2019. He understood that the interview was to investigate complaints to the College about him. Mr. Gilboa stated he was uncertain at the time, felt bad for the complainants, and did not want to be rude, so his answers were very “un-decisive”.
- [105] Mr. Sim played portions of the audio of Mr. Acton and Mr. Hamer interviewing Mr. Gilboa, which Mr. Gilboa confirmed were questions he was asked and which he answered. He did not dispute that, in the interview, he said he did not remember being sexually aroused with a patient, but said that he was now definitely certain that he was not sexually aroused when dealing with C.T. In response to Mr. Sim proposing that Mr. Gilboa was arguing his memory was better in August 2019 than in February 2019, Mr. Gilboa stated that he had been over it in his head and determined that he could only remember being sexually aroused by a patient in his first year of being a physiotherapist. He remembered saying to the investigators that he did not pay attention to whether he was sexually aroused with a patient, but said he did not know why he said that. Mr. Gilboa also denied that he went to Sexaholics Anonymous because he becomes sexually aroused by patients and stated he has no sexual addiction problem.
- [106] Mr. Gilboa agreed that he had testified earlier that he performed most of C.T.’s treatment from her right side, and that he leaned his pelvis over the table. He did not deny asking C.T. to move over, and stated that there could have been a misunderstanding when she said she felt his erect penis. Mr. Gilboa stated that he had showed the investigators how anatomically it could not have happened. Mr. Sim asked if Mr. Gilboa told the investigators that C.T. could have felt his penis and he just did not notice. Mr. Gilboa replied that he had other things in his pocket and that it could not have happened based on the way he was positioned. He stated that he was not saying she was lying, just that it could not be. He also denied that he manipulated her right shoulder so that her hand rubbed against his penis. Mr. Gilboa stated that he could not have told the investigators it could have happened, but in response to playing audio of his interview with the investigators stated that he was very surprised that he agreed with statements made by the investigators, and that the conversation went by awfully fast. He stated that he did not think he could ask for clarification in the interview. Mr. Gilboa admitted that he never wrote a letter to the College about inaccuracies in the transcript, and again did not know it was a possibility.

- [107] Mr. Gilboa stated that although his body could have touched C.T., his groin could not have, but admitted he told investigators that he was not aware of his body touching her. Mr. Gilboa reiterated that his pelvis did not touch the patient.
- [108] Mr. Gilboa admitted that he told investigators that when he is treating a patient, he focusses on his hands, and sometimes even closes his eyes, but still knows where his pelvis is. He maintained that his pelvis could not have come into contact with C.T. or J.H.'s hand, either intentionally or unintentionally. He stated that he is not saying they are lying, just that they are wrong. He stated that for it to happen, he would have had to do something really weird with his body.
- [109] Regarding Mr. Statham, Mr. Gilboa stated that he met with Mr. Statham several times following Lifemark's investigation of C.T.'s complaint. He confirmed that Mr. Statham had asked him to avoid treating patients alone behind closed curtains, and that if he was going to treat a female patient, he should have a third party, like a physiotherapy assistant present. Mr. Gilboa confirmed that he made no notes about his meetings with Mr. Statham.
- [110] Mr. Gilboa confirmed that J.H. started as a patient in November 2018. He agreed that in retrospect, he maybe should have had a third party present to protect himself from false allegations, but that it was not practical for him. When asked if he had told the investigators that he would have ensured a third party was present if he had to expose part of a patient's body, Mr. Gilboa stated that he should have had someone present to protect himself, but that it was not practical in the reality of the clinic. He stated that he never told Mr. Statham that it was impractical and never asked for more help. He also stated that it was never an obligation or mandatory.
- [111] Mr. Gilboa confirmed that he treated J.H. behind a closed curtain because she was removing her clothing from the waist up and that he never had anyone else present when he treated her. He also confirmed that all J.H.'s appointments were in the evening. He denied that she felt his erect penis in her hand and stated that she could not have felt it because it was nowhere near her, and he did not have an erect penis. Mr. Gilboa agreed that he was relying on his standard practice to know that his pelvis did not touch C.T. or J.H. He confirmed that he had told the investigators that he was not paying attention to his body position with J.H. He also admitted that he told the investigators that he let his guard down about body position.
- [112] Mr. Gilboa stated that after the first complaint, he tried to change to asking patients to tuck their hands under their bodies, which he normally did when he remembered to do so. He also tried to change his body position, to be further from the bed. However, this really hurt his back.
- [113] He denied again that J.H. might have felt his penis in her hand and was absolutely certain that he was not sexually aroused by J.H. In response to audio from the investigation, Mr.

Gilboa stated that he was surprised that he had told them that he was probably not sexually aroused with J.H., but that he meant no, he was not sexually aroused.

- [114] Mr. Gilboa confirmed that he never asked the investigator to slow down, that he understood it was an investigation interview, that the complaints were serious, and that his physiotherapy licence was on the line. However, he still found it difficult to ask people to slow down for him.
- [115] Regarding the Facebook messages to J.H., Mr. Gilboa confirmed that it was his attempt to apologize to J.H. He explained that he mentioned his worry about his job, licence, and pregnant wife and son because he could lose his job and licence and it was very emotionally difficult for him. He stated that he no intention of pressuring J.H. to drop her complaint. He could not explain why he put his wife and son in the text other than because he was emotionally disturbed at that time. He also agreed that he knew it was wrong to send the Facebook message the minute he did it.
- [116] Mr. Gilboa confirmed that the portable massage table he used in demonstrations before the Hearing Tribunal did not go up and down, and that the ones he used at Sunpark with J.H. and C.T. did go up and down. Looking at photos of the Sunpark location, Mr. Gilboa agreed that between each bed there was a chair, so that on one side of a table there would be at least that width, but that on the other side of table, the curtain is really close to the table. Mr. Gilboa stated that he preferred the table close to the computer because that is where the music was, and that he only went to the "other one" when all the others were occupied. He stated that only J.H.'s last appointment was at the end station, and confirmed that C.T.'s appointment was at the last bed because all the rest were occupied.
- [117] Mr. Gilboa confirmed the dates and times that he had texted J.H. relative to her appointments, when starting on December 13, he texted her immediately after all her appointments, but rarely in between. Mr. Gilboa denied that this was because he was trying to assess J.H.'s mental state after those appointments.
- [118] On redirect, Mr. Gilboa confirmed that he is Jewish. He stated that he attended Sexaholics Anonymous because he was advised to do something that might appear useful to the College and that this was the only thing he could fit in his zero budget. When he attended Sexaholics Anonymous he had been suspended by the College. He had no resources to pay for private counselling.
- [119] Mr. Gilboa stated that neither the College nor the interviewer Mr. Acton told him that he could have a lawyer present at the interview with Mr. Acton. Mr. Gilboa testified that at the end, Mr. Acton had asked why he did not bring counsel, and Mr. Gilboa said he could not afford it. He stated that he did know he had the right to one from his insurance.
- [120] In response to more audio recordings, Mr. Gilboa stated that he and Mr. Acton discussed that the complainants could have felt a phone, a reflex hammer, or car keys. He also confirmed that in one audio section, he did not hear any reference to pelvis or penis.

VI. Closing Submissions

Closing Submissions on behalf of the Complaints Director

- [121] Mr. Sim stated that sufficient evidence had been laid out for the Hearing Tribunal to find that the purposeful allegations laid out in allegations 2 and 4 were made out, but that in the alternative, if the Hearing Tribunal determined that insufficient evidence was available to show purposeful or intentional conduct, then the Tribunal should find that Mr. Gilboa's conduct was unintentional. Mr. Sim acknowledged that should the Tribunal determine that there was insufficient evidence to prove any of the allegations, the Tribunal should dismiss all the allegations.
- [122] Mr. Sim cited the case *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, for the principle that there is only one civil standard of proof in Canada, and that standard requires proof on a balance of probabilities. He further argued that the case mandates that tribunals be satisfied that the evidence before them is clear, cogent and convincing, but that the evidence only needs to satisfy the Hearing Tribunal that, on a balance of probabilities, it is more likely than not that the facts occurred as alleged. In this case, it would mean that the evidence shows unprofessional conduct by Mr. Gilboa.
- [123] Mr. Sim argued that the present case turns on a question of credibility. He acknowledged that Mr. Statham was not present during the appointments with C.T. and J.H., but that C.T. and J.H. both testified as to what they saw, heard, and felt. Mr. Sim reminded the Hearing Tribunal that Mr. Gilboa had testified to a very different version of events than C.T. and J.H., and therefore the Tribunal needs to assess which witnesses and evidence are more credible in order to resolve inconsistencies.
- [124] In his accompanying written submissions, Mr. Sim included assessments on the credibility of each witness. Mr. Sim argued that C.T. appeared credible. Her demeanour was truthful and she did not evade the questions put to her. Although she could not remember a few small details, her memory of the sexual misconduct was clear and detailed. Mr. Sim argued that C.T.'s testimony was both internally and externally consistent. He argued that her failure to confront Mr. Gilboa during the misconduct, and decision to follow him to the exercise area afterward, cannot be held against her, as sexual assault victims do not behave in predictable ways, and complying with orders to avoid a confrontation is an understandable response. C.T. did not appear biased and admitted her anger at Mr. Gilboa while still displaying sympathy for his family. The biggest concern with C.T.'s testimony is that she is relying on what she felt, because she could not turn her head to look at Mr. Gilboa.
- [125] Mr. Sim argued that Mr. Statham also appeared credible. He was open and not defensive, and had no difficulty answering questions. He could not recall some small details, and had no firsthand knowledge of the allegations, but his testimony was largely consistent with Mr. Gilboa's recollections of his time at Lifemark. Mr. Statham also has no emotional investment in the proceedings, and was willing to admit details that might have been

embarrassing to him as clinic director, for example failing to put into writing that Mr. Gilboa was required to have a PTA present when seeing female patients behind closed curtains.

- [126] Mr. Sim argued that J.H. was generally credible, but that at times she appeared emotional or defensive and there were gaps in her memory, for example regarding specific dates and what Mr. Gilboa was wearing. The biggest inconsistency in her testimony was that her initial complaint alleged sexual misconduct at her last two appointments but in her testimony before the Hearing Tribunal, she maintained it was the last three appointments. Her decision to reply to Mr. Gilboa over Facebook following the last appointment might appear incongruous, but again there is no usual response to sexual assault. Mr. Sim argued that J.H.'s testimony was internally consistent, and bore striking similarities to C.T.'s. As with C.T., the biggest concern with J.H.'s testimony is that she is relying on what she felt and did not see Mr. Gilboa place his penis in her hand. She also admitted that she might have been mistaken about what she felt.
- [127] Regarding Ms. Thiessen, Mr. Sim argued that although she appeared credible, she was not helpful because she was highly partial. She was also not in a position to provide much useful information about Mr. Gilboa because her opportunities to see him with any patients was limited and she had never observed him with younger female patients. Mr. Sim argued that her evidence was of limited relevance.
- [128] Mr. Sim argued that Mr. Gilboa's testimony casts doubt on his credibility. Mr. Gilboa's evidence was at times implausible, and his physical demonstrations, which were supposed to show that his pelvis could not come into contact with a patient's hand, appeared to show the opposite. Mr. Sim also noted his surprise that Mr. Gilboa decided to work with female patients without a PTA present despite recent professional and police investigations relating to alleged misconduct. Mr. Sim characterized Mr. Gilboa's attendance at Sexaholics Anonymous meetings as bizarre in light of Mr. Gilboa's protestation that the meetings had nothing to do with him personally.
- [129] Mr. Sim referenced *Faryna v Chorny* (1951), [1952] 2 DLR 354, [1952] 4 WWR 171 (BC CA), which he argued stands for the principle that when assessing the credibility of witnesses, it is not enough to simply assess how they appear in a witness box. Rather, the Court laid out a series of factors, which Mr. Sim reviewed in his written submissions, and which he explored in detail in his oral submissions.
- [130] Mr. Sim acknowledged that Mr. Gilboa had not admitted any intention in relation to the alleged events, and therefore that the Hearing Tribunal would have to infer from the evidence whether the allegations are made out or not. In terms of what evidence the Tribunal could infer supports the allegation that Mr. Gilboa's actions were intentional, Mr. Sim argued first, that the two allegations are virtually identical. He argued that inadvertent conduct does not happen multiple times. Mr. Sim also pointed out that it is significant that the allegations in relation to J.H. happened after Mr. Gilboa had

responded to C.T.'s complaint, been investigated by Lifemark, and been counselled by Mr. Statham as to how to prevent these events from reoccurring.

- [131] Second, Mr. Sim argued that both J.H. and C.T. said that Mr. Gilboa had manipulated the table height and asked them to move closer to him. Mr. Sim acknowledged that Mr. Gilboa had explained these actions as reducing the strain on his own back. However, Mr. Sim argued that the Tribunal should consider the evidence that Mr. Gilboa moved the table and asked the complainants to move closer around the time they felt his penis. Although this is only one piece of information, Mr. Sim argued that the Tribunal could weigh this evidence to determine that Mr. Gilboa knew what he was doing and did it on purpose.
- [132] Third, Mr. Sim argued that the complainants both described the way that Mr. Gilboa spoke to them during appointments. Mr. Sim suggested that the way C.T. described Mr. Gilboa's tone changing, and the fact that he started asking her if it felt good, was an odd thing for a physiotherapist to say to a patient during treatment. Mr. Sim recognized that it is expected that a therapist will check in with a patient during treatment to determine if something causes pain, but that the point of physiotherapy is not to make a patient feel nice. Mr. Sim argued that even Mr. Gilboa admitted that some of his techniques are quite painful, and Mr. Sim suggested that therefore it is not surprising that C.T. was concerned about Mr. Gilboa asking her if it felt nice or felt good.
- [133] In relation to J.H., Mr. Sim suggested that although there may be some discrepancies in relation to English not being Mr. Gilboa's first language, and that the Hearing Tribunal should not put much weight on Mr. Gilboa's use of the word "chemistry", it was still odd to tell a patient that he felt a connection. Mr. Sim argued that this begins to cross a boundary.
- [134] Fourth, Mr. Sim pointed out that J.H. was not wearing a gown during her appointments. Although there are discrepancies in the evidence regarding whether he offered her a gown or not, Mr. Sim submitted that it is very odd to suggest to a patient that she be naked from the waist up with her bare breasts on the exam table.
- [135] Fifth, Mr. Sim directed the Hearing Tribunal's attention to Mr. Gilboa's assertion that he did not become sexually aroused with either complainant, nor did he allow his groin or genitals to come into contact with their bodies. Mr. Sim pointed out how adamant Mr. Gilboa was in his testimony before the Tribunal, but that during the investigation, he had admitted that because of the way he stands and leans over the table, his pelvis can lean over the table, and that this is where patients are and their hands are. Mr. Sim asked the Hearing Tribunal to remember Mr. Gilboa's physical demonstrations at the portable massage table, and suggested to the Tribunal that his groin was right up against the table.
- [136] Sixth, Mr. Sim directed the Hearing Tribunal's attention to the Facebook exchanges with J.H. He pointed specifically to Mr. Gilboa's communications with J.H. immediately following her appointments on December 13, 18, and 21. He acknowledged that the texts

were relatively innocuous, but asked the Hearing Tribunal to infer from the pattern that Mr. Gilboa was checking in on J.H. to assess whether she was worried or upset, and whether he should be worried that she would complain. Mr. Sim argued that the text messages culminated in Mr. Gilboa's communication to J.H. on January 3, 2019 when he learned that she had, in fact, made a complaint. Mr. Sim argued that if Mr. Gilboa's intention was only to apologize, that it did not make sense for Mr. Gilboa to reference how her complaint was going to impact him. Mr. Sim asked the Hearing Tribunal to infer that Mr. Gilboa's purpose was to get J.H. to forgive him and withdraw her complaint. This, he argued, was evidence that Mr. Gilboa did something wrong, and that he knew it at the time.

[137] Seventh, Mr. Sim directed the Hearing Tribunal to Mr. Gilboa's evidence about his attendance at Sexaholics Anonymous and Mr. Gilboa's explanation that he was just trying to find something to demonstrate that he was trying, and that was free. Mr. Sim submitted that this was incredible in the context of the evidence on what Sexaholics Anonymous provides. Mr. Sim suggested that the Hearing Tribunal could infer that Mr. Gilboa's attendance was evidence of his own recognition that his behaviour was problematic and that he needed help.

[138] Mr. Sim provided the Hearing Tribunal with excerpts from the HPA definition of unprofessional conduct, the Code of Ethical Conduct for Alberta Physiotherapists, and the Standards of Practice for Physiotherapists in Alberta, all of which were referred to in the Notice of Hearing. In closing, Mr. Sim argued that if the Tribunal were to find that Mr. Gilboa did what he is alleged to have done, whether intentionally or unintentionally, that according to those sections, Mr. Gilboa's conduct is unprofessional. He argued further that the public expects the College to ensure that health professionals do not conduct themselves in these ways. Mr. Sim noted that the version of the Standard provided to the Hearing Tribunal was the one in force at the time the conduct in question took place.

Closing Submissions on behalf of Mr. Gilboa

[139] Ms. Burnett also provided the Hearing Tribunal with written submissions, and supplemented them with oral submissions.

[140] Regarding the standard of proof, Ms. Burnett directed the Hearing Tribunal to the decision of *JC v College of Physicians and Surgeons of British Columbia*, [1990] 2 WWR 673 (BC CA) in which she argued that the Court directed decision makers to consider the nature of the charges at issue in assessing the degree of proof required. Ms. Burnett argued that the nature of the allegations in this case are quasi-criminal in nature.

[141] Ms. Burnett also argued that it is not sufficient for the Tribunal to bring their own personal views as to what they can infer, but instead the findings must be based on clear, cogent, and convincing evidence. She directed the Hearing Tribunal to consider decisions she provided including In the *Matter of Dr. Stanley Karl Bernstein* (1977), 15 OR (2d) 447, 76 DLR (3d) 38 (Ont Div Ct), which she argued stands for the proposition that where serious

allegations with serious consequences are at issue, the Tribunal should take this into account when assessing the evidence.

- [142] Regarding credibility, Ms. Burnett argued that C.T. and J.H. were less credible than the Complaints Director suggested. She argued that the absence of any real detail in relation to either complaint was a significant factor. Looking at *Pawlett v Dominion Protection Services Ltd*, 2008 ABCA 369, Ms. Burnett argued that where credibility is an issue, there is a principle of fairness that matters involving a witness personally be put to that witness if contradictory evidence is later going to be presented that will impeach a witness's credibility. She argued that although Mr. Sim put the December 13, 18, and 21 text messages to Mr. Gilboa, he did not put them to J.H., and that in fact, those text messages were only entered into evidence on cross-examination. Ms. Burnett submitted that this process was contrary to the principle in *Browne v Dunn* (1893), 6 R 67 (UK HL) to the extent that if Mr. Sim wanted to make inferences from those text messages, he should have put them to J.H.
- [143] Regarding prior inconsistent statements, Ms. Burnett cited the case of *R v KGB*, [1993] 1 SCR 740, 148 NR 241 for three criteria for reliability: that a statement made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, the statement is videotaped in its entirety, and the opposing party has a full opportunity to cross-examine the witness respecting the statement. Ms. Burnett also cited *Mangat v Taxicab Board*, 2006 MBCA 24 for the principle that sworn testimony is given more weight than unsworn testimony.
- [144] Regarding credibility, Ms. Burnett asked the Hearing Tribunal to consider the evidence of C.T. and J.H. and whether, in the context of all the evidence, what they said happened could physically and anatomically have happened.
- [145] Regarding C.T., Ms. Burnett argued that C.T. gave evidence that a bare penis lay on top of her gown, but that there was no evidence of undressing. She argued that it was impossible that Mr. Gilboa could have unzipped his pants, taken out his penis, and laid it on C.T.'s gown in the cubicle with only a curtain around it. Ms. Burnett also argued that C.T. was only shown a photo of a reflex hammer, and that, in fact, it is plausible that C.T. actually felt the reflex hammer Mr. Gilboa has testified he kept in his pocket.
- [146] Regarding C.T.'s evidence about Mr. Gilboa's positioning, Ms. Burnett argued that based on Mr. Gilboa's evidence, his body was parallel to the table, and that it would be physically impossible for his penis to be near her hand when he was treating her shoulder. Therefore, Ms. Burnett submitted that it was neither plausible nor probable that C.T. could have held Mr. Gilboa's bare penis in her hand for one to two minutes.
- [147] Regarding J.H., Ms. Burnett noted that she changed her mind about how many times she felt Mr. Gilboa's penis in her hand, and that this was significant because the Tribunal had to find whether Mr. Gilboa intentionally or unintentionally allowed his penis to come into contact with J.H.'s hand. Ms. Burnett also argued that it was very significant that J.H. had

testified that she could have been mistaken about what she felt in her hand. Ms. Burnett also noted that J.H. confirmed Mr. Gilboa was always fully clothed. Based on J.H.'s testimony as to the size and shape of what she felt in her hand, Ms. Burnett argued that it was not plausible, probable or realistic for the Tribunal to find that what J.H. felt was a penis.

- [148] Ms. Burnett argued that when dealing with allegations of sexual assault and intentional conduct, the facts and specifics of the encounter are highly relevant. She argued that C.T.'s complaint lacked specificity, even though she came forward not long after the treatment, including regarding how long the appointment was, and that she made assumptions regarding what occurred during the treatment.
- [149] Ms. Burnett argued that Mr. Statham was clear that following the Lifemark investigation, the letter clearly set out that the treatment was appropriate, there was no sexual misconduct, and that going forward Mr. Gilboa should do certain things. She argued that Mr. Statham agreed that if a PTA was required in the room, it should have been in the letter, and that no PTA was assigned to Mr. Gilboa. Ms. Burnett also argued that there was no evidence for the Tribunal to infer that just because Mr. Gilboa did not have a PTA present, his actions were intentional.
- [150] Regarding comments Mr. Gilboa made to his patients during treatment, Ms. Burnett argued that both C.T. and J.H. had confirmed that Mr. Gilboa would check in with them during treatment.
- [151] Ms. Burnett argued that Mr. Gilboa's demeanour during his testimony was forthright and honest. She also pointed out that he acknowledged making certain statements previously. She argued that the questions asked by the investigator were leading and sometimes rephrased, and she asked that the Hearing Tribunal review the portions of the transcript put to Mr. Gilboa with careful attention.
- [152] Regarding Ms. Thiessen's testimony, Ms. Burnett argued that she had no stake in the process whatsoever, and gave evidence that she did not feel uncomfortable around Mr. Gilboa, and that she had knowledge of his work at Age Care. Ms. Thiessen also testified that sometimes physiotherapists are in close proximity with their patients.
- [153] Ms. Burnett submitted that regarding contact with patients, Mr. Gilboa was not submitting that no part of his body came into contact with a patient, only that his groin and pelvis, including his penis, could not have. She reminded the Hearing Tribunal that both C.T. and J.H. testified that they did not see the object they allege was a penis, nor did they see Mr. Gilboa with an erection or hear him unzip his pants. Neither complainant felt skin-on-skin contact, felt any secretions, or made any contact with Mr. Gilboa's groin or testicles. Therefore, Ms. Burnett argued, it was impossible for a penis to come into contact with a hand without something else, like a groin or testicles, also coming into contact. Further, given Mr. Gilboa's testimony about his body position, it was impossible for an erect penis to be in their hands. Ms. Burnett argued that given the seriousness of

the allegations, the Hearing Tribunal was lacking any expert evidence in anatomy to explain how allegations of this sort could have occurred.

- [154] Relying on her written submissions, Ms. Burnett argued that there was no clear, convincing, or cogent evidence that the object in either complainant's hand could have been Mr. Gilboa's penis.
- [155] Regarding Mr. Sims argument that the Hearing Tribunal could consider that the two complaints were virtually identical, Ms. Burnett countered that their evidence was not virtually identical, and that a closer examination of the transcript would reveal this.
- [156] Regarding the height of the table during treatment, Ms. Burnett argued that J.H. could not even recall at what point in the treatment the table was manipulated. She submitted that although the table might have been moved up or down at some point, no inference could be drawn from this. She submitted that Mr. Gilboa's unchallenged evidence was that he moved the table to accommodate his body mechanics. Ms. Burnett argued that there was no evidence this was inappropriate and that if it was, one would need to ask why the clinic had tables that could be adjusted.
- [157] Regarding the word "chemistry", Ms. Burnett argued that even J.H. acknowledged that this word could have a different meaning in different languages. Ms. Burnett urged the Hearing Tribunal to consider that English is Mr. Gilboa's second language. She also argued that there was no expert evidence to show that Mr. Gilboa's questions to his patients checking in with them were inappropriate. Ms. Burnett also argued that Mr. Gilboa's sexual arousal with patients years earlier was insufficient to infer intent with regard to C.T. and J.H.
- [158] Ms. Burnett disputed Mr. Sim's characterization that Mr. Gilboa had convinced himself that his penis did not come into contact with C.T. and J.H. Rather, she argued that Mr. Gilboa had been forthright and adamant throughout his testimony. She submitted that the same argument could be made regarding J.H., namely that she had convinced herself of what happened. Ms. Burnett also submitted that it was important that J.H. spent a couple of days crafting an email because it was important to get it accurate, but still got the number wrong. This, she argued, was evidence that J.H. had convinced herself that the object she felt must have been Mr. Gilboa's penis.
- [159] Regarding the January 2019 text message, Ms. Burnett disputed Mr. Sim's characterization of the purpose of it. Rather, she argued it was a genuine expression from Mr. Gilboa that he felt bad that this person had made this complaint and felt this way. She argued that it could not be taken as more than him saying he was sorry, even though he acknowledged that he should not have sent the text.
- [160] Ms. Burnett argued that Mr. Gilboa had testified that his attendance at Sexaholics Anonymous was evidence that he was willing to do anything to go back to work, and was looking for anything he could do with his limited resources. She noted that he had also

testified that he was Jewish, and that he had also completed reading on boundaries. She argued that all the Tribunal could infer from Mr. Gilboa's attendance at Sexaholics Anonymous, that he took courses, and that he reached out for counselling, was that he was prepared to do whatever it took to get back to work.

[161] Ms. Burnett also directed the Hearing Tribunal to her written arguments and authorities, and closed by submitting that the Complaints Director had not met the burden of proof based on C.T. and J.H.'s perceptions alone, which she argued could not be found to be clear and convincing. However, Ms. Burnett argued that if the Tribunal found that the Complaints Director had met the burden of proof based on the complainant's perceptions, that a further analysis of the evidence had to be undertaken, which would involve assessing the credibility of the witnesses and weighing all the evidence to determine whether it is clear and convincing that Mr. Gilboa was guilty of the allegations in issue.

Reply Submissions of Mr. Sim

[162] In reply, Mr. Sim argued first, that the cases cited by Ms. Burnett in her arguments on the appropriate standard of proof all predated the Supreme Court decision in *FH v McDougall*, which was decided in 2008.

[163] Second, regarding Ms. Burnett's submissions on *Browne v Dunn*, Mr. Sim argued that the principle in that case is that if an argument is going to be made at the end of a hearing, it needs to be put to the witness who is being challenged so that they have a chance to respond. Mr. Sim admitted that he did not ask J.H. about the text messages, and only put them to Mr. Gilboa, however, he argued that it is not really important what J.H. took from the messages, but rather what Mr. Gilboa's intention was in sending the messages. Mr. Sim submitted that he did put the messages to Mr. Gilboa.

[164] Third, regarding the weight to be given to prior inconsistent statements, Mr. Sim reminded the Tribunal that *R v KGB* is a criminal case. He also argued that he was not introducing a transcript of the interview, which would make it a KGB statement if it were used to prove what happened. Rather, Mr. Sim argued he showed the Hearing Tribunal a transcript in order to impeach Mr. Gilboa using the audio from which the transcript was derived. He emphasized that the transcript itself is not in evidence, but that Mr. Gilboa did acknowledge that what is heard on the recording is what he said. Mr. Sim argued that therefore the Hearing Tribunal can use that evidence to consider a) Mr. Gilboa's credibility because he said one thing to the interviewers and a different thing to the Tribunal, and b) that when reviewing the interview, Mr. Sim asked Mr. Gilboa if what he said to the interviewers was true, and Mr. Gilboa's answers to those questions is also evidence the Hearing Tribunal can use.

[165] Addressing the reliability of C.T. and J.H.'s evidence, Mr. Sim urged the Hearing Tribunal to remember that the witnesses are victims of sexual assault and that victims of sexual

assault cannot be expected to remember everything in a linear way. He argued that this makes J.H. adjustment of the number of times events happened unsurprising.

[166] Fourth, Mr. Sim addressed Ms. Burnett's remarks on the conclusions of the Lifemark investigation. He asked the Hearing Tribunal to remember that that investigation is not the same as what the Tribunal is undertaking, for example, because the Hearing Tribunal hears witnesses under oath. Lifemark's decision has no impact in the hearing.

[167] Fifth, Mr. Sim addressed the question of experts in plausibility. He argued that it is the Hearing Tribunal's job to decide if witnesses are credible, not an expert. He argued that if the Hearing Tribunal determines C.T. and J.H. are credible, then it is plausible that these events happened. If the Hearing Tribunal determines that Mr. Gilboa is more plausible, then the Hearing Tribunal should accept his evidence.

[168] Finally, Mr. Sim argued that based on Mr. Gilboa's evidence about where his pelvis was during treatment, it was not impossible that his pelvis was leaning over the table.

VII. Additional Submissions Regarding Amendments to HPA

[169] From the materials provided to the Hearing Tribunal at the hearing, it was not clear if the legislative changes to the HPA encompassed in *An Act to Protect Patients*, SA 2018, c 15 ("Bill 21") would apply in the proceedings regarding Mr. Gilboa. For this reason, the Hearing Tribunal asked the parties for further submissions on their positions as to the applicability of Bill 21 on Mr. Gilboa's disciplinary proceedings. Both parties provided additional materials.

[170] The parties agreed that all instances of alleged unprofessional conduct occurred between September 2018 and December 21, 2018. The parties both submitted that the amendments to the HPA contemplated in Bill 21 should not apply to the proceedings against Mr. Gilboa.

[171] The Complaints Director took the position that the amendments to the HPA requiring a Tribunal to order an investigated person's practice permit be suspended immediately after a finding of unprofessional conduct based in whole or in part on sexual abuse did not come into force until April 1, 2019. Mr. Sim submitted that the legislature did not intend these amendments to have a retrospective effect. Citing case authority and principles of statutory interpretation, he argued that there is a strong presumption against the retrospective application of legislation, which he submitted had not been rebutted in this case.

[172] Ms. Burnett also submitted that, absent clear intent to the contrary, there is a strong presumption against the retrospectivity of legislation. Although Bill 21 gives direction that the amendments that came into force in November 2018 are not retroactive, it is silent on the application of the amendments that came into force on April 1, 2019. Ms. Burnett noted that although Bill 21 allows the Minister to make regulations regarding the

transitional aspects of Bill 21, the Minister has not done so to date. In her submission, the public safety exception is not triggered in these circumstances.

[173] Both parties referred to the case of *Ontario (College of Physicians and Surgeons of Ontario) v Kunynetz*, 2019 ONSC 4300 as a persuasive and analogous example of a court considering a similar situation and concluding that the legislation in question should not apply retrospectively. The parties also referred to other case law and authorities for their positions.

[174] The Hearing Tribunal has considered the submissions of both parties. The Hearing Tribunal finds that, given the case law and arguments provided, it is reasonable to find that the Bill 21 amendments to the HPA that came into force on April 1, 2019, have no application to Mr. Gilboa's disciplinary proceedings.

VIII. Decision of the Hearing Tribunal

[175] The Hearing Tribunal finds that Allegations 2 and 4 are proven. The Hearing Tribunal applied the standard of proof of the balance of probabilities in determining if the allegations were proven.

[176] The Hearing Tribunal finds that on or about September 14, 2018, while fully clothed, Mr. Gilboa inappropriately and purposefully allowed his penis to come into contact with client C.T.'s hand while he was providing physiotherapy treatment to her.

[177] The Hearing Tribunal finds that on or about December 13, 2018, December 18, 2018 and December 21, 2018, while fully clothed, Mr. Gilboa inappropriately and purposefully allowed his penis to come into contact with client J.H.'s hand while he was providing physiotherapy treatment to her.

[178] Based on the wording of the Allegations, the Hearing Tribunal dismisses Allegations 1 and 3, which are allegations in the alternative to Allegations 2 and 4. That is, with a finding that the conduct was purposeful for Allegations 2 and 4, the Hearing Tribunal does not find that it was inadvertent as set out in Allegations 1 and 3.

[179] The Hearing Tribunal finds that the conduct constitutes unprofessional conduct under the HPA, section 1(1)(pp) as follows:

- (i) displaying a lack of knowledge of or lack of skill or judgment in the provision of professional services;
- (ii) contravention of this Act, a code of ethics or standards of practice;
- ...
- (xii) conduct that harms the integrity of the regulated profession.

[180] The reasons of the Hearing Tribunal are set out below.

IX. Findings and Reasons of the Hearing Tribunal

[181] The Hearing Tribunal carefully considered the evidence of the witnesses and the documents entered as exhibits. The Hearing Tribunal also carefully considered the written and oral submissions of the parties.

Witness Credibility

[182] In assessing the witness evidence, the Hearing Tribunal recognized that the only individuals with firsthand knowledge of the incidents are C.T., J.H. and Mr. Gilboa. The Hearing Tribunal found C.T. and J.H. to be credible and accepted their evidence. The Hearing Tribunal found Mr. Gilboa less credible with respect to his evidence about the incidents with C.T. and J.H.

[183] The Hearing Tribunal found C.T. to be generally consistent in her evidence, both during the hearing and with other evidence provided, including the email complaint from her husband, as reproduced in Exhibit 5. Although she did not raise her head to see what was in her hand, she was certain about what she felt during her appointment with Mr. Gilboa. Although she did not remember all the details of the incident, the Hearing Tribunal found overall, C.T. had a good memory of the incident. There was no indication of any motivation on C.T.'s behalf to fabricate allegations against Mr. Gilboa. Also, while she was angry with Mr. Gilboa, she expressed sympathy for his position, given that he had a wife and child.

[184] The Hearing Tribunal also found J.H. to be generally consistent in her evidence. There was one significant discrepancy in her evidence. J.H. indicated in her initial email (Exhibit 12) that there were two incidents where she felt uncomfortable (on December 18 and 21, 2018). However, in her testimony she indicated that there were three incidents (December 13, 18 and 21, 2018). While the Hearing Tribunal recognizes that this is a discrepancy, the Hearing Tribunal accepts that a victim of a sexual assault might not recall exact details. The Hearing Tribunal also considered that J.H. was not certain what she felt at first and stated she talked herself out of thinking anything inappropriate had happened, but by December 21, 2018 she had concluded that she was feeling Mr. Gilboa's penis in her hand. At the hearing, she was certain the conduct had occurred three times. The Hearing Tribunal also considered that J.H. acknowledged in cross-examination that she was not certain of what she had felt in her hand. She acknowledged that she did not see what was in her hand, but concluded it was a penis. Again, there was no indication of any motivation for J.H. to fabricate allegations against Mr. Gilboa.

[185] J.H.'s evidence is consistent and very similar to the account given by C.T. The Hearing Tribunal placed significant weight on the consistencies between the evidence of C.T. and

J.H. The Hearing Tribunal considered that the two women did not know each other and would not have had any knowledge of each other at the time of the events. Given the similarities of the two versions of events, this weighed in favour of accepting the evidence of both C.T. and J.H.

- [186] In considering the evidence of C.T. and J.H., the Hearing Tribunal considered the following similarities. Both were laying face prone with their hands to their sides, palms up. Each was in the treatment area, with the curtain closed. Mr. Gilboa was on their right side. Neither was asked to tuck their hands into their sides by Mr. Gilboa. Mr. Gilboa adjusted the bed height in both cases. Both were asked by Mr. Gilboa to move closer to the side of the table. Both reported having a conversation with Mr. Gilboa and that Mr. Gilboa said things that seemed odd and made them feel uncomfortable. For C.T., Mr. Gilboa said something like “does that feel good, does that feel nice.” For J.H., Mr. Gilboa made statements to the effect that he was happy that she was his client, how he looked forward to her coming, and how he felt like they had good chemistry.
- [187] The Hearing Tribunal found Mr. Gilboa less credible than C.T. and J.H. Mr. Gilboa’s complete denial that his groin or penis could come into contact with a patient is not believable. The Hearing Tribunal rejects his evidence on this point. His demonstration during the hearing showed that his groin or penis could come into contact with a patient. Given that the patient is lying down, hands at their sides and palms up, it would be possible for his anatomy to come into contact with a patient. In addition, the evidence was that he asked both C.T. and J.H. to move closer to the side of the table, thereby bringing their hands closer to him as he stood at the side of the table. He also adjusted the table height in both cases. These factors would make it possible for Mr. Gilboa’s anatomy to come into contact with the patient’s hand. Mr. Gilboa also indicated that he often closes his eyes during treatment and only focusses on one thing, the treatment.
- [188] The Hearing Tribunal considered the contradictory statements given by Mr. Gilboa during his evidence and during his interview with the investigators. The Hearing Tribunal placed less reliance on these discrepancies in terms of assessing Mr. Gilboa’s credibility. The Hearing Tribunal found that it is possible that Mr. Gilboa did not understand all the questions being asked of him or that the interview might be used to contradict him at a later date. Given that English is not Mr. Gilboa’s first language and given that he did not have legal representation, the Hearing Tribunal placed less reliance on the information provided by Mr. Gilboa to the investigators or as contradictory statements to what he said in the hearing.
- [189] The Hearing Tribunal considered the evidence that Mr. Gilboa attended Sexaholics Anonymous. Mr. Gilboa denied becoming sexually aroused during treatment. Rather, he indicated that he was trying to access whatever free services he could and that he was advised to do something that would appear useful to the College. The Hearing Tribunal found Mr. Gilboa’s attendance at Sexaholics Anonymous to be unusual given his unequivocal denial that his groin or penis could have touched a patient’s hand. The

Hearing Tribunal recognizes that Mr. Gilboa was fairly new to Canada at the time and may not have known what services were available. As such, the Hearing Tribunal placed limited weight on this evidence. However, the Hearing Tribunal did consider it as another factor, although not a significant factor, in weighing the credibility of Mr. Gilboa.

[190] Kerry Statham had knowledge of the investigation done by Lifemark and discussions he had with Mr. Gilboa. However, the Hearing Tribunal recognizes that Mr. Statham has no firsthand knowledge of the events that form the basis of the allegations and so his evidence is of limited use. The Hearing Tribunal accepts the evidence of Mr. Statham, to the extent of the investigation undertaken by Lifemark and the discussions Mr. Statham had with Mr. Gilboa. Mr. Statham had notes of the discussions and correspondence which helped refresh his memory. His evidence on these points was consistent.

[191] The Hearing Tribunal finds that Nancy Thiessen was truthful in her evidence, but given that she had no firsthand knowledge of any of the events, the Hearing Tribunal placed little weight on her evidence.

[192] The Hearing Tribunal finds that Mr. Gilboa is less credible than C.T. and J.H. On a balance of probabilities, the Hearing Tribunal finds that it is more probable than not that the conduct in Allegations 2 and 4 occurred.

Allegation 2

[193] C.T. is 30 years old. She was experiencing neck pain and so she made an appointment at Lifemark at the Sunpark location, which is close to her home. She was assigned Mr. Gilboa. Her appointment with Mr. Gilboa was on September 14, 2018, at approximately 5:30 p.m. This was C.T.'s first appointment with Mr. Gilboa and her first time attending at Sunpark. She had been to a physiotherapist previously, when she was about 16 years old.

[194] Mr. Gilboa did an initial assessment, including testing and stretches. C.T. then lay down on a table in the treatment area. Mr. Gilboa asked her to remove her hoodie. She agreed and he left the treatment area while she removed her hoodie. She was wearing a tank top. Mr. Gilboa then asked her if she could remove her tank top and change into a gown. She consented. Mr. Gilboa again left the treatment area while she removed her tank top. She was wearing leggings and a gown during treatment.

[195] Mr. Gilboa spent a portion of the treatment on her right hand side. He adjusted the height of the table and asked her to move closer to the side of the table. The evidence on these points is not disputed, although it is not clear at what point Mr. Gilboa adjusted the height of the table.

[196] The above facts are not disputed. However, at some point in the treatment, C.T. felt something in her hand. While she was not certain what it was at first, she became certain that it was Mr. Gilboa's erect penis. Although counsel for Mr. Gilboa indicated in closing submissions that C.T. stated that Mr. Gilboa's bare penis was in her hand, this is not what

the transcript of C.T.'s evidence indicates. There is no allegation that Mr. Gilboa's bare penis was in her hand, nor that there were any secretions or skin felt by C.T.

- [197] For the reasons set out above regarding the findings of credibility, the Hearing Tribunal accepts C.T.'s evidence on this point. The Hearing Tribunal finds that while fully clothed, Mr. Gilboa allowed his penis to come into contact with client C.T.'s hand while he was providing physiotherapy treatment to her on September 14, 2018.
- [198] C.T.'s husband complained to Lifemark in person on the evening of the incident and then wrote an email to Mr. Statham. C.T. also complained to the police. The police investigated the complaint and interviewed Mr. Gilboa and ultimately determined that there was insufficient evidence to lay charges.
- [199] Following the allegation by C.T., Mr. Gilboa was suspended by Lifemark on September 18, 2018. On October 1, 2018, Mr. Gilboa was permitted to return to work, but was to see only male patients until the police investigation was concluded.

Allegation 4

- [200] J.H. is 30 years old. She was in a motor vehicle accident and her insurer referred her to Lifemark because of pain in her neck and lower back. She was assigned Mr. Gilboa. She had appointments with Mr. Gilboa in November 2018. From the patient record (Exhibit 15), it appears there was a first intake appointment on November 5, 2018 and treatment appointments on November 12, 15, 19, 26, 30 and December 11, 13, 18 and 21, 2018. These facts are not disputed.
- [201] J.H.'s evidence is that she was not offered a gown at any of the appointments. It was suggested to her in cross-examination that she had told the investigator that she had been offered a gown at the first appointment, but she did not recall this and the statement to the investigator was not put into evidence or used in cross-examining J.H.
- [202] The patient record (Exhibit 15) for the November 12, 2018 appointment indicates "treatment was done in closed curtains due to need for exposure, was offered a gown and refused. ... making sure adequate distance from patient for patient convenience".
- [203] The patient record (Exhibit 15) shows the following excerpts of entries for subsequent appointments:
- a. November 15, 2018 – "patient consented to treatment. treatment was done in closed curtain due to exposure ... keeping adequate distance from patient and reassuring her convenience constantly";
 - b. November 19, 2018 – "treatment was done with closed curtains due to need of exposure";
 - c. November 26, 2018 – no information re curtains or exposure

- d. November 30, 2018 – “treatment was done with closed curtains due to need for exposure (same way in every treatment so far) through the whole session asking the patient for comfort/discomfort”;
- e. December 11, 2018 – “treatment was done in closed curtains due to need of exposure”;
- f. December 13, 2018 – “as always treatment was done with closed curtains due to need of exposure, patient consented to manual treatment and exposure”;
- g. December 18, 2018 – “as always treatment was done with closed curtains due to need of exposure, patient consented to manual treatment and exposure”;
- h. December 21, 2018 – “as always treatment was done with closed curtains due to need of exposure, patient consented to manual treatment and exposure” and “during that time kept reassuring the patients comfort”.

[204] Although J.H. does not remember being offered a gown at the first appointment, the record indicates that a gown was offered to her but refused. The Hearing Tribunal finds that it is not necessary to make a finding on this point. What is important and not disputed is that at the subsequent appointments, there was no gown worn by J.H. or offered to her. She was naked from the waist up on a treatment table behind closed curtains with Mr. Gilboa.

[205] What is also not disputed is that Mr. Gilboa would ask her to move to the side of the table and would stand at her right side for at least a portion of the treatment. It is also not disputed that he adjusted the table height.

[206] J.H.’s evidence, which is accepted by the Hearing Tribunal for the reasons set out above, is that during the last three appointments, on December 13, 18, and 21, 2018, she felt Mr. Gilboa’s penis in her hand. She was not certain at first what she was feeling and continued to attend for treatment because she told herself she was wrong and Mr. Gilboa was a professional. However, by the last appointment on December 21, 2018, J.H. was certain she had felt his penis in her hand. For the reasons previously stated, the Hearing Tribunal accepts J.H.’s evidence on this point.

[207] Mr. Gilboa and J.H. also corresponded through a series of Facebook messages between December 1, 2018 and January 3, 2019 (Exhibit 19). These initially related to a t-shirt Mr. Gilboa was ordering from J.H. On January 3, 2019, after learning that J.H. had made a complaint to Lifemark, Mr. Gilboa wrote to J.H.: “I spoke to my manager now, and i understand i made you feel very uncomfortable in our last appointment. I am terribly sorry. I never ment [sic] to hurt you and was trying my best to make you feel as comfortable as possible. I feel realy [sic] bad and i am realy [sic] worried i will loose [sic] my job and license to practice. I have a son and my wife is pregnant. Please find it in your heart to forgive me. Please”

[208] The Hearing Tribunals finds that Mr. Gilboa engaged in inappropriate Facebook communications with J.H. There exists a power imbalance between a physiotherapist and client, requiring the physiotherapist to maintain appropriate professional boundaries. There was clearly a lack of professional boundaries by Mr. Gilboa in the January 3, 2019 communication. While this is not a separate allegation, the Hearing Tribunal finds that Mr. Gilboa was attempting to influence the outcome of J.H.'s complaint in his January 3, 2019 communication to her.

[209] Again, there is no allegation that Mr. Gilboa's bare penis was in J.H.'s hand. The Hearing Tribunal finds that, while fully clothed, Mr. Gilboa allowed his penis to come into contact with J.H.'s hand while providing physiotherapy treatment to her on December 13, 18, and 21, 2018.

Purposeful touching

[210] The Hearing Tribunal considered whether it was possible that Mr. Gilboa inadvertently allowed his penis to come into contact with the hand of either C.T. or J.H. Mr. Gilboa rejected this possibility outright. This rejection makes it less likely in the view of the Hearing Tribunal that the conduct was inadvertent and more likely that it was deliberate.

[211] In addition, the Hearing Tribunal placed weight on the fact that there were two very similar incidents. The conduct with J.H. occurred after the complaint by C.T., which involved a workplace investigation and an interview by the Calgary Police. The Hearing Tribunal would expect that if Mr. Gilboa inadvertently touched a patient, he would be extremely careful and aware with other female patients after being permitted to return to work with female patients.

[212] The Hearing Tribunal also finds that it is plausible that a physiotherapist would be checking in with the patient as to whether they are comfortable or how they are doing. However, the Hearing Tribunal accepts C.T.'s evidence that the communication by Mr. Gilboa changed at about the same time that she felt his penis in her hand. This communication change makes it more likely that the conduct was purposeful and not inadvertent.

[213] The Hearing Tribunal also accepts that Mr. Gilboa made comments to J.H. that make it more likely than not that the conduct was purposeful. The Hearing Tribunal recognizes that English is not Mr. Gilboa's first language, however the types of comments made to J.H., including that he looks forward to seeing her as a patient, are not appropriate comments by a physiotherapist to a patient.

[214] The Hearing Tribunal also considered the argument by Mr. Sim that the Facebook messages from Mr. Gilboa to J.H. may have been Mr. Gilboa checking in with J.H. after each of the last three appointments to test the waters. Mr. Gilboa initiated an electronic communication with J.H. shortly after each of the appointments on December 13, 18, and 21, 2018. After having an allegation already made against him, the conduct by Mr. Gilboa

in communicating with a patient in this manner makes it plausible that he was checking in with J.H. This is another factor considered by the Hearing Tribunal in determining that the conduct was purposeful.

- [215] The number of instances that the conduct occurred also make it more probable that the conduct was purposeful rather than inadvertent. It is improbable that inadvertent touching occurred at three consecutive appointments with J.H.
- [216] The Hearing Tribunal finds that after the incident with C.T., if Mr. Gilboa did not intentionally engage in inappropriate sexual behaviour with C.T., he would be expected to be “hyper-vigilant” with female patients. Mr. Statham gave evidence that this was the term he used in his discussions with Mr. Gilboa. Mr. Gilboa had been told to treat female patients with a PTA present if the curtains were closed. Although this conversation is not documented in the letter for his return to work (Exhibit 9), Mr. Gilboa acknowledged being told by Mr. Statham that if he was treating a female patient with closed curtains, he should have a PTA present.
- [217] The Hearing Tribunal recognizes that having a PTA present was not a documented requirement. However, the Hearing Tribunal questions why, after an allegation of inappropriate sexual behaviour, a workplace investigation, and a police investigation, Mr. Gilboa would place himself in the position of treating a female patient who was naked from the waist up and without a gown, behind closed curtains without someone else present. These facts make it more likely than not that the conduct was purposeful and not inadvertent.
- [218] Mr. Statham also indicated that Mr. Gilboa had told him on September 17, 2018, when the allegation from C.T. first came to light, that his practice when he is working with a client prone, especially a female, would typically be to request the client to tuck their hands under their thighs. This is documented in Mr. Statham’s notes of the meeting (Exhibit 6). Mr. Gilboa did not deny making this statement in his evidence. In his evidence, Mr. Gilboa also indicated that after the complaint by C.T., he started asking patients to tuck their hands when he remembered to do so. This is inconsistent with him telling Mr. Statham in the meeting that his practice is to tell patients, especially female patients to tuck their hands under their thighs. C.T. and J.H. both confirmed that they were not asked to tuck their hands under their thighs. Mr. Gilboa does not deny that he did not do this with either C.T. or J.H.
- [219] As such, in addition to not following the instructions from Mr. Statham about treating female patients, it is not believable that Mr. Gilboa would have forgotten to tell J.H. to tuck her hands at every appointment, if this was his practice. This also leads the Hearing Tribunal to conclude that the touching was purposeful.
- [220] Finally, the evidence of Mr. Gilboa about having patients tuck their hands is inconsistent with his evidence that it is impossible that his anatomy would touch a patient’s hands. He made this statement to Mr. Statham when the first allegation (by C.T.) came to light. This

statement is not consistent with Mr. Gilboa's position that it is not possible that his groin or penis could come into contact with the patient's hand (when the patient's hands are not tucked in as in the case of C.T. and J.H.). This undermines Mr. Gilboa's credibility and also leads the Hearing Tribunal to conclude that the touching was purposeful.

Unprofessional Conduct

[221] The Hearing Tribunal finds that the conduct by Mr. Gilboa constitutes unprofessional conduct under the HPA, section 1(1)(pp) as follows:

- (iii) displaying a lack of knowledge of or lack of skill or judgment in the provision of professional services;
- (iv) contravention of this Act, a code of ethics or standards of practice;
- ...
- (xiii) conduct that harms the integrity of the regulated profession.

[222] The conduct by Mr. Gilboa shows a very clear lack of judgment in the provision of professional services. Mr. Gilboa did not provide appropriate professional services and breached the trust placed in him by his patients.

[223] The conduct is also a breach of the Standards of Practice for Physiotherapists in Alberta (the "Standards of Practice"), which provide:

Standard
Professional Boundaries

Standard

The physiotherapist acts with professional integrity and maintains appropriate **professional boundaries** with **clients**, colleagues, students and others.

...

The physiotherapist:

...

Establishes and maintains professional boundaries and does not make abusive, suggestive or harassing comments or engage in inappropriate physical contact or sexual advances with clients, colleagues, students, and others. (emphasis original)

[224] The Code of Ethical Conduct for Alberta Physiotherapists ("Code of Ethical Conduct") provides:

A. Responsibilities to the Client

Members of the physiotherapy profession have an ethical responsibility to:

...

4. Maintain professional boundaries that honour and respect the therapeutic relationship with clients.

...

12. Practice in a safe, competent, accountable and responsible manner during the provision of services.

...

B. Responsibilities to the Public

Members of the physiotherapy profession have an ethical responsibility to:

1. Conduct and present themselves with integrity and professionalism.

...

C. Responsibilities to Self and the Profession

Members of the physiotherapy profession have an ethical responsibility to:

1. Commit to maintaining and enhancing the reputation and standing of the physiotherapy profession, and to inspiring public trust and confidence by treating everyone with dignity and respect in all interactions.

[225] Mr. Gilboa clearly breached the Standards of Practice and Code of Ethical Conduct. The breaches are very serious and undermine the trust placed by a patient in the professional. He clearly crossed professional boundaries and failed to provide services in a safe, competent, accountable and responsible manner. His conduct leads to a serious breach of the public trust and confidence and the trust and confidence placed in him by his patients.

[226] Finally, the conduct clearly harms the integrity of the profession of physiotherapy. The relationship between patient and physiotherapist is one of trust and Mr. Gilboa fundamentally breached that trust for both C.T. and J.H. Patients and the public expect that physiotherapists will follow the law and maintain appropriate boundaries in treating patients.

[227] This is very serious conduct given the finding that the inappropriate behaviour was purposeful. The Hearing Tribunal will hear submissions on sanction from the parties. The Hearing Tribunal will also consider whether it should make a referral to the Minister of Justice pursuant to section 80(2) of the HPA. The parties may also make submissions on this issue.

[228] The Hearing Tribunal asks that the parties consult each other to determine whether submissions will be made in writing or in person, and the timing of such submissions. If the parties need further direction from the Hearing Tribunal regarding the submissions on sanction and section 80(2) of the HPA, they can request such direction from the Hearing Tribunal.

Dated this 9th day of January, 2020.

Signed on behalf of the Hearing Tribunal



Margaret Hayne, Chair