

**IN THE MATTER OF A HEARING BEFORE THE HEARING TRIBUNAL  
OF THE COLLEGE OF PHYSIOTHERAPISTS OF ALBERTA  
(ALSO KNOWN AS PHYSIOTHERAPY ALBERTA COLLEGE + ASSOCIATION)  
INTO THE CONDUCT OF DALE THOMAS DEIS  
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 the College of Physiotherapists of Alberta (also known as Physiotherapy Alberta College + Association) (the “College”) was conducted virtually on April 5, 6 and 8, 2022 with the following individuals present:

Hearing Tribunal:

Mark Hall, PT, Tribunal Member, Chair  
Simone Hunter, PT, Tribunal Member  
James Lees, Tribunal Public Member  
David Rolfe, Tribunal Public Member

Also present were:

Moyra McAllister, Complaints Director  
Katrina Haymond, Q.C., Legal Counsel for the Complaints Director  
Abbey Bartel, Legal Counsel for the Complaints Director  
Dale Thomas Deis, Investigated Member  
Taryn Burnett, Q.C., Legal Counsel for the Investigated Member  
Shayla Stein, Legal Counsel for the Investigated Member  
Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal

**II. Preliminary Matters**

- [2] There were no objections to the composition of the Hearing Tribunal or its jurisdiction to hear the matter.
- [3] There were no objections to the timelines for service of the Notice of Hearing.
- [4] The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 (“HPA”).
- [5] No application was made to close the hearing. However, Ms. Haymond requested that the complainant be referred to by her initials, ■■■, rather than her full name and that there be a direction that any reference to the complainant’s full name be redacted from the transcript and her initials be substituted. This would achieve maximum transparency but also protect the complainant’s privacy. Ms. Burnett had no objection to the request. The Chair confirmed that the complainant would be referred to by her initials ■■■.

[6] Ms. Burnett advised there would be an application regarding the evidence of two expert witnesses and at the time there would be an application to close that portion of the hearing. However, both Ms. Burnett and Ms. Haymond suggested the application should be heard later in the hearing. The Hearing Tribunal agreed with this suggestion.

[7] There were no other applications of a preliminary or jurisdictional nature.

### III. Allegations

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

1. On or about November 5, 2020, while providing physiotherapy treatment to [REDACTED], did one or more of the following to [REDACTED]
  - a. Told her that “you have to keep the girls happy”, or words to that effect, in reference to [REDACTED]’s breasts;
  - b. Told her that “I bet this is how your baby was conceived”, or words to that effect;
  - c. Told her that you “doubt these were the clothes you were wearing when you made the baby”, or words to that effect.
  
2. On or about November 5, 2020, Mr. Deis failed to provide adequate ongoing informed consent while assessing [REDACTED]’s hip, the particulars of which include:
  - a. Prior to engaging in the assessment, failed to explain that Mr. Deis was going to perform an assessment of [REDACTED]’s hip while she was positioned on her back with her legs raised to her chest and while at the same time Mr. Deis was kneeling on the treatment table;
  - b. Failed to obtain [REDACTED]’s consent prior to positioning himself on the treatment table.

**IT IS FURTHER ALLEGED THAT** the conduct constitutes “unprofessional conduct” as defined in s. 1(1)(pp)(i)(ii)(xii) of the HPA, in particular:

1. The conduct in relation to allegation #1 constitutes “sexual misconduct” as defined in s. 1(1)(nn.2) of the HPA and contravenes Physiotherapy Alberta’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct.
  
2. Further or in the alternative, the conduct with respect to allegations #1 and #2 breaches one or more of the following:
  - a. Code of Ethical Conduct for Alberta Physiotherapists: Responsibilities to the Client (A1, A4, A5, A6, A18); Responsibilities to the Public (B1); and Responsibilities to Self and the Profession (C1);
  - b. Standards of Practice for Physiotherapists in Alberta: Professional Boundaries; Communication; Consent.

- [9] Mr. Deis was asked by the Chair if he admitted or denied the allegations in the Notice of Hearing. Ms. Burnett on behalf of Mr. Deis noted that he admitted that he made some inappropriate comments, but that there was an issue with respect to the wording and that Mr. Deis denied the second allegation.

#### IV. Exhibits

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

Exhibit #1 – Joint Agreed Exhibit Book, with Tabs 1 to 11  
Exhibit #2 – Text Messages between the Complainant and the Investigated Member  
Exhibit #3 – Photographs of [REDACTED]

#### V. Witnesses

- [11] The following individuals were called as witnesses for the Complaints Director during the Hearing:

[REDACTED]

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

Dale Thomas Deis

i. Summary of Witness Testimony

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

[REDACTED]

- [14] [REDACTED] testified that she made a complaint to the College following a physical therapy appointment with Mr. Deis on November 5, 2020. [REDACTED] stated she was 18 weeks pregnant at the time. She had injured her back at work while picking up a box and was referred to physical therapy. Her husband worked at [REDACTED] [REDACTED], where Mr. Deis was a physiotherapist. She testified her husband had texted Mr. Deis to set up the appointment.

- [15] [REDACTED] had not seen Mr. Deis before for physical therapy, but had met him a few times in passing while at [REDACTED] [REDACTED]. Mr. Deis had a treatment area there. [REDACTED] stated she had never socialized with Mr. Deis outside of [REDACTED] [REDACTED].

- [16] [REDACTED] claimed a number of inappropriate events took place during the appointment. She claimed Mr. Deis touched her above her knee and congratulated her on her pregnancy. Mr.

Deis proceeded to ask questions about her injury, her past medical and social history. He then proceeded with his objective examination. At this point [REDACTED] was standing. Mr. Deis made a comment about why woman wear heels, how it makes their calves and buttocks look and what it does to the curvature of their back. [REDACTED] felt this was inappropriate.

- [17] To inspect her back and sacro iliac joint, Mr. Deis asked if he could tuck her shirt into her bra strap and roll down her waistband, to which she agreed. Mr. Deis in attempting to tuck in her shirt commented how tight her bra was. This also made [REDACTED] feel uncomfortable. Following some assessment in standing, Mr. Deis drew a diagram and indicated she had a right pelvic upslip. He asked her to get onto the treatment table on her back with her knees bent. Mr. Deis began by assessing her hips. He was initially standing and brought her hips one at a time to her opposite shoulder. [REDACTED] stated that Mr. Deis warned her he would be pulling on her leg/hips. He indicated he needed her consent to perform the manipulation and she agreed.
- [18] Next [REDACTED] stated that Mr. Deis got up on the treatment table. She had her legs spread with her feet together in a “froggy” position. [REDACTED] claimed Mr. Deis pushed on her shins so that her knees went towards her shoulders, that he was in her space with his face close to hers and at this point he stated “I bet this was how your baby was conceived”. [REDACTED] stated she said “Wow, that was incredibly inappropriate” to which Mr. Deis laughed and joked “I bet these weren’t the clothes you were wearing.” [REDACTED] felt uncomfortable and vulnerable as she had a grown man pushing down on her legs making these inappropriate comments. She assumed Mr. Deis was picturing her having sex with her husband.
- [19] After he made the comments, Mr. Deis asked her to get off the table and asked her to walk to see if the hips had improved. Mr. Deis wrote up a receipt and asked her about a follow up appointment. [REDACTED] stated she would get back to him. She asked him to write down her diagnosis and Mr. Deis indicated he would send it in a text message (Exhibit 2). [REDACTED] then left the treatment space. She nodded to her husband on the way out trying to indicate she needed to see him. She went to her car in the parkade and tried to call her husband and two of her friends. She also called the [REDACTED] manager [REDACTED], as well as the gym owner [REDACTED] and [REDACTED] the HR representative.
- [20] [REDACTED] sent [REDACTED] an email on November 6 after speaking with him on the phone. [REDACTED] felt she needed to make the complaint for her unborn daughter, she wanted her daughter to know she stood up for something that was not right. As a result of the incident [REDACTED] reports not sleeping well, having anxiety and that the hearing has brought up events from her past, and was “triggering”.
- [21] On cross-examination it was clarified that [REDACTED] had in fact texted Mr. Deis to set up the appointment (Exhibit 2). [REDACTED] confirmed that when Mr. Deis entered the treatment area, she was sitting on the treatment table. He came into the room, greeted her, put his hand above her knee and then proceeded to sit on an exercise ball. He obtained a history and advised her he would do an assessment.

- [22] On cross-examination [REDACTED] was asked about whether Mr. Deis explained what he was doing throughout. [REDACTED] claims not entirely, and claimed he did not clearly obtain consent to lift her knees towards her shoulders while she was lying supine.
- [23] In response to questions from the Hearing Tribunal, [REDACTED] indicated that there was no explanation for why Mr. Deis was bending her knees up towards her shoulders. He told her to spread her legs in that position and then he did the treatment. [REDACTED] stated that in seeking treatment from a healthcare professional, you put your trust in them. [REDACTED] indicated not signing a consent form or any other documentation.

#### Dale Thomas Deis

- [24] Mr. Deis described his professional history. He graduated from the physical therapy program at the University of Alberta in 1990 and has completed a number of post-graduate courses. He has been a regulated member of a college for 32 years in both Alberta and British Columbia. Mr. Deis began working at [REDACTED] [REDACTED] in January 2020, following a meeting with [REDACTED] [REDACTED], the owner.
- [25] Mr. Deis described meeting [REDACTED]'s husband who also worked at [REDACTED]. Mr. Deis would walk around the [REDACTED] and introduce himself to people and let them know that physical therapy services were available. He had seen and met [REDACTED] at [REDACTED] previously. Mr. Deis stated that [REDACTED]'s husband had told him two days prior to the November 5, 2020 appointment that he and [REDACTED] were expecting a baby. Mr. Deis was very happy for them and congratulated him.
- [26] In his evidence, Mr. Deis reviewed photographs of [REDACTED] [REDACTED] and described the facility and where his treatment area was located in the facility (Exhibit 3).
- [27] On November 5, 2020, [REDACTED] arrived for her appointment. Mr. Deis asked her to have a seat on the treatment table while he finished up with his earlier appointment and washed his hands. He returned and greeted [REDACTED]. He sat on his exercise ball, then placed his hand on her knee and patted it, and congratulated her on her pregnancy.
- [28] He proceeded with a subjective and objective history to ascertain [REDACTED]'s concerns and determine a cause. He asked her to stand next to the treatment table. [REDACTED] was wearing yoga wear, he had on pants and a golf shirt. He asked her to touch her toes, checked her hip levels and then asked if he could lift her shirt and tuck it into her bra as well as roll down her waist band to visualize her back. [REDACTED] agreed. Following some more investigations Mr. Deis determined [REDACTED] had a right pelvic upslip and drew a diagram to explain to [REDACTED]. He explained there were a number of tests to confirm his diagnosis.
- [29] Mr. Deis asked [REDACTED] to lie down on the table on her back with her knees bent. Standing next to her, he lifted her right knee towards her left shoulder and then her left knee towards her right shoulder. He checked her gluteal muscles and neural tension in legs and arms. He stated he would try and correct the pelvic upslip using a long traction manipulation and

obtained consent for the procedure. He then reassessed [REDACTED]'s mobility and determined there was still some restriction. Mr. Deis stated that he told [REDACTED] that he wanted to try and stretch out her lower back muscles by bringing her knees to her chest.

- [30] Mr. Deis then knelt on the end of the treatment table, took her ankles and raised them towards her chest. He then realized that it probably would not be a good idea to bring her knees up in her chest because it would squish her developing child so he did not do that. He said, "we are going to check your hips instead". He widened her knees a bit and holding her shins raised her legs toward her shoulders on either side of her abdomen. There was less resistance than he anticipated and her knees kept going. Mr. Deis stated he was caught off guard and surprised at the mobility. He felt embarrassed by the position and lowered her knees.
- [31] At this point Mr. Deis stated "I guess this is how it all started, just different attire" in an attempt to lighten the situation and relieve any awkwardness with humour. Mr. Deis testified those were his exact words.
- [32] Mr. Deis claims his toes were of the edge of the treatment table and he was back on his haunches. He mentioned again about using these knee positions to stretch and that her husband could help.
- [33] He then got off the table and reassessed her hips and median nerve tension. He had [REDACTED] stand next to the treatment table, hold onto it and lean back to assess her back. This was the end of the appointment. Mr. Deis wrote out a receipt (Exhibit 1, Tab 4), discussed that he did not deal with Workers' Compensation Board and that if she did not pursue a workers' compensation claim he could see her for a follow up appointment. [REDACTED] asked him to write out the diagnosis, and he said he would text it to her, which he did at 12 noon on November 5, 2020 (Exhibit 2).
- [34] When Mr. Deis arrived for work on November 6, 2020, he took a call from [REDACTED] [REDACTED] who said they needed to talk. Mr. Deis and [REDACTED] [REDACTED] spoke at 0930 and [REDACTED] mentioned a complaint and asked him to go home. On his way home, Mr. Deis realized who the complaint was from as he only had male clients besides [REDACTED] the day before. He sent a text to apologize to [REDACTED].
- [35] Mr. Deis reflected on the comments he made. He was sorry that he made them in the first place, they should never have been made. He got nervous and he tried to deflect with humour. He felt uneasy bringing [REDACTED]'s knees up to her shoulders and was unprepared for the amount of movement in her hips.
- [36] Mr. Deis spoke specifically to the position in which [REDACTED]'s knees and thighs were situated when the comments were made and he claimed her thighs were vertical and feet just off the bed. The frog position is not something he would ever do; he did not put her feet together and knees apart. [REDACTED] claimed he was visualizing her having sex with her husband

but this was not on his mind. ■■■'s husband was a friend. As to his comment about ■■■'s attire, Mr. Deis claimed he thought she and her husband might be out on a date.

- [37] On cross-examination, Mr. Deis was asked about the required training he had done to renew his practice permit in September 2019 in relation to legislation on sexual misconduct. Mr. Deis indicated yes, he remembered and he did the required reading. He acknowledged reading the guides for the patient and physical therapist with respect to sexual abuse and sexual misconduct. He understood that sexual misconduct was prohibited and was an offence. Mr. Deis indicated he understood the inherent power imbalance between healthcare professional and their patient, and that sensitive practice meant being aware of boundaries, it required adequate and ongoing consent, and that sensitive practice was required for victims of sexual assault.
- [38] Mr. Deis acknowledged no personal relationship with ■■■ prior to the appointment but thought they had a budding friendship due to his friendship with ■■■'s husband.
- [39] Ms. Haymond asked Mr. Deis if he recalled his interview with Mr. Acton in which Mr. Deis stated he put his hand "on, just above her knee and kind of patted it." Ms. Haymond asked whether his memory was clearer closer to the incident. Mr. Deis stated he was nervous during the interview. Ms. Haymond then asked whether Mr. Deis greets all of his patients by touching their knees. Mr. Deis said no, unless he had a certain degree of comfort with them. Ms. Haymond asked whether he had consent to touch her knee, and Mr. Deis replied he was very happy for them as he had just found out about the pregnancy.
- [40] Ms. Haymond questioned Mr. Deis about assessing ■■■'s back. Mr. Deis stated he attempted to tuck her shirt into her bra with one hand. He was unsuccessful and then attempted with both hands and commented on the tightness "holy moly how do you breathe?" to which ■■■ replied "I have to keep things in place." Mr. Deis then stated "yes, you have to keep the girls happy." He agreed he was referring to her breasts. He claimed her bra might be restricting her breathing but he did not want to belabour the point. He agreed it did not have any bearing on the treatment for her back pain.
- [41] Ms. Haymond asked about informed consent. Mr. Deis stated he uses ongoing consent in everything he does, he asked about lifting her shirt and rolling down the waistband, not just doing it. Ms. Haymond asked about the need to document consent. Mr. Deis noted that it was not his practice to record informed consent in his chart at that time.
- [42] Mr. Deis then described his position when he was on the treatment table. He stated his feet were off the edge of the table, his knees about 1.5ft up the table. Ms. Haymond asked whether getting on the table was common for him and Mr. Deis stated on occasion to help patients get a feel for what the back stretch would be like. He stated there was torque involved if it were to be done from the side. He stated it was safer for the patient and for him if he got on the table to do the stretch.

- [43] Mr. Deis stated he started this practice when he worked at the YMCA in 1999. He had a mat on the floor and has continued it at other clinics. For this reason, he has a very sturdy table. He did not learn this technique in university or see someone else do it, but he has seen pictures of it. It is something he has researched in the course of this investigation and also something he had researched previously. He had seen examples of it. Ms. Haymond noted this was inconsistent with what he had previously told Mr. Acton where he indicated that he had never really looked into it. Mr. Deis stated that he must have forgotten, that he had done the research on that before and that was a mistake on his part with Mr. Acton.
- [44] Mr. Deis denied that someone with a back injury would be uncomfortable with him getting on the table. Ms. Haymond asked when [REDACTED] came in 18-weeks pregnant whether that would be uncomfortable for her. Mr. Deis replied he was trying to provide her comfort for her back issues and trying to help her. Mr. Deis agreed that he did not ask for consent to get up on the table, however, he did not perceive this to be treatment that was out of the ordinary that would require explicit consent.
- [45] Mr. Deis noted that his knees were about 6 or 8 inches from [REDACTED]'s feet when he was on the table. Mr. Deis's hands were on [REDACTED]'s shins. He had to lean forward and he indicated that at one point his chest and face had to move closer to her, a tiny bit. He confirmed that as her knees went toward her ears his chest and face would move closer to her but he was not to the point where he was on top of her.
- [46] Ms. Haymond asked whether "it" in "I guess this is the way it all started, just different attire" was referring to [REDACTED]'s pregnancy. Mr. Deis agreed that in the normal course a woman becomes pregnant through sexual intercourse. Ms. Haymond then suggested to Mr. Deis that the reference to "this is the way it all started" was a reference to how her baby was made. Mr. Deis stated that he was not thinking about the actual act. Mr. Deis stated that he was referring more to the date that could have led up to that.
- [47] Mr. Deis confirmed that when he made the comment, [REDACTED]'s knees were vertical above her thighs and her feet were near the table. She had her knees towards her shoulders, higher than he thought they would go. Her feet were on either side of her baby bump.
- [48] Mr. Deis then stated that the comment was made after [REDACTED]'s knees were already back down. Ms. Haymond put the transcript of the interview with Mr. Acton to Mr. Deis, where he indicated "as I was bringing her knees down, I told her that". Mr. Deis stated that the statement was made under his breath and they both had masks on. It was not meant to be heard.
- [49] Mr. Deis agreed that the position [REDACTED] was in just prior to the comment being made, was a position a woman could be in during sexual intercourse.
- [50] Ms. Haymond asked whether he knew that [REDACTED] might be feeling uncomfortable in that position. He stated he was uncomfortable and embarrassed when he almost brought her knees up to her chest as that would have been a mistake. He was expecting resistance but

he did not feel that, and was caught off guard when her knees went further. He was embarrassed and then made the comment.

- [51] In his interview with Mr. Acton, Mr. Deis noted that [REDACTED] may have felt it was a sexual position and that she may have been uncomfortable.
- [52] Mr. Deis stated there was no strategy to making the comment, he was embarrassed and it was a stupid comment. Mr. Deis stated he did not recall [REDACTED] stating that the comment was inappropriate. His recollection was that she did not say anything at all. He claimed the comment about it starting and the different attire was one comment not two separate comments.
- [53] Ms. Haymond asked about his evidence that he had made the comment under his breath and noted that he never stated this in his response to the College. Mr. Deis claimed that things became clearer over time as he had time to reflect. However, Ms. Haymond noted that in the text sent to [REDACTED]'s husband, Mr. Deis stated it was an attempt at humour, not that it was made under his breath.

ii. Application to Adduce Expert Evidence

Submissions on the Application to Adduce Expert Evidence on behalf of Mr. Deis

- [54] Ms. Burnett made submissions on the inclusion of expert witness testimony of Dr. Thomas Dalby and Steven Harbourne, to provide evidence and opinion on whether Mr. Deis has a diagnosis or disorder related to the underlying offences, and to aid the Tribunal in determining whether the offences were of a sexual nature or whether there was sexual intent in Mr. Deis's actions.
- [55] Ms. Burnett spoke of *R v Mohan* and that the Tribunal must decide on the test of admissibility: whether the testimony is relevant, whether it is necessary, whether there is any exclusionary rule and whether the expert is properly qualified. If those conditions are met the Tribunal must perform a cost/benefit analysis.
- [56] Ms. Burnett cited *R v Chase* to determine whether the conduct was of a sexual nature and noted the remarks and the situation in which the allegations occurred. The Tribunal must determine whether there was intent or purpose in committing the act, whether there was sexual arousal or sexual intent, motivation or purpose.
- [57] Ms. Burnett stated it was necessary for the Tribunal to hear the expert testimony as boundary crossing is outside of the experience of some members of the Tribunal and that expert testimony satisfies the necessity requirement.
- [58] Ms. Burnett referred to the decisions in *Ganapathy* and the Supreme Court of Canada Case of *R v D.D.*

- [59] With respect to the exclusionary rule, Ms. Burnett stated that the witnesses would not be speaking to whether the facts were correct, commenting on credibility, not on whether the allegations are true or false. They are simply providing their assessment with respect to the pathology or diagnosis that may be of assistance to the Tribunal in determining if the conduct was sexual in nature.
- [60] Ms. Burnett stated that both Dr. Dalby and Mr. Harbourne are qualified, have both been previously qualified as experts and would provide reliable and helpful evidence.
- [61] Ms. Burnett stated that if Mr. Deis is found to have committed sexual misconduct it would be career altering and on balance, the benefit of allowing expert testimony outweighed the cost.

Submissions on the Application to Adduce Expert Evidence on behalf of the Complaints Director

- [62] Ms. Haymond objected to the inclusion of expert witness testimony. Ms. Haymond stated that the expert testimony would not assist the Tribunal in determining facts or whether the conduct constitutes sexual misconduct.
- [63] Ms. Haymond noted the case of *R v Mohan* and *White Burgess Langille Inman v Abbott and Haliburton Co.* where the Supreme Court of Canada commented on the dangers of admitting expert evidence, that the evidence may be misused and that scientific language may be given more weight than it deserves. Ms. Haymond also cited *R v Sandoval-Brillas* urging caution be used before admitting expert testimony.
- [64] Ms. Haymond stated that the opinions provided by both Dr. Dalby and Mr. Harbourne have no bearing on the facts of the case in deciding innocence or guilt, but they may be useful in sanction. Whether Mr. Deis has a mental or sexual disorder or whether he would commit an offence again are not relevant to determining whether he did commit sexual misconduct. Ms. Haymond submitted that the comments were sexual in nature. She stated that if the act is ambiguous then motive or intent are relevant factors, but this act is not ambiguous and that expert testimony is not relevant at this stage.
- [65] Ms. Haymond stated that the Tribunal comprises experienced public members and physical therapists. The Tribunal has the expertise to find if the allegations are proven. Ms. Haymond stated that the Tribunal must do some statutory interpretation and that the expert testimony was not necessary.
- [66] If the factors for admitting expert testimony are met then moving to the gatekeeper phase of *White Burgess v Abbot*, the Tribunal must weigh the utility of the opinion versus the prejudice. Ms. Haymond stated that the expert poses a danger of usurping the role of the Tribunal.

- [67] Ms. Haymond noted that the reference cited by Ms. Burnett in *R v D.D.* was the dissenting opinion and the majority agreed that there was a danger in admitting expert testimony. Ms. Haymond stated that whether Mr. Deis has a mental or sexual disorder was not relevant to whether the conduct occurred.
- [68] With respect to *R v Chase*, Ms. Haymond stated that sexual misconduct, according to the HPA, is an objective test. While motive may be a factor, it is but one factor to consider. She stated that in some cases a sexual act may be ambiguous. But, in this case we can determine whether the act was sexual in nature without determining motive.
- [69] Ms. Haymond stated that sexual gratification was not a prerequisite for sexual assault. Gratification is not alleged in sexual misconduct, there is no evidence that Mr. Deis was experiencing sexual gratification. Mr. Deis made comments and hearing from expert testimony does not serve a purpose to determine whether the act occurred.
- [70] Ms. Haymond cited cases in the Complaints Director's submissions including *CPSO v Feigel* and *Ontario v Islam* in which no experts were called.

Reply Submission on the Application to Adduce Expert Evidence on behalf of Mr. Deis

- [71] Ms. Burnett spoke to the impartiality of the expert as stated in *White Burgess v Abbott*. The gatekeeper function is to perform the cost benefit analysis; does the prejudice of not admitting the testimony outweigh the cost?
- [72] Ms. Burnett stated that this was not a straightforward case; there is ambiguity and the Tribunal needs to consider all of the circumstances in *R v Chase*. In characterizing the expert testimony, Ms. Burnett suggested that Ms. Haymond had misstated the evidence. Ms. Burnett stated that Dr. Dalby has performed psychological tests and his opinion on the pathology will be important in determining the sexual nature of the comments. Mr. Harbourne completed an assessment to determine whether personality traits or pathology were present. Ms. Burnett stated she believed they were relevant to determine whether the comments were of a sexual nature.
- [73] In closing her submission Ms. Burnett stated that qualified experts would not speak to the issue, but to issues relating to findings of clinical pathology.

Hearing Tribunal Decision on the Application to Adduce Expert Evidence

- [74] The Hearing Tribunal carefully considered the submissions of both parties. The Tribunal determined that the expert testimony would not assist the Tribunal in determining the issues at hand. The expert evidence will not help establish whether or not the allegation is proven or not.
- [75] The Tribunal reviewed the *Standard: Sexual Abuse and Sexual Misconduct* and *A Guide for Physiotherapists: Protecting Patients from Sexual Abuse or Misconduct*. The Tribunal

reviewed the definition of sexual misconduct in the HPA and as stated in the *Guide* and determined that the Tribunal had the experience and expertise to establish whether the allegations are proven without the assistance of expert testimony. The Tribunal did not feel that the testimony was relevant or necessary at this stage. The Tribunal determined that the test for admissibility of expert evidence has not been met.

- [76] While the Tribunal did not see value in hearing from expert witnesses at this stage of the hearing, it felt that should it find the allegations proven and that the conduct is sexual misconduct, then expert testimony of this nature may be appropriate during the sanction phase of the hearing.

## VI. Closing Submissions

### Closing Submissions on behalf of the Complaints Director

- [77] Ms. Haymond noted that the standard of proof is a balance of probabilities. She stated that the evidence from [REDACTED] and Mr. Deis is consistent. [REDACTED] attended physical therapy with Mr. Deis and they did not know each other socially. She was not asked to sign a consent to treatment. [REDACTED] was 18-weeks pregnant at the time. Mr. Deis touched her on or above the knee. He made a comment on the tightness of her bra.
- [78] He got up onto the treatment table without asking for permission to do so. He bent her knees up to her shoulders while holding her shins. He made comments about how her baby was conceived and her attire at the time.
- [79] Ms. Haymond stated that in some cases the evidence of [REDACTED] and Mr. Deis did vary. [REDACTED] stated there was no social relationship, Mr. Deis claimed they had a budding friendship. There was inconsistency in where on or around her knee he touched her. [REDACTED] claimed she was put in a “froggy” position, which Mr. Deis denied. There was also inconsistency about how close their faces were when he made the comment, where exactly her knees were, whether or not the comment relating to making the baby and her attire was one statement or two and whether [REDACTED] indicated that what Mr. Deis said was inappropriate. Ms. Haymond stated that the exact wording was not necessarily material to the case.
- [80] Ms. Haymond discussed the credibility of the witnesses and whether the testimony has changed over time. She stated that where there was a material discrepancy, [REDACTED] had a clearer memory, that her testimony was plausible and consistent with the email to [REDACTED] and the complaint to the College. Ms. Haymond stated there were no inconsistencies in [REDACTED]’s testimony, except the comment about high heels which was not included in the original complaint. Ms. Haymond stated that [REDACTED]’s testimony was largely consistent with that of Mr. Deis except for the inconsistencies noted previously.
- [81] Ms. Haymond stated that [REDACTED] had nothing to gain from the complaint beyond doing the right thing. The process has been hard and triggering for her. Ms. Haymond discussed Mr. Deis’s credibility and his recollection of what happened. Ms. Haymond stated that Mr. Deis’s

testimony about where his face may have been as he moved ■■■'s knees towards her shoulders was not consistent with common sense – his face had to move closer as he moved forward.

- [82] Ms. Haymond discussed the inconsistencies in Mr. Deis's testimony compared to what he said to Mr. Acton when interviewed. She said that the position that ■■■ described was a position in which she was vulnerable and that Mr. Deis was attempting to portray himself in a more favourable light.
- [83] Ms. Haymond referred to the comments made by Mr. Deis which he claimed were intended as a joke, but then stated that he said them under his breath and ■■■ was not meant to hear them. This was not mentioned to Mr. Acton and not noted in the written response to the complaint. She claimed this was a major discrepancy in Mr. Deis's testimony and if ■■■ was not supposed to hear it, then it was not intended as a joke.
- [84] Ms. Haymond spoke to Mr. Deis's comment about not requiring documentation of informed consent while the Standard states that consent must be documented. This goes to external consistency.
- [85] Ms. Haymond stated that the three comments are factually proven; the witnesses are largely in agreement that the comments were made. Even with inconsistencies, the differences are not material differences and the allegations in 1(b) and 1(c) are factually proven. The question is whether the conduct constitutes unprofessional conduct and specifically sexual misconduct.
- [86] Ms. Haymond spoke to sexual misconduct as defined in the HPA in s. 1(1)(nn.2) as "*any incident or repeated incidents of objectionable or unwelcome conduct, behaviour or remarks of a sexual nature by a regulated member towards a patient that the regulated member knows or ought reasonably to know will cause offence or humiliation.*" The Tribunal must decide whether Mr. Deis made an objectionable remark, if he did whether it was of a sexual nature, and if he ought reasonably to have known that remark would cause offence or humiliation.
- [87] Ms. Haymond spoke to ■■■'s vulnerability. ■■■ was pregnant, she was in pain and she was shocked by the comments that did not have anything to do with her treatment. Ms. Haymond discussed the meaning of "sexual nature" which is not defined in the HPA but the dictionary defines it as related to sex or the sexual, physiological processes. In stating "I guess this is how it all started" Mr. Deis had no other explanation when asked on cross-examination whether this referred to the pregnancy which starts with sexual intercourse. Mr. Deis's comment about envisioning ■■■ out on a date with her husband made no sense.
- [88] Although this case is not about sexual abuse, Ms. Haymond cited *R v Chase* and stated that there is an objective test. Viewed in light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer. She stated that the words and context in which those words were made cannot be interpreted other than in a sexual

manner. ■■■ was in a vulnerable and compromising position, the context suggests the comments were of a sexual nature.

- [89] Ms. Haymond then discussed consent. She described Mr. Deis's failure to explain what he was going to do and failed to obtain consent prior to his getting onto the treatment table. Although Mr. Deis did explain some aspects of his assessment and treatment, Ms. Haymond stated that he did not obtain informed and ongoing consent specifically related to stretching ■■■'s back and moving her knees to her shoulders. She stated that consent is only valid if the patient fully understands what is going to happen.
- [90] Ms. Haymond stated that physical therapists can rely on implied consent and do not need to ask for permission at every step, but if something is out of the ordinary then implied consent is not good enough. Ms. Haymond stated that for Mr. Deis to get on the table, this was out of the ordinary and he should have asked for permission.
- [91] Ms. Haymond concluded by stating that both allegations are factually proven, both constitute unprofessional conduct, and that at the least allegations 1(b) and 1(c) constitute sexual misconduct.

#### Closing Submissions on behalf of Mr. Deis

- [92] Ms. Burnett began her closing submissions by stating that the allegations were twofold, whether the comments made constitute sexual misconduct and whether Mr. Deis failed to gain adequate, ongoing consent. Ms. Burnett stated there was no expert testimony on what is adequate, ongoing consent.
- [93] Ms. Burnett stated that the evidence differs with respect to the wording in allegations 1(b) and 1(c) and in the position ■■■ was in when the comments were made. The Tribunal must decide if the comments constitute sexual misconduct or professional misconduct. The Tribunal must make its finding based on two witnesses and must do a credibility check. The Tribunal must decide whether the Complaints Director has proven her case based on clear, cogent evidence.
- [94] Ms. Burnett stated that the Tribunal must consider the seriousness of the charge, as a finding of sexual misconduct has a significant penalty. Mr. Deis has had a 32-year career and this is the only complaint. Mr. Deis considered his relationship with ■■■ as a budding friendship due to his relationship with ■■■'s husband. He had a knowledge of her pregnancy as ■■■'s husband had shared it with him previously. His text messaging with her was entirely appropriate.
- [95] Mr. Deis sat on a ball near her and patted her knee. During the appointment Mr. Deis was wearing a golf shirt and pants and ■■■ was in yoga attire. He completed a thorough history and assessment. Ms. Burnett stated that the treatment was appropriate based on the assessment. Mr. Deis asked for permission to lift her shirt during the assessment. ■■■ consented to this. At that point he made a comment about her bra. During that time ■■■

was facing away from him. He completed the assessment and drew a diagram for her to explain the pelvic upslip.

- [96] Mr. Deis asked [REDACTED] to lie on her back. She lay down and bent her knees. He explained he was going to perform further tests. He went to the right and left of her to assess hip mobility, gluteal tension, and median nerve tension. He explained the need to do the long hip traction manipulation to which [REDACTED] consented. Thereafter, he explained he was going to stretch her lower back. He got on the treatment table to do the stretch. He was positioned at the end of the table on his haunches. He placed his hands on her shins with her feet together, he did not want to put pressure on her belly so he brought her knees down. He parted her knees slightly and moved her knees towards her shoulders. Her legs moved more than anticipated; Mr. Deis was shocked by the amount of movement, he brought her knees down, thighs vertical. He tried to defuse the situation by attempting to be humorous and stated I guess this is how it started. Ms. Burnett stated that Mr. Deis made one comment not two.
- [97] Ms. Burnett stated that Mr. Deis denies putting body weight on her or making contact other than her shins. He was sitting upright with his weight on his heels, her shins were at arm's length and he denies that he put her in a "froggy" position. He continued to perform the movements before getting off the table to check median nerve tension. After the treatment [REDACTED] asked him to write down his conclusions and he agreed to send her a text setting out his conclusions (Exhibit 2).
- [98] Mr. Deis provided a response to the complaint in December 2020. There was no sexual intent or motive. He did not sexualize or make sexual advances. The comment was stupid and should not have been made, but at no time was he visualizing [REDACTED] having sex. Mr. Deis provided an honest explanation that [REDACTED]'s husband was his friend and that was not where his mind went. He was honoured that [REDACTED]'s husband trusted him to treat his wife.
- [99] Ms. Burnett summarized the cross-examination of [REDACTED]. She described that [REDACTED] acknowledged that Mr. Deis completed a history and assessment of her back. She agreed to lie on the treatment table with her knees bent; she agreed that Mr. Deis held her shins and pushed her knees toward her shoulders and at this point made the comment. [REDACTED] agreed she was hypermobile and agreed that Mr. Deis did explain what a pelvic upslip was and that he was going to do a manipulation and reassess. [REDACTED] agreed that this session was no different than previous physiotherapy sessions and she had no other expectations.
- [100] Ms. Burnett stated that she is not claiming that [REDACTED] is insincere. [REDACTED] mentioned the experience was triggering although there was no mention that she was a survivor of sexual assault. [REDACTED] claimed she was in a vulnerable position, that she was in shock at the incident and that she felt unsafe. Ms. Burnett stated that [REDACTED]'s reliability to recall what happened while feeling those emotions must be considered.
- [101] Ms. Burnett stated that the evidence [REDACTED] recalled was not plausible. She claimed she was in the froggy position and Mr. Deis was pushing down on her, but on cross-examination she

agreed Mr. Deis was pushing her knees toward her shoulders with her feet apart. Ms. Burnett stated that [REDACTED] claimed that [REDACTED]'s husband made the appointment but later agreed that it was she who made the appointment.

- [102] Ms. Burnett noted [REDACTED]'s evidence regarding Mr. Deis's comments being broken in two parts which Mr. Deis denied. Ms. Burnett stated that [REDACTED] telling Mr. Deis his comment was inappropriate was not consistent with her testimony that she was in shock and too scared to say anything.
- [103] Ms. Burnett spoke of Mr. Deis's credibility; that he has been sincere in his evidence, and has been apologetic and regretful since he heard of the complaint. He acknowledged making the comments, or words to that effect, and has acknowledged that his words were inappropriate and unprofessional. He has been consistent in his testimony and has not tried to deny his behaviour.
- [104] Ms. Burnett addressed the alleged inconsistencies between Mr. Deis's cross-examination and the interview with Dr. Acton. Ms. Burnett stated that getting on the table was not something he learned in university but saw other physiotherapists doing. He told Mr. Acton he started doing it 20 years ago when he was working on the floor with clients. When asked if he had any documentation related to this Mr. Deis stated he had not looked into it. It is not an inconsistency. Ms. Burnett claimed that Mr. Deis's statement about the position of [REDACTED]'s knees when he made the comment has been consistent, the knees were vertical, and this is consistent in his response to the Complaints Director and in his testimony.
- [105] Ms. Burnett then addressed the allegations. Allegation 1 has three components – three comments. The Complaints Director has asserted that the comments are either sexual misconduct or unprofessional conduct. Ms. Burnett referenced the *Standard: Professional Boundaries* which states physiotherapists must maintain appropriate professional boundaries with clients, and that sexual comments may reasonably be perceived as unprofessional and may constitute a breach of the Standard of Practice. Not all comments are considered sexual misconduct – they may constitute a violation of professional boundaries.
- [106] Ms. Burnett highlighted the *Standard: Sexual Abuse and Sexual Misconduct* which states that the comments must be of a sexual nature. She references the HPA (nn.2) "*any incident or repeated incidents of objectionable or unwelcome conduct, behaviour or remarks by a regulated member*". She stated there was no definition of a "sexual nature" in the HPA and therefore the Tribunal needed to refer to *R v Chase* which outlines the test for what constitutes sexual nature. Intent is one factor, sexual gratification is another, and motive is also a factor the Tribunal must consider.
- [107] Ms. Burnett referred to the case authorities submitted by the Complaints Director which deal with a different test, that of sexual assault, referring to the *R v George-Ooman* decision, a case not analogous to the case at hand. Additionally, *the R v Cook* decision alleged a teacher placed a catheter on students' penises for a mock kidney transplant operation

noting the case impacted the sexual integrity of the victim and was not relevant to the present case.

- [108] Ms. Burnett referred to the *College of Physicians and Surgeons of Ontario v Feigel* where a physician was accused of making comments that were sexual in nature. In that case, the disciplinary committee found that the remarks were sexual in nature but considered that ultimately they were inappropriate and unprofessional but did not amount to sexual misconduct.
- [109] Ms. Burnett stated that the Tribunal did not hear evidence from [REDACTED] regarding allegation 1(a) and does not have the evidence required to conclude the comment was of a sexual nature. Ms. Burnett referenced *CPSO v Islam* in which the disciplinary committee considered the *Chase* test to determine if comments related to her breasts, her granny panties and the patient's sex life were of a sexual nature. The committee found that the allegations that the remarks were of a sexual nature were not proven but found the physician guilty of unprofessional conduct. The committee noted the comments were of sexual topics but not of a sexualized character or nature.
- [110] Ms. Burnett referenced other cases that employed the *Chase* test (*Gudov*, *CPSO v Lee*) and found that the conduct was ultimately unprofessional conduct but did not rise to the level of sexual misconduct. With respect to allegation 1(a), Ms. Burnett stated that the Complaints Director had failed to prove that the comments amount to either sexual misconduct or unprofessional conduct.
- [111] With respect to allegations 1(b) and 1(c), Ms. Burnett stated that Mr. Deis has been consistent throughout that the comment, "I guess this is how it all started but with different attire," had been one phrase not two separate phrases. Ms. Burnett submitted that Mr. Deis has acknowledged that the comment was unprofessional but there is no evidence on a balance of probabilities that it amounts to sexual misconduct. The comments do not meet the *Chase* test required to establish they were of a sexual nature.
- [112] Ms. Burnett referred to Mr. Deis's relationship with [REDACTED]'s husband, his belief of a budding friendship made him more familiar than he should have been. His assessment was professional, he provided a clinically relevant procedure with an unexpected result that caught him off guard. The comment was not made to sexualize [REDACTED], but rather to address an uncomfortable situation. Mr. Deis acknowledges that it was inappropriate and unprofessional.
- [113] There was no sexual touching or gratification, both were clothed in a semi-private area and [REDACTED]'s husband was not far away. The comments may have touched on a sexual topic but like *Islam* they were not of a sexualized nature. Mr. Deis did not make any sexual advances; he had no intent or motive. There is no evidence that Mr. Deis attempted to sexualize [REDACTED] in any manner. Ms. Burnett stated that a reasonable observer would not consider these sexual in nature as in previous case law. The comments amount to unprofessional conduct and not sexual misconduct.

- [114] Ms. Burnett stated that with respect to the allegation of informed and ongoing consent, Mr. Deis did explain what he was doing, he made a drawing, explained that he was going to stretch her lower back, and after completing some movements while standing, he got onto the treatment table and did not require specific consent to do so.
- [115] Ms. Burnett stated that the Complaints Director did not provide any evidence that getting on the table was unconventional and that Mr. Deis required additional consent. Clients understand that physiotherapists need to be in close contact. Mr. Deis had consent to perform the manipulation in close proximity.
- [116] Ms. Burnett stated that [REDACTED] cooperated with Mr. Deis's instruction to lie on the treatment table and Mr. Deis explained as he went along.
- [117] Ms. Burnett stated that the Complaints Director had not proven allegations 1(a) or 2. Mr. Deis disputes the wording in allegation 1(b) but admits to the comment which constitutes unprofessional conduct.

#### Reply Submissions of Ms. Haymond

- [118] Ms. Haymond cited *F.H. v McDougall* regarding Ms. Burnett's contention that more serious allegations require more careful scrutiny. She stated that there is no shifting standard of proof, and that more or better quality evidence is not required with a more serious charge.
- [119] With respect to [REDACTED] being a survivor of sexual abuse, Ms. Haymond stated the Tribunal needed to be careful as while there may be an inference that she is a survivor there is no evidence on the record to that effect. Ms. Haymond cautioned against doubting the reliability of [REDACTED]'s testimony due to the inference of sexual abuse. She stated the Tribunal should not draw an inference that sexual abuse survivors are less reliable.
- [120] Ms. Haymond stated that case authorities submitted should be looked at with caution. The Tribunal should rely on the working definition of sexual misconduct in the HPA. If the Tribunal needed to look at case law, then it should start with *R v Chase*, and also look at the contextual nature of the cases submitted to determine whether something was of a sexual nature.
- [121] With respect to allegation 1(a), she noted that [REDACTED] did not testify about the comment which did not mean the allegation was not proven. Mr. Deis was compelled to testify and the Tribunal could rely on his evidence to find that the allegation is proven.
- [122] With respect to allegation 2, Ms. Haymond submitted that the Standard of Practice sets out the need for ongoing, informed consent. The Tribunal does not need expert testimony to interpret the Standard of Practice and it is not an error to rely solely on the Standard (*Novick v Ontario College of Teachers*, 2016, ONSC 508; *Walsh and Council for Licensed Practical Nurses*, 2010 NLCA 11).

[123] In closing, Ms. Haymond reiterated it was ultimately up to the Tribunal to decide on credibility.

## **VII. Decision of the Hearing Tribunal**

[124] The Hearing Tribunal finds that Allegation 1 is proven and that the conduct constitutes unprofessional conduct. The Hearing Tribunal finds that the conduct in Allegation 1(b) and (c) constitutes sexual misconduct.

[125] The Hearing Tribunal finds that Allegation 2(a) is proven on a balance of probabilities, however, the Hearing Tribunal finds that Allegation 2(a) does not constitute unprofessional conduct. Allegation 2(b) is not proven.

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

## **VIII. Findings and Reasons of the Hearing Tribunal**

[127] The Hearing Tribunal carefully considered the evidence of the witnesses and the documents entered as exhibits. The Hearing Tribunal also carefully considered the oral submissions of the parties and the authorities presented by each party.

### **Allegation 1**

On or about November 5, 2020, while providing physiotherapy treatment to ■■■■■, Mr. Deis did one or more of the following to ■■■■■

- a. Told her that “you have to keep the girls happy”, or words to that effect, in reference to ■■■■■’s breasts;
- b. Told her that “I bet this is how your baby was conceived”, or words to that effect;
- c. Told her that you “doubt these were the clothes you were wearing when you made the baby”, or words to that effect.

### *Allegation 1(a)*

[128] The facts in Allegation 1 are largely undisputed between ■■■■■ and Mr. Deis. Mr. Deis admits making the comments or words to that effect as stated in Allegation 1.

[129] The Hearing Tribunal finds that Mr. Deis commented on the tightness of ■■■■■’s bra while attempting to tuck her shirt into the back of her bra so he could observe her back during his assessment. In response to ■■■■■ then saying she needed to keep things in place, Mr. Deis stated “you need to keep the girls happy”, or words to that effect.

[130] ■■■■■ was facing away from Mr. Deis at the time he made the comment and Mr. Deis stated he was concerned about her breathing but did no further follow up or assessment related to ■■■■■’s breathing.

- [131] While ■■■ did not give testimony about this interaction, Mr. Deis acknowledges making the comment. Based on this acknowledgement, the Hearing Tribunal finds that on a balance of probabilities, the comment in Allegation 1(a) was made.
- [132] In the context of the assessment, there was no need for Mr. Deis to make a comment at all about the tightness of ■■■'s bra or a need to comment on keeping "the girls", her breasts, happy.
- [133] The Hearing Tribunal considered the *Standard: Professional Boundaries* and the *Standard: Communication*, with respect to allegation 1(a). The comment had nothing to do with the presenting complaint of lower back pain or the assessment and treatment. The Tribunal found that the comment was inappropriate and unprofessional. The Tribunal found that the comment breached the *Standard: Communication*, specifically, "The physiotherapist communicates clearly, effectively, professionally, and in a timely manner to support and promote quality services" and Expected Outcome "Clients can expect that communication with the physiotherapist will be respectful and professional and will contribute to their understanding and participation in their health management." The Tribunal finds that on the balance of probabilities Allegation 1(a) is proven and that the comment breaches the *Standard: Communication* and is sufficiently serious to amount to unprofessional conduct.

*Allegation 1(b) and (c)*

- [134] With respect to Allegation 1(b) and 1(c), Mr. Deis has acknowledged making the comments in the allegation or comments to that effect. He has expressed remorse for making the comments and acknowledged they were stupid and unprofessional.
- [135] Mr. Deis states that the comments were made as one phrase or sentence, whereas ■■■ states there were two separate comments. ■■■ says she told him the first comment was inappropriate before he proceeded to make the second comment. Mr. Deis denies that ■■■ said the comment was inappropriate. Further, ■■■ says she was in a "froggy position" with her feet together and the comments were made while Mr. Deis was on top of her. Mr. Deis denies she was in this position and that her feet were apart. He says he made the comment shortly after her knees were back down, or as he was bringing her knees down.
- [136] The Tribunal finds that on a balance of probabilities Allegation 1(b) and (c) are proven. Mr. Deis made the comments in the Allegation, or words to that effect. The Tribunal finds that it does not matter whether there was one phrase or two or whether ■■■ told Mr. Deis the comment was inappropriate. Further, the Tribunal finds that the precise position of ■■■'s knees or the exact timing of when the comments were made do not affect a finding that Allegation 1(b) and (c) are proven.
- [137] The Tribunal finds that the comments, given the position ■■■ was in, lying on her back with her knees up and with Mr. Deis also on the table with his hands on her shins, were in relation to ■■■'s pregnancy and her having sexual intercourse. ■■■ was shocked by the comments, she was pregnant and in a very vulnerable position. She was offended and felt

uncomfortable. Although she continued with the treatment, she tried to call her husband and friends from her car in the parkade following treatment as she was upset by this encounter. She called [REDACTED] [REDACTED] the clinic owner, as well as the clinic manager to make a complaint and shortly thereafter made a complaint to the College on November 13, 2020.

- [138] Mr. Deis assumed a friendly relationship with [REDACTED] due to his friendship with [REDACTED]'s husband, however, [REDACTED] had only met Mr. Deis on a few instances in passing at the [REDACTED]. There was no budding friendship in her mind. Mr. Deis patted on or around her knee to congratulate her on her pregnancy, he was excited for them, but [REDACTED] did not really know him. Mr. Deis was more familiar than he should have been with [REDACTED], he made a number of inappropriate comments that day that collectively made [REDACTED] uncomfortable and upset.
- [139] Mr. Deis had completed the required education relating the Bill 21 including reviewing *A guide for Physiotherapists: Protecting Patients from Sexual Abuse or Misconduct*, as well as the *Standard: Professional Boundaries*. As a result, Mr. Deis ought reasonably to have known that his comments would cause harm or offence to [REDACTED]. The fact that Mr. Deis did not intend to offend her, and his motive was an attempt to address an awkward situation does not detract from the fact that his comments caused her offence.
- [140] The Tribunal carefully considered the definition of sexual misconduct in the HPA. Section 1(1)(nn.2) defines sexual misconduct as:
- “sexual misconduct” means any incident or repeated incidents of objectionable or unwelcome conduct, behavior or remarks of a sexual nature by a regulated member towards a patient that the regulated member knows or ought reasonably to know will or would cause offence or humiliation to the patient or adversely affect the patient’s health and well-being but does not include sexual abuse.
- [141] The HPA defines “sexual nature” at section1(1)(nn.3) as follows:
- “sexual nature” does not include any conduct, behaviour or remarks that are appropriate to the service provided.
- [142] The comments were not appropriate to the service provided.
- [143] The HPA provides no further guidance on what will be considered to be comments of a sexual nature.
- [144] The Tribunal considered the cases referred to by the parties. In *College of Physicians and Surgeons of Ontario v Feigel* and in *College of Physicians and Surgeons of Ontario v Islam*, the principles of *R v Chase* were applied to determine if behaviour or remarks are of a “sexual nature”.

- [145] In *R v Chase*, the objective test to be applied is: “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.”
- [146] The committee in *Feigel* held that the subjective perception of the complainant alone should not be determinative. All surrounding circumstances must be considered. The committee further held that whether the alleged perpetrator derived sexual gratification or had a sexual purpose is a relevant factor, but the absence of sexual motivation would not necessarily preclude a finding that the behaviour in question was of a sexual nature.
- [147] The Tribunal considered how ■■■ viewed the comments. ■■■ felt the comments were sexual in nature. She believed Mr. Deis was picturing her having sexual intercourse with her husband. This is a factor to be considered.
- [148] The Tribunal also accepted that there was no evidence of sexual gratification or a sexual motive or purpose on the part of Mr. Deis. This is another factor to be considered.
- [149] The Tribunal considered how the comments would be viewed by a reasonable observer.
- [150] ■■■ presented to the appointment while 18-weeks pregnant. She was in pain because of her back and hypermobile due to her pregnancy. While on the treatment table, Mr. Deis was going to stretch her back out by pushing her knees to her abdomen, but remembering her pregnancy he separated her knees and, with his hands on her shins, took her knees towards her shoulders to assess hip mobility instead of stretching. Mr. Deis expected resistance at some point but there was none and ■■■’s knees went further than anticipated. This caught Mr. Deis off-guard. Mr. Deis moved into her space, he felt embarrassed and uncomfortable and assumed ■■■ may be uncomfortable due to the nature of this position. He brought her knees back towards the table and made the comments. Mr. Deis then said “I guess this is how it all started, just with different attire” or words to that effect to ■■■ while she was lying on her back, her knees were bent, and Mr. Deis was on the table, holding her shins.
- [151] The Tribunal considered how the comments would be viewed by a reasonable observer. The comments were unrelated to any treatment being provided. The Tribunal finds that the comments would be viewed by a reasonable observer as being of a sexual nature. The Tribunal finds the comments referred to the beginning of ■■■’s pregnancy - that is to ■■■ having sexual intercourse with her husband.
- [152] The Tribunal finds that there is no reasonable explanation for the comment except that Mr. Deis was referring to the position ■■■ was in and that she would have been wearing no clothes or something different when she and her husband were having sexual intercourse, conceiving their child.
- [153] The Tribunal rejects Mr. Deis’s explanation that he was referencing ■■■ and her husband being on a date. This explanation was not credible to the Tribunal. The Tribunal also considered that Mr. Deis’s evidence was contradictory in that he said the comment was

intended as a joke or an attempt at humor, he provided this explanation in his text to ■■■'s husband and to ■■■ ■■■ and in his explanation to the College but then changed his evidence to indicate it was said under his breath and was not meant to be heard.

- [154] The comments in Allegation 1(b) and (c) are unprofessional conduct and meet the definition of sexual misconduct in the HPA. The remarks were made by Mr. Deis towards ■■■, a patient, were objectionable or unwelcome and of a sexual nature. Mr. Deis ought reasonably to have known that his comments would cause offence or humiliation to ■■■ or adversely affect her health and well-being.
- [155] After careful consideration the Tribunal finds that the comments in Allegation 1(b) and 1(c) rise to the level of sexual misconduct as defined in *s.1(1)(nn.2) of the HPA* and contravene *Standard: Sexual Abuse and Sexual Misconduct*.
- [156] Specifically the Tribunal used the definition of sexual misconduct in the HPA also referenced in the *Standard: Sexual Abuse and Sexual Misconduct*:

*An incident or repeated incidents of objectionable or unwelcome conduct, behavior or remarks of a sexual nature by a regulated member towards a patient that the regulated member knows or ought reasonably to know will or would cause offence or humiliation to the patient or adversely affect the patient's health and well-being,*

- [157] The comments by Mr. Deis also breach the following from the *Standard: Sexual Abuse and Sexual Misconduct*: "The physiotherapist abstains from conduct, behaviour or remarks directed towards a patient that constitutes sexual abuse or sexual misconduct" and from the Expected Outcome "A patient can expect physiotherapy services will be free from conduct, behaviour or remarks of a sexual nature, and the physiotherapist will maintain professional boundaries appropriate to the therapeutic relationship in all interactions, in reaching its decision."

#### *Conclusion on Allegation 1*

- [158] The Tribunal finds that Mr. Deis's comments collectively amount to unprofessional conduct. The comment in Allegation 1(a) was unprofessional and breaches the *Standard: Communication*. The comments in Allegation 1(b) and (c) were unprofessional, and breach the *Standard: Sexual Abuse and Sexual Misconduct* and constitutes sexual misconduct under the HPA.

#### Allegation 2

On or about November 5, 2020, Mr. Deis failed to provide adequate ongoing informed consent while assessing ■■■'s hip, the particulars of which include:

- a. Prior to engaging in the assessment, failed to explain that Mr. Deis was going to perform an assessment of ■■■'s hip while she was positioned on her back with her legs raised to her chest and while at the same time Mr. Deis was kneeling on the treatment table;

- b. Failed to obtain ■■■■■'s consent prior to positioning himself on the treatment table.

*Allegation 2(a)*

- [159] With respect to Allegation 2(a) the Tribunal considered the evidence presented with respect to consent, specifically as stated in the *Standard: Consent*, relating to ongoing and informed consent.
- [160] ■■■■■ acknowledges that Mr. Deis did explain what he was going to do for some components for her assessment and treatment. He explained to her that he was going to get her to do some movements in standing to assess what was happening. Mr. Deis obtained consent to lift her shirt and tuck it into her bra to observe her back while moving. Mr. Deis explained his diagnosis of a right pelvic upslip and drew a diagram of the anatomy of her back to explain this to ■■■■■. He asked her to lie on the treatment table and explained that he was going check her hips for impingement, he explained he was going to check her neural tension with a straight leg raise. These tests confirmed the right pelvic upslip. Mr. Deis explained that he would do a long traction manipulation to correct the pelvic upslip and that he needed specific consent to do so, which ■■■■■ provided. He then retested her mobility and noted improved range of motion.
- [161] Mr. Deis explained that he was going to stretch her back as he got onto the treatment table and took her ankles and began to lift her knees up initially toward her abdomen, and then knees apart towards her shoulders. He then retested her mobility.
- [162] The Tribunal found that while Mr. Deis did explain many aspects of his assessment and treatment to ■■■■■, and he obtained specific consent for the long traction manipulation, Mr. Deis did not adequately explain his procedures and intentions to climb on the treatment table to stretch ■■■■■'s back. He explained that he would stretch her back, and asked her to lie on the treatment table, but this explanation was not a fulsome one. For this intervention and Allegation 2(a), the Tribunal finds that Mr. Deis did not meet the *Standard: Consent* in terms of ongoing and informed consent.
- [163] The Tribunal then considered whether the conduct was sufficiently serious to constitute unprofessional conduct. Not every breach of a Standard is necessarily or automatically unprofessional.
- [164] The Tribunal considered that there was a relatively comprehensive and ongoing explanation of what Mr. Deis was doing. Mr. Deis obtained consent from ■■■■■ for most aspects of the assessment and treatment. Mr. Deis should have provided a more fulsome explanation of the assessment of the hip while he was on the treatment table. However, considering the totality of the ongoing consent process that occurred during the assessment and treatment, the Tribunal does not find that the specific failure relating to the assessment of ■■■■■'s hip while Mr. Deis was on the treatment table rises to the level of unprofessional conduct.

*Allegation 2(b)*

- [165] With respect to Allegation 2(b), the Tribunal considered the evidence presented and the submissions of the parties. Ms. Haymond submitted that getting on the table was out of the ordinary and required specific consent.
- [166] The Tribunal found that Mr. Deis did get onto the treatment table, but this may be considered part of a normal treatment and does not require specific consent or permission. Mr. Deis should have better informed [REDACTED] as part of his explanation about his treatment that he would get onto the treatment table. However, the Tribunal heard no evidence that this practice was sufficiently unusual to require that Mr. Deis explicitly obtain consent in this instance. For this reason, the Hearing Tribunal finds that Allegation 2(b) is not proven.

*Conclusion on Allegation 2*

- [167] In considering Allegation 2 and in reviewing Exhibit 1 and the testimony in the hearing, the Tribunal noted there was no evidence presented that Mr. Deis documented obtaining informed consent. Mr. Deis stated he believed consent could be verbal, which it can, but he failed to document this consent as required in the Standard of Practice. The Tribunal notes that the *Standard: Consent*, specifically the Performance Expectation states: "Obtains and documents clients' ongoing and informed consent to proposed services." However, a failure to document consent is not part of Allegation 2.
- [168] The Tribunal finds that Allegation 2(a) is proven but the conduct does not rise to the level of unprofessional conduct. The Tribunal finds that Allegation 2(b) is not proven.

**IX. CONCLUSION**

- [169] The Hearing Tribunal finds that Mr. Deis is guilty of unprofessional conduct in all aspects of Allegation 1, and guilty specifically of sexual misconduct on Allegation 1(b) and 1(c). The Hearing Tribunal finds that Allegation 2(a) is proven, but the conduct does not amount to unprofessional conduct and that Allegation 2(b) is not proven.
- [170] The Hearing Tribunal will receive submissions on the appropriate orders to be made for Allegation 1(a), (b) and (c). Submissions may be received either in writing or by way of oral submissions. The Hearing Tribunal asks the parties to determine if they can agree on the process and timelines for making submissions, and if the parties cannot agree, the Hearing Tribunal will provide further direction on how it will receive submissions on penalty.

Dated this 1<sup>st</sup> day of June, 2022.

Signed on behalf of the Hearing Tribunal

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a vertical line and a horizontal line, all enclosed within a large, sweeping loop.

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Mark Hall, PT, Chair