

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

**DECISION OF THE HEARING TRIBUNAL**

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**I. Introduction**

- [1] The Hearing Tribunal of Physiotherapy Alberta College + Association (the “**College**”) conducted a hearing by video conference on July 13, 14, 15, August 9, 10 and September 9, 2022 with the following individuals present:

Hearing Tribunal:

Todd Wolansky, PT, Tribunal Member, Chair  
Jo-Ann Ogle, PT, Tribunal Member  
Doug Dawson, Tribunal Member, Public Member  
David Rolfe, Tribunal Member, Public Member

Also present were:

Moyra McAllister, Complaints Director  
Gregory Sim, Legal Counsel for the Complaints Director  
Caitlyn Field, Legal Counsel for the Complaints Director  
Scott Thomas Sherman, Investigated Member (“**Mr. Sherman**” or the “**Investigated Member**”)  
Taryn Burnett, K.C., Legal Counsel for the Investigated Member  
Katie Stys, Legal Counsel for the Investigated Member  
Angela Danko, Legal Counsel for the Investigated Member  
Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal  
Haylee O’Reilly, Hearings Administrator  
Cheryl Blahut, Conduct Coordinator

**II. Preliminary Matters**

- [2] The parties confirmed there were no objections to the composition of the Hearing Tribunal or its jurisdiction to proceed with the hearing.
- [3] The hearing was open to the public pursuant to section 78 of the *Health Professions Act, RSA 2000, c. H-7* (“**HPA**”). Counsel for Mr. Sherman brought an application to have the patient’s name referred to by initials throughout the proceeding and to close a portion of the hearing, relating to the patient’s testimony. The application was brought on the basis that not disclosing a person’s confidential personal health information outweighed the

desirability of having the hearing open to the public and because the presence of the public could compromise the ability of the witness to testify.

- [4] Counsel for the Complaints Director noted that the Complaints Director agreed that the patient's name should be referred to by her initials and that the hearing should be closed while the patient gave her evidence.
- [5] The Hearing Tribunal considered the application and the agreement of both parties to close the hearing for the testimony of the patient. The Hearing Tribunal directed the hearing would be held in private for the patient's testimony. The Hearing Tribunal found that protecting the patient's identity and the confidentiality of her personal information outweighed the desirability of an open hearing for the portion of the hearing where she would be giving her evidence. The Hearing Tribunal further directed that the patient would be referred to by her initials, SB, throughout the hearing.

### III. Allegations

[6] The allegations that appear in the Notice of Hearing (Exhibit 1, Tab 1) are:

1. On or between December 2019 and March 2020, Mr. Sherman failed to maintain appropriate boundaries during his therapeutic relationship with client SB by meeting with her on one or more occasions in a personal capacity for coffee.
2. Mr. Sherman engaged in sexual abuse toward patient SB the particulars of which include:
  - a. He provided physiotherapy treatment to SB on a number of occasions between February 5, 2014 – September 3, 2019;
  - b. On or about March 17, 2020, he commenced a sexual relationship with SB and engaged in conduct of a sexual nature with her while she was still a "patient" as defined in Physiotherapy Alberta's Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct;
  - c. He provided further treatment to SB on or between October 7, 2020 to November 23, 2020, while continuing to engage in a sexual relationship with her and when SB was still a "patient".
3. Further or in the alternative to allegations #2, Mr. Sherman's conduct in engaging in an intimate and/or sexual relationship with SB constitutes an inappropriate boundary violation.

**IT IS FURTHER ALLEGED THAT** Mr. Sherman's conduct constitutes "unprofessional conduct" as defined in s. 1(1)(pp)(i)(ii)(xii) of the HPA, in particular

1. His conduct with respect to allegation #1 contravenes one or more of the following:
  - a. Code of Ethical Conduct for Alberta Physiotherapists: Responsibilities to the Client (A4, A18); Responsibilities to the Public (B1); and Responsibilities to Self and the Profession (C1, C6); and
  - b. Standards of Practice for Physiotherapists in Alberta: Professional Boundaries.
2. His conduct with respect to allegations #2:
  - a. constitutes “sexual abuse” as defined in s. 1(1)(nn.1) of the HPA and contravenes Physiotherapy Alberta’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct; and/or
  - b. breaches one or more of the following:
    - i. Code of Ethical Conduct for Alberta Physiotherapists: Responsibilities to the Client (A4, A18); Responsibilities to the Public (B1); and Responsibilities to Self and the Profession (C1, C6); and
    - ii. Standards of Practice for Physiotherapists in Alberta: Professional Boundaries.

#### IV. Exhibits

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

- Exhibit 1 - Agreed Exhibit Book (Tabs 1 to 25)
- Tab 1 - Signed Notice of Hearing
- Tab 2 - December 2018 Draft Standard of Practice re Sexual Abuse and Misconduct
- Tab 3 - Standard of Practice: Sexual Abuse and Sexual Misconduct effective April 1, 2019 (“**Sexual Abuse Standard**”)
- Tab 4 - Email to S. Sherman, March 29, 2019
- Tab 5 - Newsletter to S. Sherman, April 5, 2019
- Tab 6 - Physiotherapy Alberta College + Association: The Movement Specialists: Introducing the New Sexual Abuse and Sexual Misconduct Standard of Practice: Who is a Patient?, April 1, 2019
- Tab 7 - Mandatory Education and Training Program compilation, March 28, 2019
- Tab 8 - 2019 College-Selected Activity: Sexual Abuse and Misconduct March 28, 2019
- Tab 9 - Publication date of College-Selected Activity
- Tab 10 - Protecting Patients. Guide for Physiotherapists
- Tab 11 - Publication date of a Guide for Physiotherapists
- Tab 12 - A guide for Patients: Protecting Patients from Sexual Abuse or Misconduct

- Tab 13 - Publication date of a Guide for Patients
- Tab 14 - Physiotherapy Alberta College + Association: The Movement Specialists: 2019 College-Selected Activity: Complete Even if you Plan to Renew or Cancel your Registration, September 6, 2019
- Tab 15 - 2019 Professional Renewal Declaration - Scott Sherman
- Tab 16 - Standard of Practice for Physiotherapists in Alberta: Professional Boundaries, January 2017 ("**Boundary Standard**")
- Tab 17 - Code of Ethical Conduct
- Tab 18 - Complaint from Lloyd Weber
- Tab 19 - Letter from Lloyd Weber, April 29, 2021 re Transaction History ("**Transaction History**")
- Tab 20 - Treatment Records of SB
- Tab 21 - Email from S. Sherman to K. Cadrin, Nov 15, 2020
- Tab 22 - Email to K. Cadrin re SB, Nov 17, 2020
- Tab 23 - Text Messages between K. Cadrin and S. Sherman
- Tab 24 - Email from S. Sherman to K. Cadrin, Dec 7, 2020
- Tab 25 - Response from Scott Sherman, April 27, 2021
- Exhibit 2 - Document entitled "Alberta Health Feedback to Physiotherapy Alberta College & Association Regarding Proposed Standard of Practice"
- Exhibit 3 - Document entitled "Alberta Health Feedback on the Proposed Standard of Practice – Sexual Abuse and Sexual Misconduct"
- Exhibit 4 - Printout Relating to Webinar
- Exhibit 5 - Webinar Slides
- Exhibit 6 - Curriculum Vitae of Jeffrey Stuart Begg
- Exhibit 7 - Expert Report by Jeffrey Stuart Begg dated June 2, 2022 re Complaint of Unprofessional Conduct Against Scott Sherman
- Exhibit 8 - Document entitled "Index of Documents Reviewed by Jeff Begg, Expert"
- Exhibit 9 - Document entitled "Treatment Plan (Form AB-2)" ("**AB-2 Report**")

## V. Witnesses

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

Jody Prohar  
Lloyd Weber  
Kimberly Cadrin

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

Jeffrey Begg  
Scott Sherman  
SB

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

Jody Prohar

[11] Jody Prohar is the Registrar and Executive Director for the College and has held that position since November 2017. Ms. Prohar is responsible for carrying out the strategies set by Council for the College. She was involved in the development of the Sexual Abuse Standard.

[12] Ms. Prohar confirmed that the Mr. Sherman became a regulated member of the College in 1991 and has remained a regulated member of the College since that time.

[13] Ms. Prohar provided background information on how the Sexual Abuse Standard came to be developed. The Standard was developed in accordance with Bill 21 (*An Act to Protect Patients*), which received royal assent in November 2018. The Standard was developed throughout November 2018, was circulated to regulated members on December 10, 2018, and then submitted to government in December of 2018.

[14] Ms. Prohar noted that the definition of “patient” changed from the draft Sexual Abuse Standard that was submitted to government and the one that was eventually approved by Council for the College. In February 2019, the College received feedback from Alberta Health asking why the College did not contemplate episodic care in the definition of a patient.

[15] Ms. Prohar noted that following receipt of the feedback from Alberta Health, the College contemplated possible scenarios in which episodic care may occur. Ultimately a briefing note for Council was prepared and Council approved the wording that is in the current Sexual Abuse Standard.

[16] Ms. Prohar gave evidence about the power imbalance that exists between health care professionals and patients and how this was considered in drafting the Sexual Abuse Standard. The College tried to create a Standard to eliminate grey areas of interpretation for regulated members. One of the options that was set out in the briefing note to Council was to include a definition of episodic care in the Sexual Abuse Standard. The Council ultimately voted to accept a definition of episodic care.

[17] The Sexual Abuse Standard came into effect on April 1, 2019. Regulated members were notified by directive email on March 28, 2019. In addition, the April 2019 College newsletter included information about the new Standard. There was ongoing communication on this topic until renewal of registration in September 2019.

[18] As part of the continuing competence program, the College decided to make a mandatory College-selected activity on the Sexual Abuse Standard for all members to complete. There were two learning objectives. First, to understand who is a patient as defined by

the Sexual Abuse Standard and the second, was to understand why and how the Standard as well as the guides that were developed applied to their practice specifically. Two guides were developed, one geared towards physiotherapists and the other for patients.

- [19] The College-selected activity involved reading the Sexual Abuse Standard, a document entitled “Introducing the New Sexual Abuse and Sexual Misconduct Standard of Practice, Who is a Patient” as well as the guides and to watch a webinar. The College-selected activity was required to be completed prior to renewal of registration on September 30, 2019.
- [20] Mr. Sherman declared that he had completed the activity as required by the College and stated in his declaration that he had achieved the learning objectives.
- [21] In cross-examination, Ms. Prohar confirmed that the College drafts standards of practice, but Council approves them. The College also publishes articles on the various standards and drafts guidelines for members.
- [22] Ms. Prohar acknowledged that the Boundary Standard does not provide a time frame for when a member can meet with a client or former client in a social setting such as meeting for coffee. The Boundary Standard does not refer a member back to the Sexual Abuse Standard.
- [23] Ms. Prohar confirmed that the Sexual Abuse Standard does not require explicit transfer or termination of care.
- [24] Ms. Prohar was asked about a Council Briefing Note (Exhibit 3) that noted that adding the concept of episodic care to the Sexual Abuse Standard creates an unnecessary grey area for members, patients and Hearing Tribunals. It was put to Ms. Prohar that the definition of “episodic care” does not state that it captures a physiotherapist who treated a patient at only one point in time. The definition does not state that a member providing episodic care will have limited or less patient information during the encounter.
- [25] Ms. Prohar was asked about Exhibit 1, Tab 6, a College News Item called: “Introducing the New Sexual Abuse and Sexual Misconduct Standard of Practice: Who is a Patient.” The document raises questions about the new Sexual Abuse Standard including questions about patients and episodic care, but does not provide any answers to the questions. Ms. Prohar noted that there is a practice advisor who can be contacted with questions about the standards of practice.
- [26] In response to a question from the Hearing Tribunal, Ms. Prohar noted that when the regulated member submits the Professional Renewal Declaration for Physiotherapist form, the College accepts at face value that the regulated member has completed the required learning.

Lloyd Weber

- [27] Lloyd Weber is a physiotherapist and was one of the founders of Panther Sports Medicine & Rehabilitation Centres (“**Panther**”), which started in 1987. He was the CEO until the majority shares of the organization were sold to a third party. Panther has 10 clinics and provides physiotherapy services, massage therapy services, access to a sports medicine doctor, orthopedic surgeon and orthotics.
- [28] Mr. Sherman was also a partner of Panther. Mr. Sherman was the clinic director at one of the Panther clinics, the Trico Clinic (the “**Clinic**”).
- [29] Mr. Weber submitted a complaint to the College (Exhibit 1, Tab 18). Mr. Weber was informed by another partner on or about December 4, 2020 that Mr. Sherman admitted to Kim Cadrin, the Manager at the Clinic, that he was seeing a patient, SB, outside the Clinic. There were concerns about this and a number of discussions within the partnership group. There was a meeting set up on January 12, 2021 and Mr. Sherman admitted he was dating or seeing a patient outside of the office.
- [30] Mr. Weber did an investigation to see if this was inappropriate under the College guidelines and HPA. He was not certain if there was an infraction, and so he sent his letter to the College out of an abundance of caution. He was looking for clarification from the College and notifying them that this had occurred.
- [31] Mr. Weber provided a further letter to the College on April 29, 2021 which attached the Transaction History for SB (Exhibit 1, Tab 19). Mr. Weber noted that Mr. Sherman reported entering a personal relationship with a patient in approximately March 2020. Mr. Weber noted that Mr. Sherman actively treated SB from February 2015 to March 2019 and then an assessment/report was provided on September 3, 2019 and further treatment was provided from October 7 to November 23, 2020.
- [32] Mr. Weber reviewed and explained the Transaction History (Exhibit 1, Tab 19) which provides the billing and financial record. Mr. Weber explained that the entry on September 3, 2019 is an AB-3 progress report (“**AB-3 Report**”) that is provided to the insurance company. Typically an AB-3 Report involves an assessment of the patient at the time. The AB-3 Report is not mandatory, but it is typically requested by the insurance company. The AB-3 Report is a progress report, and not necessarily a final report. It would require the physiotherapist to ask the patient about their symptoms and provide a description of treatments administered to date, treatment goals and the patient’s progress towards those goals. Typically, an AB-4 Report is used as a discharge report. Mr. Weber confirmed that the services on September 3, 2019 provided by Mr. Sherman were billed.
- [33] In cross-examination, Mr. Weber confirmed that he had reviewed the Sexual Abuse Standard at the time it was issued by the College. He completed the required College-selected activity. He also reviewed the HPA and the Sexual Abuse Standard at the time of



his investigation into the conduct of Mr. Sherman. It was not clear to him whether Mr. Sherman dating SB would constitute unprofessional conduct. He did not know how to interpret the September 3, 2019 encounter.

Kimberly Cadrin

- [34] Kimberly Cadrin is Manager of Operations and Customer Service and was the Officer Manager of the Clinic in 2019 and 2020.
- [35] Ms. Cadrin was asked about an email from Mr. Sherman to herself dated November 15, 2020 (Exhibit 1, Tab 21) where Mr. Sherman asked her to put together a copy of the chart for SB. Following the email, the receptionist advised Ms. Cadrin of some odd billing. The billings showed that SB had two private treatments and five pro bono treatments (from October 7 to November 13, 2020) which was unusual for a motor vehicle accident. Ms. Cadrin discussed the matter with Mr. Sherman. Ms. Cadrin told him that they could no longer do pro bono treatments for SB.
- [36] On December 3, 2020 as part of her regular monthly duties, she pulled a receivables report for private patients and she noticed that SB was outstanding for a treatment on November 23, 2020. The receptionists advised Ms. Cadrin that Mr. Sherman had indicated it was okay to leave her outstanding. Ms. Cadrin spoke to Mr. Sherman who said she had extended benefits through Manulife. Ms. Cadrin called SB to collect on the outstanding November 23, 2020 treatment.
- [37] On December 3, 2020, after leaving the office, Ms. Cadrin received a text message from Mr. Sherman letting her know to process SB's Manulife claim and to process the remainder on SB's credit card. In the text chain, Mr. Sherman advised Ms. Cadrin that he was seeing SB and that he could no longer treat her. (Exhibit 1, Tab 23). The text message states: "The complicating issue with SB is now she has an official legal case pending. That wasn't all that clear until recently. As I am seeing her outside the office I told her I can no longer be her official physio. Technically the outstanding visits should not be with me either but again we weren't sure until a few days ago. ... I/Panther can't be offside with the College. If she plans on coming for more treatment (which is likely) it will have to be with someone else unfortunately."
- [38] Ms. Cadrin called one of the owners of Panther to advise him of the text message.
- [39] On December 7, 2020, Ms. Cadrin received an email from Mr. Sherman asking if she could attach a different physiotherapist's name to the previous appointments (Exhibit 1, Tab 24). The email states: "There were some pro bono sessions done throughout the spring and summer with SB that we are going to have to bill as well. Go ahead and bill for these using the credit card on file for whatever is not covered. Ideally if we could put them thru attaching them to another therapist rather than me that would be best. Not sure if we can do that or not?"

- [40] Ms. Cadrin did not respond to the email. She advised the owner she had spoken to previously and also called and left a message for Lloyd Weber, CEO.
- [41] On December 10, 2020 she was advised by one of the owners that SB would no longer be able to come to the Clinic and that they needed to collect for the outstanding pro bono sessions of October 7 to November 13, 2020.
- [42] Ms. Cadrin noted that there were no pro bono sessions for spring or summer 2020 listed on the financial record. Ms. Cadrin confirmed that the pro bono sessions were October 7, 9, 13, 27 and November 13, 2020.

#### Application to Adduce Expert Evidence

##### *Submissions by Counsel for the Investigated Member*

- [43] Counsel for Mr. Sherman brought an application to adduce the evidence of Jeffrey Begg, a physiotherapist, to provide expert opinion evidence in the area of physiotherapy generally and whether certain conduct, if proven, constitutes a breach of the relevant Standards of Practice and Code of Ethical Conduct.
- [44] Counsel for Mr. Sherman noted there is a two-step test for admitting expert evidence. The first part is to determine if the evidence satisfies the test set out in *R. v. Mohan*: relevance, necessity, absence of any exclusionary rule and a properly qualified expert. If the Hearing Tribunal determines that the expert opinion meets the four criteria, then the Hearing Tribunal must move to the second step, which is a cost-benefit analysis. The Hearing Tribunal must weigh the probative value (i.e. what does this opinion prove or speak to) against the prejudicial effect of admitting that evidence. Essentially the Hearing Tribunal must determine whether the value of admitting the evidence outweighs the potential harm or drawbacks of admitting it.
- [45] Counsel for Mr. Sherman took the position that the test in *Mohan* was met. The evidence is relevant and necessary. There is no exclusionary rule and Mr. Begg is a highly qualified physiotherapist who has been a member of the College since 1997. Mr. Begg will provide a physiotherapist's interpretation of key and poorly defined terms in the Sexual Abuse Standard based on the standard practice of the profession. Hearing expert evidence regarding what types of situations are considered episodic care amongst physiotherapists in private practice is relevant to understanding whether the Boundary Standard or the Sexual Abuse Standard have been breached.
- [46] In addition, counsel for Mr. Sherman submitted that Mr. Begg's evidence is necessary to respond to the evidence presented by Ms. Prohar. Counsel for Mr. Sherman took the position that the evidence of Ms. Prohar went beyond the scope of providing contextual information and gave evidence regarding what members are required to do to understand the Sexual Abuse Standard.

- [47] It is the function of the Hearing Tribunal to assign weight to expert evidence. It is ultimately up to the Hearing Tribunal to determine if a standard of practice has been breached. However, the expert evidence here is key since there are lay persons on the Hearing Tribunal who have limited knowledge of professional practice issues.

*Jeffrey Begg's Qualifications*

- [48] Following an application by counsel for the Complaints Director, the Hearing Tribunal determined it would hear evidence on Mr. Begg's qualifications prior to hearing from counsel for the Complaints Director and rendering a decision on the issue.
- [49] Jeffrey Begg reviewed his CV and qualifications. He became a registered member of the College in 1997. He reviewed his education and work history. He noted that he provides direct supervision to physiotherapy aides in all of his practice environments. He has also acted in the role of a clinical preceptor for university students who are completing their physiotherapy program. He estimates having mentored 12 to 15 physiotherapy students. This role involves complete supervision of the practice of the student, including their understanding of ethical considerations and the application of the Code of Ethical Conduct and Standards of Practice.
- [50] He was also a clinic director from 2003 to 2021 where he provided direct supervision and leadership to a team of multiple practitioners.
- [51] Mr. Begg has had extensive experience in treating patients who have been in motor vehicle accidents. He has completed hundreds of AB-3 Reports. He assisted the College in providing feedback to government during the establishment of the regulations in 2003 and 2004 regarding auto insurance legislation. In his role as clinic director, he was the case manager for motor vehicle accident patients for approximately 12 years. He assessed and reassessed patients even if they were receiving treatment from a different physiotherapist. He has provided feedback to the profession based on his expertise on the auto insurance regulations.
- [52] Mr. Begg agreed that his experience with understanding and applying the Standards of Practice, guidelines and Code of Ethical Conduct is the same as anyone who is a member, which is to be aware of them and to understand them and complete College-selected activities on them. He noted that in his role as clinical preceptor for students and supervisor of numerous physiotherapists, he advises on specific cases and provides education, for example through presenting scenarios.
- [53] Mr. Begg was not involved in developing the College's Boundary Standard or Sexual Abuse Standard. He has looked at the two standards and thought about them. He agreed that he has the same expertise in interpretation of Standards of Practice or the Code of Ethical Conduct as any other member of the profession with similar roles and similar years of service.

*Complaints Director's Submissions*

- [54] Counsel for the Complaints Director disputed that Ms. Prohar provided any opinion evidence and took the position that the evidence of Mr. Begg was not necessary and would not assist the Hearing Tribunal in reaching its decision.
- [55] Counsel for the Complaints Director reviewed the test in *Mohan*. Counsel explained that there are inherent dangers in admitting expert evidence, especially where it has the potential to usurp or distort the role of the Hearing Tribunal.
- [56] Expert evidence may be necessary to establish a common understanding of a particular practice. However, where a written standard exists, as in this case, no expert evidence is needed. In some cases, Hearing Tribunals may rely on expert evidence to interpret or comment on written standards in a specialized area of practice. However, this is not the case before the Hearing Tribunal. The issue in this case is whether the Hearing Tribunal can interpret the Standards of Practice or whether it needs expert evidence to do so. The Standard of Practice at issue here is not a technical or specialized area of practice.
- [57] Mr. Begg's expertise in the area of auto insurance regulation is not relevant to this case. His opinion is not relevant nor is it necessary. The Hearing Tribunal's core function is to hear evidence from fact witnesses, interpret the HPA, Standards of Practice and Code of Ethical Conduct. Finally, Mr. Begg's experience in interpreting standards of practice is no different from any other physiotherapist and would be no different from a member of the public who has taken the time to read and understand the Standards of Practice.
- [58] If the Hearing Tribunal determines that Mr. Begg's opinion meets the four criteria, it must still exercise the gatekeeping role and weigh the utility of the opinion evidence against the potential for prejudice to the hearing.

*Decision of the Hearing Tribunal*

- [59] The Hearing Tribunal carefully considered the oral and written submissions of the parties regarding the admissibility of the expert evidence. Counsel for Mr. Sherman sought to qualify Mr. Begg as an expert in the area of physiotherapy to provide an opinion on physiotherapy generally and whether certain conduct, if proven, constitutes a breach of the relevant Standards of Practice and Code of Ethical Conduct.
- [60] The Hearing Tribunal considered that there were issues where expert evidence may be of assistance to the Hearing Tribunal, including information from a physiotherapist on treatment of motor vehicle injuries and the role of the physiotherapist in preparing and providing AB Reports, in particular an AB-3 Report.
- [61] The Hearing Tribunal determined that it had wide latitude in determining whether to admit expert evidence and the weight to assign to expert evidence. The Hearing Tribunal

also considered that the determination of whether there was a breach of a Standard of Practice or Code of Ethical Conduct in this case and whether the conduct constitutes unprofessional conduct is ultimately up to the Hearing Tribunal.

- [62] The Hearing Tribunal recognized that the opinion evidence as provided in the written report could be argued to cross into the realm of the Hearing Tribunal's role. Ultimately, the Hearing Tribunal would need to determine whether or not the Sexual Abuse Standard was vague and difficult to interpret. If so, then expert evidence might be of assistance to the Hearing Tribunal in interpreting the Sexual Abuse Standard. However, the Hearing Tribunal had not yet determined this issue.
- [63] As such, the Hearing Tribunal felt that the value of admitting the evidence at this stage outweighed the potential harm in admitting it. The Hearing Tribunal determined that it would allow the evidence and determine the weight to place on the evidence in its deliberations, while remaining mindful of its role as the ultimate decision maker.

#### Jeffrey Begg

- [64] Jeffrey Begg reviewed his written report (Exhibit 7). Mr. Begg provided evidence regarding the definition of episodic care in the Sexual Abuse Standard, which states: "episodic care refers to a single encounter with a patient focused on a presenting concern(s), where neither the physiotherapist nor patient have the expectation of an ongoing care relationship."
- [65] Mr. Begg noted that episodic care, by its nature is understood to mean multiple events that are at an irregular frequency. Physiotherapists may consider "episodic" to mean at irregular intervals multiple times. The term "episodic care" does not provide much information because it does not seem to mean what it is intended to mean, which is a single encounter.
- [66] The term "single encounter" in the definition does not assist because it could mean a single encounter during a series of loosely connected episodes. The next part of the definition focusses on "presenting concern". It is inherent in all physiotherapy visits in private practice that there will be a presenting concern.
- [67] Mr. Begg noted that the next part of the definition is that there is no expectation of ongoing care. It is not unusual in a clinic to see a patient only once, or to see a patient episodically over time. Physiotherapists do not necessarily expect to provide ongoing care even though they have seen the patient multiple times in the past in private practice.
- [68] Mr. Begg noted that his understanding of episodic care in a private practice setting is that, without any definition being provided, episodic care would be something provided irregularly, which is in contrast to predetermined care (seeing a patient once a week for the next year). Strictly applying the definition in the Standard of Practice, he noted "we provide this kind of care when we see a patient once only for a unique complaint without

any intent to follow up after. This could occur as the first visit ever with the patient, but it also occurs a week or a month after the last time we saw the same patient for a different condition.”

- [69] Mr. Begg gave examples of what he would consider to be episodic care in private practice. He reviewed the wording of clauses for episodic care for other Colleges, including the College of Physicians and Surgeons of Alberta and the Alberta College of Pharmacists.
- [70] According to Mr. Begg, SB was a patient of Mr. Sherman’s until the March 2019 session when he last saw her and care was then transferred to another physiotherapist. The 365-day time frame in the Sexual Abuse Standard began in March 2019. The September 3, 2019 visit was an episodic care visit as defined in the Sexual Abuse Standard. SB was no longer considered a patient as of March 2020. Later in 2020, when physiotherapy visits were provided to SB, she was now in an intimate relationship with Mr. Sherman and the Sexual Abuse Standard allows the provision of physiotherapy when an intimate relationship has already been established.
- [71] Mr. Begg noted that the fact that Mr. Sherman and SB did not view that there would be ongoing care further helps to reach the conclusion that at face value, the September 2019 appointment appears to be episodic care.
- [72] With respect to professional boundaries, Mr. Begg noted that the Code of Ethical Conduct states that physiotherapists must reflect the societal ethics of the time. A male and female having a coffee would not be seen as an overtly sexual act in our society and not knowing any additional circumstances, this would not be seen, on its own, as a breach of the Code of Ethical Conduct.
- [73] Mr. Begg noted that Allegation 3 was less clear. There could potentially be a breach of the Standard of Practice on professional boundaries. His written opinion addressed the Sexual Abuse Standard, but he acknowledged there could be a boundary violation here.
- [74] With respect to the AB-3 Report, Mr. Begg noted that an AB Report is an example of a visit that is requested by an insurance company to provide them information. This would fit in the definition of episodic care since the insurance company asks for a single visit to complete a report with no expectation from the insurance company for ongoing care.
- [75] Mr. Begg’s evidence was that the September 3, 2019 visit was episodic care in that it was a single encounter, it was focused on a presenting concern, here whether the accident injuries were recovered and there was no expectation of ongoing care, which the evidence shows and Mr. Sherman and SB have confirmed.
- [76] In cross-examination, Mr. Begg noted that he did attest to understanding the Standard of Practice in 2019 when he completed the College-selected activity. Mr. Begg acknowledged that a professional has an obligation to inquire if they do not understand

a new Standard. He also acknowledged there is a practice advisor who can provide advice at any time.

- [77] Mr. Begg acknowledged that the Sexual Abuse Standard provides definitions of physiotherapy services and therapeutic services and states that “A patient is deemed discharged and no longer a patient if there have been no physiotherapy services provided for one year (365 days).”
- [78] Mr. Begg indicated that without a doubt Mr. Sherman provided physiotherapy services to SB on September 3, 2019. In his written report, he indicated that “Mr. Sherman discharged SB from his care on that date” (Exhibit 7). He reached this conclusion on the basis that the chart notes for September 3, 2019 which state “no further follow-up required” (Exhibit 1, Tab 20, page 126). Nothing in the records state that Mr. Sherman discharged SB from his care.
- [79] With respect to Allegation 1, Mr. Begg agreed that expert opinion would not be required for the proposition that in our society, it is normal for two people, including men and women, to go for coffee.
- [80] In his written report, Mr. Begg noted that the September 3, 2019 visit was a single encounter because it was six months after the last visit (Exhibit 7). He noted that it was temporally distant enough to be considered distinct. Mr. Begg stated that he had to come up with this timeline on his own because the College does not give any guidelines. Mr. Begg agreed that SB remained a patient for 365 days after March 15, 2019. However, he took the position that the September 3, 2019 visit, although falling within the one-year period, was episodic care and did not restart the 365-day time period.
- [81] Mr. Begg confirmed his view that every encounter is a single encounter. He agreed that if that is the case, the sentence in the definition of episodic care ceases to have all meaning.
- [82] Mr. Begg confirmed that there is a power imbalance between a physiotherapist and patient and that the College chose the arbitrary period of 365 days, as the period of time for that power imbalance to dissipate.
- [83] Mr. Begg agreed that on September 3, 2019, SB was a patient in a therapeutic relationship with Mr. Sherman, according to the letter of the law and that there was a power imbalance between them at that time. On September 3, 2019, SB was not being seen for a new issue. The visit was addressing the same motor vehicle accident injury that had been assessed and treated between January and March 2019.
- [84] At the time of preparing his written report, Mr. Begg did not address the further visits between October and November 2020. In cross-examination, he qualified his written statement to say “there are no further treatment notes recorded by Mr. Sherman during

the 365-day period.” Mr. Begg agreed that the October 7, 9, 13, 27 and November 13 and 23, 2020 visits related to the same motor vehicle accident injuries.

- [85] Mr. Begg agreed that if the September 3, 2019 visit is not considered episodic care, then SB would still have been a patient of Mr. Sherman’s when the sexual relationship began.

Scott Sherman

- [86] Scott Sherman became a regulated member of the College and started working with Mr. Weber in 1991. He became a fifty percent partner with Mr. Weber after approximately three years and they have built the business over 27 years. He has been a clinical lecturer and professor with the University of Alberta and Panther takes students on a yearly basis. Mr. Sherman was part of a committee that helped develop the College’s needling standards for the province of Alberta.
- [87] Between 2016 and 2020, Mr. Sherman’s practice consisted of patients with chronic pain, post motor vehicle accident and complex chronic spinal patients. He had a very difficult caseload. He primarily worked at the Clinic. Individuals were often referred specifically to him.
- [88] Where someone is involved in a motor vehicle accident, there is an auto accident protocol. The patient is referred for physiotherapy. Their injuries need to be evaluated and that determines a care pathway. At Panther, the way the patient and physiotherapist are paired is based on the availability of their schedules.
- [89] For motor vehicle accident patients, there were two pathways of care. The first pathway for more minor injuries has a fee schedule and a reporting system which involves the completion of an AB-1 report by the patient. There is a treatment plan, progress report and a discharge report with a 90-day duration attached to it. There are a maximum number of treatments within this time frame.
- [90] The second pathway, for more serious injuries, had a different fee schedule which is not as rigid as the pre-approved diagnostic and treatment protocols for the first pathway. There is a two-year limitation on individuals in the second pathway.
- [91] Mr. Sherman reviewed the breakdown of the financial transactions for visits by SB (Exhibit 1, Tab 19). References to “Corp.” are references to him as a practitioner in the system. Mr. Sherman first saw SB in 2014 when she was injured in a car-pedestrian collision. SB was assessed on February 5, 2014. His last session with SB related to that accident was in March 2017. During that time frame, SB had Pilates and massage therapy sessions at the Clinic. Mr. Sherman had no involvement with SB’s care in 2018.
- [92] SB was involved in a subsequent collision in early January 2019. Mr. Sherman saw her on January 16, 2019. There was a physical examination. She was provided a therapeutic hot pack and education with respect to modifications of her daily activities. She had a WADII



diagnosis and would have been told to go slowly with her activities and return for further treatment if her symptoms dictated it. The findings are outlined in the chart (Exhibit 1, Tab 20) and AB-2 Report (Exhibit 9).

- [93] Mr. Sherman explained that at the first treatment on January 16, 2019, he provided SB a hot pack, but at subsequent treatments, the receptionist or physiotherapist aide who brings the patient to the treatment area will provide them with a hot pack (or an ice pack, depending on the patient's preference), which is placed on the patient until the physiotherapist arrives.
- [94] Mr. Sherman next saw SB on February 12, 2019. SB saw another physiotherapist on February 21, 2019. Mr. Sherman saw SB on March 15, 2019. Mr. Sherman testified that he had no expectation of ongoing care for SB following this appointment. Mr. Sherman stated that because his and SB's schedules were not in alignment, SB ended up transferring to another physiotherapist. Mr. Sherman had no involvement in the AB-4 Report (Concluding Report) (Exhibit 1, Tab 20, page 115) dated April 1, 2019, which discharges her from the treatment protocol system for minor injuries program.
- [95] Mr. Sherman did see SB on September 3, 2019. The Clinic received a request from SB's insurance company for an updated reporting to close her claim file. At this juncture, the other physiotherapist was treating and managing a full-time caseload. Mr. Sherman was not and he was seeing patients on a part-time basis. As such, when the report request came in, he offered to do it.
- [96] On September 3, 2019, SB would have been provided a hot pack by the person who brought her to the treatment area. Mr. Sherman attended with her. They had a brief discussion related to her symptoms at that time, and he did a cursory range of movement examination and brief palpatory exam in order to provide the findings in the AB-3 Report. They had a parting conversation and that was the end of the appointment.
- [97] The reason for SB's attendance on September 3, 2019 was to provide documentation to the insurance company. Mr. Sherman did not ask her to return to the office, nor did the other physiotherapist. He did not provide any treatment to SB on that day. He had no expectation of ongoing care arising from the September 3, 2019 visit. The purpose of the visit was to close her claim as she did not require further care. The visit was coded as a treatment because that is associated with a lesser fee. This type of visit is often coded this way as a courtesy to the patient.
- [98] Mr. Sherman reviewed the AB-3 Report (Exhibit 1, Tab 24). His signature appears on the second page of the document. The report was requested by SB's insurance company. Many adjusters request these to be on file when they close claims to support that it is appropriate to close a claim. Mr. Sherman does not provide the patient a formal discharge letter, as part of his practice in dealing with motor vehicle accident patients.

- [99] Following September 3, 2019, SB continued to self-manage ongoing symptoms. She continued to experience chronic pain from her original car-pedestrian injury, but was managing quite well with Pilates and massage therapy at the Clinic. Mr. Sherman and SB would bump into each other from time to time during these appointments and have a cordial discussion. On a couple of occasions, they decided to leave the Clinic and go for a coffee. There was a coffee shop nearby. On one occasion, they went across the street to the mall. They had coffee together two or three times between December 2019 and March 2020. These were casual conversations. There was no physical relationship between them at that time.
- [100] When the pandemic restrictions came into effect, Mr. Sherman and SB decided to be in the same cohort, because they shared a lot of common ground and enjoyed spending time together. The relationship evolved and they decided to become a couple in the spring or early summer of 2020.
- [101] Mr. Sherman let SB know at that time that if they were going to move forward on a personal level, that he would no longer be her physiotherapist if she needed treatment in the future. He recalls referencing some of the wording from the Standards of Practice on power imbalance. They both decided they were comfortable with this and to move forward.
- [102] Mr. Sherman confirmed that he completed the College-selected activity regarding Bill 21 as part of his registration process in 2019.
- [103] In October and November 2020, Mr. Sherman provided treatment to SB. As a consequence of the lack of access to treatment during the pandemic, a number of people who were unable to access care had a relapse or experienced a deterioration in their condition. This is what happened with SB. They tried a number of things at home, including a motorized sit-stand desk and a mechanical traction machine. However, SB's symptoms escalated and Mr. Sherman indicated he would need to get her back into the Clinic or to see someone to get more treatment. SB had seen three other physiotherapists at the Clinic and did not want to return to see any of them, so he agreed to treat her. He was not completely comfortable providing treatment and being involved on a personal basis, so he decided to provide the treatment on a pro bono basis. Her symptoms persisted however and she ended up retaining legal counsel and filing a lawsuit.
- [104] The relationship with SB became sexual in mid-July 2020. Mr. Sherman had a hip joint replacement surgery in mid-May 2020 which precluded pursuing a sexual relationship at that time. He also remembers the timing because it was SB's birthday in July. He did not consider her to be a patient at that time because it had been well past the 365-day limitation outlined in the Sexual Abuse Standard. He testified that, at the time, he briefly considered the September 3, 2019 visit, however, in his mind, it was not part of the therapeutic relationship. He did not give strong consideration to whether it was "episodic care". He did not dissect the definition until later. In his mind, the September 3, 2019 visit was a classic example of episodic care.

- [105] The relationship with SB came to the attention of the management at the Clinic in the fall of 2020 when SB filed her lawsuit. Part of the responsibility is on the person to mitigate damages, which means to treat your injuries and so, it was incumbent on SB to seek care. Mr. Sherman stated that when SB filed her lawsuit, he knew at that point that he had to file a claim.
- [106] Mr. Sherman gave evidence about the emails to the management of the Clinic. With respect to the email of December 7, 2020 to Kim Cadrin (Exhibit 1, Tab 24), Mr. Sherman stated that he did not feel comfortable with his name being on the documents if they knew he was in a relationship with SB. He was thinking out loud in his email, that it would be ideal if they could bill for someone else, but he in fact knew what the answer was. There were conversations after the email and the chart record and clinical record had to be maintained, so in the end nothing was changed.
- [107] In cross-examination, Mr. Sherman reviewed his letter to the College where he indicated that the relationship became sexual after the pandemic shut-down on March 17, 2020. In his response to the College investigator he indicated that he did not have a particular date for when the relationship became sexual. In discussions with SB, he remembered in more detail the date that the sexual relationship began.
- [108] With respect to the AB-3 Report completed on September 3, 2019, a copy of the report went to SB's insurance company. A copy was also placed in SB's chart. The insurance company was charged \$40 for the visit and SB was charged \$80.
- [109] The AB-3 Report notes that SB "reported ongoing bilateral leg pain/symptoms reported as burning in nature" and that she used gabapentin and tramadol. Mr. Sherman agreed that SB was providing clinical information. The AB-3 Report notes under functional goals: "improve spinal joint, adjacent soft-tissue and myofascial range of motion". He noted that those goals had improved significantly. He assessed that SB's spinal soft-tissue and myofascial range of motion have improved significantly. He noted that SB's functional goal to improve her muscle strength and endurance had resolved. SB was essentially back to normal function. Mr. Sherman assessed SB's muscle strength. Some of the other information was inferred based on their conversation. Mr. Sherman assessed her ability to function as reasonably normal, as she never fully recovered from her previously collision. She was back to her pre-second accident status.
- [110] Mr. Sherman was asked if he was doing an assessment on September 3, 2019. He stated that he was doing a cursory evaluation. He agreed he was reporting on SB's progress after physiotherapy services were provided by himself and others at the Clinic. Mr. Sherman had done the initial assessment on January 16, 2019 (Exhibit 1, Tab 20). Mr. Sherman reviewed the findings from the assessment. In the final entry, Mr. Sherman determined that the symptoms were not bad, and that if SB started running into trouble to come back and see him.

- [111] In some situations, Mr. Sherman will recommend follow up with a patient a certain number of times per week, but for others, it is up to the patient to decide if they need to come back to see him. If it is up to the patient, he will not know whether or not the patient may come back to see him or not. In SB's case, her symptoms continued and she attended at the Clinic for a number of sessions.
- [112] In February 2019, Mr. Sherman filled out the AB-2 Report which establishes a diagnosis and treatment plan (Exhibit 9). The AB forms are required as part of the insurance program. Mr. Sherman saw SB for treatment on February 12, 2019 (Exhibit 1, Tab 20) and concluded that SB should return for further treatment if her symptoms continued. SB attended again with Mr. Sherman on March 15, 2019. He next saw SB on September 3, 2019 for the AB-3 Report. This was the fourth time he was seeing SB in relation to the same motor vehicle accident. She saw other physiotherapists at the Clinic as well.
- [113] Mr. Sherman acknowledged that when he saw SB in January, February and March 2019, he was in a position of power relative to her. Mr. Sherman disagreed that he was in a position of power relative to SB on September 3, 2019. Mr. Sherman noted that there was no reason on September 3, 2019 to tell SB not to come back. She was not there at anyone's request. She was not having any symptoms. The only reason she was there was to complete the insurance documentation.
- [114] Mr. Sherman agreed that SB did come back for more treatment beginning in October 2020 for the same injury. He saw her in the Clinic for the same injury on October 7, 9, 13, 27, November 13 and 23, 2020.
- [115] Mr. Sherman stated that by reporting the relationship to Ms. Cadrin, the office manager, he was reporting it to the partnership, and he expected she would go speak with the other owners of Panther.
- [116] In response to questions from the Hearing Tribunal, Mr. Sherman noted that the Clinic closed due to the pandemic on March 17, 2020. Mr. Sherman was also asked to clarify why the pro bono treatments had to be billed once SB commenced a legal claim. He stated that the amount paid for treatment forms part of the settlement damages.

SB

- [117] SB's evidence was given in a closed portion of the hearing.
- [118] SB confirmed that she had been a pedestrian involved in a motor vehicle accident in 2014 and attended at Panther for treatment. She saw Mr. Sherman for treatment at the time. She was involved in another motor vehicle collision in January 2019. She attended for treatment at the Clinic. She initially saw Mr. Sherman. However, given her schedule, she was unable to attend with Mr. Sherman during his working hours. She saw another physiotherapist at the Clinic for treatment. She was also doing Pilates and receiving massage therapy treatments at the Clinic.

- [119] In terms of the September 3, 2019 appointment, SB was contacted by the Clinic and told that she needed to come in to fill out some paperwork for the insurance company. Generally, during her appointments, she was taken to the back and asked if she wanted to lie on her stomach or be sitting up. They would bring a hot pack and apply it to her.
- [120] On September 3, 2019, Mr. Sherman asked her some questions, asked how she was doing, said that he had to fill out some paperwork for the insurance company and that they were going to “cut her loose.” She understood that to mean that she did not need anymore treatment as she was managing on her own. She did not have any expectation of ongoing care with Mr. Sherman and she understood that her treatment was at an end.
- [121] Following September 3, 2019, SB continued to attend the Clinic for massage therapy and on a few occasions, she bumped into Mr. Sherman and they went for coffee at a nearby coffee shop. On one occasion they went to the mall. SB described that she and Mr. Sherman were friends between the fall of 2019 and March 2020.
- [122] Following March 17, 2020, their friendship developed and they decided to form a cohort during the pandemic. The relationship did not really evolve until after Mr. Sherman’s hip surgery in May 2020. At the time, she and Mr. Sherman discussed that it was not a good idea that he continued treating her and that she should find another physiotherapist. Their relationship turned into a sexual relationship in July 2020.
- [123] In the fall of 2020, SB was having significant neck pain and went to the Clinic on a few occasions. Mr. Sherman stopped treating her after November 2020 and she found another physiotherapist.
- [124] In cross-examination, SB confirmed that following the appointments from January to March 2019, she was told to return for further treatment if her symptoms persisted. It would not necessarily be to see Mr. Sherman, and whoever was available would see her. This was also her understanding following the June 2019 appointment with another physiotherapist. SB stated she did not have a preference over seeing Mr. Sherman or the other physiotherapist, it was whoever was available.
- [125] With respect to the September 3, 2019 appointment, SB indicated she was contacted by the front desk at the Clinic and told that they needed to book her in with Mr. Sherman as he had an insurance questionnaire to fill out.
- [126] It was her understanding following that appointment that her issues would not be resolved with physiotherapy and that they were the result of multiple motor vehicle accidents and it was just a fact of life for her. She agreed she could have continued to go to the Clinic if she paid on her own or through her company benefits. She did continue to attend at the Clinic for massage therapy. She also had more physiotherapy treatments with Mr. Sherman in October and November, 2020.

- [127] SB agreed that Mr. Sherman provided some form of treatment at home in the spring or summer of 2020, but this was very limited and she would not consider this to be physiotherapy treatment.
- [128] In response to a question from the Hearing Tribunal, SB confirmed that the pro bono treatments were later billed to her because she thought they would form an important part of her legal claim.

## **VI. Closing Submissions**

### Closing Submissions of the Complaints Director

- [129] Counsel for the Complaints Director submitted that Allegations 1 and 2 were factually proven on a balance of probabilities and that the proven conduct constituted unprofessional conduct within the meaning of section 1(1)(pp) of the HPA. In the alternative, counsel for the Complaints Director submitted that Allegations 1 and 3 were factually proven on a balance of probabilities and that the proven conduct constituted unprofessional conduct.
- [130] Counsel for the Complaints Director noted that the College was required to implement a new Standard of Practice following the Bill 21 amendments to the HPA that prohibited sexual abuse and sexual misconduct of patients and included defined penalties for such conduct. The Standard of Practice was required to define a “patient” for the purposes of the HPA. A key consideration for the College in drafting the Sexual Abuse Standard was the inherent ongoing power imbalance between physiotherapists and their patients. The College determined that 365 days from the date of the last documented physiotherapy service was the minimum time needed for the power imbalance to equalize.
- [131] Counsel for the Complaints Director provided an overview of principles the Hearing Tribunal should consider in assessing witness credibility. Counsel for the Complaints Director submitted that Mr. Sherman’s credibility was diminished given the evidence provided and the manner in which he gave his evidence during the course of the hearing. Counsel for the Complaints Director submitted that the evidence of the witnesses for the Complaints Director was credible and should be accepted over Mr. Sherman’s evidence.
- [132] With respect to the evidence of Mr. Begg, counsel for the Complaints Director submitted that Mr. Begg’s evidence on the interpretation of the Standards and the ultimate issue of whether Mr. Sherman engaged in unprofessional conduct should be given no weight.
- [133] With respect to Allegation 1, counsel for the Complaints Director submitted that the Hearing Tribunal would need to determine whether Mr. Sherman and SB had a therapeutic relationship on or between December 2019 and March 2020; whether Mr. Sherman and SB met on one or more occasions in a personal capacity for coffee; and whether Mr. Sherman failed to maintain appropriate boundaries by meeting with SB in a personal capacity for coffee.

- [134] With respect to Allegation 2, counsel for the Complaints Director submitted that the Hearing Tribunal had to determine whether Mr. Sherman provided physiotherapy services to SB and on which dates; whether the September 3, 2019 appointment was episodic care and whether SB was a patient as defined by the Sexual Abuse Standard when Mr. Sherman commenced a sexual relationship with SB in March or July 2020, amounting to sexual abuse; and whether Mr. Sherman continued to treat SB such that she remained a patient and Mr. Sherman's ongoing sexual relationship with her amounted to ongoing sexual abuse.
- [135] With respect to Allegation 3, counsel for the Complaints Director noted that in the event the Hearing Tribunal found Allegation 2 was proven, then Allegation 3 should be dismissed. Counsel for the Complaints Director submitted that, if the Hearing Tribunal found that the September 3, 2019 treatment was episodic care and that Mr. Sherman did not commit sexual abuse, that in the alternative, such conduct was an inappropriate boundary violation and unprofessional.

#### Closing Submissions of the Investigated Member

- [136] Counsel for Mr. Sherman submitted that Mr. Sherman did not engage in a boundary violation by having coffee with SB between December 2019 and March 2020 and that the Boundary Standard was not breached. Further, counsel for Mr. Sherman submitted that SB was no longer considered a "patient" at the time the relationship began and that the Sexual Abuse Standard had not been breached.
- [137] Counsel for Mr. Sherman noted that the central issue in dispute was whether the September 3, 2019 appointment constituted "episodic care" as defined by the Sexual Abuse Standard and the meaning in private practice.
- [138] Counsel for Mr. Sherman noted that Mr. Sherman's testimony was consistent with his treatment records and responses to the College. Counsel for Mr. Sherman submitted that Ms. Prohar's evidence should be afforded less weight.
- [139] Counsel for Mr. Sherman noted that the Complaints Director sought to establish that Mr. Sherman provided physiotherapy services to SB in the spring and summer of 2020. SB was questioned regarding what occurred in the spring and summer of 2020 and, notably, SB did not consider these to be physiotherapy services. Counsel for Mr. Sherman raised the issue that this line of questioning was not put to Mr. Sherman. Mr. Sherman was not provided with the opportunity to explain or address what occurred during the spring and summer of 2020. Counsel for Mr. Sherman took the position that the Hearing Tribunal could not rely on this line of questioning in support of Allegation 2.
- [140] Counsel for Mr. Sherman made submissions regarding the interpretation of the Sexual Abuse Standard and took the position that the definition of "episodic care" is vague, ambiguous and unclear. To resolve the ambiguity, the Hearing Tribunal must apply principles of statutory interpretation, which require the "words of an act to be read in

their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” (*Sobeys West Inc. v Alberta College of Pharmacists*, 2016 ABQB 232, at para. 15)

[141] Counsel for Mr. Sherman submitted that Allegation 1 had not been proven on a balance of probabilities, having regard to the totality of the evidence.

[142] Counsel for Mr. Sherman further submitted that Allegation 2 had not been proven because:

- a. March 15, 2019 was the last date SB attended on Mr. Sherman for physiotherapy treatment and following this appointment, she was under the care of another physiotherapist;
- b. the September 3, 2019 appointment was episodic care as defined by the Sexual Abuse Standard because:
  - i. it was a single encounter between Mr. Sherman and SB;
  - ii. it was focused on the single presenting concern of completing a mandatory insurance form; and
  - iii. neither Mr. Sherman nor SB had the expectation of ongoing care;
- c. in the spring or early summer 2020, Mr. Sherman and SB started a romantic relationship that became sexual in July 2020, which was more than 365 days after SB was deemed discharged and no longer a patient of Mr. Sherman pursuant to the Sexual Abuse Standard;
- d. when Mr. Sherman treated SB in October and November 2020, she was not considered a patient pursuant to the Sexual Abuse Standard.

[143] With respect to Allegation 3, Mr. Sherman’s counsel took the position that the allegation could not be substantiated if the definition of “patient” was not satisfied. In addition, the Sexual Abuse Standard specifically excludes circumstances when treatment is provided where there is a pre-existing relationship.

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

[144] 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.

[145] The burden of proving the allegations is on the Complaints Director. In considering the evidence, the Hearing Tribunal applied the standard of proof of the balance of probabilities.



[146] The Hearing Tribunal found that Allegation 1 was not proven. The Hearing Tribunal found that Allegation 2 was proven and constituted sexual abuse under the Sexual Abuse Standard and unprofessional conduct. Given the findings for Allegation 2 and that Allegation 3 was worded in the Notice of Hearing as being in the alternative to Allegation 2, the Hearing Tribunal dismissed Allegation 3.

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

[147] The Hearing Tribunal considered that many facts in this case are not in dispute. The witness evidence was consistent on many factual issues. The Hearing Tribunal accepted the evidence as set out below as relevant and reliable. Further, the Clinical Notes (Exhibit 1, Tab 20) and billing record (in the Transaction History Exhibit 1, Tab 19) for SB provided relevant and credible evidence on which the Hearing Tribunal relied.

[148] SB was a client of the Clinic starting in 2014 when she was injured in a pedestrian involved motor vehicle accident. SB attended for physiotherapy appointments with Mr. Sherman in 2014, 2015, 2016, and 2017 for treatment related to that accident. She also attended the Clinic with other professionals, including a massage therapist between 2014 and 2018.

[149] SB was involved in another motor vehicle accident in early January 2019. She attended the Clinic on January 16, 2019 and had an assessment appointment with Mr. Sherman. Mr. Sherman prepared an AB-2 Report (Treatment Plan) (Exhibit 9), which was invoiced on February 1, 2019 (Exhibit 1, Tab 19). Mr. Sherman then saw SB again on February 12 and March 15, 2019 for physiotherapy treatments (Exhibit 1, Tabs 19 and 20). SB saw other physiotherapists at the Clinic between January and the end of March 2019. An AB-4 Report (Concluding Report) (Exhibit 1, Tab 20, page 115) was prepared on April 1, 2019 and billed to the insurance company (Exhibit 1, Tab 19). SB continued to see other physiotherapists at the Clinic for treatment in May and June 2019. SB also attended for massage therapy appointments at the Clinic between January and December 2019 and in 2020 (Exhibit 1, Tab 19).

[150] On September 3, 2019, SB had an appointment with Mr. Sherman at which he assessed her and completed an AB-3 Report for SB's insurance company. Mr. Sherman noted in the AB-3 Report that SB was "able to continue independently at this point."

[151] The Hearing Tribunal accepted Mr. Sherman's evidence that on September 3, 2019, SB would have been provided a hot pack by the person who brought her to the treatment area. Mr. Sherman attended with her. They had a brief discussion related to her symptoms at that time, and he did a cursory range of movement examination and brief palpatory exam in order to provide the findings in the AB-3 Report. They had a parting conversation and that was the end of the appointment.

[152] SB and Mr. Sherman both provided evidence that they did not expect there to be an ongoing physiotherapy relationship beyond this appointment. There was no further insurance coverage for physiotherapy treatment arising from the accident.

- [153] The Hearing Tribunal found that there was no ongoing physiotherapy treatment planned beyond this appointment and no further insurance coverage for physiotherapy treatment. However, SB would have been able to book an appointment for further physiotherapy treatment at the Clinic if she wished to do so, either at her own cost, or potentially paid for by her employer benefits.
- [154] SB continued to attend at the Clinic for massage therapy appointments between September 5, 2019 and February 2021 as confirmed in the Transaction History (Exhibit 1, Tab 19).
- [155] Mr. Sherman and SB went for coffee on a few occasions between December 2019 and March 2020 after bumping into each other at the Clinic following her massage therapy appointments. They went to a nearby coffee shop and on one occasion went for coffee at a shopping mall located across the street from the Clinic.
- [156] Mr. Sherman and SB developed a friendship and decided to form a cohort when the pandemic lockdowns occurred in March 2020. Their relationship further developed and became sexual in July 2020.
- [157] Mr. Sherman provided pro bono treatments to SB on October 7, 9, 13, 27 and November 13 and 23, 2020. These were eventually billed when SB decided to pursue a legal claim in relation to the motor vehicle accident (Exhibit 1, Tab 19).
- [158] The relationship between Mr. Sherman and SB was disclosed to Kim Cadrin, the Clinic Manager in a text message on December 3, 2020 (Exhibit 1, Tab 23). Mr. Sherman noted in his text to Ms. Cadrin: "Technically the outstanding visits should not be with me either but again we weren't sure until a few days ago. ... I/Panther can't be offside with the College. If she plans on coming for more treatment (which is likely) it will have to be with someone else unfortunately."
- [159] On December 7, 2020, Ms. Cadrin received an email from Mr. Sherman asking if she could attach a different physiotherapist's name to the previous appointments (Exhibit 1, Tab 24). The email states: "There were some pro bono sessions done throughout the spring and summer with SB that we are going to have to bill as well. Go ahead and bill for these using the credit card on file for whatever is not covered. Ideally if we could put them thru attaching them to another therapist rather than me that would be best. Not sure if we can do that or not?"
- [160] Although the email of December 7, 2020 references pro bono sessions in the spring and summer, there was limited evidence of what exactly was provided. Both Mr. Sherman and SB testified that Mr. Sherman provided some assistance at home to SB in this timeframe, however, the exact nature of what occurred was not clear and the Hearing Tribunal found that the evidence did not establish that the assistance Mr. Sherman provided to SB at this time constituted physiotherapy treatment. Further, no sessions were billed for the spring and summer 2020.

- [161] In its deliberations, the Hearing Tribunal considered the evidence of Mr. Begg. During the hearing, out of an abundance of caution, the Hearing Tribunal determined it would allow the evidence of Mr. Begg and determine the weight to place on this evidence in its deliberations.
- [162] The Hearing Tribunal found that Mr. Begg had expertise in the area of physiotherapy services for motor vehicle accidents. His evidence regarding physiotherapy services for motor vehicle accidents was accepted, as set out in Allegation 2 below.
- [163] However, the Hearing Tribunal found that Mr. Begg had no particular expertise in the interpretation of the Boundary Standard or the Sexual Abuse Standard.
- [164] Mr. Begg was in no better position to advise the Hearing Tribunal on the interpretation of the Standards of Practice than the Hearing Tribunal. It is the Hearing Tribunal's role to interpret the Boundary Standard and Sexual Abuse Standard in relation to the Allegations in the Notice of Hearing. As such, the Hearing Tribunal placed little weight on Mr. Begg's interpretation of the Standards of Practice, including his view of what constitutes episodic care in practice or as defined in the Sexual Abuse Standard.
- [165] Counsel for Mr. Sherman noted that the evidence of Mr. Begg was presented in part as a response to the evidence of Ms. Prohar. The Hearing Tribunal did not rely on the evidence of Ms. Prohar in interpreting the Sexual Abuse Standard. The Hearing Tribunal limited any weight placed on the evidence of Ms. Prohar to why and how the Sexual Abuse Standard came to be developed. Similarly, the Hearing Tribunal placed no weight on the interpretation of the Sexual Abuse Standard by Mr. Weber.

*Allegation 1: On or between December 2019 and March 2020, Mr. Sherman failed to maintain appropriate boundaries during his therapeutic relationship with client SB by meeting with her on one or more occasions in a personal capacity for coffee*

- [166] As noted above, the Hearing Tribunal found that Mr. Sherman and SB met for coffee on a few occasions between December 2019 and March 2020.
- [167] Mr. Sherman and SB would see each other occasionally at the Clinic when SB attended for massage therapy appointments and decided to go for coffee on a few occasions in a personal capacity. They would go to a nearby coffee shop and, on one occasion, went to a shopping mall located across the street from the Clinic.
- [168] The Hearing Tribunal found that there was no evidence that there was a romantic or sexual relationship between Mr. Sherman and SB from December 2019 to March 2020. Further, the evidence presented did not establish that Mr. Sherman was trying to pursue a romantic or sexual relationship with SB at that time.
- [169] The Boundary Standard (Exhibit 1, Tab 16) provides:

**Standard**

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

### **Expected outcome**

Clients can expect to be treated with integrity and respect, and that the physiotherapist will maintain professional boundaries appropriate to the therapeutic relationship in all interactions.

...

### **Performance expectations**

The physiotherapist:

- Demonstrates sensitivity, accountability, integrity, honesty, compassion, and respect in all professional interactions.
- Understands the impact of power, trust, respect, and physical closeness on relationships with clients, colleagues, students, and others.
- Treats clients, colleagues, students and others with respect avoiding all situations, comments and/or actions (e.g., sexual, racial) that would reasonably be perceived as unprofessional, in violation of human rights, or discriminatory.
- 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.
- Identifies, discusses, and attempts to resolve issues or seeks advice when the potential for compromising boundaries exists, whether by the physiotherapist or the client.
- Manages situations of real, potential, or perceived conflicts of interest where the relationship with clients, colleagues, students, and others could be compromised.
- Explains to clients beforehand any procedures that could be misinterpreted (e.g., removal of clothing, touching, physical closeness) and obtains ongoing informed consent.
- Ends any therapeutic relationship with clients where professional boundaries cannot be maintained or reestablished, by appropriately discontinuing treatment or transferring care as required.
- Confirms that any exchanges using electronic communication and social media are appropriate for therapeutic relationships established with clients

**Clients** are recipients of physiotherapy services, and may be individuals, families, groups, organizations, communities, or populations. An individual client may also be referred to as a patient. In some circumstances, clients/patients may be represented by their substitute decision-makers.

**Conflicts** of interest refers to situations that arise when the physiotherapist has a relationship or interest that may be seen as improperly influencing their professional judgment or ability to act in the best interest of the client.

...

**Professional boundaries** set the limitations around relationships between clients and health-care providers to ensure the delivery of safe, ethical, client-centered care. Professional boundaries are characterized by respectful, trusting, and ethical interactions with patients that are free of abuse, sexual and/or romantic encounters.

**Therapeutic relationship** refers to the relationship that exists between a physical therapist and a client during the course of physical therapy treatment. The relationship is based on trust, respect, and the expectation that the physical therapist will establish and maintain the relationship according to applicable legislation and regulatory requirements and will not harm or exploit the client in any way.

- [170] The Hearing Tribunal found that a therapeutic relationship had been established between Mr. Sherman and SB. SB had seen Mr. Sherman as her physiotherapist on several occasions from 2014 to 2019. As set out in Allegation 2 below, The Hearing Tribunal found that SB was a client/patient of Mr. Sherman's and of the Clinic in 2019.
- [171] However, the evidence presented did not establish that there was an inappropriate boundary violation by Mr. Sherman towards SB nor that Mr. Sherman failed to maintain professional boundaries during the period of December 2019 and March 2020, in particular in going for coffee with SB in a personal capacity.
- [172] There was no evidence that Mr. Sherman was disrespectful, untrustworthy, unethical or otherwise behaved in an unprofessional manner in his interactions with SB during the coffee meetings or that there was any abuse or any sexual or romantic encounters in this period of time.
- [173] Further, the evidence presented did not establish that the conduct by Mr. Sherman during the coffee meetings led to the romantic and sexual relationship that eventually developed between Mr. Sherman and SB.
- [174] The Hearing Tribunal carefully reviewed and considered the Boundary Standard. The Hearing Tribunal found that there is nothing in the Boundary Standard that prohibits a physiotherapist from having coffee with a client. The act of having coffee with a client is not in itself a failure to maintain an appropriate boundary.
- [175] The Code of Ethical Conduct for Alberta Physiotherapists states (Exhibit 1, Tab 17):

Responsibilities to the Client

A4: Maintain professional boundaries that honour and respect the therapeutic relationship with clients.

A18: Comply with all legislation, guidelines, and regulatory requirements that pertain to the profession of physiotherapy.

Responsibilities to the Public

B1: Conduct and present themselves with integrity and professionalism.

Responsibilities to Self and the Profession

C1: 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.

C6: Refrain from harassment, abuse or discrimination of colleagues, employees, or students.

- [176] There was no evidence that Mr. Sherman did not honour or respect the therapeutic relationship with SB in the period of December 2019 to March 2020 by going for coffee with her. The evidence did not establish that he breached legislation, guidelines or regulatory requirements or that he did not conduct himself with integrity and professionalism. There was no evidence he harassed, abused or discriminated against SB, did not treat her with dignity or respect or failed to inspire public trust or confidence or otherwise did not maintain or enhance the reputation and standing of the profession during the coffee meetings with SB.
- [177] The evidence presented did not establish a breach of the Code of Ethical Conduct by Mr. Sherman in having coffee with SB during the period of December 2019 to March 2020.
- [178] The Hearing Tribunal found that Allegation 1 was not proven on a balance of probabilities. The evidence did not establish, on a balance of probabilities, that Mr. Sherman failed to maintain appropriate boundaries with SB between December 2019 and March 2020. The act of having coffee with a client/patient is not in itself sufficient to establish that there is a failure to maintain appropriate boundaries in breach of the Boundary Standard or Code of Ethical Conduct. Allegation 1 is dismissed.

*Allegation 2: Mr. Sherman engaged in sexual abuse toward patient SB the particulars of which include:*

- a. He provided physiotherapy treatment to SB on a number of occasions between February 5, 2014 – September 3, 2019;*
- b. On or about March 17, 2020, he commenced a sexual relationship with SB and engaged in conduct of a sexual nature with her while she was still a “patient” as defined in Physiotherapy Alberta’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct;*

- c. *He provided further treatment to SB on or between October 7, 2020 to November 23, 2020, while continuing to engage in a sexual relationship with her and when SB was still a "patient".*

- [179] SB was a patient of the Clinic from 2014 to 2018 when she was treated at the Clinic in relation to a pedestrian involved motor vehicle accident. In this time period, Mr. Sherman provided physiotherapy treatment to SB on a number of occasions in 2014, 2015, 2016, and 2017.
- [180] SB was involved in a subsequent motor vehicle accident in January 2019 and was assessed and treated by Mr. Sherman on January 16, 2019. Mr. Sherman prepared an AB-2 Report (Treatment Plan) (Exhibit 9), which was billed on February 1, 2019. Mr. Sherman provided physiotherapy treatments on February 12 and March 15, 2019 in relation to this motor vehicle accident.
- [181] SB saw other physiotherapists in February and March 2019. An AB-4 Report (Concluding Report) (Exhibit 1, Tab 20, page 115) was prepared on April 1, 2019 by another physiotherapist. Although the AB-4 Report is a Concluding Report, the AB-4 Report specifically noted that the client "continues to struggle" and "would benefit from ongoing treatment at a frequency of 1x/week x 10 weeks + re-assess at that point moving forward" (Exhibit 1, Tab 20, pages 116 and 117). SB continued to receive physiotherapy services in April, May and June 2019 from another physiotherapist. In addition, SB received massage therapy at the Clinic between January and December 2019 and in 2020 (Exhibit 1, Tab 19).
- [182] The Hearing Tribunal carefully considered the September 3, 2019 appointment. Mr. Sherman saw SB on September 3, 2019 to complete an AB-3 Report (Progress Report) (Exhibit 1, Tab 20, page 127.)
- [183] The AB-3 Report was requested by SB's insurance company. Mr. Sherman's evidence was that he indicated to the Clinic staff that he would complete it. The Clinic contacted SB to advise her she needed to come in for an appointment with Mr. Sherman for the AB-3 Report to be completed.
- [184] At the September 3, 2019 appointment, SB was provided a hot pack by the person who brought her to the treatment area. Mr. Sherman attended with her. Mr. Sherman and SB had a brief discussion related to her symptoms at that time, Mr. Sherman did a cursory range of movement examination and a brief palpatory examination in order to provide the findings in the AB-3 Report. They had a parting conversation and that was the end of the appointment. Mr. Sherman noted in the AB-3 Report that SB was "able to continue independently at this point." Neither Mr. Sherman nor SB expected there to be an ongoing physiotherapy treatment beyond this appointment and her insurance coverage was terminated following the appointment. However, SB would have been able to book an appointment for further physiotherapy treatment at the Clinic if she wished to do so. In fact, SB continued to attend at the Clinic for massage therapy appointments between

September 5, 2019 and February 2021 and received further physiotherapy treatment in October and November 2020.

- [185] Mr. Sherman and SB had coffee on a few occasions between December 2019 and March 2020 after bumping into each other at the Clinic following her massage therapy appointments. They developed a friendship. When the pandemic lockdowns occurred in March 2020, Mr. Sherman and SB decided to form a cohort. At some point, their relationship became romantic. The Hearing Tribunal accepted the evidence of both Mr. Sherman and SB that their relationship became sexual in July 2020, following a hip surgery by Mr. Sherman and around SB's birthday.
- [186] Mr. Sherman provided treatments to SB on October 7, 9, 13, 27 and November 13 and 23, 2020. While the October and November 13, 2020 treatments were initially pro bono, these were eventually billed when SB decided to pursue a legal claim in relation to the motor vehicle accident as confirmed in the Transaction History (Exhibit 1, Tab 19).
- [187] Counsel for Mr. Sherman noted that the Complaints Director sought to establish that Mr. Sherman provided physiotherapy services to SB in the spring and summer of 2020. SB was questioned regarding what occurred in the spring and summer of 2020. Her evidence was that she did not consider these to be physiotherapy services. Counsel for Mr. Sherman took issue that this line of questioning was not put to Mr. Sherman and submitted that Mr. Sherman was not provided with the opportunity to explain or address what occurred during the spring and summer of 2020. Counsel for Mr. Sherman took the position that the Hearing Tribunal cannot rely on this line of questioning in support of Allegation 2. The Hearing Tribunal considered this issue. The Hearing Tribunal found that based on the evidence of Mr. Sherman and SB, there was assistance provided by Mr. Sherman to SB during the pandemic lockdown in the spring or summer 2020. However, the Hearing Tribunal found that, even if it did consider the evidence of SB, the evidence presented did not establish, on a balance of probabilities, that this constituted physiotherapy services. As such, the Hearing Tribunal found that it was not necessary to address the objection.
- [188] The main issue with respect to Allegation 2 is whether or not SB was a "patient" for the purposes of the Sexual Abuse Standard. Mr. Sherman sought to establish that the appointment of September 3, 2019 constituted "episodic care" as that term is defined in the Sexual Abuse Standard. Mr. Sherman took the position that SB was no longer a patient for the purposes of the Sexual Abuse Standard because the September 3, 2019 visit was "episodic care".
- [189] Counsel for Mr. Sherman noted that the central issue in dispute was how "episodic care" is defined in the Sexual Abuse Standard and its meaning in private practice. However, given that "episodic care" is a specifically defined term in the Sexual Abuse Standard, the Hearing Tribunal based its interpretation of this term on the definition in the Standard rather than the meaning it might have in private practice.



- [190] Further, in interpreting the Sexual Abuse Standard, the Hearing Tribunal reviewed the Standard in its entirety. The Hearing Tribunal considered if the Standard or any of the definitions in the Standard, including “episodic care” were vague, ambiguous or unclear. The Hearing Tribunal agreed with counsel for Mr. Sherman that it must apply principles of statutory interpretation, which requires the “words of [a Standard] to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Sobeys West Inc. v Alberta College of Pharmacists*, 2016 ABQB 232, at para. 15).
- [191] The Hearing Tribunal found that the Sexual Abuse Standard must be reviewed and considered in its entirety and in light of the context of the changes made to the HPA by the government of Alberta in introducing Bill 21, An Act to Protect Patients.
- [192] The Sexual Abuse Standard provides (Exhibit 1, Tab 3) (underlined emphasis added):

#### **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.

#### **Performance expectations**

The physiotherapist:

- Clearly and thoroughly explains any physiotherapy service which could potentially be perceived to be sexual in nature, taking all reasonable steps to confirm the patient's understanding of the service and its rationale, and obtaining informed **consent** prior to engaging in the service.
- Abstains from all forms of conduct towards a patient that constitutes sexual abuse for the duration of the therapeutic relationship, which extends for one year (365 days) from the date of the last documented physiotherapy service provided.
- Abstains from conduct, behaviour, or remarks directed towards a patient that constitutes sexual misconduct for the duration of the therapeutic relationship, which extends for one year (365 days) from the date of the last documented physiotherapy service provided.
- Abstains from commencing an intimate or sexual relationship with a patient for the duration of the therapeutic relationship, which extends for one year (365 days) from the date of the last documented physiotherapy service provided.
- Recognizes that due to the nature of **physiotherapy practice**, there is always an inherent power imbalance between the patient and the physiotherapist, and due to this inherent power imbalance, sexual relationships are prohibited for the duration of the therapeutic relationship, which extends for one year (365 days) from the date of the last documented physiotherapy service provided, even if the patient consents to the sexual relationship.

- Reports all instances where the physiotherapist has reasonable grounds to believe that the conduct of another **regulated member** of any College constitutes sexual abuse or sexual misconduct to the Complaints Director of the other regulated member's College.
- Recognizes conduct which constitutes sexual abuse or sexual misconduct as defined in the Health Professions Act, but which is not related to a patient as defined in the Sexual Abuse and Sexual Misconduct Standard of Practice, is not subject to this Standard. However, such conduct is subject to the Standards of Practice for Physiotherapists in Alberta and may still be considered unprofessional conduct under the Health Professions Act.

[193] The following terms are defined in the Sexual Abuse Standard (Exhibit 1, Tab 3):

**Episodic care** refers to a single encounter with a patient focused on a presenting concern(s), where neither the physiotherapist nor patient have the expectation of an ongoing care relationship. The individual is considered a patient for the duration of the episode of care. A physiotherapist who engages in the type of activity described in the definition of sexual abuse or sexual misconduct while providing episodic care will be considered to have committed sexual abuse or sexual misconduct.

**Patient:** An individual is a patient of a physiotherapist when they are a recipient of physiotherapy services and a therapeutic relationship is formed. This occurs when a physiotherapist has engaged in one or more of the following activities:

- Gathered clinical information to assess an individual
- Contributed to a health record or file for the individual
- Provided a diagnosis
- Provided physiotherapy advice or treatment
- Charged or received payment from the individual or third party on behalf of the individual for physiotherapy services provided
- Received consent from an individual for recommended physiotherapy services

A patient is deemed discharged and no longer a patient if there have been no physiotherapy services provided for one year (365 days).

For the purposes of sexual abuse and sexual misconduct provisions in the Health Professions Act, an individual is not considered a patient if a current sexual, spousal, or adult interdependent partner relationship exists between the individual and the physiotherapist at the time the physiotherapist provides physiotherapy services.

OR

The physiotherapist has provided episodic care to a patient where neither the physiotherapist nor the patient have the expectation of an ongoing care relationship,

AND

48 hours have elapsed between the episode of care and the start of the sexual relationship or communication for the purpose of starting the sexual relationship.

...

**Physiotherapy services** are "services provided by or under the direction of a physiotherapist. This includes client assessment and intervention, and related communication with and reporting to various parties for the purposes of delivering patient care."

...

**Sexual abuse** is defined in the Health Professions Act, and "means the threatened, attempted or actual conduct of a regulated member towards a patient that is of a sexual nature and includes any of the following conduct:

- a) Sexual intercourse between a regulated member and a patient of that regulated member;

...

**Therapeutic relationship** refers to the relationship that exists between a physiotherapist and a patient during the course of physiotherapy services. The relationship is based on trust, respect, and the expectation that the physiotherapist will establish and maintain the relationship according to applicable legislation and regulatory requirements and will not harm or exploit the patient in any way.

Due to the nature of physiotherapy practice, there is always an inherent power imbalance between the patient and their physiotherapist. Because of the existence of an inherent power imbalance, sexual relationships are prohibited for the duration of the therapeutic relationship even if the patient consents to the sexual relationship.

The therapeutic relationship extends from the time of initial professional contact between the physiotherapist and the patient until one year (365 days) from the date of the last documented physiotherapy service.

[194] Mr. Begg provided evidence regarding physiotherapy services in the context of motor vehicle accidents. With respect to the AB-3 Report, Mr. Begg testified that an AB Report is an example of a visit that is requested by an insurance company to provide information to the insurance company. Mr. Begg's evidence was that there was no doubt that physiotherapy services were provided to SB on September 3, 2019.

[195] The Hearing Tribunal found that the September 3, 2019 appointment met the definition of a physiotherapy service. Although the AB-3 Report was requested by the insurance company, it required an assessment, communication and reporting. A chart note was

created for the visit. The AB-3 Report was in relation to the motor vehicle accident suffered by SB in January 2019.

- [196] The Hearing Tribunal also considered the argument advanced by Mr. Sherman that following March 15, 2019, SB was under the care of another physiotherapist at the Clinic. Although Mr. Sherman stated in his evidence that SB ended up transferring to another physiotherapist, the Hearing Tribunal considered that there was no evidence in the record to substantiate a transfer or discharge by Mr. Sherman of SB as his patient. Further, the Hearing Tribunal considered the evidence of SB that she could see whatever physiotherapist at the Clinic that she chose to and that she chose a physiotherapist based on her schedule. The Hearing Tribunal found that SB was not exclusively the patient of the other physiotherapist following the March 15, 2019 appointment. This finding is further confirmed by the fact that Mr. Sherman decided he would see SB for the September 3, 2019 appointment. As such, the Hearing Tribunal rejected the argument that SB was under the care of another physiotherapist following March 15, 2019.
- [197] The Hearing Tribunal considered the definition of “patient” in the Sexual Abuse Standard (Exhibit 1, Tab 3). SB met this definition. SB was the recipient of physiotherapy services and a therapeutic relationship had been formed. Mr. Sherman had engaged in the following activities, in accordance with the definition of a patient in the Sexual Abuse Standard: he gathered clinical information to assess SB, contributed to her health record and chart, provided a diagnosis, provided physiotherapy advice or treatment, charged and received payment for the physiotherapy services provided, and received consent from for the physiotherapy services.
- [198] Under the definition of “patient” in the Sexual Abuse Standard, it is stated: “A patient is deemed discharged and no longer a patient if there have been no physiotherapy services provided for one year (365 days).” The September 3, 2019 appointment was a physiotherapy service and, provided this was the last visit with Mr. Sherman, the 365-day time period in the Sexual Abuse Standard would have started following this appointment.
- [199] The Hearing Tribunal considered the definition of “episodic care”. The Hearing Tribunal rejected the position that the September 3, 2019 appointment was a single encounter. This was a continuation of the physiotherapy services provided to SB that were initiated in January 2019 and were related to a motor vehicle accident which occurred in early January 2019. SB had been seen over the course of her care by Mr. Sherman and other physiotherapists at the Clinic. The AB-3 Report that was completed September 3, 2019 was part of the overall physiotherapy services provided for the same motor vehicle accident. The presenting concern on September 3, 2019 was to assess the status of SB’s injuries from the motor vehicle accident. The AB-3 Report was clearly not an isolated episode of treatment.

- [200] SB was receiving ongoing care related to the motor vehicle accident and by definition, the assessment and preparing of the AB-3 Report, which was directly linked to the motor vehicle accident, was a physiotherapy service, and was not episodic care, as defined in the Sexual Abuse Standard.
- [201] While Mr. Sherman and SB viewed that there was no expectation of ongoing care following September 3, 2019, this does not negate that the September 3, 2019 visit was part of the physiotherapy services for the motor vehicle accident. Had there been subsequent visits with Mr. Sherman following the September 3, 2019 appointment, this would have restarted the 365-day time period.
- [202] While the Hearing Tribunal recognized the consensual nature of the relationship between Mr. Sherman and SB, that does not absolve Mr. Sherman of his responsibility under the Sexual Abuse Standard. It is possible that Mr. Sherman did not properly set his mind to the Standard and in fact, he appears to have been confused as to when a physiotherapist can provide services to an adult interdependent partner or someone where a sexual relationship exists between the physiotherapist and the individual.
- [203] The Hearing Tribunal found the Sexual Abuse Standard to be clear and unambiguous in this case. When read as a whole, it is clear that a member must abstain from commencing a relationship or engaging in conduct that constitutes sexual abuse for a period of one year (365 days) from the date of the last documented physiotherapy service provided. In the context of treating a motor vehicle accident injury under an insurance protocol, the provision of AB Forms related to ongoing physiotherapy services for an existing claim does not meet the definition of episodic care as defined in the Sexual Abuse Standard.
- [204] While the term “single encounter” is not defined in the Standard of Practice, to accept the argument advanced by Mr. Sherman would mean that any visit would constitute a single encounter. Further, the position put forward by Mr. Sherman would lead to an interpretation that every last visit with a patient constitutes episodic care. This would defeat the purpose of the 365-day time period in the definition of “patient” and “therapeutic relationship” and would directly contradict the clear Performance Expectations set out in the Sexual Abuse Standard that the physiotherapist must “abstain from all forms of conduct towards a patient that constitutes sexual abuse for the duration of the therapeutic relationship, which extends for one year (365 days) from the date of the last documented physiotherapy service provided” and “abstain from commencing an intimate or sexual relationship with a patient for the duration of the therapeutic relationship, which extends for one year (365 days) from the date of the last documented physiotherapy service provided.” The interpretation advanced by Mr. Sherman would lead to an absurd result.
- [205] It was therefore Mr. Sherman’s responsibility to be aware of the provisions in the Sexual Abuse Standard and to ensure the Standard was followed.

- [206] The Hearing Tribunal placed little weight on the treatment performed in October and November 2020. Those appointments were provided once a sexual relationship had been established. Had SB not been a patient when the sexual relationship began, the provision of treatment in October and November 2020 would not have been contrary to the Sexual Abuse Standard, as the Standard provides that: “an individual is not considered a patient if a current sexual, spousal, or adult interdependent partner relationship exists between the individual and the physiotherapist at the time the physiotherapist provides physiotherapy services.” (Exhibit 1, Tab 3)
- [207] The Hearing Tribunal found that SB was a patient under the Sexual Abuse Standard at the time of the September 3, 2019 visit. The sexual relationship between Mr. Sherman and SB started in July 2020, less than 365 days from the date of the last visit with Mr. Sherman. This is a breach of the Sexual Abuse Standard and constitutes sexual abuse in accordance with the Standard. Sexual abuse is defined in the Sexual Abuse Standard to include: “sexual intercourse between a regulated member and a patient of that regulated member.”
- [208] For the reasons set out above, the conduct in Allegation 2 is proven on a balance of probabilities. The conduct is a breach of the Sexual Abuse Standard and constitutes unprofessional conduct and sexual abuse, as that term is defined in section 1(1)(nn.1) of the HPA, as “the threatened, attempted or actual conduct of a regulated member towards a patient that is of a sexual nature and includes any of the following conduct: sexual intercourse between a regulated member and a patient of that regulated member.”

*Allegation 3: Further or in the alternative to allegations #2, Mr. Sherman’s conduct in engaging in an intimate and/or sexual relationship with SB constitutes an inappropriate boundary violation.*

- [209] With respect to Allegation 3, this Allegation was in the alternative to Allegation 2. The Hearing Tribunal found that the September 3, 2019 appointment was not episodic care under the Sexual Abuse Standard. Allegation 2 was proven and the Hearing Tribunal found the conduct constituted unprofessional conduct and sexual abuse under the Sexual Abuse Standard.
- [210] Given the Hearing Tribunal’s findings on Allegation 2, Allegation 3 is dismissed.

## **IX. Conclusion**

- [211] Allegations 1 and 3 are dismissed. Allegation 2 is proven and constitutes unprofessional conduct and sexual abuse as defined in the HPA. The Hearing Tribunal will receive sanction submissions from the parties on any orders to be made by the Hearing Tribunal under section 82 of the HPA.

[212] The Hearing Tribunal requests that the parties consult each other with respect to the process for submissions and advise the Hearing Tribunal of the proposed procedure for submissions on sanction within 2 weeks of receipt of this decision. If the parties are unable to agree on the process for submissions, the Hearing Tribunal will provide further direction.

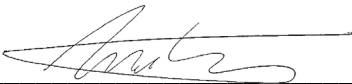
[213] Section 81.1(1) of the HPA provides:

If the subject-matter of a hearing relates to a complaint alleging sexual abuse, and the hearing tribunal decides that the conduct of an investigated person constitutes unprofessional conduct based in whole or in part on sexual abuse, the hearing tribunal must immediately order the suspension of the investigated person's practice permit until an order is made under section 82.

[214] As such, in accordance with section 81.1(1) of the HPA, the practice permit is immediately suspended until an order is made under section 82 of the HPA.

Dated this 28<sup>th</sup> day of February, 2023.

Signed on behalf of the Hearing Tribunal



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Todd Wolansky, PT, Chair