

IN THE MATTER OF THE *MASSAGE THERAPY ACT*

AND IN THE MATTER OF COMPLAINT #032 AGAINST JOSHUA LUTES

DECISION OF THE DISCIPLINE AND FITNESS TO PRACTISE COMMITTEE

Panel Members:

Jenn Allaert, RMT (Chair)

Edwin White, RMT

Melissa Michaud, Public Member

I. Background

1. On October 24, 2019, KG (the “Complainant”) filed a complaint with the College of Massage Therapists of New Brunswick (the “College”) regarding incidents of an alleged sexual nature by member Joshua Lutes (the “Respondent”). The complaint is known as Complaint #032 (the “Complaint”).
2. Mr. Matheson on behalf of the Respondent filed a Response to the Complaint (mistakenly dated October 8, 2021) and, amongst other things, flatly denies that the Respondent sexually touched the complainant in any inappropriate manner.
3. The Complainant provided a rebuttal to the Response.
4. On September 24, 2020, the Complaints Committee of the College determined that the Complaint relates to professional misconduct, incompetence, or incapacity and merits further consideration by the Discipline and Fitness to Practise Committee (the “Discipline Committee”) of the College.
5. The Complaint was therefore referred to the Discipline Committee pursuant to para. 35(2)(b) of the *Act to Incorporate the College of Massage Therapists of New Brunswick* (the “Act”).

6. On October 30, 2021, a Panel of the Discipline Committee (the “Panel” or the “Discipline Committee”) of the College held an in-person hearing to determine Complaint #032 filed by the Complainant K.G. (“KG” or the “Complainant”) against Joshua Lutes, RMT (the “Respondent”). Throughout the case, the College was represented by counsel Jessica Bungay and the Respondent was represented by counsel James J. Matheson. The Panel was assisted by independent legal counsel Dominic Caron.

A. Hearing days

7. As we will see below, this first day of hearing was ultimately adjourned and numerous hearing days were required to determine Complaint #032. The last hearing day was held on October 29, 2022. Consequently, the Panel is of the opinion that a lengthy summary of the proceedings is warranted in the circumstances.

(1) October 30, 2021

8. At the outset of the hearing on October 30, 2021, the Respondent made an objection on the Discipline Committee’s jurisdiction to hear and determine the Complaint.
9. The Respondent’s objection was rooted in s. 38(2) of the *Massage Therapy Act* which states that the Discipline Committee must commence a hearing no later than 60 days after the matter has been referred to the Discipline Committee:

38(2) Subject to subsection (3), the Discipline and Fitness to Practise Committee shall commence a hearing as soon as possible, but not later than sixty days after the date on which the matter was referred to the Committee pursuant to paragraph 35(2)(b) or paragraph 36(2)(c), unless the parties otherwise agree.

10. Counsel for the College informed the Panel that no notice of objection had been provided to the College by the Respondent and at no time this had been mentioned by the Respondent’s legal counsel when he provided dates of availability for the hearing.
11. The College requested an adjournment to provide submission against this objection. This adjournment was granted by the Panel and written submission was subsequently filed by the College. The Respondent elected not file additional written submission.
12. A written decision dismissing the objection was issued on January 13, 2022, by the Panel.

(2) January 22, 2022

13. Based on the availability of everyone involved, the hearing on the merits of the Complaint was scheduled to resume by videoconference on Saturday, January 22, 2022.
14. At approximately 6:48 AM on January 22, 2022, counsel for the Respondent sent an email to inform the Panel that he was feeling ill with several symptoms and requested an adjournment of the hearing. The College consented to an adjournment, and it was granted by the Discipline Committee.

(3) April 2, 2022

15. Based on the availability of everyone involved, the hearing on the merits of the Complaint was scheduled to resume by videoconference on Saturday, April 2, 2022.
16. At approximately 8:02 AM on April 2, 2022, counsel for the Respondent sent an email to inform the Panel that the Respondent was feeling ill and would not be able to attend the hearing nor be able to give instructions as the hearing unfolds.
17. Consequently, another adjournment was requested by the Respondent. The College reluctantly consented to an adjournment, and it was reluctantly granted by the Panel.

(4) April 30, 2022

18. Based on the availability of everyone involved, the hearing on the merits of the Complaint was scheduled to resume by videoconference on Saturday, April 30, 2022.
19. At approximately 8:26 AM on April 30, 2022, counsel for the Respondent informed the Panel that he would be unable to participate as his partner's grandfather had passed away that morning.
20. The College did not object to an adjournment but requested that a copy of the obituary be provided to the Panel when it becomes available.
21. The Panel granted the Respondent's request for an adjournment without the need for an obituary. However, the Panel informed both counsels that in light of the repeated adjournment requests, it was not unreasonable for the College to request the obituary.

(5) May 28, 2022

22. Based on the availability of everyone involved, the hearing on the merits of the Complaint was scheduled to resume by videoconference on Saturday, May 7, 2022. However, during the week of May 7, 2022, counsel for the Respondent communicated with the Registrar and informed him he would be unavailable on May 7, 2022.
23. Consequently, the hearing on the merits of the Complaint was rescheduled to Saturday, May 28, 2022, and would also be held by videoconference.
24. The hearing on the merits of the Complaint was held as planned on May 28, 2022, and as a preliminary issue, counsel for the Respondent made an objection stating that the Panel should recuse itself and alleged that there was a reasonable apprehension of bias as the Panel had previously heard evidence from the Complainant in another complaint (Complaint #040).
25. The panel deliberated and ultimately dismissed the objection. It determined that the evidence heard from complaint #040 was for different consideration for a different complaint. Although some of the evidence overlapped, the Panel did not put its mind nor adjudicate complaint #032 when it determined complaint #040.
26. Ultimately, the panel determined that it was prepared to proceed in an impartial manner and asked counsel for the College to proceed with the College's case.
27. The College called the Complainant KG to testify. Her evidence is summarized further in this decision.
28. KG testified for a certain amount of time and eventually the Respondent and Counsel for the Respondent were mired by technological difficulties. Several solutions were proposed but they were all unsuccessful. The Panel adjourned the matter until Saturday, October 1, 2022.

(6) October 1, 2022

29. Based on the availability of everyone involved, the hearing on the merits of the Complaint was scheduled to resume by videoconference on Saturday, October 1, 2022.

30. The hearing on the merits of the Complaint was continued as planned on October 1, 2022. It was scheduled for 10:00 AM.
31. The Respondent along with counsel for the Respondent were both absent. Independent legal counsel for the Panel along with counsel for the Respondent exchanged emails and it was confirmed at 10:16AM in an email by counsel for the Respondent that he would log on shortly “to the best of his abilities”. Counsel for the Respondent also indicated that he could not explain the Respondent’s absence - he expected him to be present.
32. Subsequent to this confirmation, Counsel for the College made a motion to proceed in the Respondent’s absence pursuant to s. 39(3) of the *Act*. The Panel deliberated and in light of the numerous adjournments and delays in this matter, the Panel determined at 10:45AM that it was ready to proceed in the Respondent’s absence in accordance with s. 39(3) of the *Act*.
33. The College resumed the examination-in-chief of the Complainant where the matter had been adjourned on May 28, 2022.
34. At 10:51AM Counsel for the Respondent logged on to explain that he was suffering from COVID-19 but was nevertheless prepared to go ahead. However, Counsel for the Respondent could not explain the Respondent’s absence and confirmed that he expected the Respondent to be present. His last communication with his client was the night before. However, as counsel for the Respondent was lacking instructions from his client, he decided to log off.
35. The College completed the examination-in-chief of the Complainant and closed their evidence. As the Respondent was absent, there was no cross-examination of the Complainant, nor was there evidence or witnesses called by the Respondent.
36. Counsel for the College then started presenting the College’s closing arguments regarding the merits of the Complaint. The Respondent logged on at 11:40AM for the first time of the day during the College’s closing arguments.
37. The Respondent requested a 5-minute break to speak to his counsel who was not logged on, and according to the Respondent, was not in a position to log on at that time.

38. The Chair of the Panel asked the Respondent how he intended to proceed given that the evidence was closed and he had missed the majority of the closing arguments presented on behalf of the College.
39. The Respondent requested to re-open the evidence portion of the hearing and to be permitted to adduce evidence.
40. In response to this request, counsel for the College stated on the record that this was a very unusual situation but that the College opposed any reopening of the evidence as the hearing was proceeding in absence of the Respondent pursuant to s. 39(3) of the Act and that the evidence was closed.
41. The Panel took some time to review the request.

42. The Chair of the Panel stated the following:

For the record, the panel is reluctant to grant Mr. Lutes' request to reopen the evidence. This matter has been going on for too long. Numerous adjournments have been granted to Mr. Lutes already. And this morning the hearing was scheduled for 10AM. Mr. Lutes and his counsel were not present at 10AM. No notices were provided. The panel decided to proceed in Mr. Lutes' absence. Mr. Matheson came on at 10:51 AM confirming that he has tried repeatedly to contact his client and had no instructions. He logged off. The hearing continued, the College closed their evidence and presented their closing arguments. Mr. Lutes came on at 11:40AM during the College's closing arguments. He then made a request to have a 5 min break. The break took 15 minutes. Then, he made a request to reopen the case and present evidence.

43. The Chair of the Panel then allowed the request of the Respondent with clear ground rules:

Although, the panel is reluctant to permit Mr. Lutes to present evidence, the panel will allow him. However, these are the ground rules: No more delays. If I give a 5 min break, it's 5 minutes. Not 15. And if technical issues arise on either Mr. Lutes end or Mr. Matheson's end and they cannot present evidence, the Panel will order that the evidence be provided via Affidavit testimony. Is this clear?

44. The Respondent, after speaking with his counsel on the telephone, agreed to the ground rules and stated that he was not in a position to provide evidence on that day but would gladly provide Affidavit evidence of the following three witnesses:

- The Respondent Mr. Lutes;

- MG; and
- AC.

45. Counsel for the Respondent who was speaking to the Respondent on the telephone and listening in to the hearing clarified that there could be other affiants as well.

46. The parties agreed to provide the Respondent with a 10-day deadline to produce the Affidavit. The Panel thereby ordered that the Affidavits be filed by October 11, 2022, at 5:00PM.

47. Parties then agreed to resume the matter on October 29, 2022, by videoconference. It was clarified and agreed by the parties that on October 29, 2022, the matter would commence with potential cross-examination of the Respondent's affiants and move to closing arguments. Finally, the parties agreed that, should there be a finding of professional misconduct, submissions on the penalty will be made on October 29, 2022, and will not require a separate penalty hearing.

48. The Panel adjourned the matter to Saturday, October 29, 2022.

(7) October 11, 2022

49. The Respondent filed three Affidavits by the October 11, 2022, deadline. This evidence will be summarized further in the decision.

(8) October 29, 2022

50. The matter resumed with everyone present virtually. Counsel for the Respondent informed everyone that he was suffering from COVID-19 and that he would not turn his on his webcam. The Panel confirmed having received the Affidavits which were entered as Exhibit 7.

51. Counsel for the Respondent also provided additional documents and requested that they be entered into the record. The parties agreed that the Respondent's witness could speak to these documents and that they would be entered as exhibits in the normal course of action.

52. Counsel for the College cross-examined the three affiants and Counsel for the Respondent was permitted to expand on the Affidavit for the narrow purpose of speaking to documents.

53. Both parties then presented closing arguments with respect to professional misconduct and the penalty should there be a finding of professional misconduct.

54. The matter was adjourned, and the Panel reserved on the decision.

II. The Evidence

A. Exhibits

55. At the hearing, counsel for the College filed the following exhibits which were admitted into evidence and form part of the record:

- Notice of Hearing – Exhibit 1;
- Complaint – Exhibit 2;
- Response to the Complaint – Exhibit 3;
- Rebuttal – Exhibit 4;
- Complaints Committee decision – Exhibit 5;
- Book of Documents (99 pages) – Exhibit 6;

56. Counsel for the Respondent filed the following exhibits which were also admitted into evidence and form part of the record:

- Affidavits of Joshua Lutes, AC and MG – Exhibit 7; and
- Examination/Treatment Sheet dated June 21, 2016, and July 12, 2016, with handwritten notes and duplicating documents– Exhibit 8.

A. The College's Evidence

57. The College called one witness: the Complainant KG . This is a summary of her evidence:

First appointment

- In June 2016, KG was suffering from migraines and scoliosis. A co-worker of KG recommended that she book a massage with the Respondent;
- KG had already received massages from “half a dozen” massage therapists but was still looking for a massage therapist to further aid her in relieving pain;

- KG did not know the Respondent and had to look on Google to find the contact information for the Respondent and his clinic in order to book an appointment;
- The first appointment occurred on June 21, 2016.
- During the first appointment, KG and the Respondent went to his “room” at the clinic to discuss a treatment plan. The conversation was “easy” and the Respondent was “charming, nice and fun”;
- In this room, KG recognized the Respondent’s son in a picture and therefore connected with the Respondent on that level;
- KG testified that during this conversation, the Respondent complimented her on her athletic build and said that *“he enjoys having a pretty blond on the table”*;
- Also according to KG, the Respondent mentioned during this conversation that he sat on the “board of the discipline committee” of the College;

- The first massage went well;

Second Massage

- The second massage occurred on July 12, 2016;
- At the end of this massage, the Respondents slapped KG’s butt. She described it as a “love tap” and the force exerted was approximately 3/10;
- At this point, KG was attracted to the Respondent;

August 8,9 2016

- On approximately August 8, 2016, KG added the Respondent on Facebook and Facebook Messenger (“Messenger”);
- The two started communicating immediately through Messenger and the conversation was fun and flirty. At the outset there was a reference to a lunch date which did not occur. An appointment was also made by Messenger for a massage at 1pm the following day (Aug. 9);
- The massage did occur the following day. Shortly after, the Respondent sent an image of a LEGO slapping the “butt” of another LEGO in a sexual manner. KG thought it made sense given that the Respondent had previously slapped her “butt”.
- That same evening, the flirty texting continued and the Respondent mentioned that he was at the bar and that he will head to his “lonely ole house” after the bar;
- In the same chain of correspondence, the Respondent asked KG *“should I text you when I leave the bar ;)”*
- KG declined the invitation but maintained a flirtatious tone in her Messenger texts. The two kept texting throughout August;

September 12

- On September 12, 2016, KG mistakenly believed she had a massage appointment that evening and sent Messenger texts to the Respondent. The Respondent informed KG that her appointment was the following day: September 13. Nevertheless, KG and the Respondent texted back and forth throughout the day;
- The Respondent offered to do a “house call” and in the same text conversation informed KG that he was test driving a new truck on that evening;
- KG and the Respondent agreed that they would go for a “rip” in the truck the Respondent was test driving. When the Respondent asked for KG’s address, she gave it but warned the Respondent that he wouldn’t be invited inside as KG was fostering 7 cats and the house therefore smelled like cats;
- KG and the Respondent kept texting and making sexual innuendos about cats and cat smell. Eventually the Respondent texted the following: *“Hahaha I was only teasin!!!! I don’t mind if your place smells like pussy, I’ll still cum in... I mean go in.... Ummmm....”*
- They also agreed that the Respondent would pick up KG at 10pm at her house to go for a test drive in the truck;
- KG testified that most of the “test drive” was spent at the Lounsbury dealership and that the Respondent subsequently invited KG to his place which she did;
- KG remembered details of the Respondent’s house and testified that she and the Respondent went upstairs in the main bedroom and started to “make out”.
- The Respondent then performed oral sex on KG and then they decided to go to the next level and had sex with a condom;
- After sex, KG and the respondent snuggled and cuddled and fell asleep;
- September 13
- The next morning the Respondent performed oral sex on KG;
- After, the Respondent called the clinic receptionist to inform her that he would be late. He then drove KG back to her house;
- KG sent a Messenger text to the Respondent at 10:37AM offering him coffee “for making [him] late”;
- The Respondent replied that he does not drink coffee. That he enjoyed her company last night and that she can bring him her “sugga” that night at 8pm for her pre-booked massage appointment with the Respondent;
- KG had a massage appointment that evening on September 13 at 8pm. According to KG, the massage was more “rough” therapeutically. During the massage, KG and the Respondent discussed the night before and also discussed their religious views;
- The Respondent also made a joke to KG *“don’t stare too hard, I might poke your eye out”*, hinting that he was going to get an erection;

- Later in the evening on September 13, 2016, KG and the Respondent exchanged a number of flirtatious Messenger texts and it was agreed at approximately 11pm that KG would go over to the Respondent's place;
- When KG arrived, the Respondent was drinking, he was "high" and had made a charcuterie board of hotdogs, olives, BBQ sauces, etc. which KG stated she does not like;
- KG remembers being annoyed at the Respondent that evening. Unlike in the past, the conversations were dark and "boring". They ended up cuddling together but did not engage in sexual intercourse that night;

After September 12-13

- After the events of September 12-13, 2016, the communication between KG and the Respondent started to dwindle;
- On September 18, 2016, KG sent a Messenger text to the Respondent informing him that what happened a "few nights ago" was really not like her and that this would not happen again; She was referring to the one-night stand on September 12;
- KG went for massages on November 15 and 24 and December 8, 2016, but nothing sexual happened during these massages;
- On March 9, 2017, KG sent a Messenger text to the Respondent asking him if he wanted to have a drink at Moxies. This also led to KG booking an appointment on March 14, 2017;
- On March 16, 2017, KG and the Respondent met at Moxies for drinks. This was the last time KG and the Respondent hung out together;

Why KG filed a Complaint

- KG was disturbed when she saw a news article where the Respondent was commenting as chair of the Discipline Committee and had taken the licence of a Registered Massage Therapist who had kissed a patient. According to KG, the Respondent was enforcing the rules, but he was breaking them himself;
- This is when KG realized what had occurred between KG and the Respondent was wrong – even if it was years later. According to KG, if the Respondent can do it to her, he can do it to anybody.

B. The Respondent's Evidence

58. The Respondent filed three Affidavits : Joshua Lutes, MG and AC. All affiants were subject to a cross-examination.

59. The evidence of AC can be summarized as follows:

- AC and the Respondent have known each other for roughly 15 years. They have been sexually intimate “on and off” for a number of years but did not have a boyfriend-girlfriend relationship;
- In September 2016, AC was married. She would still see the Respondent from time to time. In order to see the Respondent, she would usually pretend that she was working an overtime shift, but instead go to the Respondent’s house;
- AC and the Respondent had made the arrangements to see each other on September 12, 2016, at approximately 11PM, shortly after the end of AC’s shift;
- AC says that she remembers going to the Respondent’s house on September 12, 2016, but that he was not present and she had to wait until 11:30PM in his driveway for him to arrive. When he did arrive, it was in a white truck.
- The Respondent informed AC that he was late because he was test driving a truck with a friend and had lost track of the time;
- AC said that she and the Respondent proceeded to go inside the residence and she had sexual intercourse with the Respondent and spent the night over;
- AC states that on September 12, 2016, she went to the Respondent’s house shortly after her shift which ended at 11PM;
- On cross-examination, AC acknowledged that she had no idea how many days or how many overtime shifts she would have worked in September 2016;
- AC also testified that she was unsure how many times she had sexual relations with the Respondent in September 2016. She did “piece together” that one of the evenings she had a sexual relation with the Respondent was on September 12, 2016, because the Respondent was late, and he was test driving a white truck. She recognize the truck because it was a Dodge and she also drove a Dodge truck;
- On cross-examination, AC acknowledged that there was a possibility that the Respondent test drove the white truck another day in September 2016.

60. The evidence of MG can be summarized as follows:

- MG and the Respondent are former colleagues and have been friends for approximately 20 years;
- Every 3 to 4 weeks, MG and the Respondent would get together for appetizers or drinks;
- In June 2016, MG and the Respondent were at Moxie’s, a resto-bar in Moncton for drinks and appetizers. During the evening, the Complainant KG arrived at Moxie’s and the Respondent eventually invited her to join MG and the Respondent’s table;
- KG was “very flirty” with the Respondent;

- On July 24, 2016, MG and the Respondent were also at Moxie's and KG joined their booth uninvited. KG was again very flirty with the Respondent;
- On cross-examination, MG had difficulty describing the Complainant and he acknowledged that he could be mixing up the servers with the Complainant;
- MG also had difficulty remembering details of these evenings because of the passage of time.

61. The evidence of the Respondent can be summarized as follows:

June-July 2016

- He has been a registered massage therapist since 2012;
- The Respondent saw KG for the first time in a patient-therapist relationship on June 21, 2016. During this session, the Respondent informed KG that he liked to go to Moxie's;
- Two days later KG was at Moxie's and joined the Respondent and MG at their booth. She was very flirty with the Respondent that evening;
- The Respondent saw KG again on July 12, 2016. Two days later, KG showed up at the Moxie's impromptu and again joined MG and the Respondent's booth. She was very flirty with the Respondent that evening;

September 12

- The Respondent resided on Cornhill Street in Moncton;
- In September, 2016 he was shopping for a new truck. On the evening of September 12 he was test driving a white Dodge Ram as a purchasing tactic. The following morning the Respondent was going to discuss purchasing a Chevrolet Silverado at Lounsbury's and believed that by arriving in a truck from another dealership, this would increase his chances of obtaining a better price for the Chevrolet Silverado truck;
- The Respondent made plans with KG to go for a "rip" in the white Dodge Ram on the evening of September 12. He picked her up at approximately 10:10pm and they headed to Lounsbury's car dealership to look at another truck that interested the Respondent;
- The Respondent and KG got into a "riveting" conversation that progressed to a "heated debate" about religion. The Respondent lost track of time and eventually dropped off KG at her house that evening. He did not have sex with KG that evening or any evening;
- The Respondent rushed home as he had made plans with AC to meet her at approximately 11pm. It was approximately 11:30pm by the time he got home;
- The Respondent apologized to AC and informed her that he was late because he got into a heated debate with KG and lost track of time;

- AC and the Respondent had sexual relations that evening and the two spent the night together;
Cross-examination
- On cross-examination, the Respondent acknowledged that certain Messenger texts exchanged between him and KG were inappropriate and unprofessional but that most of them were not sexual in nature;
- For instance, an invitation to KG to engage in “dirty sexting” is not, according to the Respondent, sexual in nature;
- However, the Respondent acknowledged that the Messenger text: “[...] *I don’t mind if you’re place smells like pussy, I’ll still cum in...I mean go in...[...]*” was sexual in nature but it was because KG had made reference to the word pussy during treatment;
- The Respondent acknowledged that despite sexual advances from KG, he never referred her to another therapist in his clinic;
- The Respondent stated that KG had never been to his house, and during cross-examination explained that the text to KG that said “*you know how to find me*” was not a reference to her having previously been at his residence;
- The Respondent acknowledged in cross-examination that his version of events surrounding September 12, 2016, during the hearing is different than the version of events he provided to the investigator;
- The Respondent justified this that during the investigation, he had no time to prepare or recollect the events, and therefore told a version of events to the best of his recollection. With the passage of time, he was able to “piece” it back together.

III. Position of the Parties

A. *The College*

(1) Arguments on Professional Misconduct

62. The College takes the position that the Respondent ought to be found to have committed acts of sexual abuse of a patient and acts of professional misconduct in violation of ss. 31(h) and 60(1) of the Act.

63. Firstly, the Act defines sexual abuse under different forms.

64. S. 60(1) of the Act defines sexual abuse as follows:

60(1) Sexual abuse of a patient by a member includes, but is not limited to:

- (a) sexual intercourse or other forms of physical sexual relations between the member and the patient;
- (b) touching, of a sexual nature or in a sexual manner, of the patient by the member;
- (c) behaviour or remarks of a sexual nature by the member towards the patient.

65. The College submits that the documentary evidence in the record speaks for itself. In the eyes of the College, the Respondent clearly made remarks of a sexual nature in violation of the *Act*.

66. The College takes the position that the Respondent had sexual intercourse or other forms of physical sexual relations with the Complainant in violation of the *Act*.

67. The College submits that this is borne out by the evidence adduced by the Complainant KG who was a credible witness as she was forthright and honest during her testimony and has nothing to gain by filing a complaint against the Respondent.

68. The evidence is consistent with the documentary evidence and the Messenger texts between KG and the Respondent.

69. During her testimony, the Complainant provided details regarding the evening of September 12-13 2016 when her and the Respondent had sexual intercourse and September 13, 2016, when the Respondent performed oral sex on her.

70. The College submits that this evidence should be accepted and preferred over the version of events provided by the Respondent and his witnesses.

71. It is the position of the College that the Respondent's version of events does not "have an air of reality". It does not make sense that he would make arrangements with two different women within an hour of each other on the night of September 12, 2016.

72. More importantly, the College submits that the version of events now being put forward by the Respondent was not mentioned to the investigator who was tasked with investigating this complaint. It doesn't make sense that the Respondent has radically changed his story from what he informed the investigator.

73. With respect to the witness MG, the College submits that his evidence does not corroborate the Respondent's version of events.

74. With respect to witness AC, the College submits that she candidly admitted that the sexual intercourse she had with the Respondent could have occurred on another day than September 12-13, 2016.

75. In short, the College submits that this matter must be determined on credibility and that based on the harmony of evidence, the Panel should only accept KG's version of events.

(2) Arguments on Penalty

76. The College suggests that should the Respondent be found guilty of professional misconduct, there are aggravating factors:

- He was former chair of the Discipline Committee and "knew better";
- He was previously found guilty of professional misconduct for sexual abuse.

77. The College submits that the following penalty is appropriate:

- Reprimand;
- Fine of \$2,500.00
- Revocation of membership and no possibility of reinstatement for 5 years;
- Registrar is to publish a notice of the Discipline Committee's order;
- Cost of the investigation;
- Costs of \$2,500.00 representing partial costs of the discipline proceedings.

78. Ms. Bungay on behalf of the College made extensive arguments to support the proposed penalty above. Notably, the College submits that in Ontario, it is mandatory for the massage therapy regulator to order a revocation of a licence for at least 5 years in the case when there is a finding of sexual abuse.

B. The Respondent

(1) Arguments on Professional Misconduct

79. The Respondent submits that this matter is equally a matter to be determined on credibility. However, the Respondent states that only the testimonies of witnesses for the Respondent are credible.

80. Mr. Matheson on behalf of the Respondent highlights the fact that the Panel has had the benefit of hearing cross-examination of witnesses AC, MG and the Respondent. The same cannot be said with respect to witness KG because of the circumstances of the matter. Consequently, the panel does not know what questions would have been put to witness KG.
81. The Respondent strenuously argued that the College's "compartmentalizing" and "slicing and dicing" each witnesses' evidence provides an inaccurate portrayal of the facts.
82. Instead, counsel for the Respondent opines that the evidence must follow a sequence of events and be taken in its context. This leads to one night: the only night that the Respondent:
- had the white Dodge Ram;
 - slept with AC;
 - arrived late; and
 - dropped off KG at her house.
83. The Respondent then submits that the Complaint did not initially state the specific day that alleged sexual intercourse between KG and the Respondent would have occurred. The Respondent attempted to get it clarified but it was only later in the complaints and discipline process that KG did provide the date of September 12, 2016.
84. The Respondent then submits that this explains why the Respondent's version of events changed between the investigation and the hearing. When the Respondent first answered questions in front of the investigator, he responded "*off the cuff*" to the best of his recollection. With the benefit of time, the Respondent was able to piece back the night in question.
85. The Respondent also submits that the absence of text and other documentary evidence from the Respondent's witnesses can be explained by the lengthy delay between the alleged incident and the hearing dates. "People change phones".
86. The Respondent's view of KG is different than that of the College in that the Respondent states that KG could potentially sue the Respondent if he was guilty of professional misconduct. In other words, KG could stand to gain something if her complaint was successful.

87. The Respondent offers an explanation for KG's complaint: KG became romantically attracted to the Respondent but he resisted her advances. She is jilted. The evidence points to KG "stalking" the Respondent, namely by showing up uninvited at Moxies.
88. The Respondent takes the position that The College has not met its onus. In the real world the Respondent benefits from an alibi. AC may not remember the exact day, but what matters, is the recollection of events that occurred on that night: AC slept with the Respondent on the night he had the white Dodge Ram. The Respondent submits that his evidence is clear: he only test drove the Dodge Ram one night. This is the same night he took KG for a "rip" and dropped her off at home.
89. Simply put, the Respondent denies having engaged in sexual intercourse with KG and the College has not met their burden.

Arguments on the Penalty

90. The Respondent was laconic with respect to the penalty. In short, if the panel reaches this stage, it will have determined that KG and the Respondent engaged in sexual activity. The evidence does not go in that direction. Otherwise, the authorities are clear with respect to penalty in such circumstances.

IV. Decision

91. As part of its decision, the Panel must determine the following issues:
- Did the parties engage in sexual activity on September 12-13, 2016?
 - Is the Respondent guilty of professional misconduct?;
 - If so, what is the appropriate penalty in the circumstances?

A. First issue: Did the parties engage in sexual activity on September 12-13, 2016?

(1) One allegation of Wrongdoing: Sexual Intercourse

92. In the Notice of hearing found at Exhibit 1, the College only brought forward one count against the Respondent. It reads as such:

That Joshua Lutes, while a registered member of the College, during the period of June 21, 2016, to March 14, 2017, provided massage therapy services to [KG] in a therapist-patient relationship and had sex with [KG]

during said therapist-patient relationship. Thereby Joshua Lutes did commit an act or acts of sexual abuse of a patient as defined in subsection[sic] 60(1)(b) and (c) of the CMTNB Act, and further did commit an act or acts of professional misconduct as defined by subsection 31(h) of the CMTNB Act.

93. The Panel must exclusively focus on this allegation in accordance with the clear directives of the New Brunswick Court of Appeal in *Violette v. New Brunswick Dental Society*, 2004 NBCA 1 in that “*there must be a match between the alleged wrongdoing and the findings of the tribunal*”.

94. There is no “physical” evidence that the Respondent and KG had sexual intercourse on September 12-13, 2016.

95. Instead, the Panel is left with testimonial evidence from the Complainant stating that sexual intercourse and touching of a sexual nature did occur on September 12 and 13, 2016. Conversely, the Respondent blatantly denies that this occurred.

96. The Panel is faced with a *he said – she said* situation and must evaluate the credibility of witnesses and their testimonies in order to make its determination.

97. The Panel is guided by the oft-quoted test on credibility found in *Faryna v. Chorny* [1951] B.C.J. No. 128 :

10. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

98. In other words, the credibility of the witnesses in the present case ought not to be solely determined on how the witnesses appeared in the virtual witness box. Instead, surrounding circumstances becomes an invaluable tool in determining which version of the events put forth by witnesses did in fact occur.

99. The Panel finds that the numerous exchanges in the Messenger texts between the Respondent and KG while they were in a therapist-patient relationship can become very relevant to the question of whether or not, sex occurred on September 12-13, 2016.

(2) Many Messenger Texts are Sexual in Nature

100. The Messenger texts between the Respondent and the Complainant are found in Exhibit 6, tab 10 and 11.

101. The Panel finds that numerous exchanges found in the Messenger texts between the Respondent and KG while in a therapist-patient relationship were sexual in nature. For example, the following messages are sexual in nature:

- *“Lol I’ll be in Plaster Rock setting up my tent having a few as well...Maybe we can have sum dirty sexting [emoji of smile and emoji of blowing kiss/heart].*
- *“Didn’t think you were the type of girl to be flashing pics of your pussy ;)”*
- *“Might take that long to get that pussy smell out lol”, and “Hahaha I was only teasin!!! I don’t mind if your place place (sic) smells like pussy, I’ll still cum in...I mean go in....Ummmm...”.*
- *“I was just about to text you and tell you again the pleasure it was to have your company last night!!! As for coffee I don’t drink but thank you anyway!!! Just bring me ya sugga when you come tonight at 8”.*

102. The Panel also finds that reference to “cuddling” can, in certain circumstances, be considered sexual in nature. The Panel finds, in the circumstances, that when the Respondent is asking KG to come over to his “lonely ole house” to take her up on her “cuddle offer”, it is evidence of remarks of a sexual nature.

103. What is more, the Panel finds that the Respondent’s action on August 9, 2016, of sending a Messenger text that contains an image of a LEGO which appears to be portraying a posterior slap is sexual in nature. In short, the Panel finds the Respondent’s explanation implausible - the LEGO is not only “waving”. More importantly, KG responded on Messenger with *“That is awful ! Lego porn. .. ! :p”* which was not denied nor rejected by the Respondent.

104. The Panel recognizes that an exchange of texts of a sexual nature unrelated to the night of September 12-13 does not automatically mean that sex did occur between the Respondent and KG on September 12-13, 2016. As such, a closer examination of the texts between the Respondent and KG around September 12-13, 2016 and a review of the context is warranted in the circumstances.

(3) September 12 and 13, 2016

105. KG was under the impression that she had an appointment with the Respondent for a massage on September 12, 2016. As such, on September 12, 2016, KG sent the following text message to the Respondent :

"Halla handsome I'll be seeing you tonight ;) Have a great day"

106. The Respondent answered "CANT HARDLY WAIT" by Messenger text and later realized that KG's appointment was not on September 12 but instead on September 13, 2016.

107. The Messenger conversation eventually evolved to an offer from the Respondent to do a house call. He stated the following at 6:56PM:

"Well I'm testing out another new truck tonight...Maybe I could do a house all since I missed your house warming party ;)"

108. KG responded within the minute and asked questions regarding the truck the Respondent was testing. KG and the Respondent exchanged numerous texts regarding trucks and the Respondent eventually offered KG to come for a "rip":

"Yeah the high country is what in going with...The ram tonight is a buyers sales tactic!!! I can tell ya about it tonight if ya wanna come for a rip or tomorrow during our massage"

109. KG answered that she would "definitely come for a rip". The two agreed that the Respondent would pick up KG at her residence at 9:30 PM. KG said that she would not invite the Respondent in because she was taking care of 7 cats. The two joked regarding this situation and it led to the following text which, as previously stated, is sexual in nature:

"Hahaha I was only teasin!!! I don't mind if your place smells like pussy, I'll still cum in....I mean go in...Ummmm..."

110. KG flirted back with the Respondent by stating the following at 9:14PM:

“Haha ;) good one. Don’t get me going Josh or you’ll have no choice!”

111. Eventually, the Respondent showed up at KG’s residence and the two went for a drive in the truck the Respondent was testing. However, this is where the version of events diverges.

112. The Panel finds the Respondent’s version of events to be unlikely and implausible. The Respondent makes a reference to a *“heated debate about religion”* that led him to drive KG back to her residence. This is inconsistent with the flirty nature of the text exchange between him and KG the following morning on September 13, 2016.

113. The Respondent also offers an “alibi” stating that he slept and spent the entire night with AC on September 12-13, 2016. This new version of events contradicts the previous version that the Respondent offered to an investigator. This was acknowledged by the Respondent in cross-examination.

114. The Panel finds this version of events implausible. The uncontroverted evidence is that the Respondent picked up KG at approximately 10:10PM. It is, thus, improbable that he made plans with AC to see her at approximately 11:00PM. The timeline does not add up.

115. In addition, this “alibi” includes a testimony from witness AC who has acknowledged that the night she slept with the Respondent in September 2016 could have been another night than September 12, 2016. Witness AC had difficulty providing specifics about September 2016 and did not provide any hard or physical evidence to confirm her whereabouts on the night of September 12-13, 2016. The Panel gives little to no weight to her testimony.

116. Conversely, the Panel found KG’s testimony very credible. She was authentic in her testimony and provided specific and accurate details with respect to the interaction with the Respondent, the house, the rooms in the house and how the sexual activity occurred between her and the Respondent.

117. In addition, the numerous Messenger texts between the Respondent and KG of a sexual nature strongly suggests that there was mutual interest between KG and the Respondent to engage in sexual activity.

118. As stated in *Faryna v. Chorny, Supra* “the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

119. Simply put, the Panel finds that KG’s testimony and version of events is in harmony with the preponderance of probabilities. The Panel finds that, in light of all relevant circumstances, KG and the Respondent did engage in sexual activity on the night of September 12 and/or early morning of September 13, 2016.

(3) Morning of September 13, 2016

120. KG also testified that the Respondent performed oral sex on her on the morning of September 13, 2016, and, as a result was late for work. The Panel finds that this is consistent with KG’s version of events and specifically with the Messenger text exchange between KG and the Respondent the next morning. The Panel accepts KG’s testimony and finds that KG and the Respondent engaged in sexual activity on the morning of September 13, 2016.

B. Second Issue: Is the Respondent guilty of professional misconduct?;

121. The Panel is guided by s. 60(1) of the *Act* which states that the following is sexual abuse :

60(1) Sexual abuse of a patient by a member includes, but is not limited to:

- (a) sexual intercourse or other forms of physical sexual relations between the member and the patient;
- (b) touching, of a sexual nature or in a sexual manner, of the patient by the member;
- (c) behaviour or remarks of a sexual nature by the member towards the patient.

122. The Panel has found that the Respondent (a member) had sexual intercourse, other forms of physical sexual relations (oral sex) and touched KG (a patient) in a sexual manner. The Panel also finds that this constitutes behaviour of a sexual nature and sexual manner by the Respondent towards KG.

123. Accordingly, the College has met its onus and established Count #1 pursuant to para. 60(1)(b) and (c) of the *Act*.

124.This constitutes sexual abuse and the Panel finds that the Respondent is therefore guilty of professional misconduct.

C. *Third Issue:* What is the appropriate penalty in the circumstances?

125.The Panel is guided by a number of factors including but not limited to the protection of the public, specific deterrence of the member, general deterrence of the membership and the reputation of the profession.

126.The Panel must take into account aggravating and mitigating factors to determine the appropriate penalty.

127.The Panel accepts that the Respondent's previous role as chair of the Discipline Committee constitutes an aggravating factor.

128.The Panel must also take into consideration prior disciplinary history. The Respondent has already been sanctioned for sexual abuse: *College of Massage Therapists v. Joshua Lutes*, 2022 NBCMT 040. Consequently, this constitutes an aggravating factor that militates for a more severe sanction.

129.In his submission, Mr. Matheson on behalf of the Respondent conceded that if the Committee reaches the penalty stage, the authorities are clear on the sanctions.

(2) Revocation

130.The Panel considers sexual intercourse and touching of a sexual nature to be one of the most serious types of professional misconduct committed by a regulated health professional. A strong message must be sent to the profession and to the public that sexual abuse of a patient is one of the most serious forms of misconduct and will result in the most severe sanction available to the Panel. Revocation of the Respondent's membership is, thus, warranted in the circumstances.

131. Moreover, the Respondent will not be eligible to apply for reinstatement to the College for a period of five years from the date of this decision.

132.The Panel relies on the decisions submitted by the College including *College of Massage Therapists v. Blair Eagles*, 2019 NBCMT 02, *College of Massage Therapists v. Alice Michaud*, 2018 NBCMT 1. The Panel also takes heed that in Ontario certain findings of

sexual abuse such as sexual intercourse for massage therapists lead to an automatic statutory revocation to practise the profession. See for example *Ontario (College of Massage Therapists of Ontario) v Zhang*, 2018 ONCMTO 21 (CanLII).

133. New Brunswick does not have similar mandatory legislation, but the Panel nevertheless determines that mandatory or not, revocation without the possibility of reinstatement for five years is justified in the circumstances. This sanction satisfies the following factors: protection of the public, specific deterrence of the member, general deterrence of the membership and the reputation of the profession.

(3) Reprimand

134. The Panel has determined that this sanction is appropriate in the circumstances.

(4) Fine

135. The Panel has determined that \$2,500 in costs is appropriate in the circumstances.

(4) Public Notice

136. The Panel has determined that this sanction is appropriate in the circumstances. The Registrar is to publish a Notice of the sanctions against the Respondent and the notice shall include the Respondent's name. This Notice is to be sent to the membership of the College.

137. The Notice in both official languages is attached as Appendix "A" of this decision.

(5) Costs

138. The Panel notes that the College had recommended two sanctions with respect to costs:

- i. Costs of the investigation; and
- ii. \$2,500 as partial reimbursement of disciplinary proceedings costs.

139. The Panel has determined that this is appropriate in the circumstances.

V. Order

140. To summarize, the Discipline Committee orders that:

- I. Pursuant to Para. 40(f) of the *Act*, the Respondent's membership with the College is revoked and he is not permitted to apply for reinstatement for a period of five years from the date of this order;
- II. Pursuant to Para. 40(2)(a) of the *Act*, the Respondent is reprimanded;
- III. Pursuant to Para. 40(2)(c) of the *Act*, the Respondent shall pay a fine of \$2,500.00;
- IV. Pursuant to Para. 40(2)(g), 40(2)(h) and s. 50 of the *Act*, the Registrar is directed to publish a Notice of the sanctions against the Respondent and the notice shall include the Respondent's name. A hyperlink of this Notice is to be sent to the membership of the College.
- V. Pursuant to Para. 40(2)(i) of the *Act*, the Respondent shall pay \$2,500 as partial reimbursement of the College's costs with respect to this Complaint and the full costs of the investigation;

141. This is a unanimous decision and order by the Panel.

Dated this _____ day of _____, 2023.

Jenn Allaert, RMT (Chair)

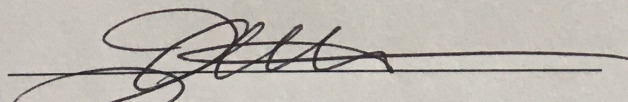
Edwin White, RMT

Melissa Michaud, Public Member

- I. Pursuant to Para. 40(f) of the Act, the Respondent's membership with the College is revoked and he is not permitted to apply for reinstatement for a period of five years from the date of this order;
- II. Pursuant to Para. 40(2)(a) of the Act, the Respondent is reprimanded;
- III. Pursuant to Para. 40(2)(c) of the Act, the Respondent shall pay a fine of \$2,500.00;
- IV. Pursuant to Para. 40(2)(g), 40(2)(h) and s. 50 of the Act, the Registrar is directed to publish a Notice of the sanctions against the Respondent and the notice shall include the Respondent's name. A hyperlink of this Notice is to be sent to the membership of the College.
- V. Pursuant to Para. 40(2)(i) of the Act, the Respondent shall pay \$2,500 as partial reimbursement of the College's costs with respect to this Complaint and the full costs of the investigation;

141. This is a unanimous decision and order by the Panel.

Dated this 17th day of April, 2023.


Jenn Allaert, RMT (Chair)

Edwin White, RMT

Melissa Michaud, Public Member

- I. Pursuant to Para. 40(f) of the Act, the Respondent's membership with the College is revoked and he is not permitted to apply for reinstatement for a period of five years from the date of this order;
- II. Pursuant to Para. 40(2)(a) of the Act, the Respondent is reprimanded;
- III. Pursuant to Para. 40(2)(c) of the Act, the Respondent shall pay a fine of \$2,500.00;
- IV. Pursuant to Para. 40(2)(g), 40(2)(h) and s. 50 of the Act, the Registrar is directed to publish a Notice of the sanctions against the Respondent and the notice shall include the Respondent's name. A hyperlink of this Notice is to be sent to the membership of the College.
- V. Pursuant to Para. 40(2)(i) of the Act, the Respondent shall pay \$2,500 as partial reimbursement of the College's costs with respect to this Complaint and the full costs of the investigation;

141. This is a unanimous decision and order by the Panel.

Dated this 18 day of April, 2023.

Jenn Allaert, RMT (Chair)

Ed White

Edwin White, RMT

Melissa Michaud

Melissa Michaud, Public Member

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *MASSAGE THERAPY ACT*

AND IN THE MATTER OF COMPLAINT #032 AGAINST JOSHUA LUTES

NOTICE OF REVOCATION

PLEASE NOTE that on [*insert date*], 2023, a panel of the Discipline and Fitness to Practise Committee of the College of Massage Therapists of New Brunswick (the “College”) found that Joshua Lutes committed acts of professional misconduct and ordered the following:

- I. Mr. Lutes’ membership is revoked and he is not permitted to apply for reinstatement for a period of five years from the date of this order;
- I. Mr. Lutes is reprimanded;
- II. Mr. Lutes is required to pay a fine of \$2,500.00; and
- III. Mr. Lutes must reimburse \$2,500 and the costs of the investigation to the College.

The full decision can be found here [*insert hyperlink*].

THIS PUBLIC NOTICE made this [*insert date*], 2023.

André Bouchard

Registrar

PROVINCE DU NOUVEAU-BRUNSWICK

DANS L’AFFAIRE DE LA LOI SUR LA MASSOTHÉRAPIE

ET DANS L’AFFAIRE DE LA PLAINTÉ #032 CONTRE JOSHUA LUTES

AVIS DE RÉVOCATION

SOYEZ AVISÉ que le [date], 2023, un sous-comité du Comité de discipline et de l’aptitude à exercer du Collège des massothérapeutes du Nouveau-Brunswick (le « Collège ») a déterminé que Joshua Lutes était coupable d’inconduite professionnelle et a ordonné ce qui suit :

- I. La qualité de membre de M. Lutes est révoquée et ce dernier ne peut faire de demande de réintégration pour 5 années;
- II. M. Lutes est réprimandé;
- III. M. Lutes doit payer une amende de 2 500.00\$; et
- IV. M. Lutes doit rembourser des dépens de 2 500.00\$ ainsi que les frais d’enquête au Collège.

La décision est disponible ici [[hyperlien](#)].

AVIS PUBLIC émis le [date], 2023.

André Bouchard
Registraire