

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *MASSAGE THERAPY ACT*

AND IN THE MATTER OF COMPLAINT #040 AGAINST JOSHUA LUTES

DECISION OF THE DISCIPLINE AND FITNESS TO PRACTISE COMMITTEE - PENALTY

Panel Members:

Jenn Allaert, RMT (Chair)

Edwin White, RMT

Erica Robertson, RMT

Melissa Michaud, Public Member

Background

1. In 2020, MC (the “Complainant”) filed a Complaint with the College of Massage Therapists of New Brunswick (the “College”) against JL (the “Respondent”) regarding an incident of an alleged sexual nature that occurred in the summer of 2016. The Complaint is known as Complaint #040.
2. On September 10, 2020, the Respondent filed a Reply and denied the allegations of the Complaint.
3. On November 15, 2021, 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. The Complaint was therefore referred to the Discipline Committee.
4. On January 8, 2021 a Panel of the Discipline Committee (the “Panel”) held a videoconference hearing to determine Complaint #040. The College was represented by counsel Jessica Bungay and the Respondent by counsel James J. Matheson. The Panel was assisted by independent legal counsel Dominic Caron.

5. On March 15, 2022 the Panel rendered a decision on the merits and determined that the Respondent is guilty of professional misconduct because of comments of a sexual nature made to the Complainant. More specifically, the Panel determined that this constitutes sexual abuse pursuant to s. 60 of the *Massage Therapy Act* (The “Act”).

The Penalty

6. On April 10, 2022 the Panel held a videoconference hearing to determine the Penalty of the Complainant for Complaint #040. The College was represented by counsel Jessica Bungay and the Respondent by counsel James J. Matheson. The Panel was assisted by independent legal counsel Dominic Caron.
7. The Panel heard submissions from Ms. Bungay and Mr. Matheson. No witnesses were called. The only additional evidence adduced was an investigation invoice submitted by the College.

A. Position of the College

8. Ms. Bungay on behalf of the College provided a number of analogous cases from massage therapy regulators, which included the recent New Brunswick case of *College of Massage Therapists v. Blair Eagles*, 2019 NBCMT 02.
9. Borrowing from these decisions, Ms. Bungay reminded the Panel of the principles of penalty for self-regulating professions such as protection of the public and the maintenance of the public confidence.
10. Ms. Bungay argued that in the present matter there are three aggravating factors:
 - a. The Respondent had previously been Chair of the Discipline Committee and, thus, was well aware of behaviour that constitutes a clear violation of professional standards;
 - b. Throughout this hearing, the Respondent has failed to recognize any wrongdoing and forced a full hearing; and
 - c. The Respondent is subject to another complaint of a similar nature that occurred around the same time.
11. Ms. Bungay opines that no mitigating factors exist in this matter.
12. Based on the facts of this case and the jurisprudence, Ms. Bungay on behalf of the College recommends the following sanction:

- a. Reprimand;
- b. Fine of \$2,500;
- c. Suspension of 2 months;
- d. Public notice of the Results of this matter which includes the Respondent's name;
- e. Costs of the investigation (\$8,067.25);
- f. Reimbursement of \$2,500 in costs of the disciplinary proceedings; and
- g. Condition that all costs and financial penalty must be paid in full prior to reinstatement of the Respondent's licence.

B. The Position of the Respondent

- 13. Mr. Matheson on behalf of the Respondent reminded the Panel that sentencing is difficult in that analogous cases are rarely directly on point. As such, case law is not always of a great assistance.
- 14. Mr. Matheson also reminded the Panel that proportionality must guide the Panel when determining a penalty. In the words of Mr. Matheson : "The punishment must fit the *crime*".
- 15. The severity of sexual abuse has a very wide spectrum. Mr. Matheson opines that the Panel has to keep this in mind when making a determination on the appropriate penalty.
- 16. As such, the Respondent takes the position that the severity of sexual abuse in this case ranks lower than the sexual abuse committed in the *Eagles* Matter where the massage therapist kissed a client.
- 17. With respect to mitigating factors, Mr. Matheson states the following:
 - a. The Respondent is a single father; and
 - b. The Respondent sat on the Discipline Committee, thereby providing community service to the College.
- 18. Mr. Matheson takes great issue with the College's position that the Panel should take into consideration the fact that another complaint has been filed against the Respondent.
- 19. On this, Mr. Matheson cautioned the Panel that this case has not yet been determined and that the Respondent is "presumed innocent" in that matter.

20. With respect to the College's position that the necessity of having a full hearing constitutes an aggravating factor, Mr. Matheson retorts that the Respondent was exercising his rights to have a hearing. This ought not be considered an aggravating factor.
21. Finally on the sanction, Mr. Matheson on behalf of the Respondent does not take issue with the proposed 2-month suspension. However, Mr. Matheson reminded the Panel that the Respondent has been suspended on an interim basis since November 2021 – a total of 4.5 months.
22. Therefore, Mr. Matheson argues that the Respondent has already served this 2-month suspension and should therefore be credited for the time served.
23. Mr. Matheson takes issue with the costs and the fine proposed by the College arguing that the Respondent has been deprived of his right to earn a living for 4.5 months and is therefore in a difficult financial situation because of this matter.
24. The other sanctions recommended by the College were not addressed by Mr. Matheson.

C. College's Reply

25. Ms. Bungay on behalf of the College replied that the current interim suspension is an interim measure used as protection of the public and does not constitute a sentence.
26. Ms. Bungay said that she found no analogous case where a Respondent was credited with time served for an interim suspension.

Decision

27. In the determination of an appropriate penalty, the Panel understands that it must take into consideration a number of factors including but not limited to the protection of the public, the reputation of the profession, the specific deterrence of the member and the general deterrence.
28. To achieve this the Panel must apply the principle of proportionality and must take into consideration aggravating and mitigating factors.

29. With respect to aggravating factors, the Panel disagrees with the College that the other complaint against the Respondent should be taken into consideration. Although evidentiary elements of that Complaint have been incorporated to the present matter (for the purpose of the present matter), the other Complaint remains undetermined. No findings have been made against the Respondent in that Complaint. Consequently, the Panel agrees with Mr. Matheson and will not take that factor into consideration.

30. The other aggravating and mitigating factors presented by each party were considered by the Panel.

31. The Panel notes that there is not much dispute between the Parties on the sanctions proposed except for costs and fines. The Panel has considered each party's position on the recommended sanctions and has decided the following:

A. Reprimand

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

B. Fine

33. The Panel considered the sanction recommended by the College and has determined that a fine of \$1,500.00 is more appropriate in the circumstances. This fine will have to be paid before the member is reinstated as an active member in good standing.

C. 2-Month Suspension

34. The Panel accepts this sanction. In light of the current interim suspension currently in force against the Respondent which has exceeded 2 months, the Panel recognizes that the Respondent has already served this sanction. However, to be clear, the Respondent remains suspended on an interim basis until the disposition of another Complaint.

D. Public Notice

35. 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 on the College's website and the notice shall include the Respondent's name. A hyperlink of this Notice is to be sent to the membership of the College.

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

E. Costs

37. The Panel notes that the College had recommended two sanctions with respect to costs:
- i. \$ 8,067.25 as costs of the investigation; and
 - ii. \$2,500 as partial reimbursement of disciplinary proceedings costs.
38. The Panel has determined that costs should not be divided and that global costs of \$6,500.00 are appropriate in the circumstances. These costs will have to be reimbursed before the member is reinstated as an active member in good standing.

E. Ethics Course

39. This sanction was not recommended by either party. Nevertheless, the Panel believes the protection of the public would be better served by ordering that the Respondent take an ethics course similar to the one Mr. Eagles was ordered to take in the *Eagles* matter.
40. The Respondent shall take an ethics and/or professionalism course offered by an accredited institution as approved in advance by the Registrar and shall provide evidence of successful completion to the Registrar within 12 months from the date of this decision. The Respondent is to bear all costs associated with this course.

Order

41. To summarize, the Discipline Committee orders that:
- I. Pursuant to Para. 40(2)(a) of the *Act*, the Respondent is reprimanded for his conduct and cautioned that if another complaint is filed against him, this decision may be taken into consideration;
 - II. Pursuant to Para. 40(2)(c) of the *Act*, the Respondent shall pay a fine of \$1,500.00 before returning to the active practice of massage therapy;
 - III. Pursuant to Para. 40(2)(e) of the *Act*, the Respondent has received a suspension of his registration and membership for a period of 2 months which has already been served;
 - 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 on the College's website 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 a portion of the costs of the College with respect to this Complaint, in the amount of \$6,500.00 before returning to the active practice of massage therapy;
- VI. Pursuant to Para. 40(2)(d) of the *Act*, the Respondent shall take an ethics and/or professionalism course offered by an accredited institution as approved in advance by the Registrar and shall provide evidence of successful completion to the Registrar within 12 months from the date of this Order;
- VII. Failure to submit the confirmation of complete the course referred to in (VI), pay the fine referred to in (II) or pay the costs referred to in (V) above, shall result in the suspension of the member's registration until such time as the conditions are met.

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

Dated this _____ day of _____, 2022

Jenn Allaert, RMT (Chair)

Edwin White, RMT

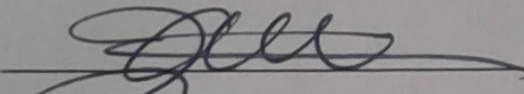
Erica Robertson, RMT

Melissa Michaud, Public Member

- V. Pursuant to Para. 40(2)(i) of the Act, the Respondent shall pay a portion of the costs of the College with respect to this Complaint, in the amount of \$6,500.00 before returning to the active practice of massage therapy;
- VI. Pursuant to Para. 40(2)(d) of the Act, the Respondent shall take an ethics and/or professionalism course offered by an accredited institution as approved in advance by the Registrar and shall provide evidence of successful completion to the Registrar within 12 months from the date of this Order;
- VII. Failure to submit the confirmation of complete the course referred to in (VI), pay the fine referred to in (II) or pay the costs referred to in (V) above, shall result in the suspension of the member's registration until such time as the conditions are met.

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

Dated this 30 day of April, 2022


Jenn Allaert, RMT (Chair)

Edwin White, RMT

Erica Robertson, RMT

Melissa Michaud, Public Member

- III. Pursuant to Para. 40(2)(e) of the *Act*, the Respondent has received a suspension of his registration and membership for a period of 2 months which has already been served;
- 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 on the College's website 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 a portion of the costs of the College with respect to this Complaint, in the amount of \$6,500.00 before returning to the active practice of massage therapy;
- VI. Pursuant to Para. 40(2)(d) of the *Act*, the Respondent shall take an ethics and/or professionalism course offered by an accredited institution as approved in advance by the Registrar and shall provide evidence of successful completion to the Registrar within 12 months from the date of this Order;
- VII. Failure to submit the confirmation of complete the course referred to in (VI), pay the fine referred to in (II) or pay the costs referred to in (V) above, shall result in the suspension of the member's registration until such time as the conditions are met.

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

Dated this 30 day of April, 2022

Jenn Allaert, RMT (Chair)

Ed White

Edwin White, RMT

Erica Robertson, RMT

- V. Pursuant to Para. 40(2)(i) of the Act, the Respondent shall pay a portion of the costs of the College with respect to this Complaint, in the amount of \$6,500.00 before returning to the active practice of massage therapy;
- VI. Pursuant to Para. 40(2)(d) of the Act, the Respondent shall take an ethics and/or professionalism course offered by an accredited institution as approved in advance by the Registrar and shall provide evidence of successful completion to the Registrar within 12 months from the date of this Order;
- VII. Failure to submit the confirmation of complete the course referred to in (VI), pay the fine referred to in (II) or pay the costs referred to in (V) above, shall result in the suspension of the member's registration until such time as the conditions are met.

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

Dated this 1 day of May, 2022

Jenn Allaert, RMT (Chair)

Edwin White, RMT



Erica Robertson, RMT

Melissa Michaud, Public Member

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 a portion of the costs of the College with respect to this Complaint, in the amount of \$6,500.00 before returning to the active practice of massage therapy;
- VI. Pursuant to Para. 40(2)(d) of the *Act*, the Respondent shall take an ethics and/or professionalism course offered by an accredited institution as approved in advance by the Registrar and shall provide evidence of successful completion to the Registrar within 12 months from the date of this Order;
- VII. Failure to submit the confirmation of complete the course referred to in (VI), pay the fine referred to in (II) or pay the costs referred to in (V) above, shall result in the suspension of the member's registration until such time as the conditions are met.

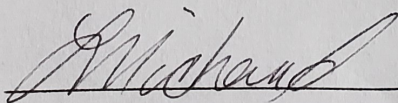
42. This is a unanimous decision and order by the Panel.

Dated this 30 day of April, 2022

Jenn Allaert, RMT (Chair)

Edwin White, RMT

Erica Robertson, RMT



Melissa Michaud, Public Member

Appendix "A"

PROVINCE OF NEW BRUNSWICK

IN THE MATTER OF THE *MASSAGE THERAPY ACT*

AND IN THE MATTER OF COMPLAINT #040 AGAINST JOSHUA LUTES

NOTICE OF SUSPENSION

PLEASE NOTE that on [*insert date*], 2022, a panel of the Discipline and Fitness to Practise Committee of the College of Massage Therapists of New Brunswick (the "College") ordered that Joshua Lutes, R.M.T.:

- I. Be reprimanded;
- II. pay a fine of \$1,500.00;
- III. is suspended for a period of 2 months (already served);
- IV. pay costs to the College in the amount of \$6,500.00; and
- V. is to take an ethics and/or professionalism course.

THIS PUBLIC NOTICE made this [*insert date*], 2022.

André Bouchard
Registrar

PROVINCE DU NOUVEAU-BRUNSWICK

DANS L’AFFAIRE DE LA LOI SUR LA MASSOTHÉRAPIE

ET DANS L’AFFAIRE DE LA PLAINTÉ #040 CONTRE JOSHUA LUTES

AVIS DE SUSPENSION

SOYEZ AVISÉ que le [date], 2022, un sous-comité du Comité de discipline et de l’aptitude à exercer du Collège des massothérapeutes du Nouveau-Brunswick (le « Collège ») a ordonné que Joshua Lutes :

- I. soit réprimandé;
- II. paie une amende de 1 500.00\$
- III. est suspendu pour une période de 2 mois (déjà purgée);
- IV. rembourse des dépens de 6 500.00\$ au Collège; et
- V. devra suivre un cours d’éthique et/ou professionnalisme.

AVIS PUBLIC émis le [date], 2022.

André Bouchard
Registraire