

**DISCIPLINE AND FITNESS TO PRACTISE COMMITTEE OF THE COLLEGE OF
MESSAGE THERAPISTS OF
NEW BRUNSWICK**

**Indexed as: College of Massage Therapists of New Brunswick v. Matthew McKay,
2019 NBCMT 01**

IN THE MATTER OF a Hearing
by the Discipline and Fitness to Practise Committee of
the College of Massage Therapists of New Brunswick
under Ss. 38(1) of the
Massage Therapy Act, SNB 2013, c. 49

BETWEEN:

THE COLLEGE OF MESSAGE THERAPISTS OF NEW BRUNSWICK

- and -

MATTHEW MCKAY, RMT

PANEL MEMBERS:

Joshua D. Lutes RMT
Jolyane Richard RMT
Jenn Allaert RMT
Edwin White RMT
Lorraine Downing

Chair, Professional Member
Professional Member
Professional Member
Professional Member
Public Member

Hearing Date: *February 9, 2019*

Decision Date: *February 9, 2019*

Release of Written Reasons: *April 4, 2019*

DECISION AND REASONS

A Panel of the Discipline and Fitness to Practise Committee of the College of Massage Therapists of New Brunswick (the "Committee") held a hearing on February 9, 2019.

Lawyer David J. Shore (Mr. Shore) represented the College of Massage Therapists of New Brunswick (the "College"). Mr. Shore called M.F., the client/complainant as a witness.

Lawyer George Kalinowski (Mr. Kalinowski) represented the Registrant, Matthew McKay (Mr. McKay). Mr. Kalinowski called Mr. McKay as a witness.

.Mr. Shore submitted a Book of Documents with 9 Tabs of documents, which, with Mr. Kalinowski's consent, was admitted into evidence and marked as Exhibit 1. Any reference to evidence will refer to a particular Tab of Exhibit 1.

Allegations of Professional Misconduct

The Notice of Discipline Hearing (Tab 1) dated December 11, 2018, alleged that:

1. Count #1

Matthew McKay, while a registered member of the College, during the period of October 31, 2017 to July 16, 2018, did provide massage therapy services to M. F. in a therapist-patient relationship and did on or about June 28, 2018 engage in sexual intercourse with M. F. during said therapist-patient relationship, and thereby Matthew McKay did commit an act or acts of sexual abuse of a patient as defined in subsection 60 (1) (a) of the CMTNB Act, SNB 2013, c. 49 (the "Act") ["CMTNB" being defined earlier in the Notice of Hearing] and further did commit an act of professional misconduct as defined by subsection 31 (h) of the CMTNB Act.

The Registrant's Position

Mr. McKay pleaded guilty to Count 1 when it was read to him and the hearing proceeded as a Penalty Hearing.

Evidence

As noted above, the evidence consisted of the Exhibit Book, Exhibit 1 which consisted of 9 Tabs and the oral evidence of M.F. and Mr. McKay. Both M.F. and Mr. McKay were subject to cross-examination with the opportunity for re-examination if necessary. Mr. Kalinowski also submitted character references on Mr. McKay's behalf.

Position of the Parties on Penalty

Mr. Shore and Mr. Kalinowski each made representations as to what should be an appropriate penalty order.

Mr. Shore argued that the appropriate penalty for sexual abuse as defined by the Act was revocation of membership as provided for under subsection 40 (2) (f) of the Act. He noted that Ontario legislation dealing with Registered Massage Therapists mandated revocation of membership in cases of sexual abuse, as defined in its Act, which definition is similar to our legislation. In the alternative, he submitted that a lengthy suspension under subsection 40 (2) (e) of the Act was appropriate.

Mr. Kalinowski argued that the appropriate penalty was a suspension of 6 to 9 months, and that a lengthy suspension in the area of 2 years was equivalent to the revocation of membership and was excessive. He pointed out that Mr. McKay had no previous discipline history with the College and there was no inappropriate conduct during therapy sessions. Mr. Kalinowski also submitted character references in support of Mr. McKay.

Decision on Penalty

The Committee's decision of the penalty is that Mr. McKay's membership be revoked and he not be permitted to reapply for reinstatement for 5 years. There will be no order imposing any other penalty.

Reasons for Penalty

In determining an appropriate penalty for Mr. McKay, it is the Panel's responsibility to give adequate and proper consideration to protection of the public. The Panel must also consider specific deterrence of the member, general deterrence of the profession, maintenance of public confidence in the integrity of the profession and in doing so, display the College's ability to self-regulate.

The Panel must also consider if there are any mitigating or aggravating factors in determining the appropriate penalty.

The Panel is aware that in Ontario revocation of membership is mandated by statute in sexual abuse cases. Although there is no similar statutory provision on the CMTNB Act and no obligation to follow the Ontario legislation, the Committee is of the view that as a matter of policy, revocation of membership should be the College's default penalty position in sexual abuse cases, absent clear, cogent and compelling mitigating factors.

The 2 mitigating factors present in this case are Mr. McKay's guilty plea, which has saved M.F. from a contested hearing on guilt and, that he has no previous discipline history. Given the nature and quality of the evidence, as set out in the various Tabs of Exhibit 1, that a contested penalty hearing requiring oral testimony was necessary in any event, and for reasons expressed in the paragraphs below, the Committee finds that the mitigating factor of the guilty plea loses some of its weight.

During Mr. Kalinowski's direct examination, Mr. McKay expressed remorse and regret: he offered he now recognizes that he made an error in judgment and he acknowledged his actions in this therapist-patient relationship were inappropriate.

Shortly after expressing this remorse and regret, and while still being directly examined, Mr. McKay used an obscene word to describe the sexual act he engaged in with MF. This made the Committee question whether the expression of regret and remorse was genuine.

In Mr. McKay's direct evidence, he admitted that he had "crossed boundaries" in his professional relationship with MF. After the direct examination, one Committee member asked Mr. McKay when it was that he realized he had "crossed the boundary line".

In response, Mr. McKay said it was on June 28, 2018 when he was in bed with M.F. just before they engaged in sexual intercourse. The Committee's view is the boundary line was crossed in April or May 2018 when Mr. McKay offered to and did attend M.F.'s home, delivered peppermint oil and performed massage therapy on her.

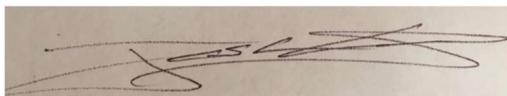
The Committee views this response as showing that Mr. McKay does not understand or appreciate the true nature of the therapist-patient relationship.

Order

THE COMMITTEE FINDS AND ORDERS THAT:

- 1) Matthew McKay, while a registered member of the College, during the period of October 31, 2017 to July 16, 2018 did provide massage therapy services to M.F. in a therapist-patient relationship and did on or about June 28, 2018, engage in sexual intercourse with M.F. during said therapist-patient relationship, and thereby Matthew McKay did commit an act or acts of sexual abuse of a patient as defined in subsection 60(1)(a) of the Act, and further did commit an act of professional misconduct as defined by subsection 31(h) of the Act;
- 2) Matthew McKay's membership is revoked under ss. 40(2)(f) of the Act and he is not entitled to apply for reinstatement for 5 years from the date of this Order;
- 3) The Registrar will give public notice of the Committee's Order revoking Mr. McKay's membership under ss. 50(1) of the Act;
- 4) The Board of Directors will instruct the Registrar to strike Mr. McKay's name from the registry under ss. 17(5) of the Act.

THIS DECISION IS SIGNED BY THE CHAIRMAN JOSHUA D. LUTES, ON BEHALF OF THE DISCIPLINE AND FITNESS TO PRACTISE COMMITTEE THIS 4th DAY OF APRIL, 2019.



JOSHUA D. LUTES, RMT