

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF TRADITIONAL CHINESE MEDICINE PRACTITIONERS AND
ACUPUNCTURISTS OF ONTARIO**

IN THE MATTER OF

*the Regulated Health Professions Act, 1991, S.O. 1991, c.
18, and the Traditional Chinese Medicine Act, S.O. 2006,
c.27*

Decision Date: February 11, 2019

Indexed as: Ontario (College of Traditional Chinese Medicine
Practitioners & Acupuncturists of Ontario) v Alan Canon,
2019 ONCTCMPAO 4

Panel:	Martial Moreau	Chairperson, Public Member
	Barrie Haywood	Public Member
	Yuqi Yang	Professional Member

BETWEEN:

THE COLLEGE OF TRADITIONAL CHINESE MEDICINE PRACTITIONERS AND ACUPUNCTURISTS OF ONTARIO	((Kelly Hayden, for the College ((((
-and-	(((
ALAN CANON Reg. No. 3112	(Member not present or represented (((Fredrick Schumann (Independent Legal Counsel ((Date of Hearing: January 11, 2019

DECISION AND REASONS ON PENALTY

The penalty phase of this matter came on for hearing before a panel of the Discipline Committee (the “Panel”) on January 11, 2019 at the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (the “College”).

Alan Canon (the “Member”) was not present.

On November 27, 2018, the Panel released its Decision and Reasons finding that the Member had committed professional misconduct as set out in Allegations 1-2 and 4-9 of the Notice of Hearing which was dated July 7, 2017. Allegation 3 had been withdrawn.

Mr. Canon had not been present at the hearing underlying that decision either, although he had been properly served with the Notice of Hearing.

On January 11, 2019, the Panel received oral and written submissions on penalty from counsel for the College.

Position of the College on Penalty

The College seeks the following penalty:

1. the revocation of the Member’s certificate of registration;
2. a public and recorded reprimand;
3. an order that the Member pay costs in respect of the hearing in the amount of \$20,000.00; and
4. an order that the Member post \$16,060.00 for security for funding for therapy and counselling of the victim.

In support of this position, College counsel relies on the Panel’s findings and conclusions that the Member committed sexual abuse of a patient as defined in the *Health Professions Procedural Code* (the “Code”), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, C. 18 (the “RHPA”). The established misconduct included both inappropriate touching and inappropriate comments of a sexual nature.

The College asserts that revocation is mandatory in this case because of the amendments to s. 51(5) of the *Code* made by the *Protecting Patients Act, 2017*, S. O. 2017, c.11 – Bill 87. These amendments came into effect on May 30, 2017, after the misconduct of the Member in this case (the last appointment of the victim at the Member’s clinic was on or around May 21, 2016). They made revocation mandatory in, among other things, cases involving “touching of a sexual nature of the patient’s genitals.” (the “mandatory revocation amendment”).¹

Alternatively, College counsel argues that the Panel should make a revocation order even it is not mandatory. She argues that the misconduct was very serious and that the Member has a history of misconduct. She points to other cases, both from this College and those of other regulated health professions, in which findings of sexual abuse have triggered revocation.

¹ The College’s position implies that it is not asserting that the Member’s conduct amounted to “masturbation of the patient by the member” or “encouragement of the patient by the member to masturbate in the presence of the member.” Those kinds of sexual abuse would have led to mandatory revocation in the Code as it stood at the time of the misconduct in this case.

The College seeks a costs order in the amount of \$20,000.00 representing approximately 34% of the total costs incurred to investigate and successfully prosecute this matter.

Lastly, the College requests that, pursuant to section 51(2)(5.2) of the Code, the Member should be ordered to post \$16,060.00 as security for funding for therapy and counseling for the victim.

Decision

Having considered the findings of professional misconduct, including sexual abuse of a patient, the relevant evidence and submissions of the parties, the Panel orders as follows:

- (a) that the Registrar be directed to revoke the Member's Certificate of Registration;
- (b) that the Member appear before the Panel to receive a public and recorded reprimand;
- (c) that the Member post \$16,060.00 as security for funding for therapy and counselling for the victim, in a form acceptable to the College, to be administered in accordance with the relevant provisions of the RHPA, the Code and related Regulations; and
- (d) that the Member pay \$20,000.00 to the College in respect of hearing costs.

Reasons for Decision

I. Propriety of Revocation and Reprimand

The first issue here is whether revocation is mandatory. This comes down to whether the mandatory revocation amendments operate retrospectively, that is, whether they apply to misconduct that occurred before they came into force.

As mentioned above, the Member did not participate in this hearing. The Panel did not hear argument on both sides of this issue.

College counsel presented the Panel with three cases, one from this College and two from the College of Physicians and Surgeons of Ontario, in which the retrospectivity issue was considered.²

In *CTCMPAO v Micu*, the panel held that the mandatory revocation amendments operate retrospectively.

In *CPSO v Kunynetz*, a majority of the five-member panel held that the mandatory revocation amendments operate retrospectively. One member dissented, holding that they do not.

In *CPSO v Beirsto*, the panel held that the mandatory revocation amendments operate retrospectively, however it did not give detailed reasons on this issue.

As far as we know, none of these cases has been judicially reviewed.

Although these cases, including *Micu*, are not binding on us, we regard them as persuasive and do not believe that we should depart from them without good reason, especially since we did not hear argument on both sides of this issue. On that basis, revocation is mandatory in this case.

² *CTCMPAO v Micu*, 2018 ONCTCMAPO 17; *CPSO v Kunynetz*, 2018 ONCPSD 5; *CPSO v Beirsto*, 2017 ONCPSD 43.

In any event, we will also consider whether revocation would be the appropriate penalty even if it were not mandatory.

Matters involving sexual abuse of patients represent some of the most serious forms of professional misconduct. It is a primary responsibility of the College to establish and maintain professional standards. The public must be confident in the profession and perceive it as having integrity. Sexual abuse tarnishes the public trust in the entire profession. The penalty in this case should discourage similar conduct by others in the profession but also be commensurate with the severity of the findings that have been made.

Not only did Mr. Canon commit multiple acts of sexual abuse, but he also performed unauthorized controlled acts (ozone injections), failed to abide by an order made in a prior disciplinary hearing, and failed to cooperate with the College investigation in this matter.

There is no evidence before the Panel suggesting that there is any prospect of rehabilitation. Indeed, the Member has resigned from the College already.

In totality, the Panel assesses the severity of the penalty it is ordering as being proportionate to the severity of the misconduct.

II. Security for Funding for Counseling

While no evidence was presented by the College regarding the victim's utilization of or need for therapy or counselling as a result of her experiences with the Member, such need may reasonably arise or may have already arisen.

The *Code* mandates that the College shall maintain a program to provide funding for therapy and counseling for persons who have suffered sexual abuse by a member. The *Code* empowers the Panel to order that the Member provide the College with security for such funding where appropriate. The period of time within which funding is to remain available and the maximum amounts that can be sought for reimbursement are set out in the Code and related Regulations. The maximum amount available is \$16,060.00 and this amount, in the form of security, is hereby ordered accordingly.

The Panel understands that security for funding is provided by the Member in the form of an irrevocable letter of credit or similar instrument. It follows that if the victim elects not to seek funding for therapy, the Member will incur no financial loss on the credit instrument.

The victim in this case must be able to access funding, and this is not a cost properly borne by the profession as a whole. An order for security for funding is appropriate in this case.

III. Costs

The College cited its total costs at \$58,154.07 and sought \$20,000 in costs or approximately 34%. The validity of the College's expenses is not in dispute.

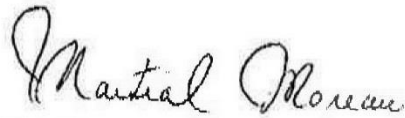
The Panel is mindful of the principle that the purpose of a costs order in favour of the College is not meant to promote public protection, be punitive, or to deter the Member or other Members from defending themselves against allegations of professional misconduct. Rather, it is meant to compensate the College for costs incurred in an appropriate case. It is recognized that, in some cases, the broader profession, which funds the discipline process through its fees to the College, should not bear the complete burden of that process.

The Member was found to have committed misconduct in respect of each allegation in which a finding was sought by the College.

In conclusion, the Panel agrees that this is an appropriate case for costs. The Panel accepts that the College and its membership should not bear the full cost of this matter. While recognizing that there are differences as between regulated professions, and that no two cases are the same, the Panel finds that an award in the amount of \$20,000.00 would be appropriate.

I, Martial Moreau, sign this Decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel as listed below:

Date: February 11, 2019

A handwritten signature in cursive script that reads "Martial Moreau".

Martial Moreau, Chairperson

Panel Members:
Martial Moreau
Yuqi Yang
Barrie Haywood