

**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****

PANEL: Henry Maeots Chairperson, Public Member
Yuqi Yang Professional Member

BETWEEN:

**THE COLLEGE OF TRADITIONAL
CHINESE MEDICINE PRACTITIONERS
AND ACUPUNCTURISTS OF ONTARIO** (Jaan Lilles and Laura Robinson
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-and- (Jacob Stilman
(for Phillip Tran
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PHILLIP TRAN (Aaron Dantowitz,
(Independent Legal Counsel

Date of Hearing: August 22, 2017

DECISION AND REASONS FOR DECISION
ON PENALTY AND COSTS

In a previous decision dated May 13, 2017, the panel found that Mr. Tran had committed acts of professional misconduct, including by sexually abusing a patient. The sexual abuse involved masturbation. In these circumstances, pursuant to subsection 51(5) of 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 Panel must impose a penalty that includes a reprimand, and revocation of the Member’s certificate of registration. The panel also has the discretion to make additional orders pursuant to subsection 51(2), and to make an order regarding the College’s costs, pursuant to s. 53.1 of the Code. A second hearing to address these issues was held on August 22, 2017.

One of the original panel members, Ms. Maureen Hopman, public member, was unable to attend the hearing on the scheduled date, having had to be in Montreal as a result of a family medical issue. The remaining members of the panel received advice from independent legal counsel that they could complete the hearing and render a decision without the participation of Ms. Hopman, notwithstanding the quorum provision of the Code (s. 38(5)), in light of s. 4.4(1) of the *Statutory Powers Procedure Act*, provided the panel was satisfied that Ms. Hopman was “unable” to complete the hearing. Independent legal counsel advised that the term “unable” could be given a broad interpretation, and the panel could take into account that it was uncertain when Ms. Hopman would again be available.

In any event, both parties indicated that they were content to proceed with the penalty and costs phase with only two panel members. In the result, the remaining panel members decided to proceed to complete the hearing without the participation of Ms. Hopman.

After hearing the parties’ submissions on penalty and costs, and after preliminary deliberation, the panel indicated that it would make an order that the member receive a reprimand and direct the registrar to revoke the Member’s certificate of registration, which were mandatory in the circumstances, but would reserve the remainder of their decision. The following are the panel’s decision and reasons for its decision.

PENALTY

Evidence and submissions of the parties on penalty

The College submitted that the following penalty is required by the Code in this case:

- (a) The revocation of Mr. Tran’s certificate of registration; and
- (b) A public and recorded reprimand.

In addition, the College sought an Order that Mr. Tran reimburse the College for funding for therapy and counselling for the victim and that Mr. Tran post \$16,060.00 for security for this funding.

Member’s Counsel agreed that the revocation of Mr. Tran’s certificate of registration and the issuance of a public and recorded reprimand was justified as part of Mr. Tran’s penalty but he objected to the issuance of an order requiring Mr. Tran to reimburse the College for funding for therapy and counselling and requiring Mr. Tran to post security.

College’s Argument in Support of the College’s Penalty Submission

College Counsel pointed out that Mr. Tran engaged in sexual abuse of a patient, thereby committing an act of professional misconduct under section 51(1)(b.1) of the Code and section 1(2) of *Ontario Regulation 318/12* (the “Professional Misconduct Regulation”). Mr. Tran also

improperly used the “Doctor” title, contrary to section 33(1) of the RHPA and section 32 of the Professional Misconduct Regulation.

Further, Mr. Tran contravened a standard of practice of the profession by failing to keep appropriate records, contrary to section 1(25) of the Professional Misconduct Regulation.

The Panel was advised to consider the following in assessing an appropriate penalty:

- protection of the public
- the principles of specific and general deterrence
- the rehabilitation of the member
- the public interest.

The Panel’s primary goal, in imposing a penalty, he submitted, should be to protect the public, maintain professional standards and preserve public confidence in the integrity of the profession. It should have regard to the nature and seriousness of the conduct in question, the Member’s circumstances, and the impact on the client. He cited *Moore v. CPSO* [2003] OJ No. 5200 (Div. Ct.) with regards to this last point.

The Panel was reminded that the Code requires that a member’s certificate of registration be revoked where he or she is found to have engaged in certain forms of sexual abuse of their patient, including masturbation of the patient by the member and that a public and recorded reprimand be administered.

College Counsel stated that Section 51(2)(5.1) of the Code permits a Panel to make an order requiring the member to reimburse the College for funding provided to a patient under the program required under section 85.7 where the act of professional misconduct was the sexual abuse of that patient. Section 85.7 of the Code mandates that each College shall establish a program to provide funding for therapy and counselling for persons who, while patients, were sexually abused by members. He argued that it is in the best interests of the public that funds be available for therapy or counselling for patients sexually abused by their health practitioner but that such costs should not be borne by the membership at large but, rather, should be borne by the practitioner who committed the act of sexual abuse. Further, section 51(2)(5.2) permits a Panel to make an order requiring the Member to post security, acceptable to the College, to guarantee any amounts the Member may be required to reimburse in this regard.

College Counsel submitted documents in support of the College’s request for an order to Mr. Tran to post \$16,060.00 for security for funding to be provided for past and/or future therapy and counselling for the victim, necessitated by Mr. Tran’s misconduct. In her Victim Impact Statement the victim stated that she has experienced significant emotional and physical harm as a result of Mr. Tran’s conduct, including:

- (a) experiencing flashbacks, hyper vigilance and a decreased sense of safety;
- (b) exacerbation of existing health conditions including Rheumatoid Arthritis and fibromyalgia; and
- (c) ongoing stress, guilt and anger.

In a letter from the sexual assault counsellor with whom the complainant has worked for over 3 years and is continuing to work, it is stated that the victim continues to experience challenges feeling safe in environments, hyper-vigilance, and triggers approximately every few days which

results in her becoming startled and anxious. In her Victim Impact Statement, the complainant stated that the sexual assault counsellor's letter was accurate and true.

College Counsel argued that although the victim has undergone significant counselling since Mr. Tran's assault, she may continue to require access to mental health resources. He cited Ontario Regulation 59/94: Funding for Therapy or Counselling for Patients Sexually Abused by Members, under *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, Schedule "B", which describes the maximum amount of funding available under statutory regime as equal to 200 half-hour sessions billed at \$80.30 per session. Such maximum amounts to the \$16,060.00 amount requested by the College.

Member's Argument in Support of His Penalty Submission

Mr. Tran's Counsel agreed that the revocation of Mr. Tran's Certificate of Registration and the issuance of a public and recorded reprimand were appropriate penalties. However, he disputed the need for Mr. Tran to reimburse the College for, and post security for, funding for therapy and counselling. As the Panel had not allowed the introduction into evidence of the complainant's health issues prior to the abuse by Mr. Tran at the disciplinary hearing, he claimed that at least some of the complainant's health issues which have been requiring therapy and counselling may have pre-existed the hearing and may not be due to Mr. Tran's actions. He claimed that it was unfair to his client to now introduce such evidence in support of a funding order.

Decision on penalty

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 Mr. Tran's Certificate of Registration;
- (b) that the Member appear before the Panel to receive a public and recorded reprimand; and
- (c) an Order that Mr. Tran reimburse the College for funding for therapy and counselling for the victim, and that Mr. Tran post \$16,060.00 for security for this purpose, in a form acceptable to the College.

Reasons for Decision on penalty

The Panel understands that the revocation of Mr. Tran's certificate of registration and the issuance of a public and recorded reprimand is mandated by legislation. Further, both parties agree with such understanding of legislation.

The evidence of lengthy therapy and counselling, which is ongoing, suggests that the need for such may continue for some time into the future. The Panel, as Member's Counsel argued, also has not seen evidence to suggest that at least some of the victim's health problems preceded Mr. Tran's actions but accepts that due to the seriousness of Mr. Tran's misconduct it is probable that such actions are at least a major cause of the victim's health issues at this time. Further, the College and

its members should not be bearing the costs of Mr. Tran's misconduct if assistance for therapy and counselling is required and claimed. A security order ensures that the College and its members do not unduly bear such costs.

COSTS

Evidence and submissions of the parties on costs

The College sought an Order of Costs in the amount of \$105,000.00. College Counsel submitted that this amount falls short of the total costs of the College's costs of investigation, prosecution and conduct of the hearing. The College submitted an outline of legal costs and expenses, and costs of conducting the hearing, which totalled \$160,778.28. The amount requested therefore constitutes 65% of the total such cost incurred by the College. College Counsel submitted that Section 53.1 of the Code permits a Panel to make an order requiring the member to pay all or part of the College's legal costs and expenses, as well as the College's costs and expenses incurred in investigating the matter and in conducting the hearing. He stated that in determining an appropriate cost award, the Panel must consider the nature of the misconduct and the relative success of the parties in the proceedings. The amount sought, he submitted, was reasonable as the hearing proceeded over five days and required significant preparation by counsel in light of the range of allegations. Further, he submitted, the member contested each of the allegations in the Notice of Hearing, all of which the Panel ultimately concluded had been established by the College on the basis of cogent and compelling evidence.

The Panel was referred to the case of *Clokier v. Royal College of Dental Surgeons of Ontario*, 2017 ONSC 2773 (Div. Ct.), where the member was found to have committed sexual abuse of a patient and the Panel had ordered that \$318,297.87 be paid to the College in respect of costs, which represented two-thirds of the amount incurred by the College for legal costs and expenses and costs and expenses in conducting the hearing. The Divisional Court upheld this award, noting that the costs were compensatory only and that the quantum sought by the College was fair and reasonable. College Counsel concluded that the costs sought in this case are reasonable and intended to compensate it for the time spent investigating and prosecuting this matter. Mr. Tran should rightly bear this cost and not the membership of the College at large.

Mr. Tran objected to the amount in the Cost Order sought by the College. His Counsel questioned the need for the attendance of two lawyers to represent the College at the hearing. He also questioned the expense of items such as photocopies which had apparently cost \$.25 per page.

Mr. Tran's Counsel also advised the Panel not to heavily weight the fact that Mr. Tran had been found guilty of other acts of professional misconduct, such as failing to keep proper patient records to the standards of the College, as these were relatively straightforward and less time-consuming matters to litigate.

Mr. Tran's Counsel pointed out that Mr. Tran had not been able to earn income from his former profession but no evidence was introduced as to other income or financial resources which he claimed were limited.

Although he opposed the Cost Order sought by the College, Mr. Tran's Counsel did not put forward what he would consider a reasonable amount in the circumstances for the Panel's consideration.

Decision on costs

The Panel orders that Mr. Tran pay \$105,000.00 to the College in respect of the hearing costs.

Reasons for Decision on costs

The Panel finds that this is an appropriate case for the awarding of a cost order, due to the seriousness of the offence and the findings of guilt on all allegations. The Panel accepts that in these circumstances the College and its members at large should not bear the full cost of the matter. The Panel was not presented with any evidence that would undermine the accuracy of the costs outlined by the College. They must therefore be taken at face value. Further, the Panel is in no position to assess the needs of the College for the number of Counsels to prepare and present their case, nor is it in a position to question the amounts charged for services such as photocopying. The amount of this Cost Order is in line with other successful orders by other health colleges for similar offences.

I, Henry Maeots, sign this Decision as Chairperson of the panel and on behalf of the panel members listed below.

Date: September 6, 2017

Signed: 

Henry Maeots, Chair
Yuqi Yang