

**IN THE MATTER OF A HEARING BEFORE THE HEARING TRIBUNAL
OF THE COLLEGE OF PHYSIOTHERAPISTS OF ALBERTA
INTO THE CONDUCT OF HARKAWALJIT SINGH RANDHAWA
PURSUANT TO THE *HEALTH PROFESSIONS ACT*, RSA 2000, c. H-7**

DECISION OF THE HEARING TRIBUNAL

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I. Introduction

1. A hearing of a matter by the Hearing Tribunal of the College of Physiotherapists of Alberta (the “**College**”) was conducted at the Chateau Louis Hotel, 11727 Kingsway NW, Edmonton, Alberta, on September 12, 13 and 14, 2023 with the following individuals present.

Hearing Tribunal:

Simone Hunter, PT, Chair;
Joey Mo, PT, member;
Emeka Ezike-Dennis, public member; and
Kwaku Adu, public member

Also present were:

Moyra McAllister, Complaints Director
Jason Kully, Legal Counsel for the Complaints Director
Vita Wensel, Legal Counsel for the Complaints Director
Harkawaljit Singh Randhawa, Investigated Member (the “**Investigated Member**”)
Katie Stys, Legal Counsel for the Investigated Member
Anika Winn, Legal Counsel for the Investigated Member
Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal

2. At the conclusion of the witness testimony, the Hearing Tribunal requested written submissions from the parties regarding the ability of the Hearing Tribunal to request an expert report under section 79(2) of the HPA. The parties provided written submissions and the Hearing Tribunal issued an interim decision dated October 24, 2023, addressing this issue.
3. The parties agreed to provide closing submissions in writing by December 8, 2023. The Hearing Tribunal met on December 21, 2023 for deliberations.

II. Preliminary Matters

4. The parties each confirmed that there was no objection to the composition of the Hearing Tribunal or its jurisdiction to hear the matter.
5. The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 (“**HPA**”). No application was made to close the hearing.

III. Allegations

6. The Allegation in the Notice of Hearing (the “**Allegation**”) states:

1. On or about April 2, 2022, while providing physiotherapy treatment to AK, you did one or more of the following to patient AK:

- (a) Touched her left breast without her consent or a therapeutic purpose;
- (b) Massaged around and on her right breast without her consent or a therapeutic purpose;
- (c) Told her she was beautiful, or words to that effect; and
- (d) Attempted to kiss her.

IT IS FURTHER ALLEGED THAT your conduct constitutes “unprofessional conduct” as defined in s. 1(1)(pp)(i), (ii), and (xii) of the *Health Professions Act*, R.S.A. 2000, c. H-7 (the “HPA”), in particular:

1. Your conduct constitutes “sexual abuse” as defined in s. 1(1)(nn.1) of the HPA and contravenes the College’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct.

2. Further or in the alternative, your conduct constitutes “sexual misconduct” as defined in s. 1(1)(nn.2) of the HPA and contravenes the College’s Standard of Practice for Physiotherapists in Alberta: Sexual Abuse and Sexual Misconduct.

3. Further or in the alternative, your conduct breaches one or more of the following:

- (a) Code of Ethical Conduct for Alberta Physiotherapists: Responsibilities to the Client (A1, A4, A5, A12, and A18); Responsibilities to the Public (B1); and Responsibilities to Self and the Profession (C1); and
- (b) Standards of Practice for Physiotherapists in Alberta: Client-Centered Care; Consent; and Professional Boundaries.

IV. Exhibits

7. The following were entered as exhibits during the hearing:

1. Agreed Exhibit Book containing tabs 1-17:

- 1. Signed Notice of Hearing dated March 9, 2022
- 2. Complaint from AK dated April 5, 2022
- 3. Response from the Investigated Member dated June 9, 2022
- 4. Resume of the Investigated Member
- 5. Complete Silverberry Physiotherapy Clinic Treatment Chart for AK

6. Screenshot of text messages between AK and the Investigated Member on April 2, 2022
7. Silverberry Physiotherapy Clinic activity log for AK on April 2, 2022
8. Silverberry Physiotherapy Clinic schedule for April 2, 2022
9. Silverberry Physiotherapy Clinic duties of front desk staff, employee name: [the receptionist]
10. Silverberry Physiotherapy Clinic timesheet for the receptionist
11. Video of Silverberry Physiotherapy Clinic reception area on April 2, 2022, file name: 2022-04-02 135008 – 2022-04-02 135105
12. Video of Silverberry Physiotherapy Clinic reception area on April 2, 2022, file name: 2022-04-02 143916 – 2022-04-02 1143952
13. Code of Ethical Conduct for Alberta Physiotherapists
14. Standards of Practice: Sexual Abuse and Sexual Misconduct, March 2019
15. Standards of Practice: Client-Centered Care, January 2017
16. Standards of Practice: Consent, January 2017
17. Standards of Practice: Professional Boundaries, January 2017
2. Agreed Statement of Facts
3. Document dated November 28, 2022 to Karen Anthony from the Investigated Member answering questions from email dated November 17, 2022
4. Photograph of reception desk
5. Photograph from reception desk looking into treatment area
6. Photograph from back of clinic looking to reception area
7. Photograph of treatment beds
8. Screenshot of text message sent October 5, 2021 at 6:04 pm
9. Time sheet relating to Physiotherapy Assistant
10. Screenshot of profile page from Silverberry Physiotherapy relating to AK
11. Curriculum Vitae of Jeffrey Begg current as of April 2023
12. Medical legal opinion letter dated July 20, 2023 written by Mr. Begg

V. Evidence

Agreed Facts

8. The parties entered into an Agreed Statement of Facts (Exhibit 2), which sets out the following agreed facts. The Investigated Member practiced as a physiotherapist in India from 2002 to 2013. He became a regulated member of the College on the Provisional

Registry in 2014 and on the General Registry in 2015. He opened Silverberry Physiotherapy Clinic (the “Clinic”) in October 2019. He is a director and part-time physiotherapist at the Clinic. He also works as a full-time physiotherapist for Alberta Health Services.

9. AK was in a motor vehicle accident on October 4, 2021. She was referred to the Investigated Member for physiotherapy treatment by a family friend. AK first attended the Clinic on October 7, 2021 and the Investigated Member provided physiotherapy treatment to her. Between October 7, 2021 and April 2, 2022, AK attended the Clinic for a total of fifty physiotherapy and massage therapy sessions. Forty-two of these sessions were with the Investigated Member.
10. On April 2, 2022, AK attended for a physiotherapy session with the Investigated Member at the Clinic. She arrived at the Clinic at 1:50 p.m. and was greeted by the receptionist working at the front desk. The receptionist’s shift started at 9:00 a.m. and ended at 3:00 p.m. AK left the Clinic at 2:39 p.m. The receptionist was not sitting at the front desk when AK left. AK made a complaint to the College about the Investigated Member on April 5, 2022.

Witness Testimony

11. The Complaints Director called as witnesses:

The Patient, AK
KM

12. The Investigated Member called as witnesses:

Harkawaljit Singh Randhawa
Jeffrey Begg

13. The following is a summary of the testimony given by each witness.

Evidence of AK

Examination in Chief

14. AK works as a child development supervisor. She has lived in Edmonton since December 2019. She lives with her brother and his wife, KM, their children and her mother and father.
15. AK received physiotherapy from the Investigated Member. She was involved in a motor vehicle accident in October 2021. At the time, she felt a little bit of pain in her chest and went to a walk-in clinic to see a doctor. He gave her medication and a note to see a physiotherapist.

16. KM's sister recommended the Investigated Member to AK. AK had never met the Investigated Member prior to receiving physiotherapy from him. AK first went to see him on October 7, 2021. She had "very bad pain" in her neck and her back. She could not move her neck properly. AK described the Clinic and the type of treatment that would be provided by the Investigated Member. AK stated that she and the Investigated Member would speak a mixture of Punjabi and English.
17. AK's last visit with the Investigated Member was April 2, 2022. AK described the April 2, 2022, appointment. Her appointment was at 12:30 p.m. It was a Saturday, and she was running late. She had initially called and spoke to the receptionist to indicate she could not come. The receptionist called her back and they spoke again and then AK also spoke to the Investigated Member on the telephone. This was the first time she spoke to the Investigated Member on the telephone. AK confirmed that her brother could drive her to the Clinic. She texted, in a mixture of English and Punjabi, at the number that had called her that she would be there in 30 minutes. She received a reply to her text indicating "no problem". She then left the house with her brother and went to the Clinic.
18. AK was wearing a sweater, a jean legging, a jacket and boots. Under her sweater, she was wearing a camisole and a bra. She was wearing a disposable mask. AK took off her sweater, her camisole and her bra and put on a blue, oversized gown. The gown had ties, including at the waist. The receptionist placed the TENS machine and a heating pad on her. Once this was done, the receptionist came in to remove these and clean the gel. AK did stretching exercises and then the Investigated Member came in. She was sitting on the bed. He opened the curtain to come in and then closed the curtain. AK and the Investigated Member were each wearing a mask.
19. AK told the Investigated Member that her neck and lower back were still hurting her but that her rib pain was better. The pain was in her upper neck and shoulder blades and in her lower back, sometimes on the right side and sometimes on the left side. On April 2, 2022, she told the Investigated Member that her main concern was her neck and lower back pain.
20. AK described the treatment provided to her by the Investigated Member. She was lying on her back on the treatment table. AK stated that while she did not remember the sequence of the treatments, the Investigated Member was talking to her, which was unusual. He was asking her how she came to Canada, what she was doing here and they discussed that she had referred a co-worker to him. AK stated that the Investigated Member also asked her how to open a day care and whether she would be interested in partnering with him. The conversation was different from other appointments.
21. AK stated it was hard to remember the sequence of events and that she did not want to remember all of it. The Investigated Member told her he wanted to compare her ribs and she said that she did not have problems with the left side of her ribs. He said he would compare them. He started comparing both sides and his left hand was moving towards her left breast. She was not okay with that and moved his hand down. She was still lying

on her back at this time and the Investigated Member was standing on her right side near her elbow. It was not the first time that he was comparing her ribs. He had done this once before, in the beginning.

22. AK described in more detail that the Investigated Member had his hands on her ribs and then moved his fingers towards the center part of her breast. He touched her breast with two fingers, his index and middle finger, on top of her gown. He was moving his fingers in what AK described as “a movement, a little movement.” She moved his hand down.
23. The Investigated Member had not touched her like that before. He did not have any discussion with her that his hands would get close to her breasts. AK stated that she had never been touched like that and does not even touch herself like that. The Investigated Member had no change in his movement or any reaction when she moved his hand. He continued talking normally.
24. The Investigated Member then said he would rub gel on her ribs and she indicated she could do that at home. He asked her if she wanted to get better. She did not say anything and he left the treatment area and went to get some gel. When he came back, he started rubbing the gel. He did not tell her what kind of gel it was. She was still lying on her back and the Investigated Member was standing on her right side. He used his left hand to pick up the gown and he put his right hand inside the gown and started rubbing the gel.
25. AK described that when he started at her ribs, his hand was going in a circular motion and getting smaller. He touched her right breast. AK stated that she was not okay with how he touched her and that she was not having any problems in that area.
26. The Investigated Member asked her if she had stiffness before the accident and she said no. He then asked her to remove her mask. She removed her mask. He did not ask her to open her mouth. Usually when he asked her to remove her mask, he would ask her to stretch her mouth open and she would tell him if she felt any pain in the area. She was becoming conscious about what was happening and so she put her mask back on. Then the Investigated Member removed his mask and he said to her that she didn’t need to have her mask on. He used his hand to remove her mask from the right side. The mask was hanging on her left side, from her ear. He said “you are beautiful” in English. He was leaning and coming towards her. She said “please stop”. She used both her hands to stop him. She described being very scared in that moment. AK stated that based on him leaning towards her, coming towards her, and his statement that “you are beautiful”, she believed he was going to kiss her.
27. AK then clarified that when the Investigated Member touched her left breast that he touched her nipple. She stated it was the center part, even though she had not used the word nipple previously. AK stated that the Investigated Member was not wearing gloves at the time.

28. AK did not understand what kind of treatment was required when the Investigated Member was touching her. AK stated that she heard him clearly when he said that she was beautiful. AK testified that she was not okay with that comment and was very scared of him.
29. After she told the Investigated Member to stop and put her hands up to stop him, she got up from the bed towards the other side. The Investigated Member said "sorry" repeatedly. He used her name when saying sorry and the term "yaar" which is a term used between friends, boyfriend and girlfriend or that a husband and wife might say to each other. It would not be used by a doctor to a patient or in a professional context. She told him to go. He left the treatment area and she put on her sweater quickly. He came back and offered to clean the gel and she said "no, thank you." She did not put her camisole and bra back on, she just grabbed them and took them with her. She then left the Clinic. She described being disturbed and shocked.
30. AK stated that she did not do any exercises before leaving. There was no discussion about future treatments or at-home exercises. She did not book another appointment and did not see anyone else around as she was leaving. The receptionist was not at her desk.
31. AK testified that she generally puts on her shoes or boots properly prior to leaving, but she just grabbed them because she did not want to stay there. She was more scared after he came back into the treatment area and offered to clean the gel. She was holding her camisole and bra inside her jacket, in her hand.
32. AK put on her boots downstairs at the entrance of the building. She called her brother to come pick her up. He picked her up after about 10 minutes. She did not discuss what had occurred with her brother. He dropped her off at their home and then left again.
33. When she was home, she told her sister-in-law KM "...he showed his true colours. He tried to kiss me. I- I respected him a lot." AK and KM spoke in a mixture of English and Punjabi. AK described being upset while talking to her sister-in-law. Her sister-in-law's children were present, so she did not describe the incident in detail, but then her sister-in-law came to AK's room. After their discussion, she Googled how to file a complaint. On Monday, she then contacted the College. She filed her complaint with the College on April 5, 2022.
34. AK indicated that she has not gone back to the Investigated Member for physiotherapy or talked to him since April 2, 2022. She has not seen any other physiotherapist as she does not dare go to a physiotherapist now because of her experience.
35. Two videos were entered during the course of AK's testimony. The first was of AK entering the clinic on April 2, 2022 and the second was AK leaving the clinic that day. [Exhibit 1, Tabs 11 and 12]

Cross-Examination

36. AK confirmed that she was referred to the Investigated Member by A and that the Investigated Member is A's family friend. AK confirmed her injuries and noted that, following the accident, she was sad. She denied that she was anxious but noted that she was nervous. She did not recall being recommended by another physiotherapist at the Clinic to see her physician for anxiety. She recalled being asked if she needed to see a physician and AK said she did not think she needed it. AK did not recall the Investigated Member discussing anxiety with her.
37. AK confirmed that by April 2, 2022, she was still not driving and had not driven since the car accident. Prior to April 2, 2022, AK found the Investigated Member's treatment helpful and wanted to refer a co-worker to him. AK confirmed that the sessions that would be paid for by her insurer would run out on April 12, 2022.
38. AK testified that she did not believe that the Investigated Member asked her to move her chin to her chest or open her mouth while she was sitting on the bed that day. She recalled another physiotherapist doing this exercise previously. She acknowledged the Investigated Member also asking her to do the exercise with her chin to her chest, but to her best recollection, he did not do this on April 2, 2022. Similarly, AK did not recall if the Investigated Member had his hand in her right armpit while her right arm was straight above her head. AK testified that on April 2, 2022, the Investigated Member did not put gel on her back. She testified that on April 2, 2022, no treatment was done on her back while she was lying on her stomach.
39. AK confirmed that others were in the Clinic when she arrived. AK confirmed that in the past, she has received treatment in a room with a door and had no issues. AK confirmed that the gown she was given ties at the neck and at the waist. She believes it was tied at the neck and the waist. She acknowledged that no one told her to take off her bra that day. AK testified that the Investigated Member did not say anything prior to coming into the treatment area.
40. AK acknowledged that Punjabi is her first language. She stated that if she does not understand something in English, she will ask it to be explained again. AK did not recall if she ever had to ask the Investigated Member to explain things again.
41. AK acknowledged that when the Investigated Member touched her left breast, she thought it was an accident. AK described the touch again and noted that with his index and middle finger he touched her nipple. In her interviews with the College investigator, she stated that he touched her breast. AK testified that she has never said the word "nipple" to anyone.
42. AK acknowledged that she did not write in her written complaint to the College that when the Investigated Member touched her right breast, it was under the gown or that he made circles around her breast that got smaller. AK also acknowledged that in her written complaint, the sequence of events of when she removed her mask is different than in her testimony. In her complaint she said she told him "no", but in her evidence she testified

she said “please stop”. AK stated that it is very common for her to say “please stop, no, thank you” because she works with kids.

43. AK acknowledged that the Investigated Member did not kiss her. AK did not tell her brother what occurred on the drive home. She told her sister-in-law what happened, but not that he touched her nipple. She did not contact the police.
44. AK agreed that she was uncomfortable and nervous after the Investigated Member put his hand close to her breast but did not tell him that. She stated that it took her some time to understand what had happened to her.
45. During the cross-examination, AK was asked to demonstrate how the Investigated Member touched her on a mannequin.

Re-Examination

46. AK stated that she did not tell her brother what happened because they do not talk openly about things like that and she did not want to stress him.

Hearing Tribunal Questions

47. AK was asked to review the symptoms she had from her car accident. AK was asked to show the Hearing Tribunal how her ribs were assessed. She was asked to clarify how the Investigated Member put his hand into the gown.
48. The parties had no questions arising from the Hearing Tribunal’s questions.

Evidence of KM

Examination in Chief

49. KM is AK’s sister-in-law. KM has known AK since 2015. KM described AK as being like her sister. They have lived together since 2019 when AK came to Canada. KM described AK as a very calm, kind and happy person. KM’s sister recommended the Investigated Member for physiotherapy after AK was in a car accident.
50. KM described the events of April 2, 2022. KM was playing with her children on the deck. AK opened the back door and said in Punjabi “he showed his true colours”. KM did not know who AK was talking about and AK said she was talking about the Investigated Member. KM gave her children chalk to play with on the deck, so that she could talk to AK. AK then told KM that the Investigated Member had tried to kiss her. AK was pale. KM held AK’s hands tight in order to settle her down because AK was shaking and crying.
51. KM testified as to what AK told her about the appointment. The Investigated Member asked about AK’s ribs and neck. AK said the ribs were okay and that either her back or neck was stiff, KM did not recall specifically which. He checked her ribs and moved his

hands from her rib to her breast. AK moved his hand down. At some point, AK took her mask off and he asked her why she always keeps her mask on and AK said she is comfortable with that. They talked about opening a day care. He took his mask off, took her mask off, and then said “you are beautiful” and tried to kiss her. AK said no and ran away. She picked up her things and came downstairs, called KM’s husband and they came home. KM testified that when AK came home, she was wearing a sweater and holding something in her hand that had two strings.

52. KM looked online to see how to file a complaint. AK wrote her complaint and sent it to KM to proofread. KM told AK what grammatical mistakes to fix. AK has not gone back for physiotherapy and has told KM that she will never go to a physiotherapist again.

Cross-Examination

53. KM testified that she did not talk to her husband that day about AK. AK told her that the Investigated Member moved his hand from the rib up to the side of the breast. KM demonstrated that AK had her jacket on her arm and KM saw something underneath it with two strings hanging.
54. KM stated that AK never told her that the Investigated Member touched the center of her breast or her nipple. AK did not tell KM that the Investigated Member put his hand inside her gown. Prior to April 2, 2022, AK had never raised any issues about the Investigated Member.
55. KM did not recommend to AK that she should report these events to the police. KM testified that she had not talked to AK the previous evening about AK’s testimony.

Evidence of Harkawaljit Singh Randhawa

Examination in Chief

56. The Investigated Member is 48 years old and has been married since 2001. The Investigated Member reviewed his curriculum vitae, his educational background and his practice in India. He first moved to Canada in 2010. He testified that he sometimes has difficulty with spoken English. The Investigated Member has had no prior complaints against him. The Investigated Member described the layout of the Clinic.
57. The Investigated Member noted that the majority of the patients who attend the Clinic are from the South Asian Community. The Investigated Member noted that he takes extra care when treating female patients from the South Asian community as they are a little bit reluctant to expose their body areas. He stated that he needs to ask them twice or three times if they are comfortable or not. He notes if there are any signs of apprehension as well.
58. The Investigated Member described a typical initial appointment related to a car accident. He identified a gown during the hearing which he stated was the gown they use at the

Clinic. He noted there is only one size of gown. He noted the gown opens at the back with a knot at the neck and a knot at the waist level.

59. With respect to his charting, the Investigated Member noted that he takes paper notes. He then shifts them to electronic charting and shreds the paper notes. He makes the paper notes on the same day as the appointment or the next day. He completes the electronic charting within a few days.
60. The Investigated Member testified regarding the appointments with AK. With respect to the timeframe of April 2022, the Investigated Member stated that AK was having anxiety issues and that they needed to reassure her from time to time.
61. The Investigated Member noted that the Clinic hours vary on Saturdays. They sometimes finish at 12:00 p.m. or are sometimes open until 3:00 p.m. They may have cancellations or walk-ins. In April 2022, the Clinic was following COVID protocols which involved wearing a mask, hand hygiene and keeping a distance.
62. AK's appointment on April 2, 2022 was rescheduled twice and was at 1:45 p.m. On that day, a massage therapist was working, his daughter who is a physiotherapy assistant was working, and the receptionist was working the front desk. The massage therapist had patients from 10 a.m. to 1 p.m. that day, although the Investigated Member does not know what time he left. The physiotherapy assistant was scheduled to work until the end of the day, but only worked until 1:15 p.m. He found out she left early when he looked at the time sheets after receiving the complaint from the College. The receptionist worked until 3 p.m.
63. The Investigated Member noted that prior to entering the treatment area he will ask if it is okay for him to come in. Once he is in the treatment area, he keeps the curtain closed.
64. The Investigated Member testified that he was mainly relying on his chart notes as he did not fully recall the appointment. The Investigated Member reviewed the treatment provided on April 2, 2022 and stated that there was nothing changed in the appointment. The Investigated Member testified that he had AK open her mouth because she was still complaining of pain on her right side of the neck. He had her bring her chin down. Once AK was lying down, he checked for flexibility of her suboccipital muscles and did stretching at the same time. His hands were on the back of her head. He did not use gel for this portion. He then did assessment and stretching of the upper trap muscles. Her head was at his chest wall. He then checked the chest expansion. He put his thumbs around the xiphoid process and his hands across the ribs, lower level. He was not touching AK's breasts. The Investigated Member stated that he knows his professional boundaries. His left hand is under the right breast and his right hand is under the left breast. Based on his chart notes, AK did not say anything during these appointments. The Investigated Member stated that he did not use gel during this assessment. The Investigated Member believed he then did a right shoulder quadrant assessment, which involves lifting the arm up. He testified that he was not sure if he treated the shoulder or the ribs first.

65. The Investigated Member then asked AK to roll over on her stomach and he used his fingers to release tension in the muscles. At this point, he used gel, which he obtained from a cart outside the curtained area. He did extension mobilization for the facet joints. He then explained to her that she had a few sessions left. She could continue her normal duties and drive as well. His assessment and treatment of AK took about 15 to 20 minutes. He stated it ended as usual and was a normal appointment.
66. The Investigated Member noted that he did not recall if AK was wearing a bra during treatment. He denied touching AK's breast. He noted that he takes extra care of his hand placement. He did not recall discussions about opening a day care together. He denied telling AK she was beautiful or trying to kiss her. He denied massaging the front of her ribs or using gel on the front. He denied re-entering the treatment area after having left. The Investigated Member noted that sometimes he provides feedback to patients in English like "nice", "wonderful", "great", "excellent" and "beauty of treatment."
67. The Investigated Member demonstrated the treatment provided on the mannequin.

Cross-Examination

68. The Investigated Member confirmed that he opened the Clinic in October 2019. He has worked there since it opened.
69. The Investigated Member acknowledged that he saw AK for 42 sessions. Some of those were for two separate parts in a day. The Investigated Member denied asking AK questions about her personal life. The Investigated Member confirmed that there was no therapeutic reason to touch AK's breasts.
70. On April 2, 2022, AK arrived around 1:50 p.m. in the afternoon. She would have changed, and then received a hot pack and TENS machine. The timer on the hot pack is set for 15 minutes. The Investigated Member had another patient at 1:30 p.m. and confirmed that those appointments generally take 45 minutes.
71. The Investigated Member stated that he had no independent recollection of April 2, 2022. He did not know what time the massage therapist left. He did not know what time his daughter, the physiotherapy assistant left. He reviewed the timesheet for his daughter and confirmed that according to the timesheet, she left at 1:15 p.m. that day and at 1 p.m. the following Saturday (Exhibit 9).
72. The Investigated Member testified that he recalled talking to AK about her next treatment, as she was booked for the following Saturday. He testified that he told her she was good to continue her normal duties and to start driving and to work on self-management strategies and her home exercise program. She told him she would discuss it with her physician and let him know. The Investigated Member acknowledged that conversation took a few minutes.

73. The Investigated Member testified that on April 2, 2022, he saw that AK had cancelled the appointment and then decided to call her himself. He noted that sometimes there are a lot of cancellations on the weekends and the receptionist may call patients. Because his friend had shared his phone number with her, he thought that she would pick up if he called her. He did not recall if the receptionist had tried to call AK first. AK did not pick up the first time he called and he then directed the receptionist to call her. The Investigated Member said that sometimes they do call patients multiple times. He wanted AK to come in that day because she only had a couple of visits left under this care period.
74. The Investigated Member acknowledged that he never signed his electronic chart. They were unsigned drafts. The chart does not indicate when the charting was completed. The Investigated Member stated that he is unaware if a draft chart can be edited without notice. He acknowledged that once it is finalized, there is a timestamp.
75. The Investigated Member stated that he did not ask AK about when she came to Canada. He stated that he did not have a discussion with AK about opening a day care. He stated that AK was planning to open a day care and he remembered that.
76. The Investigated Member stated that he did not think it was odd that AK cancelled the April 9, 2022 appointment because he had discussed with her that she could continue the home exercise program. He did not try to contact her or get the receptionist to contact her.
77. The Investigated Member testified that he obtained informed consent from AK on April 2, 2022 and explained to her what he was doing and the treatment he was providing. When asked if he had a recollection of getting informed consent he stated "Yeah, that's my usual practice. He was asked to clarify again and testified "Yeah, I didn't find anything unusual, like, where anything was refused to me and then I did it." He acknowledged that he did not chart informed consent and did not know at the time that there was a requirement to document informed consent in the chart.
78. The Investigated Member stated that he did not recall the exact sequence of treatment, but there is a normal practice for the sequence of treatment. He acknowledged that the treatment charted in his chart notes was not in the order he testified to. He acknowledged not charting anything about using gel. He stated that because it was not documented, he was not sure and that sometimes they use gel for friction massage and sometimes they do not. He agreed that his earlier testimony about the gel was based on his general practice. He acknowledged that his treatment notes for April 2 were similar to the previous appointment on March 26.

Hearing Tribunal Questions

79. The Hearing Tribunal asked additional questions about the treatment provided on April 2, 2022, including the TMJ assessment. The Investigated Member was asked if the TMJ was previously assessed, as it was not referenced in the entirety of the chart notes prior

to April 2, 2022. The Investigated Member stated that he might not have written it, but he thought it was assessed earlier as well. He testified that sometimes he forgets to write notes.

80. The Investigated Member did not remember when he completed the chart notes for April 2, 2022. He became aware of the complaint about a month after the complaint was made.
81. The Investigated Member was asked about the chart notes being unsigned drafts. He noted that this was the practice for all patients, not just AK.
82. With respect to the appointment on April 9, 2022, the Investigated Member did not know if AK was a no-show or whether she had cancelled the appointment in advance. In response to a question from his legal counsel and from looking at Exhibit 1, Tab 5, the Investigated Member was then able to confirm that the appointment was cancelled on April 8, 2022.

Evidence of Jeffrey Begg

Qualification of Mr. Begg

83. Counsel for the Investigated Member applied to qualify Mr. Begg to give evidence in the area of physiotherapy generally and whether certain conduct, if proven, constitutes a breach of the relevant Standards of Practice and Code of Ethics. The parties agreed that Mr. Begg's qualification regarding the Standards of Practice would be limited to those cited in the Notice of Hearing. The Hearing Tribunal determined that Mr. Begg would be qualified as an expert, but would determine the weight to place on his evidence in its deliberations.
84. Mr. Begg reviewed his education and experience.

Examination in Chief

85. Mr. Begg reviewed the opinion he prepared (Exhibit 12). In preparing his opinion, Mr. Begg looked at the entire patient chart, the relevant Standards of Practice, the complaint and responses from the Investigated Member. He noted that he was asked to assume that the treatment performed was as described in the chart, that informed consent was obtained and that prior to April 2, 2022, AK did not have any concerns with the behaviour or the treatment that occurred.
86. Mr. Begg reviewed his understanding of the presenting issues and treatment that occurred. Mr. Begg testified that, in his opinion, the Investigated Member's chart met the highest standard and that the amount of detail was phenomenal. Mr. Begg was of the opinion that there was a phenomenal difference in the chart notes from one day to another. He stated that it was clear these were typed out and not copied and moved.

87. Mr. Begg gave evidence regarding consent. The written informed consent form meets the standard of explicit consent upon initial examination. Mr. Begg noted that, as time goes on, the weight of consent will switch to more of an implied consent. Explicit consent is required when proposing a novel treatment that has not been provided to the patient before. The onus is on the physiotherapist. With time, the consent will become implied consent where the physiotherapist is providing the same treatment repeatedly. The onus shifts to the patient to say if they are not comfortable. The physiotherapist must still be observant of the patient's words, actions and nonverbal language. If a patient makes no comments or if there are no changes in body language, the physiotherapist will assume ongoing implied consent.
88. With respect to April 2, 2022, Mr. Begg did not see anything in the chart that would require a new consent. Mr. Begg provided his opinion on the treatment provided as reflected in the chart and noted that the treatments provided were appropriate. Part of the treatment involved assessment and treatment of AK's thoracic dysfunction. He noted that there would be no therapeutic reason to put a hand on the breast except to get as close to the ribs as one could. In addition, the chart notes indicate that the Investigated Member engaged in soft tissue release which would require the hand to be to the side of the patient below their armpit and may be on the anterior aspect underneath the breast. In addition, for chest expansion, the hands would be on the thorax. The assessment of chest expansion can be done while the patient is sitting or lying down. Mr. Begg demonstrated the treatment he assumed occurred on the mannequin.
89. Mr. Begg testified that when treating a patient in sensitive areas, it is appropriate to have benign conversation. A physiotherapist cannot engage in personal discussions about relationships as that may constitute a boundary violation, but should also avoid awkward silence. Discussions about the patient's work would be appropriate. There are times where a physiotherapist may use positive words such as "that looks great", "wonderful" or "that looks beautiful" as a positive therapeutic tool. It is used to encourage the patient and reduce their fear and anxiety.
90. Mr. Begg noted that from his review of the patient chart, he could not find evidence to suggest a breach of the Standards of Practice. He therefore assumed that the Investigated Member met those Standards.

Cross-Examination

91. Mr. Begg confirmed that the entirety of his report was based on the assumption that the conduct on April 2, 2022 occurred as charted. He stated that if the charting did not reflect what actually happened, his opinion could be different.
92. Mr. Begg was asked to confirm his comment that he had described the charts as phenomenal. He was asked whether he had concerns that the charts were unsigned drafts. Counsel for the Investigated Member objected to the question based on relevancy. The Hearing Tribunal determined it would allow the question, given that Mr. Begg had

given evidence regarding the quality of the charts in his examination in chief and would determine what weight to assign to the answer in its deliberations. Mr. Begg answered that he had no concerns that the charts were unsigned. He noted that there was a gap in practice and regulation regarding the issue of signatures of electronic charts. Because the chart indicates the Investigated Member's name and unique license number, only the Investigated Member could create that chart note. Mr. Begg stated that when he noted that it was an unsigned draft, he assumed it was a feature of the electronic medical record. Mr. Begg understood the Investigated Member was using the Jane system for his electronic records, but stated that he was not familiar with it. Mr. Begg confirmed that he did not know what date the charting was completed but that he made a strong assumption that it was on the date noted in the chart.

93. Mr. Begg noted that there would not be implied consent to touching the center of the breast during the treatment provided by the Investigated Member and that there could never be implied consent to kissing the patient. Mr. Begg agreed that it would never be clinically appropriate to tell a patient "you are beautiful" during treatment. There was nothing in the treatment provided by the Investigated Member that would required him to touch the patient's breast in circular motions.

Hearing Tribunal Questions

94. The Hearing Tribunal raised a question regarding editing unsigned notes in the Jane system. The question was objected to by counsel for the Investigated Member. The question was rephrased. The Hearing Tribunal asked Mr. Begg to consider if an unsigned chart note could be edited without an audit trail being recorded in an electronic medical record, that would impact Mr. Begg's assessment of the reliability of the chart note. Mr. Begg testified that if it was proven that the chart note could be edited, then if it had been edited, that would change his opinion.

VI. Submissions Regarding Additional Expert Report

95. At the conclusion of the witness testimony on September 14, 2023, the Hearing Tribunal raised with the parties that it was considering requesting additional information on the Jane system. The parties were advised that the two physiotherapists on the Hearing Tribunal worked with the Jane system and were familiar with it. However, the Hearing Tribunal understood it could not make any decision based on information not in the record. As such, in fairness to the parties, this issue was raised on the record, so that the parties could consider their position and provide submissions to the Hearing Tribunal on the Hearing Tribunal's ability to request expert evidence regarding the Jane system pursuant to section 79(2) of the HPA.
96. Counsel for the Investigated Member took the position that the authenticity of the chart notes had not been challenged and that based on paragraph 1 of the Book of Agreed Exhibits (Exhibit 1), it was entered as an agreed exhibit. The Allegation was not that the Investigated Member had edited his chart note. The Hearing Tribunal was limited to the

evidence presented by the parties, and the Investigated Member's evidence was that he made his chart note within a couple of days of the appointment.

97. Counsel for the Complaints Director submitted that the evidence of the Investigated Member was that he did not know when he made the chart note of April 2, 2022, but testified about his general practice. With respect to editing the chart, this was not a separate allegation of unprofessional conduct, but was relevant to the issue of the reliability of the chart. Counsel noted that the agreed exhibits were not put in for the truth of their contents, but rather that it was agreed they were records prepared at a certain time.
98. Counsel for the Investigated Member replied that the agreed exhibits were put in as authentic and the signatures as genuine. Any concerns that the chart notes were not authentic or were not prepared on or about the date indicated should have been put to the Investigated Member in cross-examination by counsel for the Complaints Director or by the Hearing Tribunal.
99. Counsel for the Complaints Director responded that there was a difference between a document being authentic and not being edited. Agreeing that a document is authentic relates to not having to call a witness to prove that the document was written by that person or having the witness identify the document.
100. After considering the oral submissions made by the parties during the hearing and given that the parties had not been provided advance notice of this issue, the Hearing Tribunal determined that it would request written submissions on the issue of whether it had authority to request an expert report on the Jane system pursuant to section 79(2) of the HPA.

Submissions of the Complaints Director

101. Counsel for the Complaints Director submitted that the Hearing Tribunal has the authority to govern its own process and that section 79 of the HPA has been interpreted to deal with the procedure at a hearing (*Alsaadi v Alberta College of Pharmacy, 2021 ABCA 313*). Given that closing submissions had not yet been made, the hearing was not concluded and therefore, the Hearing Tribunal had the power to govern its process, including through section 79(2) of the HPA.
102. Counsel for the Complaints Director submitted that the information about the Jane system was relevant to the subject-matter of the hearing, specifically as it relates to assessing the reliability of the Investigated Member's charting within the Jane system for the April 2, 2022 appointment. It was also relevant to assessing the Investigated Member's credibility as it relates to charting. Counsel for the Complaints Director made submissions on the process for obtaining an expert report.

Submissions of the Investigated Member

103. Counsel for the Investigated Member submitted that the Notice of Hearing does not include allegations regarding the Investigated Member's charting or the Standard of Practice on Documentation and Record Keeping. The Hearing Tribunal would be exceeding its jurisdiction by requesting an expert report on the Jane system because it would be providing new or additional evidence to the hearing record, instead of trying to understand the evidence, thus rendering the process unfair.
104. Counsel for the Investigated Member submitted that section 79(2) of the HPA restricts expert evidence on a matter that is relevant to the subject-matter of the hearing. In the context of the hearing, "any matter" relates to the allegations forming the basis for the charges in the Notice of Hearing. Reliability is about the accuracy of the witness' evidence and must be assessed based on the totality of the evidentiary record. Reliability is not an allegation. Obtaining an expert report to assess reliability of the chart notes is not appropriate.
105. Further, the authenticity of the chart has been accepted by the parties. By agreeing that the chart notes were created "on or about" the date they state, the Complaints Director cannot now take a different position. The phrase "on or about" encompasses some time before or after the date in question. This interpretation aligns with the Complaints Director's submissions in the hearing that the records were created in a "contemporaneous manner." In addition, any concerns about authenticity of the records had to be raised before their admission. Counsel for the Investigated Member took the position that if the Hearing Tribunal had concerns about the authenticity of the Investigated Member's chart notes because they were unsigned, this should have been raised prior to admitting the Book of Agreed Exhibits. Counsel noted that the reliability of the chart notes is a question that only the Hearing Tribunal can answer by considering the totality of the evidence in deciding whether the April 2, 2022 chart note is a full and accurate representation of the facts.
106. Finally, counsel noted that the Hearing Tribunal risked violating the rule in *Browne v Dunn* that if a cross-examiner intends to impeach the credibility of a witness by calling independent evidence, the witness must be given notice of this intention and be confronted with the evidence in cross-examination. Counsel for the Investigated Member provided submissions on the process for obtaining an expert report.

Decision of the Hearing Tribunal on section 79(2) of the HPA

107. The Hearing Tribunal met by videoconference on October 19, 2023 to consider the written submissions of the parties. The Hearing Tribunal determined that it would not request an expert report under section 79(2) of the HPA. The Hearing Tribunal considered the submissions of the parties regarding section 79(2) of the HPA and the evidence presented at the hearing and determined that it had sufficient information to make a decision. The parties were notified in an interim decision dated October 24, 2023 of the Hearing Tribunal's decision and that reasons would be provided in the final decision.

108. The Hearing Tribunal's reasons for its decision on section 79(2) of the HPA follow. In its October 19, 2023 deliberations, the Hearing Tribunal made no decision on its authority to request and expert report under section 79(2) of the HPA. Rather, the Hearing Tribunal considered whether there was any value in obtaining an expert report on the Jane system and determined such a report would provide only limited information and that such information was not directly relevant to the Allegation before the Hearing Tribunal.
109. In addition, the Hearing Tribunal made no determination at the time on the Allegation and noted it would wait until receipt of the closing submissions prior to making any findings on the Allegation. However, the Hearing Tribunal concluded that there was limited value in obtaining information on the Jane system. The Hearing Tribunal recognized that it would not be permitted to consider the information about the Jane system from the physiotherapist members on the Hearing Tribunal and was comfortable that it could decide the matter based on the information on the record, being the evidence from the exhibits and witness testimony.
110. The Hearing Tribunal noted however that it is for the Hearing Tribunal to determine the weight to be placed on the evidence. While counsel for the Investigated Member took the position that the Hearing Tribunal should have raised concerns prior to the Agreed Exhibit Book being entered as an Exhibit, this does not reflect the process of entering an Agreed Exhibit Book at the start of a hearing. When an exhibit is entered by consent, the Hearing Tribunal will generally accept it to be marked as an exhibit without any further review and will determine the weight to be placed on the evidence in due course. The Hearing Tribunal is not obligated to accept evidence, even if entered by consent, and can decide the weight to place on a piece of evidence at the conclusion of the hearing, after having considered all the evidence before it.
111. After issuing the interim decision on section 79(2) of the HPA, the Hearing Tribunal requested the parties provide closing submissions. The parties agreed to provide written closing submissions.

VII. Closing Submissions

Closing Submissions of the Complaints Director

112. Counsel for the Complaints Director submitted that Allegation 1 is factually proven on a balance of probabilities and that the proven conduct constitutes unprofessional conduct within the meaning of section 1(1)(pp)(i), (ii) and (xii) of the HPA.
113. Counsel for the Complaints Director submitted that, in assessing credibility, AK is more credible than the Investigated Member. Although there were some minor internal inconsistencies in her testimony, she was forthcoming, honest and testified to a strong recollection of what happened. Her version of events is probable and is consistent with her actions during and after the treatment. Counsel for the Complaints Director warned against using myths and stereotypes regarding victims of sexual abuse in considering

issues about why AK did not tell the Investigated Member she was uncomfortable or ask questions of him.

114. The Hearing Tribunal was cautioned against giving weight to evidence that AK was anxious as it related to her perceptions and memory of what occurred on April 2, 2022 or when assessing her credibility. It was submitted that the documentary evidence demonstrated that AK was noted as anxious by a different physiotherapist. The anxiety related to doing tasks, not physiotherapy treatment.
115. The Investigated Member made a note that AK was anxious about her recovery on October 9, 2021. The only other reference to anxiety that may relate to physiotherapy treatment was a chart note from March 26, 2022 by the Investigated Member in an unsigned entry. AK did not recall speaking with the Investigated Member about anxiety. Counsel for the Complaints Director submitted that the Investigated Member exaggerated his evidence about AK being anxious, as he testified that he observed her being anxious a few times, but only documented this on March 26, 2022 and at the start of treatment. It was further submitted that AK's nervousness when the Investigated Member was rubbing gel on her bare skin under her gown and approaching her breast is understandable.
116. Counsel for the Complaints Director noted that AK's failure to describe the Investigated Member touching her nipple prior to the Hearing had a plausible and believable explanation. Her evidence about what occurred prior to and after the appointment was corroborated by other evidence. Her perception of what happened was grounded in considerable experience receiving physiotherapy treatment and experience with the Investigated Member as a physiotherapist. She was not mistaken, nor did she misperceive what happened. She was familiar with opening her mouth for stretching, rib comparisons and having gel applied to her body from previous appointments.
117. Counsel for the Complaints Director submitted that AK's post-appointment emotional state supports a finding of sexual abuse. KM testified that AK was very scared, shaking and pale while telling KM what happened. KM described that AK's voice was shaking and was not how she normally talks. The video of her leaving also shows AK grabbing her boots and rushing out of the Clinic without stopping. The documentary evidence shows that AK cancelled the April 9, 2022 appointment on April 8, 2022. She never returned for physiotherapy sessions with the Investigated Member. Counsel for the Complaints Director submitted that KM's evidence, although hearsay, must be assessed carefully by the Hearing Tribunal. The statement made by AK to KM was a spontaneous utterance and is an exception to the hearsay rules.
118. Counsel for the Complaints Director submitted that, considering overall credibility, AK's version of what occurred is more plausible and should be believed. The Hearing Tribunal should accept that the Investigated Member's conduct was as described in the Allegation, resulting in an uncomfortable and scary event for AK and which is supported by her

emotional state with KM shortly after, her statements that “he showed his true colours” and that he tried to kiss her.

119. It was submitted that the Investigated Member’s memory of the appointment is inconsistent, as he remembers some parts but not others. Additionally, his charting, upon which he relied to testify, is not highly reliable. His evidence is not corroborated by any other evidence and is inconsistent with AK’s actions after the treatment, including leaving the Clinic without putting on her boots, cancelling her next appointment, and not returning.
120. It was submitted that Mr. Begg’s evidence was not relevant to the questions before the Hearing Tribunal.

Closing Submissions of the Investigated Member

121. Counsel for the Investigated Member reviewed the standard of proof and noted that the Hearing Tribunal can only make findings of unprofessional conduct within the four corners of the Notice of Hearing.
122. Counsel for the Investigated Member noted that AK and the Investigated Member were not alone in the Clinic during the appointment. AK observed that someone was receiving therapy and another person was on the treadmill or around that area. The receptionist was not at the front desk when AK left the Clinic but was working until 3:00 p.m. that day. The Investigated Member’s daughter, the physiotherapy assistant, was scheduled to work until the end of the day, but the Investigated Member did not know that she left at 1:15 p.m. until after he received AK’s complaint.
123. Counsel for the Investigated Member submitted that in order to meet the definition of sexual abuse or sexual misconduct, the conduct must be sexual in nature and not appropriate to the service provided. In *R v Chase*, the Supreme Court of Canada noted that the test is an objective one: “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.” Other factors considered in professional disciplinary decisions include: whether care was taken to respect the privacy and integrity of the patient during the exam, whether consent was provided for the examination or treatment and whether the touching was accidental or incidental to treatment.
124. Counsel for the Investigated Member reviewed the law in relation to credibility assessment of witnesses, including the framework to assess conflicting witness testimony. Only AK and the Investigated Member provided direct testimony. The remaining evidence is circumstantial.
125. Counsel for the Investigated Member submitted that the Complaints Director is prohibited from challenging the chart notes, to the extent that the challenge is contrary to the agreed terms in the Agreed Book of Exhibits. Counsel submits that the chart notes

were made contemporaneously and are authentic. Counsel takes the position that the clinical record is an important piece of evidence that can be relied on. The amount of weight attributed to the clinical record depends on how the Hearing Tribunal assesses its reliability. Counsel takes the position that where a party consents to the admission of business records, such as chart notes, the records are prima facie proof of the facts recorded in the records.

126. Counsel for the Investigated Member noted that AK is not credible because, she did not have a good memory and was unable to make accurate and complete observations about the events at issue; her evidence was inconsistent; her disclosure of key details was piecemeal; her story was improbable and did not make sense; and she was argumentative.
127. Counsel for the Investigated Member submitted that AK's answers to questions in re-direct should be given no weight because counsel for the Complaints Director asked leading questions. It is further submitted that inconsistencies on core issues significantly affect the credibility and reliability of her evidence. In the hearing, AK raised for the first time that the Investigated Member touched her nipple.
128. Counsel for the Investigated Member also challenged the sequence of events described by AK and submitted that it was not possible for the Investigated Member to have rubbed the gel on AK's ribs and breasts as described.
129. With respect to the statements made by AK to KM, these should not be viewed as res gestae, or spontaneous statements. There was a significant period of time between the end of the appointment and when the statements were made to KM.
130. Counsel submitted that the Investigated Member is credible and reliable. His testimony was internally and externally consistent and plausible. His evidence was that it was not unusual for him to call a patient from his cell phone; he obtained verbal or implied consent for treatment and followed his standard practice. He provided treatment as set out in his chart notes. The Investigated Member's testimony as to why it was not odd to him that AK stopped attending the Clinic following the April 2, 2022 appointment should be accepted by the Hearing Tribunal.
131. Counsel for the Investigated Member also took the position that the expert evidence of Mr. Begg should be relied on. Mr. Begg testified to the phenomenal amount of detail in the chart notes. He reviewed how consent can go from explicit to implicit over the course of several appointments. He concluded that there was nothing in the chart that would suggest that the Investigated Member breached any standard of practice.
132. Counsel for the Investigated Member submitted that the Allegation is not proven and should be dismissed.

VIII. Decision of the Hearing Tribunal

133. The Hearing Tribunal carefully considered the evidence of the witnesses and the documents entered as exhibits. The Hearing Tribunal also carefully considered the oral submissions of the parties during the hearing and the written closing submissions.
134. In considering the evidence, the Hearing Tribunal applied the standard of proof of the balance of probabilities and noted that the burden of proof is on the Complaints Director.
135. The Hearing Tribunal found that Allegation 1(a) to (d) was proven. The Hearing Tribunal found that Allegation 1(a) to (d) constitutes unprofessional conduct. The conduct constitutes sexual abuse (Allegation 1(a) and (b)) and sexual misconduct (Allegation 1(c) and (d)) as defined in the HPA and is unprofessional conduct pursuant to sections 1(1)(pp)(i), (ii) and (xii) of the HPA.

IX. Findings and Reasons of the Hearing Tribunal

136. The Allegation before the Hearing Tribunal is:

On or about April 2, 2022, while providing physiotherapy treatment to AK, [the Investigated Member] did one or more of the following to patient AK:

- (a) Touched her left breast without her consent or a therapeutic purpose;
- (b) Massaged around and on her right breast without her consent or a therapeutic purpose;
- (c) Told her she was beautiful, or words to that effect; and
- (d) Attempted to kiss her.

Findings Regarding the Evidence

Evidence of AK

137. The Hearing Tribunal considered the testimony of AK. The Hearing Tribunal found AK's evidence to be credible and reliable. AK was one of two people in the treatment area. She had the ability to perceive what occurred. AK provided clear evidence about what she recalled regarding the appointment of April 2, 2022. In examination in chief and in cross-examination, AK acknowledged when she did not remember certain events. She did not engage in speculation in her testimony. Contrary to the submissions by counsel for the Investigated Member, the Hearing Tribunal did not find that AK was argumentative or that she would not make reasonable concessions in a manner that undermined her credibility.
138. In reviewing both the written complaint and AK's testimony, the Hearing Tribunal considered that English is not AK's first language. In considering AK's evidence as a whole, it was generally consistent. The evidence was consistent on the main points, including the evidence related to the Investigated Member touching her breasts, telling her she was beautiful and leaning forward towards her, in what she perceived to be an attempt to kiss

her. On these points, her testimony was consistent with the complaint that AK made to the College.

139. While AK did not recall the sequence of treatment or the entirety of the appointment, the Hearing Tribunal did not find this to undermine her credibility or reliability. AK attended for over fifty sessions (with some sessions being on the same date) with different physiotherapists. The Hearing Tribunal found that it would be possible that some treatment-related details would be difficult to remember for a specific date. However, AK was clear on the matters relating to the April 2, 2022 appointment that were unusual. Her memory on these issues was clear and consistent. The Hearing Tribunal accepted that a witness might remember unusual events from an appointment more clearly than other more mundane details.
140. The Hearing Tribunal accepted AK's testimony that, on April 2, 2022, she had removed her sweater, camisole and bra and was wearing a loose-fitting gown. The Hearing Tribunal also accepted AK's testimony that the Investigated Member was talking to her about opening a day care and talking to her more than usual.
141. With respect to Allegation 1(a), the Hearing Tribunal accepted AK's testimony that the Investigated Member's fingers made contact with her nipple on her left breast over her gown with his index and middle fingers and that the Investigated Member moved his index and middle fingers around her nipple with a "movement, little movement".
142. The Hearing Tribunal considered that AK had not stated, prior to the hearing, that the Investigated Member touched her nipple. AK testified that she had never been touched like that and does not even touch herself like that. AK stated that she does not use the word "nipple". The Hearing Tribunal considered the cultural context and AK's testimony and found that this was a plausible reason why she had not used the word "nipple" in discussing the incident with KM, in her written complaint or with the investigator. Considering AK's testimony regarding her culture and how she discusses sensitive subjects with other individuals, it is reasonable that she did not describe her nipple being touched before the hearing. This is not a situation of a witness changing her story during testimony or not having a clear explanation for not describing aspects of what occurred. Rather, when probed in questioning during the hearing, AK provided additional detail about where the Investigated Member touched her on her breast. In addition, the Hearing Tribunal noted that, in terms of whether conduct is sexual abuse, the part of the breast that is touched is not relevant to a finding of whether conduct meets the definition of "sexual abuse" under section 1(1)(nn.1) of the HPA. There was no therapeutic purpose for touching any part of AK's breast.
143. With respect to Allegation 1(b), the Hearing Tribunal accepted AK's evidence that the Investigated Member said he would compare her ribs, went to retrieve the gel outside the curtained area, put his hand inside her gown and while moving his hand in circular motions, touched her right breast.

144. The Hearing Tribunal found AK's version of events was plausible. AK demonstrated during the hearing how the Investigated Member lifted the gown and placed his hand inside the gown. AK described that the gown was larger than the one on the mannequin used in the hearing. The Investigated Member's evidence was that the Clinic uses only one size gown, and it is the same as the one shown to the Hearing Tribunal in the hearing. The Hearing Tribunal found that it was not necessary, for the purposes of the hearing, to consider whether the type of gown provided at the hearing was the gown that was used on April 2, 2022. The Hearing Tribunal accepted that a treatment gown, such as the one described and the one shown at the hearing, would be loose fitting on AK and that it would be possible for someone to place their hand inside the gown.
145. With respect to Allegation 1(c) and (d), the Hearing Tribunal accepted AK's evidence that the Investigated Member told her she was beautiful and that he removed her mask and his and leaned forward towards her, in an attempt to kiss her.
146. The Hearing Tribunal accepted AK's evidence that at the conclusion of the appointment, the Investigated Member apologized to her, using the term "yaar" which would not be a term used in a health care professional and patient relationship.
147. In her written complaint, AK noted that she said "no" when the Investigated Member leaned in to kiss her. In her testimony, she testified that she said "please stop". In response to this inconsistency, AK testified that it is very common for her to say "please stop, no, thank you" because she works with kids. While this is an inconsistency, the Hearing Tribunal found this to be a minor inconsistency that did not undermine her credibility or reliability.
148. The Hearing Tribunal considered whether AK would have a motivation to lie about the events of April 2, 2022. AK had attended for many physiotherapy appointments with the Investigated Member and had referred a co-worker. The Hearing Tribunal did not find any plausible reason for AK to have a motivation for lying about the events that occurred.
149. The Hearing Tribunal considered whether AK might have misinterpreted what occurred. Given the totality of the conduct, that is that there was inappropriate touching of AK's breasts on two occasions, inappropriate language used and that the Investigated Member removed her mask and his and leaned towards her, the Hearing Tribunal rejected the possibility that AK misinterpreted what occurred in the appointment.
150. The Hearing Tribunal found that AK's testimony was plausible and that she was a credible and reliable witness. In addition, while not determinative of sexual abuse or misconduct, AK reported the incident to her sister-in-law, KM, immediately upon coming home. The Hearing Tribunal found AK's explanation of why she did not tell her brother in the car what occurred to be plausible, especially in the context of AK's culture and understanding that victims of sexual abuse will behave in different manners and may or may not disclose the abuse. Finally, AK cancelling her appointment on April 8, 2022 for the next day was also consistent with her testimony of what occurred on April 2, 2022.

Evidence of KM

151. The Hearing Tribunal considered the evidence of KM. KM was not present during the appointment, and so could not give direct information about what occurred. However, KM testified that AK came home upset from the appointment on April 2, 2022.
152. While KM might have a motive to support AK, her sister-in-law, the Hearing Tribunal determined that KM's evidence was credible and reliable. KM provided evidence about her recollection of what AK told her, including that the Investigated Member "showed his true colours", touched her breast and tried to kiss her. There were some inconsistencies in what KM reported that AK told her, but these were minor and the Hearing Tribunal found that KM's evidence did not appear rehearsed or to have been tailored to match AK's evidence.
153. The Hearing Tribunal placed limited weight on KM's evidence. KM could not give first-hand evidence of what occurred in the treatment area, as she was not present.
154. However, the Hearing Tribunal accepted KM's evidence that AK was upset, crying and shaking upon arriving home from the appointment and when she disclosed to KM what had occurred and that this was out of character for AK.

Video evidence

155. The Hearing Tribunal considered the videos of AK entering and leaving the Clinic. The videos do show that AK appears to have left the Clinic in a hurry and that she left without putting on her boots. No one was at the front desk in the reception area when AK left. However, the videos are of limited assistance and again do not establish what occurred in the treatment area. The Hearing Tribunal placed limited weight on the videos.

Evidence of the Investigated Member

156. The Hearing Tribunal considered the evidence of the Investigated Member. The Hearing Tribunal noted that, like AK, English is not the Investigated Member's first language. The Investigated Member had an ability to perceive the events of April 2, 2022, since he was the other person in the treatment area. However, in terms of his ability to recall, the Investigated Member testified that he did not have a specific recall of much of the appointment and was relying on his notes and general practice.
157. The Hearing Tribunal considered the internal consistency of the Investigated Member's evidence. The Investigated Member denied any wrongdoing and denied that he touched AK's breasts. He denied telling her she was beautiful, although he testified that he sometimes uses the phrase "beauty of treatment". He denied attempting to kiss her.
158. However, in his examination in chief, the Investigated Member testified to using gel on AK's back on April 2, 2022. He later clarified that he was not certain if he used gel that day as sometimes, he uses gel for friction massage and sometimes, he does not. The evidence

of the Investigated Member was internally inconsistent on this point and was an example of him not having a specific recollection of events. This undermined the credibility and reliability of the Investigated Member's testimony.

159. The Hearing Tribunal considered external consistency and noted that by the Investigated Member's own admission, the Investigated Member's chart notes for April 2, 2022 were of limited reliability. The Investigated Member testified that he does not always do things in the order he writes them in the chart. He also testified that he did an assessment of AK's TMJ on April 2, 2022, which is documented. However, of concern to the Hearing Tribunal was his testimony that he had done this assessment before, although it was not documented. The Investigated Member testified that he sometimes provides treatment that is not documented. The Hearing Tribunal found that this testimony undermined the reliability of the chart notes.
160. Therefore, to the extent that the Investigated Member relied on his chart notes for what occurred on April 2, 2022, this also affected the reliability of the Investigated Member's testimony.
161. The Hearing Tribunal considered that the Investigated Member appeared to have some specific recollections of discussions with AK on April 2, 2022, which were not charted, including their telephone conversation, changes to the appointment time, obtaining informed consent, that AK said she was planning to open a day care, that AK did not refuse any treatment and that he did not touch her breast or try to kiss her.
162. The Investigated Member also testified in his examination in chief and cross examination that he did not have any independent recollection of the April 2 appointment and was relying on his chart notes. During cross examination he gave unclear responses about what he recalled, what was charted and what was his standard of practice. He testified he did not recall if she was wearing a bra, how the gown would have fit her, if he made the comment "beauty of a treatment", or the order or which treatments he did that day. The Hearing Tribunal found it difficult to reconcile that the Investigated Member testified he had no recollection of the April 2, 2022 appointment and yet recalled other specific details of the day and appointment. This undermined his credibility and the reliability of his testimony.

Chart Notes of April 2, 2022

163. The Hearing Tribunal placed little weight on the chart notes. While the Book of Agreed Exhibits states the Agreed Exhibits are true copies of the record, are authentic and are prepared on or about the dates the documents bear, they are not admitted for the truth of their contents.
164. The Hearing Tribunal accepted that these are the Investigated Member's chart notes and that he prepared these chart notes sometime around April 2, 2022. According to the Investigated Member's own evidence, he prepares paper notes on the day of treatment

or the next day. He puts these into the electronic medical record (Jane system), generally within a few days and the paper notes are destroyed. Therefore, the Hearing Tribunal accepted that the chart notes were prepared by the Investigated Member within a few days of April 2, 2022.

165. As noted previously, the Hearing Tribunal did not consider whether the chart notes could have been edited in the Jane system without creating an audit record, as the Hearing Tribunal determined that this information was not needed for the Hearing Tribunal to make a decision on the Allegation.
166. However, the Hearing Tribunal found the chart notes should be given limited weight for two reasons. First, the Investigated Member testified that he does not necessarily chart treatment in the order it is given and sometimes does not document treatment provided or assessments made (for example he did not at the time chart consent and indicated that he had previously provided a TMJ assessment which was not charted). This testimony undermines the reliability of the chart notes.
167. Second, the Hearing Tribunal considered that someone sexually abusing a patient would not likely make a record of this in the chart notes. As such, the chart notes were of limited value in determining the ultimate question of whether Allegation 1 was proven.

Telephone call on April 2, 2022

168. The Hearing Tribunal considered the call from the Investigated Member to AK on April 2, 2022, after she had initially cancelled the appointment. The Hearing Tribunal accepted AK's evidence that the Investigated Member had never telephoned AK previously. While the Hearing Tribunal placed limited weight on this fact, it did consider that it was unusual in terms of the prior interactions between AK and the Investigated Member.

Other Individuals in the Clinic on April 2, 2022

169. The Hearing Tribunal considered the fact that other individuals were present in the Clinic on April 2, 2022, including the receptionist. As noted above, the video evidence confirms that the receptionist was not present at the front desk when AK left the Clinic. While there may have been other people present in the Clinic, both AK and the Investigated Member agree that no one else was present in the treatment area. As such, the Hearing Tribunal placed little weight on the fact that there were other individuals in the Clinic at the time.

Jeffrey Begg

170. The Hearing Tribunal placed limited weight on the evidence of Mr. Begg. Mr. Begg's evidence was largely irrelevant to whether the Allegation was proven. While Mr. Begg assumed that the charts were accurate, it is clear from the evidence of the Investigated Member that they are not accurate in terms of treatment sequencing or even what treatment or assessments occurred (as with the example of consent and the TMJ).

171. The Hearing Tribunal considered Mr. Begg's evidence regarding the placement of the Investigated Member's hands for the treatment provided in accordance with the chart. The Hearing Tribunal considered that the Investigated Member's hands would have been close to AK's breasts in providing the treatment. This was consistent with both the evidence of the Investigated Member and AK.
172. The Hearing Tribunal placed little weight on Mr. Begg's evidence regarding consent, as the Allegation does not relate to consent in treatment. Express consent and implied consent might be relevant if the issue involved possible inadvertent contact with the client's breast. However, the Investigated Member denied any contact with AK's breast. In addition, according to AK, the Investigated Member touched her breast on two occasions. This evidence was accepted, which makes it highly unlikely that if touching occurred, it was inadvertent or accidental.

Findings regarding Allegation 1

173. For the reasons noted above, the Hearing Tribunal finds AK's evidence more credible and reliable than the Investigated Member's evidence. The Hearing Tribunal considered *F.H. McDougall*, 2008 SCC 53, at para. 86, as follows:

However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. W. (D.) is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

174. The Hearing Tribunal found that Allegation 1 is proven. The Hearing Tribunal found that the Investigated Member touched AK's left breast without consent or therapeutic purpose. The Hearing Tribunal found that the Investigated Member massaged around and on her right breast without consent or therapeutic purpose. The Hearing Tribunal found that the Investigated Member told AK she was beautiful and removed his mask and her mask and attempted to kiss her.

Whether the Conduct Constitutes Unprofessional Conduct

175. The Hearing Tribunal found that the conduct is unprofessional conduct under section 1(1)(pp)(i) of the HPA. The Investigated Member showed a profound lack of judgment in the manner he provided professional services to AK. There are no circumstances where it would be appropriate for a physiotherapist to engage in the conduct found to have occurred here. The conduct occurred during physiotherapy services but was unrelated to

any treatment. This was a serious boundary violation arising from a significant lapse in judgment.

176. The Hearing Tribunal next considered the definitions in the HPA as follows:

(nn.1) “sexual abuse” means the threatened, attempted or actual conduct of a regulated member towards a patient that is of a sexual nature and includes any of the following conduct:

...

(vi) touching of a sexual nature of a patient’s genitals, anus, breasts or buttocks by a regulated member.

(nn.2) “sexual misconduct” means any incident or repeated incidents of objectionable or unwelcome conduct, behaviour or remarks of a sexual nature by a regulated member towards a patient that the regulated member knows or ought reasonably to know will or would cause offence or humiliation to the patient or adversely affect the patient’s health and well-being but does not include sexual abuse.

(nn.3) “sexual nature” does not include any conduct, behaviour or remarks that are appropriate to the service provided.

177. The Hearing Tribunal found that Allegation 1(a) and (b) constitute sexual abuse. There is no doubt that AK was the patient of the Investigated Member. The Investigated Member touched AK’s left breast on her nipple over the gown and touched AK’s right breast under the gown. The Hearing Tribunal found that the touching was of a sexual nature. The touching of AK’s breasts was not therapeutic in nature nor was it appropriate to the services provided. The touching was not inadvertent in the context of legitimate treatment being provided. Further, in considering the overall circumstances of the Investigated Member telling AK she was beautiful and attempting to kiss her, the Hearing Tribunal finds that the conduct in touching AK’s breasts was of a sexual nature.

178. The Hearing Tribunal found that Allegation 1(c) and (d) constitute sexual misconduct. The comment to AK that “she was beautiful” and the attempt to kiss her were objectionable, unwelcome and caused offence to AK. The conduct also affected her adversely, as AK stated that she would not go see another physiotherapist after what happened. The conduct was of a sexual nature having regard to the context of what occurred. The conduct was not therapeutic nor appropriate to the services provided.

179. The Hearing Tribunal found the conduct to be a breach of the College’s Standard of Practice: Sexual Abuse and Sexual Misconduct. The Standard of Practice states:

“The physiotherapist abstains from conduct, behaviour or remarks directed towards a patient that constitutes sexual abuse or sexual misconduct.”

180. The conduct is egregious. The Investigated Member undermined the trust placed by AK in him as a health care professional. AK was in a vulnerable position with respect to the physiotherapist patient relationship. It was the responsibility of the Investigated Member as the regulated profession to maintain appropriate boundaries and not sexualize any interactions with his patient.
181. The Hearing Tribunal also found that the conduct is a breach of articles A1, A4, A5, A12, and A18, B1 and C1 of the Code of Ethical Conduct for Alberta Physiotherapists. The Code of Ethical Conduct for Alberta Physiotherapists provides:

“A. Responsibilities to the Client

Members of the physiotherapy profession have an ethical responsibility to:

1. Demonstrate sensitivity toward individual clients, respecting and taking into consideration their unique rights, needs, beliefs, values, culture, goals and environmental context.
4. Maintain professional boundaries that honour and respect the therapeutic relationship with clients.
5. Communicate openly, honestly and respectfully with clients at all times.
12. Practice in a safe, competent, accountable and responsible manner during the provision of services.
18. Comply with all legislation, guidelines, and regulatory requirements that pertain to the profession of physiotherapy.

B. Responsibilities to the Public

Members of the physiotherapy profession have an ethical responsibility to:

1. Conduct and present themselves with integrity and professionalism.

C. Responsibilities to Self and the Profession

Members of the physiotherapy profession have an ethical responsibility to:

1. Commit to maintaining and enhancing the reputation and standing of the physiotherapy profession, and to inspiring public trust and confidence by treating everyone with dignity and respect in all interactions.

182. The Hearing Tribunal also finds that the conduct is a breach of the Standard of Practice: Client-Centered Care. The Standard of Practice states:

“Clients can expect that they will be treated respectfully and their input will be valued, acknowledged, and integrated into all aspects of physiotherapy service delivery.

...

The physiotherapist:

- Treats clients in a manner that recognizes and appreciates their autonomy, uniqueness, goals, and self-worth at all times.

- Values the best interests of clients.

...

- Treats all clients with compassion, respect, and dignity throughout the course of their care.”

183. The Investigated Member breached his obligations to his client, to the public and to the profession. The breaches are extremely serious. Physiotherapists must be accountable for their practice and for ensuring that they maintain the appropriate boundaries with their clients. Clients are invariably in a vulnerable position as it relates to the physiotherapist. Physiotherapy treatment can also involve close touching and contact. Clients must feel confident that the physiotherapist is respecting the boundaries and dignity of the client and acting in the client’s best interests.

184. The Hearing Tribunal finds that the breaches of the Code of Ethical Conduct and Standards of Practice are serious and constitute unprofessional conduct under section 1(1)(pp)(ii) of the HPA.

185. Finally, the Hearing Tribunal considered section 1(1)(pp)(xii) of the HPA. Sexual abuse and sexual misconduct clearly harm the integrity of the profession. As it relates to this patient, AK testified that she will never go to a physiotherapist again. The conduct also harms the integrity of the profession more broadly, as sexual abuse and misconduct towards a patient will clearly negatively affect the public’s trust and confidence in physiotherapists and the profession more broadly. The Hearing Tribunal finds that the conduct harms the integrity of the profession and constitutes unprofessional conduct under section 1(1)(pp)(xii) of the HPA.

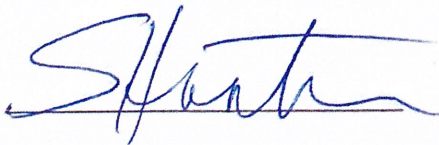
X. Conclusion

186. Allegation 1 is proven and constitutes sexual abuse and sexual misconduct as defined in the HPA and unprofessional conduct pursuant to sections 1(1)(pp)(i), (ii) and (xii) of the HPA.

186. Allegation 1 is proven and constitutes sexual abuse and sexual misconduct as defined in the HPA and unprofessional conduct pursuant to sections 1(1)(pp)(i), (ii) and (xii) of the HPA.
187. Section 81.1(1) of the HPA provides:
- If the subject-matter of a hearing relates to a complaint alleging sexual abuse, and the hearing tribunal decides that the conduct of an investigated person constitutes unprofessional conduct based in whole or in part on sexual abuse, the hearing tribunal must immediately order the suspension of the investigated person's practice permit until an order is made under section 82.
188. As such, in accordance with section 81.1(1) of the HPA, the Investigated Member's practice permit is immediately suspended until an order is made under section 82 of the HPA.
189. The Hearing Tribunal will receive submissions from the parties on any orders to be made by the Hearing Tribunal under section 82 of the HPA. The Hearing Tribunal notes section 80(2) of the HPA that if the Hearing Tribunal is of the opinion that there are reasonable and probable grounds to believe that the Investigated person has committed a criminal offence, the Hearing Tribunal must direct the Hearings Director to send a copy of the written decision under section 83 to the Minister of Justice. The parties may provide submissions respecting section 80(2) of the HPA if they choose to do so.
190. The Hearing Tribunal requests that the parties consult each other with respect to the process for submissions and advise the Hearing Tribunal of the proposed procedure for submissions on sanction within 2 weeks of receipt of this decision. If the parties are unable to agree on the process for closing submissions, the Hearing Tribunal will provide further direction.

Dated this 1st day of May, 2024.

Signed on behalf of the Hearing Tribunal

A handwritten signature in blue ink, appearing to read 'S. Hunter', written over a horizontal line.

Simone Hunter, PT, Chair