

**IN THE MATTER OF A HEARING BEFORE THE HEARING TRIBUNAL
OF PHYSIOTHERAPY ALBERTA COLLEGE AND ASSOCIATION
INTO THE CONDUCT OF ERAN GILBOA
PURSUANT TO THE *HEALTH PROFESSIONS ACT*, RSA 2000, c. H-7**

SANCTION DECISION OF THE HEARING TRIBUNAL

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I. Introduction

1. The hearing on sanction involving Mr. Eran Gilboa, a regulated member of the Physiotherapy Alberta College and Association (“College”), was held by video conference on May 25, 2020. The following individuals were present:

Hearing Tribunal:

Margaret Hayne, Public Member, Chair
Todd Wolansky
Sharla Butler

Also present were:

Moyra McAllister, Complaints Director
Gregory Sim, Legal Counsel for the Complaints Director
Jason Harley, associate, present as an observer with Mr. Sim
Eran Gilboa, Investigated Member
Taryn Burnett, Legal Counsel for the Investigated Member
Shayla Stein, Legal Counsel for the Investigated Member
Julie Gagnon, Independent Legal Counsel for the Hearing Tribunal
Emma Banfield, associate, present as an observer with Ms. Gagnon
Mikki Dergousoff, facilitator
Shelly Becker, court reporter

II. Preliminary Matters

2. The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 (“HPA”).

III. Allegations

3. The hearing on the allegations was held on August 8, 9, and 30, 2019. The Hearing Tribunal issued its decision on the merits on January 9, 2020 (the “Decision on Merits”). The Hearing Tribunal found Mr. Gilboa guilty of unprofessional conduct on allegations 2 and 4, which stated:

2. In the alternative to allegation #1, on or about September 14, 2018, while fully clothed, he inappropriately and purposefully allowed his penis to come

into contact with client CT's hand while he was providing physiotherapy treatment to her.

4. In the alternative to allegation #3, on or about December 13, 2018, December 18, 2018 and/or December 21, 2018, while fully clothed, inappropriately and purposefully allowed his penis to come into contact with client JH's hand while he was providing physiotherapy treatment to her.

4. The Hearing Tribunal dismissed allegations 1 and 3, which stated:

1. On or about September 14, 2018, while fully clothed, inadvertently and inappropriately allowed his penis to come into contact with client CT's hand while he was providing physiotherapy treatment to her, particulars of which include one or more of the following:
 - a. While providing treatment to CT, he failed to recognize that he had developed an erection; and
 - b. He failed to take adequate steps to position himself or CT in a manner that minimized or prevented contact between his penis and CT.
3. On or about December 13, 2018, December 18, 2018 and/or December 21, 2018, while fully clothed, he inadvertently and inappropriately allowed his penis to come into contact with client JH's hand while he was providing physiotherapy treatment to her, particulars of which include one or more of the following:
 - a. Despite having received a prior complaint alleging inappropriate touching, and despite having previous discussions with his employer regarding how to avoid similar complaints in the future, he failed to take adequate steps to maintain appropriate physical boundaries with JH while treating her in order to minimize the potential for inadvertent contact;
 - b. He failed to recognize on one or more occasions that while he was treating JH he had developed an erection; and
 - c. He failed to take adequate steps to position himself or JH in a manner that minimized or prevented contact between his penis and JH.

IV. Exhibits

5. The following were entered as exhibits during the sanctions hearing:

Exhibit #26 - Curriculum Vitae of Dr. J. Thomas Dalby

Exhibit #27 – Report of Dr. J. Thomas Dalby

Exhibit #28 – Regulatory History of Eran Gilboa

V. Witnesses

6. The following individuals were called as witnesses for Mr. Gilboa during the Sanction Hearing:

Dr. J. Thomas Dalby
Eran Gilboa

VI. Documents Provided to the Hearing Tribunal

7. The parties agreed to provide written submissions to the Hearing Tribunal following the hearing on May 25, 2020.
8. Counsel for the Complaints Director provided written submissions dated June 2, 2020 setting out the position of the Complaints Director on the appropriate sanction, as well as costs of the investigation and hearing. The following authorities were also provided:
- a. Excerpts of the *Health Professions Act*, RSA 2000, c H-7;
 - b. Excerpts of the *Physical Therapists Profession Regulation*, Alta Reg 64/2011;
 - c. *Jaswal v Newfoundland (Medical Board)*, 42 Admin LR (2d) 233;
 - d. *Calgary (City) v Canadian Union of Public Employees Local 37*, 2019 ABCA 388;
 - e. *Litchfield v College of Physicians and Surgeons (Alberta)*, 2008 ABCA 164;
 - f. *Sood v College of Physicians and Surgeons (Sask)*, 1995 CanLII 6137 (SKQB);
 - g. *Ontario (College of Physicians and Surgeons of Ontario) v Minnes*, 2015 ONCPSC No. 3;
 - h. *KC v College of Physical Therapists of Alberta*, 1999 ABCA 253;
 - i. Costs of the Investigation, Hearing, and Hearing Continuation as at May 20, 2020;
 - j. Excerpts of the *Criminal Code*, RSC 1985, c C-46;
 - k. *R v Phung*, 2013 ABCA 63.
9. Counsel for Mr. Gilboa provided written submissions dated June 5, 2020, setting out the position of Mr. Gilboa on the appropriate sanction, as well as costs of the investigation and hearing. The following authorities were also provided:
- a. Excerpts of the *Health Professions Act*, RSA 2000, c H-7;

- b. *Ontario (College of Pharmacists) v Oduro*, 2013 ONCPDC 15;
- c. *Ontario (College of Physiotherapists of Ontario) v Trambulo*, 2019 ONCPO 25;
- d. *Wakeford v College of Physicians of BC*, 1992 CanLII 231;
- e. *Jaswal v Newfoundland (Medical Board)*, 1996 CarswellNfld 32;
- f. *College of Physicians and Surgeons of Alberta v Bhardwaj*, (2020) published on cpsa.ca;
- g. *College of Physicians and Surgeons of Ontario v Gillen*, [1993] OJ No 947;
- h. *College of Surgeons and Physicians of Alberta v Alarape*, 2020 CanLII 10423;
- i. *Alberta College of Occupational Therapist v Thiessen*, 2019;
- j. *College of Physicians and Surgeons of Alberta v Maritz*, 2018 CarswellAlta 2318;
- k. *Physiotherapy Alberta College and Association v Respondent 540504*, 2018 ABPACA 1;
- l. *Taher v College of Physicians and Surgeons of Alberta*, 2017 CanLII 141843;
- m. *College of Physicians and Surgeons of Ontario v Peirovy*, 2015 ONCPSD 30 and 2018 ONCA 420;
- n. *College of Physicians and Surgeons of Ontario v Lee*, 2009 ONCPSD 14 and 2010 ONCPSD 10;
- o. *College of Physicians and Surgeons of Ontario v Sharma*, 2003 CanLII 74528 and 2004 ONCPSD 9;
- p. *Ontario (College of Physicians and Surgeons of Ontario) v Lee*, 2019 ONSC 4294;
- q. *McKennitt (Re)*, 2018 CanLII 105968 (AB CPSDC);
- r. *CK v College of Physical Therapists (Alberta)*, 1999 ABCA 253.

VII. Evidence Presented at the Hearing on May 25, 2020

Evidence Adduced by the Complaints Director

- 10. Mr. Sim, counsel for the Complaints Director indicated that the College would not be calling any evidence on sanction, although the College reserved its right to cross-examine any witnesses called by Mr. Gilboa.

Evidence Adduced by Mr. Gilboa

Dr. J. Thomas Dalby

11. Ms. Shayla Stein, counsel for Mr. Gilboa, called Dr. J. Thomas Dalby to give expert evidence. After reviewing Dr. Dalby's qualifications, Ms. Stein asked that Dr. Dalby be qualified to give expert evidence as a forensic psychologist with special interest in assessment and risk assessment. Dr. Dalby's expertise was accepted by legal counsel for the College, and the Hearing Tribunal therefore qualified Dr. Dalby to give the expert evidence proposed.
12. Dr. Dalby provided evidence about the materials he had reviewed in drafting his Forensic Psychological Assessment (Risk Evaluation) of Eran Gilboa, which was admitted as Exhibit 27. In preparing his report, Dr. Dalby reviewed the investigator's report, a transcript of the hearing, and the Decision on Merits, and he reviewed Mr. Gilboa's regulatory history after he drafted the report to confirm what he heard from Mr. Gilboa.
13. Dr. Dalby started his analysis by reviewing Mr. Gilboa's personal history and family life. Dr. Dalby testified about the nature of the tests he conducted with Mr. Gilboa, which were a Personality Assessment Inventory ("PAI"), a 16 Personality Factors Questionnaire – Fifth Edition, the Derogatis Sexual Functioning Inventory, and an SVR-20.
14. Dr. Dalby then testified about the results of the tests, and the conclusions he drew from the results. He indicated that he found Mr. Gilboa had no major mental health problems, and although he does have some stressors in his life, as might be expected, he is friendly and extraverted. Mr. Gilboa does not suffer from post-traumatic stress disorder, major depression, or any anxiety disorders, and does not abuse substances. Dr. Dalby indicated the Mr. Gilboa had strong social supports which he testified are a key variable in mental health.
15. Dr. Dalby testified that Mr. Gilboa is emotionally stable, mature, adaptive, unruffled, and calm in approaching difficulties, and assertive and competitive. Mr. Gilboa, in Dr. Dalby's view, is above average in his ability to think abstractly, and is warm and outgoing.
16. Regarding sexual functioning, Dr. Dalby testified that Mr. Gilboa tested average for a heterosexual male, and held views that were not typical of sexual offenders. Overall, Dr. Dalby considered Mr. Gilboa to be at a low risk for reoffending, keeping in mind that there is not a "no risk" category. Dr. Dalby testified that the behaviour Mr. Gilboa was found to have engaged in is called frotteurism, which is "rubbing or touching someone with a part of your body or part of their body without consent." Finally, Dr. Dalby confirmed his finding that Mr. Gilboa was rated as having a low risk of committing a sexual offence in the future.

17. On cross-examination, Mr. Sim, for the Complaints Director, asked Dr. Dalby whether he had factored in an increased risk of alcohol or drug abuse that had appeared in the PAI. Dr. Dalby indicated that this is simply a correlation, but that yes, some of these characteristics are associated with someone who is outgoing and bold. Dr. Dalby testified that he did not take this into account in drawing his conclusions because he understood that the PAI merely provided a correlation.
18. Mr. Sim also questioned Dr. Dalby about the frequency of the offences at issue, asking him if three incidents over nine days could be characterized as high density. Dr. Dalby agreed that it is a repeatable pattern. When Mr. Sim asked him whether he took it into account when applying the SVR, Dr. Dalby said that it was a minor element in one of the factors and would not have changed the end result.
19. Under questioning by Mr. Sim, Dr. Dalby indicated that there is a distinction between the disorder of frotteurism, and acts of frotteurism. He testified that there are tools to treat the disorder, but regarding specific behaviours, he agreed with Mr. Sim that there is no readily available treatment.
20. Mr. Sim also asked Dr. Dalby about his assessment of Mr. Gilboa's personality as risk-taking and adventurous. Dr. Dalby indicated that his report characterized Mr. Gilboa as socially bold, adventuresome and thick-skinned, and that while risk-taking might be an interpretation of that, those were not his words. When Mr. Sim asked whether being adventuresome is a personality trait that should be taken into account when determining risk, Dr. Dalby testified that it is simply a personality trait, and has no correlation to risk.
21. On re-examination, Ms. Stein asked Dr. Dalby to clarify what the presence of some risk factors would mean in his assessment of a patient. Dr. Dalby explained that there might be 20 items to correlate, and a patient could have none, or a few, or a lot. However, there is no cut-off line and the person making the assessment has to use their judgment. Dr. Dalby testified that having one indicator out of three on a single variable would be considered, but would not likely increase the entire risk judgment. Rather, the results are taken as a whole.

Eran Gilboa

22. Next, Ms. Stein called Mr. Gilboa to testify. Mr. Gilboa confirmed that he had no complaints registered with the physiotherapy regulatory body in Israel before he came to Canada. Mr. Gilboa testified that he was required to submit his disciplinary history to the College when applying to register as a physiotherapist in Alberta. Looking at exhibit 28, which was a record of Mr. Gilboa's regulatory history in Israel, Mr. Gilboa confirmed that the second section was completed by the Ministry of Health in Israel and that it indicated that there were no complaints or disciplinary acts against him as a physiotherapist. Mr. Gilboa also testified that he had no criminal history, and had never

been convicted of any criminal offences in Israel, nor charged with or convicted of any criminal offences in Canada.

23. Mr. Gilboa testified that he is a permanent resident in Canada, and as part of the application process, there was a background check. He had to provide certification from Israel to show that he had a clean criminal record check from the Israeli police; otherwise he would not have received his permanent residency in Canada.
24. Mr. Gilboa testified that his licence with the College was suspended on March 27, 2019, and that since then he worked in construction for a bit, and now is working as a brand investor for a marketing company at \$15/hour. Mr. Gilboa also testified that his salary in 2019 was a little over \$23,000. He indicated that his wife has been helping students with their homework through an Israeli website. Apart from the financial stress, Mr. Gilboa indicated that he and his wife are wondering if they can support themselves in Canada. His wife is aware of the allegations and findings against him, and is completely supportive, and they hope to remain in Canada where they have made new friends.
25. Mr. Gilboa testified that he loves being a physiotherapist and plans to continue practicing as a physiotherapist because he loves it. He testified that he was drawn to the profession after his personal experience with one when he was injured during his time in the army.
26. Ms. Stein asked Mr. Gilboa what steps he had taken to improve his practice as a result of the complaint, and he testified that because of his financial situation he was unable to take any counselling that cost money. However, he did take an online course on boundaries that he had to pay for, read several articles recommended by his lawyer, and went to Sexaholics Anonymous meetings. He testified that he took these steps to show the College that he was willing to do whatever it took to be a physiotherapist and to show that he is worthy of their trust.
27. Regarding his attendance at Sexaholics Meetings, Mr. Gilboa testified that he attended three times in an attempt to show the College that he can be a physiotherapist. He did not attend any other types of counselling because he could not afford them.
28. From reading the articles, which he reviewed several times, and the online boundaries course, Mr. Gilboa testified that he has learned the significance of maintaining boundaries. He also testified that he has learned about the imbalance between patient and caregiver, and that certain behaviours in terms of a relationship that reveals personal information are not acceptable between a caregiver and patient.
29. Referring to Dr. Dalby's report, Ms. Stein asked Mr. Gilboa whether he had ever sought the assistance of a mental health professional prior to seeing Dr. Dalby. Mr. Gilboa indicated that after his brother's suicide he sought help to cope with the emotional distress that created, and that while he was in the army he saw a friend die, and

afterward he went through psychological evaluation to make sure he was fit to command a tank.

30. Mr. Gilboa testified that he had never received any mental health diagnoses, does not use regular prescription medication, and only drinks alcohol socially. Regarding Dr. Dalby's assessment, Mr. Gilboa understood that it rated him as having low risk factors for committing a sexual offence, or any offence.
31. On cross-examination, Mr. Sim asked Mr. Gilboa if he remembered the name of the online course he took, but Mr. Gilboa could not remember, although he recalled that it had something to do with boundaries, healthcare professionals, and patients. In addition to the online course, he also reviewed articles titled Therapeutic Relationship; Where is the Line: Professional Boundaries in Therapeutic Relationships; and Boundary Violations, CPSO. All were recommended by his lawyer. When Mr. Sim asked if he had done anything on his own, Mr. Gilboa testified that he wanted to do whatever it took, but did not know what to do, so he put his trust in his lawyer. He confirmed he did none of it on his own initiative.
32. Regarding what he had learned, Mr. Gilboa testified that he learned about the differences between practice in Israel and Canada that he needed to understand better, but overall it was very clear to him. Mr. Gilboa testified that he was given readings after the first complaint against him about professionalism and boundaries, and although he understood the importance of therapeutic professional boundaries before, some issues are more clear to him now.
33. On redirect, Ms. Stein asked Mr. Gilboa if the College had directed or requested that he review any material. Mr. Gilboa testified that it had not, and that he had undertaken all his reviews of material voluntarily.
34. The Hearing Tribunal confirmed with Mr. Gilboa that he was asked to do some readings by Mr. Statham following the first allegations against him. The Hearing Tribunal also asked Mr. Gilboa whether he had learned anything new from the readings recommended by his legal counsel. Mr. Gilboa testified that his experience of practice in Israel was quite different, in that patients could contact his private cell phone number and consult with him, and that it was common for patients and therapists to talk about their personal life. It was new to him that he needs to keep conversation with patients to professional matters and to avoid talking about personal lives. He also testified that it is new for him to avoid creating contacts with patients outside practice, which is different from Israel where it is not forbidden to treat friends and family. Mr. Gilboa also added that he did not need any articles to know that the allegations he is facing are wrong, but he stands behind his denial that he never hurt anyone or did the things he was charged with. He stated that losing his license in Alberta will jeopardize his ability to practice in Israel as well.

VIII. Submissions by the Parties

Submissions on behalf of the Complaints Director on Sanction

35. Mr. Sim, on behalf of the Complaints Director, asked the Hearing Tribunal to order that Mr. Gilboa's registration be canceled and to order Mr. Gilboa to pay the costs of the investigation and hearings within 90 days of the sanction decision.
36. In support of this position, Mr. Sim argued that cancellation is the most severe sanction the Hearing Tribunal can impose, but noted that Mr. Gilboa would be permitted to reapply for registration after two years.
37. Mr. Sim submitted that the relevant factors in determining sanction come from *Jaswal v Newfoundland (Medical Board)* (1996), 42 Admin LR (2d) 233 (NL SC), and include:
 - a. Nature and gravity of the proven allegations
 - b. Mr. Gilboa's age and experience
 - c. The presence or absence of prior complaints or findings of unprofessional conduct
 - d. The number of times the offence was proven to have occurred
 - e. Whether Mr. Gilboa has acknowledged what occurred
 - f. Whether Mr. Gilboa has suffered other serious financial or other penalties as a result of the allegations have been made
 - g. The presence or absence of any mitigating circumstances
 - h. The need for specific and general deterrence
 - i. The need to maintain public confidence in the integrity of the profession
 - j. The degree to which the proven conduct was clearly regarded as falling outside the range of permitted conduct
 - k. The range of sanctions in other, similar cases
38. In relation to these factors, Mr. Sim submitted that the allegations are very serious, that neither age nor inexperience were mitigating factors in the circumstance, that Mr. Gilboa had no previous findings against him, that Mr. Gilboa had been found to have engaged in unprofessional conduct on four occasions over three months which amounted to a pattern of unprofessional behaviour, that Mr. Gilboa has maintained his denial of the findings which cannot be treated as mitigating, and that Mr. Gilboa has lost his employment as a result of the complaints and has testified he is struggling financially as a result of these proceedings.

39. Specifically in relation to the presence or absence of any mitigating circumstances, Mr. Sim submitted that the Hearing Tribunal's findings of fact highlight several aggravating factors. Mr. Gilboa was the subject of a police investigation following the first complaint and was advised to be hyper-vigilant when treating female patients, including not to treating them without a chaperone. Despite these warnings, Mr. Gilboa proceeded to treat JH behind a closed curtain, while she was topless and without a gown, and without a chaperone present. Mr. Sim submitted that Mr. Gilboa ought to have been aware of the seriousness of the allegations following the first complaint, and asked the Hearing Tribunal to consider whether it should believe that Mr. Gilboa now recognizes and respects patient boundaries.
40. Mr. Sim further submitted that following the second allegation, Mr. Gilboa intentionally and inappropriately contacted the patient through Facebook, which the Hearing Tribunal found was an attempt to influence the patient and affect the outcome of her complaint. Mr. Sim submitted that the Hearing Tribunal should find this to be an aggravating factor.
41. Mr. Sim further outlined several points in Dr. Dalby's expert report and oral testimony which he submitted should make the Hearing Tribunal cautious in considering Dr. Dalby's assessment of Mr. Gilboa's risk of recidivism. Specifically he argued that Dr. Dalby disregarded at least three risk factors that would increase Mr. Gilboa's potential risk. Further, Mr. Sim submitted that Dr. Dalby acknowledged that there is no readily available treatment for people who engage in frotterism but do not have a mental disorder.
42. Regarding specific and general deterrence, Mr. Sim submitted that general deterrence is of paramount importance in this case, as a clear message about the importance of maintaining professional boundaries and respecting the sexual integrity of clients cannot be overstated. There is a strong need for specific deterrence as well, as Mr. Sim submitted that Mr. Gilboa repeated his misconduct even after an investigation and caution for the same behaviour.
43. Mr. Sim submitted that Mr. Gilboa's action are very serious breaches of the Standards of Practice and Code of Conduct, and the public has no tolerance for unprofessional conduct of a sexual nature by regulated health professionals towards patients. Therefore, Mr. Sim submitted a complete denunciation of the conduct, through cancellation of Mr. Gilboa's registration and practice permit, are necessary to maintain public confidence in the integrity of the profession.
44. Mr. Sim submitted that Mr. Gilboa's conduct is at the very high end of unacceptable conduct. Regarding sanctions in similar cases, Mr. Sim pointed to the amendments to the HPA that were passed in 2018. He argued that lesser sanctions in cases that precede these amendments may no longer be defensible. Even before the HPA amendments, Mr. Sim submitted that unprofessional conduct of a sexual nature has resulted in cancellation. Citing a number of decisions, Mr. Sim submitted that Mr. Gilboa's

unprofessional conduct as proven was egregious and that the appropriate sanction, in light of the relevant factors and public expectation, is cancellation.

Submissions on behalf of Mr. Gilboa on Sanction

45. Mr. Gilboa's counsel proposed a 15-month suspension, with credit for the time that has passed since his suspension; a requirement to attend an in-person professional course on ethics and boundaries and submit to the College a successful certificate of completion; a requirement to practice in a multi-practitioner facility; and a 12-month supervision order on condition that Mr. Gilboa's supervisor be approved by the College, his supervisor receive a copy of the Hearing Tribunal's decision, Mr. Gilboa meets regularly with his supervisor and discusses issues relating to ethics and professional boundaries, the supervisor regularly reports to the College regarding Mr. Gilboa's practice, and the supervisor immediately advises the College of any concerns about Mr. Gilboa's practice or understanding of boundaries. These measures, in the submission of Mr. Gilboa's counsel, would protect the public, promote specific and general deterrence, and address the objective of rehabilitating Mr. Gilboa.
46. Counsel for Mr. Gilboa submitted that any sanction must be appropriate, fair, and reasonable in the particular circumstances of Mr. Gilboa as well as to the nature of the allegations proved. Counsel for Mr. Gilboa also reviewed the criteria for *Jaswal*.
47. In relation to these factors, counsel for Mr. Gilboa submitted that the allegations were serious and grave, but did not fall on the most serious end of the spectrum for sexual boundary violations. Counsel for Mr. Gilboa made no particular submissions as to how his age and experience might factor into the sanction decision. Regarding prior complaints or convictions, Mr. Gilboa's counsel submitted that he had no prior findings, nor any criminal record or outstanding charges anywhere. Regarding the age and mental condition of the victims, Mr. Gilboa's counsel noted that neither presented any particular vulnerability that might attract a more serious sanction. Mr. Gilboa's counsel submitted that repeated offences over a longer period of time would attract a more serious sanction.
48. In relation to Mr. Gilboa's continued denial of the allegation, counsel submitted that it would be an error to consider his denial as an aggravating factor or to impose a harsher sentence as a result. Further, his counsel noted that he has been respectful and cooperative with his employers, the College, and the Hearing Tribunal, and has not engaged in any conduct to hinder or obstruct the College's investigation.
49. Regarding any financial or other penalties, counsel for Mr. Gilboa submitted that he had testified that he is doing poorly financially. Regarding mitigating or aggravating factors, Mr. Gilboa's counsel submitted that after his suspension by the College, he engaged in remedial steps including readings, learning modules, and attending Sexaholics Anonymous, without any direction by the College. Counsel for Mr. Gilboa submitted that it would be unfair to view his failure to apply his employer's recommendations as

aggravating because the requirements were ambiguous and uncertain. Further, a lack of remorse is consistent with his continued denial of the allegations.

50. Regarding specific and general deterrence, Mr. Gilboa's counsel submitted that because Dr. Dalby's assessment indicated that Mr. Gilboa is at low risk to reoffend, specific deterrence can be achieved through a balanced sanction including suspension, remedial measures, education, and practice conditions. Mr. Gilboa's counsel submitted that the Complaints Director's characterization of Dr. Dalby's testimony is inaccurate, and should therefore be disregarded. In relation to general deterrence, counsel for Mr. Gilboa submitted that the proposed sanctions would be a signal to the profession that sexual boundary violations are not tolerated. Counsel for Mr. Gilboa did not dispute the serious and prohibited nature of sexual boundary violations.
51. Regarding sentences in similar cases, Mr. Gilboa's counsel submitted that similar disciplinary matters have attracted suspensions ranging from six to 18 months, with requirements for education, supervision, or a chaperone. Counsel for Mr. Gilboa submitted that the mandatory revocation provisions in the HPA amendments do not apply, and are not binding on the Hearing Tribunal. Regarding the Complaints Director's submission that older precedents may not be defensible, Mr. Gilboa's counsel submitted that older decisions already factored in changing attitudes and resulted in increased penalties. Therefore, Mr. Gilboa's counsel submitted that the cases cited should be instructive and could be followed as precedential.

Submissions on behalf of the Complaints Director on Costs

52. With respect to costs, counsel for the Complaints Director noted that the Court of Appeal of Alberta has said that the determination of costs is not a mathematical calculation, and that costs should be determined according to factors including the seriousness of the allegations, the conduct of the parties, and the reasonableness of the amounts. Further, large costs awards should be carefully scrutinized as they could deny a member the fair chance to defend themselves.
53. Counsel for the Complaints Director takes the position that Mr. Gilboa should be responsible for the full costs of the proceedings and provides decisions in support of the position that full costs should be ordered in this case.

Submissions on behalf of Mr. Gilboa on Costs

54. Counsel for Mr. Gilboa also notes that costs are discretionary, and that any order that delivers a crushing financial blow should be carefully scrutinized. Counsel for Mr. Gilboa takes the position that any order of costs will result in a crushing financial blow Mr. Gilboa cannot afford.

Submissions on Referral to the Minister of Justice

55. Counsel for the Complaints Director takes the position that pursuant to section 80(2) of the HPA, the Hearing Tribunal is bound to direct the Hearings Director to forward this matter to the Minister of Justice if the Hearing Tribunal finds that there are reasonable and probable grounds to believe that Mr. Gilboa's conduct constitute a criminal offence.
56. Counsel for Mr. Gilboa made no submissions on whether the Hearing Tribunal is bound to direct the Hearings Director to forward this matter to the Minister of Justice.

IX. Decision and Reasons of the Hearing Tribunal

57. The Hearing Tribunal carefully considered the evidence and submissions of the parties. The Hearing Tribunal considered Dr. Dalby's evidence. There was no dispute between the parties that Dr. Dalby was an expert, and his expertise was accepted. The Hearing Tribunal considered his testimony and report as part of its overall findings. The Hearing Tribunal also accepted Mr. Gilboa's evidence given on May 25, 2020.
58. The Hearing Tribunal considered the factors in *Jaswal v Newfoundland (Medical Board)*. These include the nature and gravity of the proven allegations, the age and experience of the offending member, the previous character of the member and in particular the presence or absence of any prior complaints or convictions, the impact on the offended patient, the number of times the offence was proven to have occurred, the role of the member in acknowledging what had occurred, whether the member has already suffered other serious financial or other penalties, and the presence or absence of any mitigating circumstances.
59. The Hearing Tribunal considered that the nature and gravity of the proven conduct is very significant. It is not at the most serious end of sexual conduct, but it is still very serious conduct. The Hearing Tribunal placed little weight on the age and experience of Mr. Gilboa as this conduct would be unacceptable no matter what the regulated member's age or years of experience. Mr. Gilboa has no prior findings of unprofessional conduct. With respect to the age and mental condition of the patients, the Hearing Tribunal noted that the patients in this case were not part of a vulnerable population, however the conduct remains very serious. There is a power imbalance between a health professional and a patient that must be recognized.
60. The Hearing Tribunal considered that there were four instances of the conduct over a period of a few months. The Hearing Tribunal found that the repeated behaviour with JH on three occasions after both a workplace investigation and a police investigation following CT's complaint was very concerning. The Hearing Tribunal placed little weight on Mr. Gilboa's failure to acknowledge what had occurred. A regulated member is entitled to fully defend allegations and so, this was seen as a neutral factor in terms of sanction. With respect to other serious financial or other penalties, the Hearing Tribunal recognized that Mr. Gilboa has lost his employment as a physical therapist and was

suspended pending the outcome of the proceedings. With respect to mitigating circumstances, the Hearing Tribunal considered the submissions by counsel for Mr. Gilboa that he undertook remedial steps and has demonstrated an eagerness and willingness to improve his practice. The evidence is that Mr. Gilboa undertook the steps that his lawyer recommended.

61. The Hearing Tribunal considered the issue of specific and general deterrence. Clearly a significant sanction is needed both to deter Mr. Gilboa specifically and to send a strong message to members of the profession. In addition, a clear message is required to ensure that the public's confidence in the integrity of the profession is maintained. The Hearing Tribunal considered these to be significant factors.
62. Finally, the Hearing Tribunal considered the range of sentences in similar cases. The cases presented show that similar conduct has attracted a significant suspension. As noted in its Decision on Merits, the Hearing Tribunal accepted the submissions by the parties that the recent changes to the HPA (i.e. the Bill 21 amendments to the HPA) did not apply to this case. As such, the Hearing Tribunal placed significant weight on decisions prior to the changes to the HPA. Significant weight was also placed on the more recent decisions.
63. The Hearing Tribunal finds that a significant sanction is necessary in this case, including a lengthy suspension. The suspension is appropriate given the nature of the findings against Mr. Gilboa. The conduct by Mr. Gilboa must be denounced. Mr. Gilboa was suspended pending the conclusion of these proceedings and has been suspended since March 2019. It is appropriate in these circumstances and having regard to the cases cited by counsel for Mr. Gilboa regarding interim suspensions that the interim suspension be counted in the overall suspension imposed.
64. If Mr. Gilboa chooses to return to practice following the suspension, a period of supervision and additional educational elements are also warranted. As noted previously, the Hearing Tribunal was concerned that Mr. Gilboa should have understood the gravity of the situation following the first complaint against him and the workplace and police investigation that followed. A period of supervision, additional education, and a reflective paper are appropriate in this case and are intended to rehabilitate Mr. Gilboa and protect the public.
65. The Hearing Tribunal considered the issue of costs. It is reasonable and appropriate for Mr. Gilboa to bear a portion of the costs of the investigation and hearing in this case. The Complaints Director was successful in proving the purposeful allegations. The Hearing Tribunal finds that the allegations that were proven were the more serious alternatives in this matter. The Hearing Tribunal considered the seriousness of the allegations, the conduct of the parties, and the reasonableness of the amounts. The Hearing Tribunal recognizes Mr. Gilboa's financial circumstances. While it is appropriate to send a strong message to the public and the profession that behaviour of this nature is wholly unacceptable, Mr. Gilboa was cooperative and reasonable throughout the

process, and ordering him to pay the full costs of the investigation and hearing would be a crushing financial blow. These factors are recognized in the costs order.

66. The Hearing Tribunal finds that requiring Mr. Gilboa to pay up to \$20,000 toward the costs of the investigation and hearing is appropriate in this case.

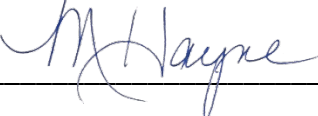
X. ORDER OF THE HEARING TRIBUNAL

67. The Hearing Tribunal orders as follows:

- a. Mr. Gilboa shall be suspended for eighteen (18) months with credit for the time he has been suspended under the interim suspension imposed pending completion of the disciplinary process;
- b. Upon return to practice, Mr. Gilboa shall be subject to a supervision order with the following conditions:
 - i. Mr. Gilboa will be supervised for 2000 practice hours;
 - ii. Mr. Gilboa must have a chaperone present when attending with female patients for the first 1000 practice hours of his supervised practice;
 - iii. Mr. Gilboa's supervisor must be approved in advance by the Complaints Director;
 - iv. Mr. Gilboa will provide his supervisor with a copy of the Decision on Merits and this decision on sanction;
 - v. Mr. Gilboa will meet with his supervisor regularly and discuss issues with respect to ethics and professional boundaries;
 - vi. The supervisor will provide regular reports to the Complaints Director regarding Mr. Gilboa's practice; and
 - vii. The supervisor will immediately advise the Complaints Director of any concerns raised with respect to Mr. Gilboa's practice or understanding of boundaries;
- c. Mr. Gilboa is required to attend an in-person professional course on ethics and boundaries as approved by the Complaints Director in advance and at his own expense. Mr. Gilboa must submit a certificate of successful completion of the course to the Complaints Director within 12 months of the date of this decision. Attendance at and completion of this course will not count toward any continuing competence program requirements;

- d. Mr. Gilboa must submit to the Complaints Director a reflective paper on what he has learned from the course and how he will adapt his practice to incorporate his learning. The reflective paper must be to the satisfaction of the Complaints Director and must be submitted within 14 months of the date of this decision;
 - e. Mr. Gilboa is required to practice in a multi-practitioner facility during his period of supervision and until he has successfully satisfied all other elements of this order; and
 - f. Mr. Gilboa shall pay the costs of the investigation and hearing to a maximum of \$20,000, to be paid over twenty-four (24) months following the date this decision is issued on a payment schedule agreeable to the Complaints Director.
68. The Hearing Tribunal is of the opinion that there are reasonable and probable grounds to believe that Mr. Gilboa has committed a criminal offence. In accordance with section 80(2) of the HPA, the Hearing Tribunal directs the Hearings Director to provide a written copy of its Decision on Merits and a copy of this decision on sanction to the Minister of Justice and Solicitor General.

Signed on behalf of the Hearing Tribunal by the Chair this 7th day of July, 2020.



Margaret Hayne, Chair