

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF DENTAL HYGIENISTS OF ONTARIO**

**PANEL: Pauline Leroux, Chair,
Trudi Enstrom, a professional member of Council,
Jenny Gibson, a professional member of Council,
Maria Lee a public member of Council. and
Beatrice Kau-Lui, a public member of Council**

BETWEEN:

College of Dental Hygienists of Ontario

**) Robin McKechney, for the)College
of Dental Hygienists of)Ontario**

- and -

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Roxanne Lindsay

**) Jasmine Ghosn, for the
) Registrant**

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**) Elyse Sunshine, Independent
) Legal Counsel**

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) Heard: August 2, 2018

DECISION AND REASONS

This matter came on for hearing before a panel of the Discipline Committee on August 2, 2018, at the College of Dental Hygienists of Ontario at Toronto. Robin McKechney represented the College. Roxanne Lindsay ("the Registrant") was represented by Jasmine Ghosn. Elyse Sunshine acted as independent legal counsel to the Panel.

THE ALLEGATIONS

The allegations against the Registrant, as stated in the Notice of Hearing dated February 22, 2018, were as follows:

1. At the material times, the "Registrant was a duly registered member of the College of Dental Hygienists of Ontario, practising at Dr. Younes Dental Care in Trenton, Ontario (the "Clinic").
2. Client #1 was a client of the Registrant's and attended for dental hygiene treatment with the Registrant at the Clinic on or about April 15, 2014, July 31, 2014, October 31, 2014, February 11, 2015 and May 26, 2015.
3. The Registrant and Client #1 were involved in a sexual relationship that included sexual intercourse.
4. The Registrant provided dental hygiene treatment to Client #1 on or about May 26, 2015, while the Registrant and Client #1 were involved in a sexual relationship.
5. During the course of a Dental Hygienist-Client Relationship with Client #1, the Registrant did one or more of the following:
 - a. sent personal text messages to Client #1 including but not limited to text messages of a flirtatious nature and text messages that discussed a former client of the Registrant's; and/or
 - b. during the course of a dental hygiene appointment with Client #1, discussed Client #1's former spouse; and/or
 - c. during the course of a dental hygiene appointment with Client #1, discussed one of her former clients; and/or
 - d. during the course of a dental hygiene appointment with Client #1, discussed the Registrant's marital issues; and/or

- e. during the course of a dental hygiene appointment with Client #1, discussed renting Client #1's house; and/or
 - f. rented a house from Client #1; and/or
 - g. met with Client #1 in his vehicle during a sporting event; and/or
 - h. entered into a sexual relationship with Client #1, that included sexual intercourse.
6. In or around March 2017 and April 2017, the Registrant disclosed personal health information regarding Client #1 in a Facebook message exchange and in a Facebook posting.
7. It is alleged that the above conduct constitutes professional misconduct pursuant to:
- a. Clause 51(1)(b.1) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the "Code") (sexual abuse of a patient, more particularly, sexual intercourse or other forms of physical sexual relations between the member and the patient); and/or
 - b. Clause 51(1)(c) of the Code and as defined in one or more of the following paragraphs of section 15 of Ontario Regulation 218/94 under the Dental Hygiene Act, 1991 (the "Dental Hygiene Regulation"):
 - i. paragraph 2: contravening by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession; and/or
 - ii. paragraph 12: acting in a professional capacity while in a conflict of interest; and/or
 - iii. paragraph 24: giving information about a client to a person without the consent of the client or his or her authorized representative except as required or permitted by law; and/or
 - iv. paragraph 52: engaging in conduct or performing an act, relevant to the practise of the profession, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and/or
 - v. paragraph 53: conduct unbecoming a dental hygienist.

WITHDRAWAL OF ALLEGATIONS

The College requested permission to withdraw the allegation in paragraph 7(b)(iii) from the Notice of Hearing, respecting giving information about a client to a person without consent, contrary to paragraph 24 of the Dental Hygiene Regulation, on the basis that the College had insufficient evidence to prove this allegation. The Panel consented to the withdrawal of this allegation

REGISTRANT'S PLEA

The Panel sought to obtain the Registrant's plea. The Registrant and her counsel requested a break in the hearing to discuss her plea. Following the break, the Registrant advised that she intended to admit to contravening a standard of practice of the profession and conduct unbecoming a dental hygienist. Specifically, the Registrant admitted to the following acts of misconduct as set out in the Notice of Hearing:

- 7(b)(i) paragraph 2: contravening by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession; and
- 7 (b)(v) paragraph 53: conduct unbecoming a dental hygienist.

The Registrant denied the allegations relating to sexual abuse, acting while in a conflict of interest or engaging in disgraceful, dishonourable or unprofessional conduct. Specifically, the Registrant advised that she was contesting the following allegations as set out in the Notice of Hearing:

- 7(a) sexual abuse of a patient, more particularly, sexual intercourse or other forms of physical sexual relations between the member and the patient), pursuant to Clause 51(1) (b.1) of the Code ; and/or
- 7(b)(ii): acting in a professional capacity while in a conflict of interest, contrary to paragraph 12 of the Dental Hygiene Regulation ; and
- 7(b)(iv): engaging in conduct or performing an act, relevant to the practise of the profession, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to paragraph 52 of the Dental Hygiene Regulation.

EVIDENCE

Counsel for the College advised the Panel that agreement had been reached on the facts and introduced an Agreed Statement of Facts which provided as follows:

The Registrant

1. The Registrant ("Ms. Lindsay") was at the material times a duly registered dental hygienist in Ontario, holding a certificate of registration in the General class from the College.
2. At all material times, Ms. Lindsay was employed at the Clinic.

The Patient

3. Client #1 initially became a patient of the Clinic in December 2008.
4. Client #1 attended for dental hygiene treatment with Ms. Lindsay at the Clinic on or about April 15, 2014, July 31, 2014, October 31, 2014, February 11, 2015 and May 26, 2015.

The Relationship between Ms. Lindsay and Client #1

5. On or about July 31, 2014, during the course of a dental hygiene treatment session, Client #1 disclosed to Ms. Lindsay that he was recently divorced.
6. On or about October 31, 2014, during the course of a dental hygiene treatment session, Ms. Lindsay disclosed to Client #1 that she was experiencing marital difficulties.
7. In or around December 2014, Ms. Lindsay and Client #1 began to exchange text messages of a personal nature including text messages that were flirtatious.
8. On or about February 11, 2015, during the course of a dental hygiene treatment session, Ms. Lindsay disclosed to Client #1 that she was leaving her husband. Ms. Lindsay and Client #1 then discussed the possibility of Ms. Lindsay renting Client #1's home in Trenton beginning in May 2015 when Client #1 intended to relocate to Cambridge.
9. At the conclusion of the February 11, 2015 appointment, an appointment was scheduled with Ms. Lindsay for May 26, 2015.
10. In late February, 2015, Ms. Lindsay met with Client #1 in his vehicle during her son's soccer practice in Oshawa.
11. In or around February and March 2015, Ms. Lindsay attended Client #1's home in Trenton on multiple occasions.

12. On or around May 1, 2015 Ms. Lindsay moved into Client #1's home in Trenton as a tenant of Client #1. At this time Client #1 was residing in Cambridge.
13. In or around early May 2015, a few weeks prior to Client #1's final dental hygiene treatment session with Ms. Lindsay, Ms. Lindsay and Client #1 commenced a romantic relationship that included sexual intercourse.
14. Prior to the May 26, 2015, appointment with Client #1, Ms. Lindsay informed Client #1 she could not provide hygiene services to him anymore because they were "more than just clinician and patient" by that point. Client #1 understood that this meant he could no longer be Ms. Lindsay's patient. Ms. Lindsay, however, did not place anything in Client #1's file indicating that the dental hygienist-client relationship had been terminated.
15. Notwithstanding the fact that Ms. Lindsay told Client #1 she was not permitted to treat him, Client #1 still asked Ms. Lindsay if she would provide dental hygiene treatment to him on May 26, 2015. Ms. Lindsay agreed to do so and provided the following explanation to the College Investigator:

He begged me to treat him and told me he liked the way I cleaned his teeth. He kept saying 'please please please please' so I felt pressured into doing the appointment even though I knew it was wrong. I then forwarded him on to a different hygienist.
16. The dental hygiene treatment session on May 26, 2015 included assessment of Client #1's teeth and gums and scaling. According to the treatment notes, the treatment session lasted 39 minutes. The treatment was paid for through Client #1's insurance provider.
17. During the course of the dental hygiene treatment session on May 26, 2015, Client #1 tried to persuade Ms. Lindsay to remain his dental hygienist, notwithstanding the fact that they were involved in a sexual relationship. Ms. Lindsay refused and, as indicated above, referred Client #1 to a different dental hygienist following the appointment. Ms. Lindsay did not treat Client #1 again.

FINDINGS ON THE UNCONTESTED ALLEGATIONS

The Panel accepts the admissions of the Registrant and the facts as set out in the Statement of Agreed Facts and finds, on a balance of probabilities, that those facts established that the Registrant:

- contravened by act or omission, a standard of practice of the profession or failed to maintain the standard of practice of the profession pursuant to paragraph 2 of section 15 of the Dental Hygiene Regulation; and
- engaged in conduct unbecoming a dental hygienist pursuant to paragraph 53 of section 15 of the Dental Hygiene Regulation.

The Panel found that evidence, as presented in the Agreed Statement of Facts, supported the findings of misconduct that were admitted to by the Registrant.

SUBMISSIONS OF THE PARTIES ON THE CONTESTED ALLEGATIONS

Submissions of the College

The College submitted that the Registrant was involved in a concurrent professional and sexual relationship during May 2015. Under the Code), concurrent sexual and professional relationships are prohibited and the sanction for this act of misconduct is mandatory revocation of the Registrant's certificate of registration. The College submitted that the Registrant commenced a sexual relationship with a client despite the fact that she knew it was prohibited. Although only one dental hygiene treatment session was provided during the currency of the sexual relationship, the College argued that this is nonetheless sufficient to meet the definition of "sexual abuse" under s.1(3) of the Code.

The College submitted that concurrent professional and sexual relationships are prohibited under the *Regulated Health Professions Act, 1991* (the "RHPA"). The legislation is clear and unambiguous: when it comes to sexual relations between a health professional and a patient, there is a black letter, bright line prohibition with a drastic sanction and no exceptions or exemptions. The zero tolerance policy precludes inquiry into any explanation or excuse for the sexual activity. A patient's consent is irrelevant.

The College relied on the decision of *Leering v College of Chiropractors of Ontario*, 2010 ONCA 87 at para 37 (*Leering*) and submitted that under the Code, "sexual abuse" was proven once it is demonstrated that the professional and sexual relationships overlapped. The College submitted that disciplinary offence of sexual abuse is defined in the Code as the concurrence of a sexual relationship and a healthcare professional - patient relationship. The College argued that there is to be no further inquiry once those two factual determinations have been made.

The College argued that the Registrant provided dental hygiene treatment to Client #1 on four successive occasions, between April 15, 2014 and February 11, 2015, prior to the commencement of a sexual relationship in early May 2015. Client #1 was clearly and unequivocally a patient of the Registrant's during this time period and there is nothing to differentiate the first four dental hygiene appointments from the appointment on May 26, 2015 (the "May 26th Appointment").

The College submitted that the Registrant did not terminate the dental hygienist -patient relationship by explaining the prohibition on treating a sexual partner to Client #1. This is evidenced by the very fact that following this explanation, the Registrant still treated Client #1. The College argued that the fact that Client #1 said “please” or that the Registrant said that she felt “pressured” did not change the obligation on the Registrant to choose between a professional and a sexual relationship.

The College further submitted that the treatment provided by the Registrant during the May 26th Appointment, could not be considered “incidental” (as the Registrant argued that where there was only incidental treatment, there was no sexual abuse of a patient). The College pointed out that the dental hygiene treatment provided during the May 26th Appointment occurred during a regularly scheduled appointment with the Registrant at the dental office where the Registrant was employed. During the May 26th Appointment, the Registrant conducted an assessment of Client #1’s teeth and gums and performed scaling and polishing. Client #1 paid for the appointment through his insurer and the Registrant made recommendations for continued self-care. The Registrant was not providing treatment on an emergency basis or because there was no other means by which Client #1 could obtain the treatment. The College submitted that Client #1 was treated by the Registrant in the normal course of a dental hygienist – client relationship.

The College argued that the Legislature has mandated in the Code a bright red line prohibition on sexual relationships between health professionals and their patients with the sanction of revocation to address the pressing problem of sexual misconduct in the health professions. The Sexual Abuse Task Force has recommended to regulatory Colleges that this prohibition must be applied in all situations where the definition of sexual abuse in the Code is met. This includes applying the law to the Registrant who has engaged precisely in the conduct that is prohibited.

Submissions of the Registrant

The Registrant argued that the zero tolerance regime under the RHPA was “harsh” and the legislative provisions have attracted constitutional challenges. The Registrant submitted that the circumstances and evidence suggest that the zero-tolerance regime ought not apply her because:

1. there was a termination of the patient relationship prior to any sexual relationship; and
2. the May 26th Appointment falls within the scope of medical care that is incidental to the intimate relationship, having regard to the circumstances of this case.

The Registrant relied on the decision of *R.A.R. v. College of Physicians and Surgeons of Ontario*, 2006 CanLII 3 7118 (ON CA), to support the proposition that she could avoid a finding of sexual abuse because she had terminated the professional relationship prior to the May 26th Appointment. The Registrant argued that there was a clear intention to terminate the

professional relationship before the May 26th Appointment and that there was no patient relationship at that time. The Registrant argued that one need only to terminate the professional relationship in order to avoid a finding of sexual abuse.

The Registrant further argued that the May 26th Appointment constituted “incidental care” and was therefore not sexual abuse. The Registrant relied on *Leering* for the proposition that while a personal / spousal relationship alone does not exempt a regulated health professional from the sexual abuse provisions of the RHPA, what will exempt a professional is if the nature of the treatment itself is incidental medical care, given the context of the intimate relationship. The Registrant relied on a number of cases¹ to argue that the May 26th Appointment would fall into the category of “incidental medical care” as it was both minor in nature and it arose in connection with a terminated professional relationship, as mutually agreed and understood by both Client #1 and the Registrant.

FINDINGS ON THE CONTESTED ALLEGATIONS

The Panel considered the Agreed Statement of Facts and the submissions of counsel and finds that, on a balance of probabilities, the facts support the findings of professional misconduct as set out in the Notice of Hearing. Specifically, in addition to the findings of misconduct on the uncontested allegations as set out above, the Panel finds that the Registrant engaged in the following acts of professional misconduct:

- sexual abuse of a patient contrary to clause 51(1)(b.1) of the Code more particularly, sexual intercourse or other forms of physical sexual relations between the member and the patient;
- acting in a professional capacity while in a conflict of interest contrary to paragraph 15 of section 15 of the Dental Hygiene Regulation; and
- engaging in conduct or performing an act, relevant to the practise of the profession, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional contrary to paragraph 52 of section 15 of the Dental Hygiene Regulation.

¹ Cases relied upon by the Registrant included: *Ontario (College of Physicians and Surgeons of Ontario) v. Carter*, 2012 ONCPSD 14 (CanLII), *Ontario (College of Physicians and Surgeons of Ontario) v. Moore*, 2013 ONCPSD 19 (CanLII), *Ontario (College of Physicians and Surgeons of Ontario) v. Nguyen*, 2000 CanLII 29779 (ON CPSD), *Ontario (College of Physicians and Surgeons of Ontario) v. Rai*, 2016 ONCPSD 1 (CanLII)

REASONS FOR DECISION ON CONTESTED FINDINGS

The burden of proving the allegations in a disciplinary hearing rests on the College. The standard of proof required, and accepted by the Committee, is that established by the Supreme Court of Canada; the allegations must be proved on the balance of probabilities, by evidence that is clear, cogent and convincing.

The contested allegations in this case are threefold: 1. that the Registrant sexually abused a patient by having sexual intercourse with him during the concurrency of the treatment relationship; 2. that the Registrant acted while in a conflict of interest; and 3. that this conduct would reasonably regarded be by members of the profession as disgraceful, dishonourable or unprofessional.

1. Sexual Abuse of a Client

Pursuant to section 51(1) (b.1) of the Code, it is an act of professional misconduct to sexually abuse a client. Sexual abuse , as defined in the Code, includes sexual intercourse.

Both parties agree that this is not a case where the patient was not a willing participant. That said, even where the patient may be an active partner in the sexual relationship, where there is concurrent sexual intercourse and a patient relationship, this would constitute sexual abuse.

It is uncontested that Client #1 was a client of the Registrant and attended for dental hygiene treatment with her on April 15, 2014, July 31, 2014, October 31, 2014, February 11, 2015 and May 26, 2015.

The uncontroverted evidence is that the Registrant and Client #1 developed a personal relationship that included exchanging personal and flirtatious text messages, and meetings outside of office at Client #1's residence and in his vehicle during a soccer practice for the Registrant's son. The Registrant also agreed to rent Client #1's home in Trenton when he relocated to Cambridge in May 2015.

It is also agreed that, in early May 2015, a few weeks prior to Client #1's final dental hygiene session, the Registrant and Client #1 commenced a sexual relationship that included sexual intercourse. The Panel accepts that the Registrant informed Client #1 that she could not provide dental hygiene services to him anymore because they were more than just clinician and patient. However, the Registrant did not document anything in Client #1's chart.

Notwithstanding that the Registrant knew that she could not treat Client #1 and be in a sexual relationship with him, after he "begged" her to clean his teeth, she provided dental hygiene treatment to him during the May 26th Appointment in the dental office. This treatment included assessment, scaling and polishing

Following the May 26th Appointment, Client #1 was referred to a different dental hygienist and the Registrant did not treat him again.

While the parties are in agreement about the facts, they disagree on the implications of same. The College submits that concurrent sexual intercourse and treatment is sexual abuse. The College argues that the Registrant was in a sexual relationship with Client #1 in May 2015, when she also provided dental hygiene services to him. This is sexual abuse. The Registrant states that the hygienist - patient relationship had ended when the May 26th Appointment occurred and thus Client #1 was not a patient and therefore, sexual abuse did not occur. The Registrant also argues that the treatment was incidental and therefore this was not sexual abuse.

It is well established that sexual abuse of a patient occurs where sexual activity and a health professional - patient relationship occur at the same time.

The Panel considered the clarification provided by the Court of Appeal in *Leering* that under the Code, "sexual abuse" was proven once it is demonstrated that the professional and sexual relationships overlapped. The Panel accepted the College's argument that the disciplinary offence of sexual abuse is defined in the Code for the purpose of these proceedings as the concurrence of a sexual relationship and a healthcare professional - patient relationship. There is no further inquiry once those two factual determinations have been made.

While the College did make submission regarding the constitutionality of the sexual abuse provisions, with which the Panel agrees, the constitutionality of the sexual abuse provisions was not challenged by the Registrant. The Registrant accepts the law (and acknowledged that she understood the law) but argues that the law does not apply in this case because she terminated the patient relationship with Client #1 before the May 26th Appointment and because the care was incidental.

The Panel considered the nature of the professional relationship between the Registrant and Client #1 and found there to be a patient relationship in place during the May 26th Appointment. The Panel considered the hallmarks of a health professional - patient relationship as enunciated in *Redhead v. CPSO, C. A., 2013 ONCPSD 18 (CanLII)* and found that they applied to the case at hand and that a patient relationship existed at the May 26th Appointment. These factors included,

- The Registrant had a patient file for Client #1;
- The Registrant billed for the services provided to Client #1;
- The May 26th Appointment occurred in the same dental office where all of the previous treatments had been provided;
- The treatment provided included all of the elements of a routine dental hygiene appointment and was consistent with treatments provided to Client #1 in the past; and
- Client #1 was not seeing another dental hygienist at the time. Similarly, the fact that the Registrant referred Client #1 to another practitioner *after* treating him does not

somehow mean that she had terminated the professional relationship prior to the treatment.

The Panel accepted that Client #1 was clearly and unequivocally a patient of the Registrant's during this time period and found that there is nothing to differentiate the first four dental hygiene appointments from the May 26th Appointment. The Panel found that the Registrant did not terminate the patient relationship by explaining the prohibition on treating a sexual partner to Client #1. This is evidenced by the fact that following this explanation, the Registrant still treated Client #1. The fact that Client #1 said "please" or that the Registrant says that she felt "pressured" does not change the obligation on the Registrant to choose between a professional and a sexual relationship. In some circumstances, this may be a difficult choice to make but the obligation on a health professional does not change because of any perceived inconvenience involved in making the choice.

Further, the Panel does not accept the Registrant's argument that the treatment provided by the Registrant at the May 26th Appointment could be considered "incidental". The May 26th Appointment was a regularly scheduled appointment with the Registrant at the dental office where the Registrant was employed. The Registrant conducted an assessment of Client #1's teeth and gums and performed scaling and polishing. Client #1 paid for the appointment through his insurer and the Registrant made recommendations for continued self-care. The Registrant was not providing treatment on an emergency basis or because there was no other means by which Client #1's could obtain the treatment.

The Panel considered the analysis by the Court of Appeal in *Leering* where the Feldman, J.A. elaborated on what was meant by "incidental" treatment:

Two examples of "incidental medical care" might be where a doctor and her spouse are in an accident and the doctor provides on-the-spot emergency care to her spouse, or a chiropractor's spouse suffers a muscle spasm and the chiropractor performs a manipulation in order to provide immediate relief. It would be unreasonable for a spouse to be denied treatment in such circumstances.

As the Court in *Leering* stated, "where medical treatment is provided on a regular basis by appointment in an office, and where payment is expected, it is most unlikely that such treatment would be considered 'incidental'."

The Panel agrees with the College's submissions that by trying to categorize the May 26th Appointment as "incidental", the Registrant is attempting to create an exception where none exists. A dental hygiene appointment does not become "incidental" simply because the patient said "please". This was not an emergent or urgent situation. This did not involve a scenario where Client #1 could not access resources because of lack of available care providers or because he lived in a small town and the Registrant was the only dental hygienist. The May 26th Appointment had all of the hallmarks of a dental hygienist – patient relationship, including

performing controlled acts and billing to a third party insurer, and none of the characteristics that would qualify it as “incidental”.

The Panel considered the numerous cases relied upon by the Registrant to argue that the care she provided was incidental. The Panel found those cases to be distinguishable from the case at hand, for the reasons outlined above, and/or the Panel would not have arrived at the same decision as those discipline panels from other colleges.

The Panel finds that the Registrant understood that she was not permitted to be in a sexual relationship with Client #1 and treat him, but she provided dental hygiene treatment anyway. There is no exception in the legislation or the case law because the patient said “please” or because the patient appreciated the way in which the dental hygienist cleaned his teeth. This does not and cannot convert a regular dental hygiene appointment to “incidental” treatment nor does it obviate the requirement that a health professional choose between a sexual or professional relationship. The Registrant must do more than simply state the rule, she must also act upon it to avoid the ambit of the sexual abuse provisions in the Code. The Panel therefore finds that the Registrant engaged in sexual abuse of a patient. The Panel also accepts the College’s submission that sexual abuse of a patient is also a breach of the standards of practice of the profession. The Panel finds that no expert evidence is required to demonstrate that sexual abuse of a client is a breach of the standards of practice of the profession because it is egregious and obvious on its face.

2. Conflict of Interest

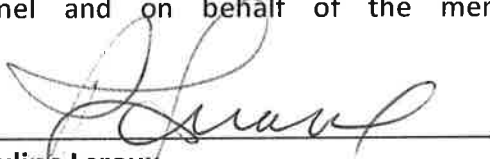
The Panel finds that the unconverted evidence supports a finding that the Registrant acted in a professional capacity while in a conflict of interest. The Panel accepts the College’s submission that this misconduct is made out by the Registrant engaging in boundary violations with Client #1, such as discussing marital issues, being in sexual relationship with Client #1 and entering into landlord tenant relationship with him.

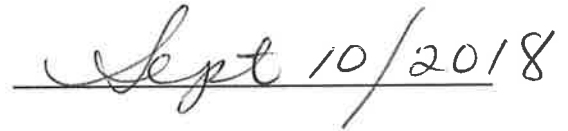
3. Disgraceful, Dishonourable and Unprofessional Conduct

The Panel finds that the Registrant engaged in behaviour that members of the profession would reasonably regard as disgraceful, dishonourable or unprofessional. The Panel accepts that conduct that demonstrates lack of integrity, dishonesty, abuse of power, or disregard for the welfare and safety of members of the public, is conduct that will not be tolerated by a health profession. The Panel finds that the factual conduct that was agreed to by the parties is evidence of this head of misconduct. The Panel finds that the same conduct that supports the uncontested findings, and the contested findings, also supports a finding of disgraceful, dishonourable or unprofessional conduct. The Panel finds that it is more likely than not that the Registrant’s conduct as alleged and as admitted to would constitute disgraceful, dishonourable or unprofessional conduct.

Given the findings of misconduct, the Panel requests that a penalty hearing be scheduled at the first available opportunity.

"I, **Pauline Leroux**, sign this decision and reasons for the decision as Chair of this Discipline panel and on behalf of the members of the Discipline panel as listed below:


Pauline Leroux
Chair, Discipline Panel


Date

**Trudi Enstrom, a professional member of Council,
Jenny Gibson, a professional member of Council
Beatrix Kau-Lui, a public member of Council, and
Maria Lee, a public member of Council.**

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College of Dental Hygienists of Ontario

- and -

Roxanne Lindsay

**) Robin McKechney, for the)College
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) Jasmine Ghosn, for the

) Registrant

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) Elyse Sunshine, Independent

) Legal Counsel

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) Heard: November 23, 2018

PENALTY DECISION AND REASONS

A Panel of the Discipline Committee of the College of Dental Hygienists of Ontario (the "Panel") held a penalty hearing on November 23, 2018. Robin McKechny represented the College of Dental Hygienists of Ontario (the "College"). Jasmine Ghosn represented Roxanne Lindsay (the "Registrant"). Elyse Sunshine acted as independent legal counsel to the Panel.

FINDINGS OF PROFESSIONAL MISCONDUCT

By decision dated September 10, 2018 (the "Misconduct Decision"), a Panel of the Discipline Committee found that the Registrant engaged in the following acts of professional misconduct:

1. sexual abuse of a patient contrary to clause 51(1)(b.1) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, as amended (the "Code") more particularly, sexual intercourse or other forms of physical sexual relations between the Registrant and a patient;
2. contravening by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession, pursuant to paragraph 2 of section 15 of the Ontario Regulation 218/94 under the *Dental Hygiene Act, 1991* (the "Dental Hygiene Regulation");
3. acting in a professional capacity while in a conflict of interest, contrary to paragraph 15 of section 15 of the Dental Hygiene Regulation;
4. engaging in conduct or performing an act, relevant to the practise of the profession, that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to paragraph 52 of section 15 of the Dental Hygiene Regulation; and
5. engaging in conduct unbecoming a dental hygienist, pursuant to paragraph 53 of section 15 of the Dental Hygiene Regulation.

As outlined in the Misconduct Decision, the Panel found that the Registrant engaged in boundary violations with, and provided treatment to, someone with whom she was in a sexual relationship, and thereby engaged in the acts of professional misconduct outlined above.

POSITION OF THE PARTIES ON PENALTY AND COSTS

The College and the Registrant were in agreement with respect to penalty. The College and the Registrant were not in agreement with respect to costs.

The parties jointly submitted that the following penalty would be appropriate:

1. an order requiring the Registrant to be reprimanded; and
2. an order directing the Registrar to revoke the Registrant's Certificate of Registration.

The College submitted that revocation and a reprimand are both mandatory terms of the penalty order, due to the findings of sexual abuse in this case. The College referred the Panel to section 51(5) of the *Code*, which provides that:

Orders relating to sexual abuse

51(5) If a panel finds a member has committed an act of professional misconduct by sexually abusing a patient, the panel shall do the following in addition to anything else the panel may do under subsection (2):

1. Reprimand the member.
[...]
3. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following:
 - i. Sexual intercourse
[...]

The College submitted that where, as in this case, a panel finds that a registrant engaged in sexual abuse of a client, the Panel also had discretion to order reimbursement for therapy for the client, pursuant to section 51(2) of the *Code*. The College advised, however, that given the circumstances in this case, the College was not seeking such funding. As such, the Panel did not order that the member reimburse the College for any costs related to therapy.

The parties were in dispute as to the amount that should be ordered for costs. The College sought an order that the Registrant pay costs in the amount of \$30,000. The Registrant opposed the College's request and stated that she should not be required to pay costs in that amount, due to financial hardship. The parties therefore called evidence and made submissions with respect to costs.

EVIDENCE REGARDING COSTS

Evidence of the College

The College filled the affidavit of Andrea Lowes, who is Director of Professional Conduct for the College (Exhibit 1). Ms. Lowes' evidence was that the College's investigative and prosecution costs, up to the point of the penalty hearing, were \$46,833.39.

Evidence of the Registrant

The Registrant testified on her own behalf. The Registrant stated that she could not afford the amount of costs the College was seeking and could not even finance a payment of that amount. The Registrant testified that she was a single mother, with a son in college. She stated that she does not receive any financial support and that she has no credit. The Registrant testified that as a result of the events at issue, she has lost her career and any job she could take would result in a significant reduction in her salary from that which she received as a dental hygienist.

SUBMISSIONS OF THE PARTIES ON COSTS

Submissions of the College

The College relied on s. 53.1 of the *Code* which allows the Panel to make an order requiring the Registrant to pay all or part of the College's legal, investigation, and hearing costs related to a matter. The College initially stated that it was seeking an award of approximately two-thirds of the College's total costs. Although the College submitted that it is appropriate to apply a guideline of two-thirds of the total costs, after considering the evidence of the Registrant and based on the order made in the recent case of the *College v. Alexandru Tanase* (August 2018), the College indicated that it would be prepared to accept costs assessed at 51% of the total costs.

The College stated that in this case, a number of factors warrant a cost award against the Registrant. First, the College was successful in proving all allegations in this matter. In addition, no issues of public importance were raised in the hearing and in fact, all of the issues in the discipline hearing had been previously decided by the Ontario Court of Appeal and Divisional Court. The College submitted that given that the live issues at the hearing had been previously decided, the costs of the hearing should not be entirely visited upon the other registrants of the College. The College did note that the Registrant cooperated with the College in arriving at an Agreed Statement of Fact, which formed the factual basis for the hearing. The College submitted, however, that the Registrant had already benefitted from this cooperation through the reduced hearing time required and thus the reduction of the total hearing costs incurred by the College. The College acknowledged that in light of the mandatory penalty of revocation, the costs award sought would be significant for the Registrant and therefore, suggested that the costs could be payable over a period of time.

Submissions of the Registrant

The Registrant submitted that costs are not mandatory and the two-thirds requirement was only a guideline. The Registrant submitted that as one allegation was withdrawn, she should

not be required to pay for costs in relation to that allegation. The Registrant further submitted that it was reasonable for her to take the position that she only provided incidental care, which was a novel argument, even though other cases may have decided this issue differently. She submitted that given the seriousness of the issues, asserting this defence was reasonable. The Registrant also pointed out that there was no element of dishonesty in this case. She asked the Panel to consider her personal circumstances and the harm a significant costs award would cause her.

PENALTY AND COSTS ORDER

The Panel provided its decision to the parties in its written order of November 23, 2018. In that order, the Panel ordered and directed on the matter of penalty and costs that:

1. The Registrant is required to appear before a panel of the Discipline Committee immediately following the hearing of this matter to be reprimanded, with the fact of the reprimand and the text of the reprimand to appear on the public register of the College;
2. The Registrar is directed to revoke the Registrant's Certificate of Registration effective immediately; and
3. The Registrant is required to pay the college costs in the amount of \$23,885.00 within five (5) years of the date of the Discipline Committee's order.

REASONS FOR THE PENALTY AND COSTS ORDER

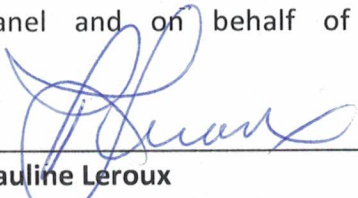
The Panel agreed with the parties that, given the findings of sexual abuse made against the Registrant, the Panel was required, pursuant to s. 51(5) of the *Code*, to order that the Registrant be reprimanded and that the Registrar be directed to revoke his Certificate of Registration.

The Panel accepts that pursuant to s. 53.1 of the *Code*, it is within the Panel's jurisdiction to make an award of costs to the College in this case. The Panel noted that this was a contested hearing and that findings were made against the Registrant with respect to the acts of professional misconduct alleged. The Panel also accepts the guiding principle that it is inappropriate to expect the general membership of the College to pay the costs of the prosecution of individual registrants through their membership dues. Therefore, the Panel found that this was an appropriate case for costs to be awarded.

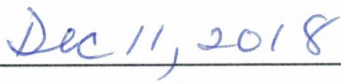
With respect to the quantum of costs, the Panel is aware that the purpose of awarding costs is not punitive, but rather, that costs should reflect a portion of the actual expense involved in investigating and prosecuting the matter. In deciding to award costs in the amount of \$23,885.00 paid over five (5) years, the Panel considered the actual costs incurred by the

College, the Discipline Committee's decision in the *Tanase* case and the information provided by the Registrant about her personal circumstances.

"I, **Pauline Leroux**, sign this decision and reasons for the decision as Chair of this Discipline panel and on behalf of the members of the Discipline panel as listed below:



Pauline Leroux
Chair, Discipline Panel



Date

Trudi Enstrom, a professional member of Council,
Jenny Gibson, a professional member of Council
Maria Lee, a public member of Council.