

NOTICE OF PUBLICATION BAN

This is notice that the Discipline Committee ordered that no person shall publish, broadcast or otherwise disclose the name of the Client referred to during the hearing or in documents filed at the hearing held on July 22, July 23, July 24, September 4, October 5 and October 20, 2020, or any information that would disclose the identity of the Client, including the name of his spouse.

The order was made pursuant to subsection 45(3) and section 47 of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18.

Subsection 93(1) of the Code, which deals with failure to comply with orders of this type, reads in part as follows:

Every person who contravenes an order made under [...] section 45 or 47 [...] is guilty of an offence and on conviction is liable,

- (a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or
- (b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence

THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

and

SHERRY LYNN MACDONALD

DECISIONS AND REASONS

A panel of the Discipline Committee of the College of Dental Hygienists of Ontario heard this matter through an electronic meeting on the Zoom platform on July 22, July 23, July 24, September 4, October 5 and October 20, 2020.

THE ALLEGATIONS

The allegations against Ms. MacDonald as stated in the Notice of Hearing dated December 13, 2019, are as follows:

It is alleged that

1. Ms. Sherry Lynn MacDonald (the “Registrant”) was at material times a duly registered dental hygienist in Ontario, holding a certificate of registration in the General class from the College of Dental Hygienists of Ontario (the “College”) practicing in Shelburne and Orangeville, Ontario.

The Client

2. On or about September 2016, a male client (the “Client”) began attending the dental clinic where the Registrant was employed (the “Clinic”).
3. The Registrant regularly provided dental hygiene treatment to the Client at the Clinic from in or about June 2017 until about March 2019.
4. On or about May 2018, the Registrant saw the Client and his family while on vacation and indicated to the Client that she found him attractive.
5. Following the vacation, the Registrant and Client corresponded via text message and telephone calls.
6. From on or about August 2018 to in or about May 2019, the Registrant and the Client entered into a sexual relationship, which included sexual intercourse and other sexual touching, including oral to genital touching. The sexual contact occurred at both the Registrant’s home and the Client’s home.

Professional Misconduct Alleged

7. It is alleged that the above conduct constitutes professional misconduct pursuant to one or more of the following:
 - 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 specifically, sexual intercourse or other forms of physical sexual relations between the member and the patient and/or behaviour or remarks of a sexual nature by the member towards 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 made under the *Dental Hygiene Act, 1991*:
- i. paragraph 2 (contravening a standard of practice of the profession or failing to maintain the standard of practice of the profession); and/or
 - ii. paragraph 52 (disgraceful, dishonourable or unprofessional conduct); and/or
 - iii. paragraph 53 (conduct unbecoming a dental hygienist)

REGISTRANT'S PLEA

Ms. MacDonald denied the allegations set out in Clause 51(1)(b.1) and 51(1)(c) of the Code and paragraph 2, paragraph 52, and paragraph 53 in the Notice of Hearing.

THE EVIDENCE

The Client [REDACTED]

Mr. [REDACTED] testified that he was a client at Shelburne Dental from June 2017 and that the Registrant was the only dental hygienist who treated him at this clinic. Upon review of the appointment schedule, Mr. [REDACTED] confirmed that he was treated by the Registrant on three occasions in 2017 and five occasions in 2018 including on October 11, 2018. He also confirmed attending an appointment on March 23, 2019 with Ms. MacDonald at Heritage Dental where the Registrant also worked. Mr. [REDACTED] testified that he became sexually and emotionally intimate with the Registrant on or around August 8, 2018 until May 16, 2019 whom was also his dental hygienist.

Mr. [REDACTED] testified to the nature of his personal relationship with the Registrant. Specifically, Mr. [REDACTED] recalled that on or about May 2018, he and his family went on a trip to the Dominican Republic, where they met up and spent the week with the Registrant and her friend, H [REDACTED] R [REDACTED] ("Ms. R [REDACTED]"). The Registrant and Ms. R [REDACTED] were staying at another resort, but would visit the [REDACTED] resort during the day.

Mr. [REDACTED] testified about several flirtatious incidents with the Registrant that occurred during the May 2018 trip. In particular, Mr. [REDACTED] recalled that the group went on a catamaran day excursion where the Registrant told Mr. [REDACTED] "how hot I was." This statement did not appear to be challenged by the defense. Mr. [REDACTED] also described an encounter a few nights later where the group went to a nightclub and the Registrant danced with Mr. [REDACTED] and kissed his neck.

Mr. [REDACTED] testified that, following the vacation, he and the Registrant started to correspond extensively via text message, iMessage, snapchat, Facetime and spoke on the phone. Mr. [REDACTED] testified that they expressed their interest in each other both physically and sexually. Mr. [REDACTED]

recalled that in June 2018, the Registrant would come by the [REDACTED] home to use their pool with her kids and that they made excuses to see one another more frequently.

Mr. [REDACTED] testified that he engaged in sexual intercourse and oral sex with the Registrant for the first time on August 8, 2018. The Client recalled the event in considerable detail including the location where they had met and where they had travelled to. He was even able to recall the clothing the Registrant was wearing that day. Mr. [REDACTED] testified that he continued to engage in sexual activity with the Registrant thereafter, approximately two to three times per month, until their last sexual encounter on May 16, 2019. Mr. [REDACTED] recalled that they would often engage in sexual activity on Wednesdays when the Registrant was off work at their respective homes and at a friend's home. Mr. [REDACTED] stated that, as time progressed, he and the Registrant developed emotional feelings for one another and became "like boyfriend and girlfriend".

Defence counsel also asked Mr. [REDACTED] to describe his last sexual encounter with the Registrant on May 16, 2019. Again Mr. [REDACTED] recalled the event in detail, stating that he met the Registrant at her home during her lunch break. Mr. [REDACTED] recalled that the Registrant had extra time on that day because a patient had cancelled.

Mr. [REDACTED] was able to describe an encounter with the Registrant on May 10, 2019, when he visited her at a condominium in Toronto for her birthday. Mr. [REDACTED] testified that he met the Registrant on the road outside the condo. She entered his car, and they parked underground in the condo's parking space. Mr. [REDACTED] recalled the details of the event, such as the location of the condo, the fact that the condo was a vacant one bedroom, one bathroom unit with an inflatable mattress on the floor, and that it had a view of the CN Tower. He recalled that he visited the Registrant after work between approximately 12:30 PM and 2:30 PM, and then left to visit a friend's cottage. Phone records demonstrate three separate conversations that took place with the Client for 22, 23 and 34 minutes.

Mr. [REDACTED] also testified that in May 2019, his wife, his daughter, his daughter's friend and the Registrant all went on a "girls trip" to Mexico. Mr. [REDACTED] drove them to airport on May 17, 2019 and picked them up from the airport upon their return on May 25, 2019. Mr. [REDACTED] testified that when he attended to pick them up at the airport, he kissed the Registrant on the side of the lips which upset Ms. [REDACTED]. He recalled arguing with his wife that same evening about whether he was having an affair with the Registrant which he initially denied. Mr. [REDACTED] described how the Registrant's contact information was saved in his phone under an alias. He testified that his wife became upset when he refused to show her his phone as they had an open phone policy in the house. Ms. [REDACTED] made attempts to obtain the phone to read the messages and Mr. [REDACTED] himself in their bathroom to prevent this from happening. While he was in the bathroom, Mr. [REDACTED] testified that he deleted the messages. Mr. [REDACTED] spoke candidly about locking himself in the bathroom during the argument and stated that Ms. [REDACTED] had broken the door hinges trying to enter.

Mr. [REDACTED] recalled that on late May 25 or early May 26, Ms. [REDACTED] told him that she was going to visit the Registrant and left the house. After Ms. [REDACTED] left, Mr. [REDACTED] called 911 because he feared for the Registrant's safety if her husband learned of the affair. Mr. [REDACTED]

testified that while he was on the phone with 911, Ms. [REDACTED] returned home, and he finally confessed to her that he and the Registrant were having an affair.

Mr. [REDACTED] testified that he believed that Ms. [REDACTED] attended at the Registrant's house again the following morning on May 26, 2019, but that he was not present at the time. Mr. [REDACTED] also stated that he and the Registrant were texting throughout the night and morning, which is reflected in his phone records.

On cross-examination, counsel examined Mr. [REDACTED] at length about the events on May 25 and 26, 2019 and the evidence remained consistent.

Mr. [REDACTED] testified about the volume of text messages and calls exchanged between himself and the Registrant. He stated that they would text each other almost every morning when they woke up and would exchange pictures in bed. He discussed particulars about various communications in the records. During his testimony, Mr. [REDACTED] examined phone records and records of text messages. He testified that the amount of communication was more than presented as they also communicated through iMessage, Facetime and snapchat which was not reflected in the phone records.

Mr. [REDACTED] testified over the course of two days and evidence in chief, through extensive cross-examination and re-examination by the College. At a later stage in the hearing the College sought to recall Mr. [REDACTED] as a witness in this hearing to provide further testimony in response to new issues raised by the defense council after his testimony was complete. Mr. [REDACTED] declined to reattend the hearing.

[REDACTED]

[REDACTED] ("Ms. [REDACTED] testified that she met the Registrant at Shelburne Dental where she worked as a dental assistant between November 2016 and September 2018. In May 2018, she vacationed with her family in Punta Cana and that the Registrant and Ms. R [REDACTED] were vacationing at a nearby resort at the time. Ms. [REDACTED] recalled that the group booked an excursion together on May 21, 2018.

Ms. [REDACTED] testified that she went to Cancun for a "girls trip" from May 17-24, 2019, with her daughter, her daughter's friend, the Registrant and Ms. R [REDACTED]. Mr. [REDACTED] picked them up at the airport on May 25, 2019 and Ms. [REDACTED] described the Client's greetings upon their return which included kissing the Registrant on the side of the lips. Ms. [REDACTED] described multiple incidents where she witnessed behaviour between the Registrant and Mr. [REDACTED] leading to her suspicion of an affair. These events included witnessing her husband rubbing the Registrant's back when sitting on a couch and rubbed her leg in a hot tub, finding her husband in a bedroom with the Registrant checking up on her when she was staying at their house.

Ms. [REDACTED] testified that later in the evening, Mr. [REDACTED] was texting an individual called "Sam" and would not show Ms. [REDACTED] his phone. Ms. [REDACTED] recalled that they argued and Mr. [REDACTED] locked himself in the bathroom. Ms. [REDACTED] agreed that she knocked the bathroom door off its hinges as she was upset believing Mr. [REDACTED] was hiding something. She testified that she then

told her husband Mr. [REDACTED] that she was going to see the Registrant and left the house. Ms. [REDACTED] then testified that she actually just went for a drive and did not visit the Registrant's house at that time.

Upon her return she asked Mr. [REDACTED] why he had called 911 when she had left. Ms. [REDACTED] testified that her husband responded that he was afraid for the Registrant's safety because they were having an affair. Ms. [REDACTED] testified that an argument ensued and Mr. [REDACTED] ultimately went to bed.

Ms. [REDACTED] testified that while Mr. [REDACTED] was sleeping, she attended at the Registrant's home around approximately 3:00 AM on May 26, 2019. Ms. [REDACTED] testified that Mr. [REDACTED] was likely unaware that she went there at this time. Ms. [REDACTED] testified that when she arrived at the Registrant's home, the Registrant and her husband Brad MacDonald ("Mr. MacDonald") came to the door. Ms. [REDACTED] stated that she accused the Registrant of having an affair with Mr. [REDACTED]. The Registrant did not deny the conduct. Ms. [REDACTED] testified that she and Mr. MacDonald went into the driveway to discuss the issues.

Ms. [REDACTED] also testified that she re-attended the Registrant's home later that same morning. Ms. [REDACTED] pulled up in front of the home (in her truck) and honked her horn because she wanted the Registrant to come outside. Ms. [REDACTED] conceded that she refused to leave the Registrant's home until the Registrant agreed to stop talking to Mr. [REDACTED]. Ms. [REDACTED] testified that the police subsequently arrived at the scene and asked her to leave.

On cross-examination, Ms. [REDACTED] also described a call to Ms. R [REDACTED] the night of May 25 or early morning of May 26, 2019. Ms. [REDACTED] testified that Ms. R [REDACTED] was the first person that she called after learning about the affair. Ms. [REDACTED] testified that she called Ms. R [REDACTED] because they had just been on vacation together and she wanted to know if Ms. R [REDACTED] knew about the affair. Ms. [REDACTED] testified that Ms. R [REDACTED] was shocked and denied knowing about the affair. Ms. [REDACTED] specifically denied that she accused Ms. R [REDACTED] of having an affair with Mr. [REDACTED].

Ms. [REDACTED] confirmed that Mr. [REDACTED] was aware of the complaint made to the College and that they made the complaint together.

Roula Anastasopoulos

Roula Anastasopoulos "Ms. Anastasopoulos" is an investigator with the College of Dental Hygienists of Ontario who had been appointed by the College to investigate allegations of professional misconduct against the Registrant. Ms. Anastasopoulos interviewed Mr. [REDACTED] by telephone. She stated that she confirmed Mr. [REDACTED] identity by asking if she was speaking to him and confirming his address and contact information. She identified in cross-examination that it is the College's practice for interviews to be conducted by a variety of means including video, in person or on the phone depending on scheduling and the location of the witness. The panel found that the investigation was conducted fairly and had no concerns.

The Registrant

The Registrant has been a dental hygienist of 22 years. She has worked in the same dental office Shelburne Dental for her entire career. She has been married for 19 years and has 5 children with her husband.

The Registrant testified that Mr. [REDACTED] was her patient and that she treated him on multiple occasions between June 2018 and March 2019. The Registrant admitted that she subsequently developed a friendship with Mr. [REDACTED] and his family when they vacationed together in the Dominican Republic in May 2018. The Registrant stated that she and Mr. [REDACTED] discovered several shared interests which included fitness and dieting.

The Registrant testified that she attended a catamaran excursion during the Dominican Republic trip along with Mr. [REDACTED] and his family. She denied that she told Mr. [REDACTED] that she thought he was “damn hot” during this excursion. Instead, the Registrant suggested that Mr. [REDACTED] misinterpreted or misheard her and that she actually said “it’s so hot” in reference to the weather. This version of the events was not presented to Mr. [REDACTED] during his testimony but does not have appeared to be raised prior to the Registrant’s testimony.

The Registrant denied kissing Mr. [REDACTED] neck while dancing at the resort disco, stating that there was “no possible way” it could have happened because there were other people around.

During her testimony, the Registrant was presented with Mr. [REDACTED] phone and text message records. She provided various explanations for the large number of calls and text messages that she exchanged with Mr. [REDACTED]. These explanations included discussing her son’s education, a daughter’s trip to Italy, birthday plans, arrangements for their children’s driver’s education, chiropractor recommendations, arrangements for a family photoshoot on the [REDACTED] property, the Registrant’s interactions with Mr. “O” and arrangements to drop off a wedding card.

The Registrant testified that in addition to communicating by text message and phone, she communicated with Mr. [REDACTED] by iMessage and Snapchat. The Registrant testified that she had deleted her text messages with Mr. [REDACTED] because her husband was upset with her after “everything went down” so the content of these messages was no longer available.

The Registrant testified about her whereabouts on August 8, 2018, the date that Mr. [REDACTED] testified was their first sexual encounter. She testified that she could not have been with Mr. [REDACTED] around lunchtime on that day as Mr. [REDACTED] testified alleged because she would have been preparing her children for a shopping trip at Costco in Barrie at that time where her daughter had a passport photo taken, they ate lunch and shopped. A receipt entered into evidence is time stamped 4:49 pm from Costco. The panel notes the time stamp is in the later afternoon.

The Registrant also testified about her birthday on May 10, 2019. The Registrant testified that she attended an Ontario Dental Association (“ODA”) conference on that day and provided screen shots suggesting that she was at an ODA session at 12:14 PM. The Registrant testified that, after the session ended at 12:30 PM, she met up with her sister-in-law and four work colleagues for approximately 30 minutes. The Registrant testified that when the others headed home at around 1:00 PM, she walked around the ODA exhibit hall pricing saddle stools, from approximately

1:00 PM to approximately 2:45 PM. The Registrant testified that she returned to the condo for 3:00 PM, where she planned to meet Ms. R [REDACTED].

The Registrant testified that when she got back to the condo at around 3:00 PM, she learned that Ms. R [REDACTED] was stuck in traffic and so she decided to clean the oven while she waited as a “thank you” to the condo’s owner. The Registrant provided a photo of a clean oven.

Phone records show that the Registrant and Mr. [REDACTED] spoke on the phone three times at 4:29 PM, 4:56 PM and 5:21 PM respectively, for a total of nearly one and a half hours. When asked about these calls during cross-examination, the Registrant testified that she and Mr. [REDACTED] discussed the condo, her day and plans for the Blue Jays game, her upcoming trip with Ms. [REDACTED] and the fact that she got lost in the condo’s parking garage.

Finally, the Registrant testified about the events on May 25 and 26, 2019. The Registrant stated that she received a number of text messages from Mr. [REDACTED] early in the morning on May 26, 2019 shortly before the police arrived at her home. The Registrant recalled that the messages read “are you there?”, “she’s on her way” and “get your kids and leave”. The Registrant asserted that these messages did not make sense to her and that she had no idea to what Mr. [REDACTED] was referring. The Registrant testified that when she subsequently spoke to Mr. [REDACTED] on the phone, she learned that he and Ms. [REDACTED] had a fight after he picked them up at the airport and that Ms. [REDACTED] “wouldn’t stop bothering him” so “he just gave her my [the Registrant’s] name”. The Registrant stated that she did not know how her name came up and repeatedly suggested that Mr. [REDACTED] had been drinking during the time in question.

The Registrant testified that Ms. [REDACTED] came to her home twice on May 26, 2019. On both occasions, when the Registrant and Mr. MacDonald opened the door, Ms. [REDACTED] accused the Registrant of having an affair with Mr. [REDACTED]. The Registrant confirmed she did not deny the affair when accused.

H [REDACTED] R [REDACTED]

The Registrant’s counsel called Ms. H [REDACTED] R [REDACTED] as a witness in this hearing. Ms. R [REDACTED] testified that she and the Registrant had been friends for twenty years. Ms. R [REDACTED] testified that the Registrant is her best friend.

Ms. R [REDACTED] testified that she met Mr. [REDACTED] and Ms. [REDACTED] in May 2018 when she and the Registrant went on vacation. Ms. R [REDACTED] testified that she did not observe any intimacy between the Registrant and Mr. [REDACTED] on this trip.

On cross-examination, Ms. R [REDACTED] testified that she was present at the resort disco but did not see anything.

On cross-examination, counsel for the College asked Ms. R [REDACTED] about the Registrant’s birthday on May 10, 2019. Ms. R [REDACTED] stated that she arrived around 5:00 PM which left a window of time. Ms. R [REDACTED] stated that the Registrant could have been on the phone with Mr. [REDACTED] when she (Ms. R [REDACTED]) went to the bathroom to get ready for the evening.

Ms. R [REDACTED] did not observe any sexual conduct between the member and the patient but provided no relevant evidence to the contrary.

Brad MacDonald

Mr. MacDonald and the Registrant have been married for 19 years. They have five children together. Mr. MacDonald testified that he first met Mr. [REDACTED] and Ms. [REDACTED] through the Registrant, when she worked with Ms. [REDACTED] at the dental office. Mr. MacDonald testified that the two couples developed a friendship and spent time at each other's homes.

Mr. MacDonald testified that he first learned of the allegations that his wife and Mr. [REDACTED] were having an affair on May 26, 2019, when Ms. [REDACTED] attended at his house. Mr. MacDonald described waking up to the sound of Ms. [REDACTED] knocking on his door and yelling. Contrary to the Registrant's own evidence, Mr. MacDonald testified that the Registrant immediately denied Ms. [REDACTED] accusation saying, "this is nonsense".

DECISION

The panel finds that based on the balance of probabilities, the evidence presented supports a finding of professional misconduct as alleged in paragraphs 2, 52 and 53 of the Notice of Hearing in that:

(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 specifically, sexual intercourse or other forms of physical sexual relations between the member and the patient and/or behaviour or remarks of a sexual nature by the member towards 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 made under the *Dental Hygiene Act, 1991*:

- iv. paragraph 2 (contravening a standard of practice of the profession or failing to maintain the standard of practice of the profession); and/or
- v. paragraph 52 (disgraceful, dishonourable or unprofessional conduct); and/or
- vi. paragraph 53 (conduct unbecoming a dental hygienist)

REASONS FOR THE DECISION

ONUS OF PROOF

The onus of proof is on the College to prove the allegations as set out in the Notice of Hearing. The panel relies on the case law initially, set out by the majority in *Re Bernstein and the College of Physicians and Surgeons* (1977), 15 S.O. (2d) 447, 470:

In all cases, before reaching a conclusion of fact, the panel must be reasonably satisfied that the fact occurred, and whether the panel is so satisfied will depend on the totality of the circumstances including the nature of the consequences of the fact or facts to be proved, the seriousness of the allegation made and the gravity of the consequences that will flow from a particular finding.

In *Bernstein* the Divisional Court held that “the degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based upon cogent evidence which is accepted by the [panel].”

It is from that case that standard of “clear, cogent and convincing evidence accepted by the panel” arises.

The panel also relies on the Supreme Court of Canada, *F.H v. McDougall*, 2008 SCC 53. In *McDougall*, the S.C.C stated that there is only one standard of proof in civil matters (including professional discipline hearings), and that is the balance of probabilities. This judgement emphasized that the civil standard, whatever the consequences, remained the same: the Committee must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. Further, “evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.”

The panel was persuaded, based on the balance of probabilities described as fifty percent plus one, that it is more likely than not that the allegations are true. Following the approach set out in *McDougall*, the panel did not look at the Client’s evidence in isolation, but looked at the totality of the evidence and assessed the impact of any inconsistencies in that evidence on questions of credibility and reliability which were issues raised in this case.

CREDIBILITY OF WITNESSES

The panel acknowledged that credibility was a significant factor in assessing the weight to be given to evidence. The panel carefully assessed the evidence of each witness and methodically based their appraisal upon the specific criteria for credibility. In *Re Pitts and the Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Div. Ct.), these factors were considered in conjunction with all of the evidence.

In determining the credit to be given to the evidence of a witness, you should use your good commonsense and your knowledge of human nature. You might, in assessing credibility, consider the following:

- The appearance and demeanour of the witness, and the nature in which he or she testified. Did the witness appear and conduct himself or herself as an honest and trustworthy person? It may be that he or she is nervous or confused in circumstances in which he or she finds himself or herself in the witness box. Is he a man or is she a woman who has a poor or faulty memory, and may that have some effect on his or her demeanour on the witness stand, or on the other hand, does he or she impress you as a witness who is shifty, evasive and unreliable?
- The extent of his or her opportunity to observe the matter about which he testified. What opportunities of observation did he or she in fact have? What are his or her powers of perception? You know that some people are very observant while others are not very observant.
- Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge or shade his or her evidence in order to lend support to his or her cause.
- Does the witness exhibit any partisanship, any undue leanings towards the side which called him or her a witness? Is he or she a relative, friend, an associate of any of the parties in this case, and if so, has this created a bias or prejudice in his or her mind and consequently affected the value of his or her testimony?
- It is always well to bear in mind the probability or improbability of a witness' story and to weigh it accordingly. That is a sound commonsense test. Did his or her evidence make sense? Was it reasonable? Was it probable? Does the witness show a tendency to exaggerate in his or her testimony?
- Was the testimony of the witness contradicted by the evidence of another witness, or witnesses whom you considered more worthy?
- Does the fact that the witness has previously given a statement that is inconsistent with part of his or her testimony at trial affect the reliability of his or her evidence?

After weighing these matters and any other matters that you believe are relevant, you will decide the credibility of truthfulness of the witness and the weight to be given to the evidence of that witness.

MR. [REDACTED] CREDIBILITY

The panel found Mr. [REDACTED] to be a credible witness. The panel found his testimony to be calm and heartfelt. The panel found Mr. [REDACTED] to be credible in that the panel did not find any potential interest in the outcome.

His testimony was consistent throughout his examination and cross-examination. His recollection of the events did not waiver and he acknowledged when he was not aware of an occurrence when he was not present.

He was able to recall sexual encounters in such detail that lead the panel to believe they probably occurred. The details included location of the buildings including specifically the sights from the rooms as well as being on cul de sacs/dead ends, room descriptions such as furniture and number of rooms within the buildings and on certain occasions what the Registrant was wearing.

Although there were times that Mr. ██████ testified that he could not remember specific details about various calls and texts, the panel accepts that this was typical as it would be unreasonable to expect an individual to recall each individual text or call response that was made over one year ago. He testified that there was communication on May 25, 2019 that is not included in the text message evidence from the phone records because this was not their sole method of communication. They also communicated through iMessage which may not be evident in the phone records.

Mr. ██████ acknowledged his wife put in the complaint about the sexual relationship between himself and the Registrant. He confirmed details with the investigator over the phone. The panel did not feel that the origin of the complaint affected whether there was sexual relationship while Mr. ██████ and the Registrant had a patient and dental hygienist relationship. The panel believe that it is unlikely that Mr. ██████ would make up the information about an affair with the Registrant as there is no apparent motive or gains that could be made by him disclosing such personal details.

Finally, Mr. ██████ reviewed his text message and phone records. This evidence was collected by the College's investigator from Ms. ██████ and is compelling circumstantial evidence that the relationship between the Registrant and Mr. ██████ happened as alleged. Mr. ██████ testified that he deleted the text messages on a frequent basis to hide the relationship from his wife as there was an open phone policy in their house. Deletion of texts by the Client can be explained by the need to hide an affair from his wife. On analysis of the phone records, the number of text message and frequency and duration of phone calls clearly demonstrate that this was not typical client-dental hygienist contact.

The panel finds Mr. ██████ to be a credible and reliable witness. The panel also finds no motivation on Mr. ██████ part to lie about any of his evidence and places significant weight to his testimony. Mr. ██████ presented as a credible witness who, quite understandably, would have much preferred not to testify. The panel has decided that Mr. ██████ testimony is more than likely to be true based on his experience, knowledge, and appearance of honesty and forthrightness.

The panel finds that it is highly unlikely that he would admit an affair he did not have in a public forum and describe very private details about their sexual encounters if it had not occurred. The alleged pressure from Ms. ██████ to make a complaint against the Registrant has no bearing on whether the events actually occurred.

We find that Mr. ██████ was direct and straight-forward in his answers. Despite a lengthy cross-examination about intensely personal matters, Mr. ██████ did not become defensive or argumentative.

MS. [REDACTED] CREDIBILITY

Although Ms. [REDACTED] appeared angry at times when testifying, Ms. [REDACTED] testimony was consistent throughout. While Ms. R [REDACTED] testified that Ms. [REDACTED] may have had a tendency to use foul language during these events it can be assumed her demeanor during that conversation as well as during testimony would be consistent with a person finding out their husband was having an affair with a family friend and dental hygienist.

She freely admitted she made the complaint to the College and not her husband as well as obtaining the phone records and submitting them to the College. While it is possible that she pressured her husband to make the complaint, the panel does not believe that. It is highly probable that Mr. [REDACTED] and the Registrant entered into a sexual relationship at a time when the Client was a client of the Registrant's at Shelburne Dental and Heritage Dental. There is no benefit to Ms. [REDACTED] that is apparent to the panel of making this complaint.

The panel finds that Mr. [REDACTED] testimony was not contradicted and she admitted to breaking down the door hinge to read text messages on [REDACTED] phone, going for a drive, making calls to try to investigate, returning to Mr. [REDACTED] admission of an affair and then going out to the Registrant's house to confront her after hearing the news. This testimony is probable, reasonable and consistent with police and phone records produced in evidence.

The panel placed little weight on a previous complaint Ms. [REDACTED] made to the Royal College of Dental Surgeons about her employer. The panel was able to move beyond this line of questioning and not make a negative inference on her credibility. It appeared she took accountability for her actions described within the ICRC report and the panel determined this did not have any bearing on whether Mr. [REDACTED] and the Registrant had entered into a sexual relationship.

MS. MACDONALD'S CREDIBILITY

The Member contended that her dealings with the complainant were merely friendly in nature and in no way were sexual. The panel considered the sheer number of texts, phone calls and the potential for more messages through iMessage and snapchats that were not in the phone records. Upon analysis of the frequency and duration of communication the panel determined the probability of the Registrant having a relationship that went beyond friendship was high.

The panel found that on May 16, 2019 the Registrant confirmed that she did not have a patient after lunch which provided a window of enough time on her lunch hour to meet with Mr. [REDACTED] for their last intimate encounter. This corresponds with Mr. [REDACTED] recollection of the timing of the events.

The Registrant denied the kiss on the lips or side of the mouth from Mr. [REDACTED] that was witnessed by Ms. [REDACTED]. She identified it was on the cheek.

Evidence the Registrant provided regarding the arrival of Ms. R [REDACTED] to the condo in Toronto contradicted Ms. R [REDACTED]'s testimony by 30 minutes leaving a window of time after the ODA convention.

One of the most concerning pieces of evidence during Ms. MacDonald's testimony was that at no time did she deny having an affair to Ms. [REDACTED]. In fact, the Registrant testified that she called Mr. [REDACTED] to tell him to tell his wife that the relationship was over. A reasonable person would interpret this event as an admittance to an affair and not a "fight or flight" frozen response as proposed by defence counsel. According to Ms. MacDonald's testimony there were no attempts to prove an affair was not occurring between the Client and the Registrant when confronted by Ms. [REDACTED] during the events on May 25th – 26th, 2019. After these events occurred the Registrant proceeded to delete all messages from Mr. [REDACTED] upon the request of her husband to cease contact. If the Registrant were not having an affair the panel believes the content of these messages would more than likely be used to demonstrate the lack of affair and they would not be deleted.

Evidence submitted by Member's counsel was put forward to suggest a window of opportunity within the discussed timeline for the sexual encounters to take place on August 8 (first sexual encounter) and May 10th (her birthday) & 16th (before the girls trip).

The panel found that the registrant became defensive under cross-examination. After reviewing all of the evidence, including the factors outlined in *Pitts*, overall the panel found that Ms. MacDonald's credibility was questionable.

MS. R [REDACTED]'S CREDIBILITY

The panel did not find Ms. R [REDACTED] to be a credible witness. There were a number of instances where her testimony appeared to be influenced to match stories of other witnesses. Ms. R [REDACTED] testified that the Registrant was not on the phone when she arrived at the condo in Toronto at 5 pm however, phone records confirmed that the Registrant was present. The testimony was then changed to identify there were times that Ms. R [REDACTED] was not in the presence of the Registrant and that it was possible that the contact could have been made without her witnessing it. The same occurred with respect to dancing at the disco in the Dominican Republic.

Ms. R [REDACTED]'s choice of language and repeated attempts may have been made in an attempt to posit a different version of Ms. [REDACTED] character. However, the panel interprets Ms. [REDACTED] response as directly proportionate to finding out about the affair.

MS. ANASTASOPOULOS' CREDIBILITY

The panel found the investigator's testimony was factual and neutral in nature. The panel finds that she made good faith efforts to confirm the identity of Mr. [REDACTED] when she interviewed him by confirming his name and his contact information which is consistent with Mr. [REDACTED] testimony.

Throughout Ms. Anastasopoulos' evidence she confirmed details of her investigation as she remembered it. The panel determined that Ms. Anastasopoulos followed standard investigation procedure for the College of Dental Hygienists of Ontario investigations.

MR. MACDONALD'S CREDIBILITY

The Panel had concerns with Mr. MacDonald's credibility. There were a number of instances where his testimony appeared to be influenced to match stories of other witnesses including his wife, the Registrant, subject to the allegations of professional misconduct. Mr. MacDonald became defensive during testimony. His account of the events on the evening of May 25, 2019 to the morning of May 26, 2019 contradict Ms. MacDonald's own testimony. Mr. MacDonald testified that Ms. MacDonald denied the affair when Ms. [REDACTED] was present at their residence which is inconsistent with Ms. MacDonald whom testified that she did not deny having the affair at that time.

CONCLUSION

The onus to prove that there is professional misconduct lies with the College. In this case, the panel finds that the College has proven its case on each of the allegations set out in the Notice of Hearing. The panel believed the evidence and testimony put forward by Mr. [REDACTED] and found him to be credible in his recollection of events. The College objected to the use of lines of questioning that may contravene to the case law of Brown & Dunn. The panel however did not feel the need to re-examine certain witnesses in order to reach its decision despite these potential concerns.

The panel assessed the testimony of the witnesses and was able to give the appropriate weight to the corresponding evidence. In so doing, the panel determined there to be sufficient evidence to conclude there was a sexual relationship between Ms. MacDonald and her patient, Mr. [REDACTED] during the course of their dental hygienist patient relationship. On a balance of probabilities, the panel concluded it agreed with the College's evidence, in support of professional misconduct.

The panel finds professional misconduct on the part of Ms. MacDonald 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 specifically, sexual intercourse or other forms of physical sexual relations between the member and the patient and/or behaviour or remarks of a sexual nature by the member towards the patient); and/or

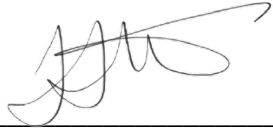
(b) Clause 51(1)(c) of the Code and as defined in one or more of the following paragraphs of section 15 of Ontario Regulation 218/94 made under the Dental Hygiene Act, 1991:

paragraph 2 (contravening a standard of practice of the profession or failing to maintain the standard of practice of the profession); and/or

paragraph 52 (disgraceful, dishonourable or unprofessional conduct); and/or

paragraph 53 (conduct unbecoming a dental hygienist)

Dated in the city of Toronto, in the province of Ontario, this 30th day of December, 2020.



Terri Strawn, Chair, Professional Member of Council

Discipline Panel Members:

Michelle Atkinson, Professional Member of Council
Paula Malcomson, Non-Council Member
Amit Vig, Public Member of Council

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

IN THE MATTER of the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of the *Dental Hygiene Act, 1991*, S.O. 1991, c.22, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of allegations of professional misconduct/incompetence referred to the Discipline Committee of the College of Dental Hygienists of Ontario by the Inquiries, Complaints and Reports Committee;

BETWEEN:

THE COLLEGE OF DENTAL
HYGIENISTS OF ONTARIO

-and-

SHERRY LYNN MACDONALD (007250)

)
)
) **Bernard Leblanc & Anastasia Hountalas**
) for the College of Dental Hygienists
) of Ontario
)

) **Jasmine Ghosn**
) for Sherry MacDonald
)

) **Josh Koziobrocki**
) Independent Legal Counsel
)

) Heard: February 16, 2021
)

Panel Members:

Terri Strawn, Chair, Professional Member of Council

Amit Vig, Public Member of Council

Paula Malcomson, Non-Council Committee Member

Michelle Atkinson, Professional Member of Council

THE COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

and

SHERRY LYNN MACDONALD

REASONS FOR ORDER ON PENALTY AND COSTS

The parties made a joint submission as to an appropriate order for penalty (the “Proposed Order”), which was filed as Exhibit 1 and included the following:

1. The Registrant is required to appear before a panel of the Discipline Committee, on a date set by the Registrar, 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;
3. The Registrant is required to reimburse the College for funding provided to the patient under the program required under section 85.7 of the Code, up to the maximum allowable amount of \$17,370.00; and
4. The Registrant is required to pay the College costs in the amount of \$77,900.00, to be paid over ten (10) years in monthly installments as follows, with the first installment being due one (1) month after the date of the Discipline Committee’s Order:
 - a. Month One (1) to Month One Hundred and Nineteen (119): \$649.16 per month; and
 - b. Month One Hundred and Twenty (120): \$649.96.

College Submissions

Counsel for the College submitted that many of the aspects of the JSPC were mandatory and there was little discretion, specifically, revocation and the reprimand.

The College submitted that the Registrant had no prior history before the Discipline Committee and while this was a lengthy hearing, the right to defend oneself should not be considered as a mitigating factor. The nature of the misconduct however, was an aggravating factor.

With respect to the portion of the proposed penalty which would require the Registrant to reimburse the College for funding for therapy provided to the Patient under the program required under section 85.7 of the Code, this would achieve general deterrence. Although the Patient has not yet made a claim for funding, it is possible he may do so at some point in the future.

Regarding the proposed costs order, the College indicated that costs are not part of the penalty but are ordered to ensure that the membership of this College does not bear the entire financial burden of the hearing expenses in cases where registrants are found to have engaged in professional misconduct. The College submitted that the cost award can also reflect the degree of the Registrant's cooperation with the College, which reduces hearing costs.

Finally, the College submitted that the JSPC should be accepted unless to do so would be so unreasonable in the circumstances that it would bring the proceedings of this Discipline Committee into disrepute. The College submitted that this high threshold for rejecting a joint submission has not been met in this case. This discipline committee agreed with the submission of the College.

Submissions of the Registrant

Counsel for the Registrant submitted that they agreed that revocation of a registrant's certificate of registration is an appropriate and mandatory penalty for a registrant found guilty of sexually abusing a patient. However, Counsel also submitted that by agreeing to this, the registrant was in no way admitting guilt in this matter.

There was agreement with College Counsel that the JSPC should be accepted unless to do so would be so unreasonable in the circumstances that it would bring the proceedings of this Discipline Committee into disrepute.

Decision and Reasons for Penalty and Costs

The Panel carefully considered the JSPC, the applicable legislation and the oral submissions.

The Panel understands its legal obligation to accept a joint submission unless doing so would bring the administration of justice into dispute or is otherwise contrary to the public interest. The JSPC does not do this.

The Panel considered the terms of the JSPC and concluded that they meet the requirements of the Code, the needs of this case and address the legal principles relevant to setting an appropriate Order.

The Panel recognized that the law requires the imposition of the penalty of a mandatory revocation and oral reprimand.

The Panel considered member's counsel's statement that the penalties and orders proposed in the joint submission is appropriate for a registrant found guilty of sexually abusing a patient, however it in no way means the registrant is admitting guilt or waiving the right to appeal.

The Panel considered its statutory obligation, taking into account the specific facts and circumstances of this case. The Panel also considered the aggravating and mitigating factors referred to by the parties.

The Panel found that based on a balance of probabilities that between the years 2018 and 2019 the Registrant engaged in a concurrent sexual and patient relationship while being a registered dental hygienist with the College. Under the Code, these actions constitute professional misconduct and as such binds this Panel to instruct the Registrar to revoke the Registrant's certificate of registration. The law preventing a concurrent sexual and treatment relationship is well known among regulated health professionals and it is the individual dental hygienist's responsibility to ensure the rule of law is upheld in the interest of public safety. Revocation would also reassure the public that the College was committed to and enforced its zero-tolerance policy toward sexual abuse.

Given all of the facts and circumstance surrounding this case, the Panel agreed that there could be no other penalty other than that set out in the JSPC.

Ultimately, the Panel was of the opinion that the Order appropriately addresses the principles of public protection, general deterrence and specific deterrence.

I, **Terri Strawn**, sign these reasons as Chair of this Discipline panel and on behalf of the members of the Discipline panel as listed below.



Terri Strawn
Chair, Discipline Panel

April 15, 2021
Date

Discipline Panel Members:

Michelle Atkinson, Professional Member of Council
Paula Malcomson, Non-Council Committee Member
Amit Vig, Public Member of Council

CITATION: MacDonald v. College of Dental Hygienists of Ontario, 2022 ONSC 632
DIVISIONAL COURT FILE NO.: DC185/21
DATE: 2022/01/31

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Sachs, Backhouse and Lederer JJ.

BETWEEN:)
)
Sherry Lynn MacDonald)
) *Jasmine M. Ghosn*, for the Appellant
Appellant)
)
– and –)
)
College of Dental Hygienists of Ontario) *Bernard LeBlanc* and *Anastasia-Maria*
) *Hountalas*, for the Respondent
Respondent)
)
) **HEARD at Toronto by videoconference:**
) January 5, 2022

PUBLICATION BAN NOTIFICATION

This is notice that the Divisional Court has ordered that no person shall publish, broadcast or otherwise disclose the name of the Client in respect of this matter, or any information that would disclose the identity of the Client, including the name of his spouse under ss. 45(3) and 47 of the Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

H. SACHS J.

Overview

[1] On December 30, 2020 the Discipline Committee (the “Committee”) of the College of Dental Hygienists of Ontario (the “College”) found that the Appellant had engaged in a sexual relationship with someone who was a client at the time the relationship occurred. On April 15, 2021, the Committee accepted a joint submission from both parties with

respect to penalty. As a result, among other things, the Appellant's certificate of registration as a dental hygienist was revoked. This is an appeal from the Committee's decision on the merits. There is no appeal from the penalty decision as both parties agree that, under the governing legislation, revocation is mandatory if a registrant is found to have engaged in a concurrent sexual relationship with a client.

[2] The Appellant's submissions were cast primarily in terms of procedural unfairness. First, the Appellant argued that the manner in which the investigation of the complaint that led to revocation was conducted put her in a position where she was unable to adequately confront her accuser. In particular, the client she is alleged to have abused did not make the complaint and when he was interviewed by the College the investigator, did not take a statement under oath from him, did not ask him to set out his own version in writing and did not ask him to initial or confirm the accuracy of the oral statement he gave to the investigator. As a result, the Appellant's rights to fully cross-examine the client were compromised. Furthermore, when the Appellant's counsel sought to question the adequacy of the investigation, she was not allowed to file the investigator's report as an exhibit. The Appellant also asserts that she was not given a full opportunity to "tell her story" because of objections made by counsel to her testimony on the basis of the rule in *Browne v. Dunn*. When the College chose to recall the client to deal with its *Browne v. Dunn* concerns, the client did not attend. Thus, the Appellant was deprived of a second right to cross-examine the client. The Appellant also questioned the Committee's findings of credibility and, in particular, asserted that the Committee subjected the evidence she called to a different level of scrutiny than the evidence called by the College. This created a basic unfairness and put her in the position of having to disprove the allegations as opposed to requiring the College to prove its case on clear and convincing evidence. Finally, the Appellant argued that the Committee took inadequate steps to ensure that its order excluding witnesses was complied with, something that was crucial given the Appellant's position that it was the client's wife who was pressuring the client to give the testimony he did.

[3] There is no merit to any of the Appellant's arguments and the appeal is dismissed.

Non-publication Order

[4] The College requested and the panel granted an order prohibiting the publication of any information that would identify the client whom the Appellant is alleged to have had sexual relations with. The order was made after notice was given to the press of the request and on the consent of all parties. In the view of the panel, society's interest in a fully open hearing was outweighed by the interest in protecting the identity of the client who was alleged to have experienced sexual abuse.

Factual Background

[5] The Appellant was a dental hygienist for over two decades. She worked at two clinics and treated the client, A.M., at one of those clinics. In addition to treating A.M. she was friends with A.M.'s wife, V.M., and the two families had travelled together. The Appellant is married and has five children.

- [6] A.M. is also married with children. He was a client of the Appellant's from 2017 to 2019. According to him, he and the Appellant became sexually intimate on August 8, 2018 and this continued two or three times a month until May 16, 2019. During the course of this time A.M. and the Appellant were in regular contact, through telephone, text and a number of other platforms. Their affair ended after the Appellant and V.M. returned from a trip together and V.M. became upset about the way A.M. kissed the Appellant when he came to pick V.M. up from the airport. V.M. confronted A.M. about their relationship; A.M. denied that it was sexual; V.M. asked to see his phone; A.M. retreated to the bathroom to delete messages from his phone and V.M. attempted to break down the door. V.M. told A.M. that she was going to drive to the Appellant's home and confront her. A.M. became concerned about what the Appellant's husband would do and called 911. V.M. returned to her home without confronting the Appellant and A.M. confessed the affair to her. V.M. then went to the Appellant's house to confront her, where she spoke to both the Appellant and her husband.
- [7] The Appellant did not deny that she had a close relationship with A.M. during the time periods in question or that he was her client at the time. However, she denied that the relationship was sexual.
- [8] V.M. filed a complaint in writing with the College. The College appointed an investigator who conducted oral interviews with A.M. and V.M. The Appellant was provided with a summary of the investigator's findings and given the opportunity to respond. The results of the investigation were reviewed by a College committee and the complaint was referred to a hearing.

The Committee's Decision

- [9] Since this was a case that turned on credibility, the Committee assessed the credibility of all the witnesses. It found that A.M. was a credible witness whose testimony was "calm and heartfelt", consistent, straightforward and not defensive. He admitted when he could not remember details. There were also two encounters that he was able to describe in great detail – the first sexual encounter and an encounter on the Appellant's birthday. These details included things that the Appellant did not contradict (such as where the condominium where the birthday encounter occurred was located) and that A.M. would be unlikely to know unless he had been there (the Appellant chose the location). It found that the records that did exist of phone and text message contact was "compelling circumstantial evidence" that the relationship between the Appellant and A.M. went beyond that of a hygienist and a client. The Committee also found it "unlikely that [A.M.] would make up the information about an affair with the [Appellant] as there is no apparent motive or gains that could be made by him disclosing such personal details."
- [10] The Committee did not find that the other main witness, the Appellant, was a credible witness. First, it "considered the sheer number of texts, phone calls and the potential for more messages through iMessage and snapchats that were not in the phone records. Upon analysis of the frequency and duration of communication the panel determined the probability of the [Appellant] having a relationship that went beyond friendship was high."

Second, it found that the Appellant's evidence about where she was on the day of her last encounter with A.M. (which A.M. testified occurred at a condominium) did not preclude her meeting A.M. in the way that he said she did. Third, it found it concerning that when the Appellant was confronted by V.M., she never denied the affair and, in fact, she called A.M. to tell him to advise his wife that the relationship was over. The Committee did not accept the Appellant's explanation for this behaviour. Fourth, the Committee found that the Appellant's deletion of all the messages between her and A.M. was behaviour that was consistent with her having an affair as opposed to just an innocent friendship. Finally, the Committee found the Appellant's demeanour, including her defensiveness under cross-examination, to be troubling.

[11] The Committee also made findings of credibility with respect to the other witnesses who testified, all of whom gave evidence that was more peripheral to the real issues. The Committee accepted the evidence of V.M. and the College investigator and had concerns with the witnesses who were called on behalf of the Appellant – her best friend and her husband.

Issues and Standard of Review

[12] The Appellant framed her issues as procedural fairness issues. If indeed the Committee conducted an unfair hearing, the appeal should be allowed. The Appellant alleged that the hearing was unfair for the following reasons:

- (1) The College conducted an inadequate investigation, which in turn compromised counsel for the Appellant's ability to cross-examine the client, A.M. As part of this argument the Appellant took issue with the Committee's failure to allow her to file the investigator's report as a separate exhibit.
- (2) Counsel for the College made objections based on *Browne v. Dunn* that inhibited the Appellant's ability to tell her story. The Appellant was also unfairly prejudiced by the fact that A.M. refused to return to testify in reply.
- (3) The Committee used a higher degree of scrutiny when it assessed the Appellant's evidence and that of the witnesses called on her behalf than it did when assessing the evidence of the witnesses called by the College, including A.M.
- (4) The Committee failed to take appropriate measures to ensure that its order with respect to exclusion of witnesses was complied with.
- (5) The Committee erred in failing to draw an adverse inference from the fact that the College did not enter the contents of the 911 call that A.M. made into evidence.

[13] In addition to asserting uneven scrutiny the Appellant alleged that the Committee erred in its assessments of credibility. On appeals courts give great deference to first instance tribunals' assessments of credibility. Absent a palpable and overriding error these assessments must be given deference. Appellate courts have also noted that to get around the deference that they must give to credibility assessments counsel often attempt to recast

these arguments as a procedural fairness argument based on uneven scrutiny. Resisting these attempts involves ensuring that the threshold for establishing uneven scrutiny is a high one: *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 26, leave to appeal refused, [2017] S.C.C.A. No. 88.

Analysis

Was the investigation inadequate and did it affect the fairness of the hearing?

- [14] The Appellant's argument about the adequacy of the investigation is centred on the fact that the investigator's report was hearsay. Thus, it only provided her with the investigator's record of her conversations with the relevant witnesses. The investigator never obtained a sworn or signed statement from the client making the complaint, A.M. This was particularly egregious because A.M. was not the one who made the complaint, his wife did. According to the Appellant, this inadequacy in the investigation record put her at an acute procedural disadvantage when it came to cross-examining A.M.
- [15] The Appellant could provide no authority for the proposition that fairness required the College to provide her with a sworn or signed statement from A.M. As the Committee noted, it is not its practice to provide such statements. The Appellant was given a summary of what A.M. said to the investigator. If A.M. said something while testifying that differed from what he was alleged to have said to the investigator the Appellant was free to cross-examine A.M. with respect to his prior inconsistent statement. There would have been no problem proving the prior inconsistent statement since the College called the investigator as a witness. Thus, there is no merit to the submission that the College's failure to provide the Appellant with a sworn or signed statement from A.M. caused her procedural unfairness.
- [16] During argument Appellant's counsel stated that she was taken by surprise by much of what A.M. said during his testimony and that she did not have the opportunity to consult with her client to find out her version of events, so she could put that version to A.M. during her cross-examination of A.M. At no point during the hearing before the Committee did Appellant's counsel request further time to prepare her cross-examination because she had not received full disclosure beforehand as to what A.M. was going to say. If a registrant perceives that the College's actions in conducting its case is causing them procedural unfairness, it is incumbent on them to raise the matter before the discipline committee that is hearing the case, not to wait to appeal to do so. It is the committee that has the power to remedy the unfairness. Finally, in this case, apart from a broad assertion, there is no evidence that the manner in which the College conducted its investigation caused the Appellant to suffer procedural unfairness.
- [17] The Appellant's submissions before us and before the Committee highlighted the fact that it was not A.M. who made the complaint. First, misconduct complaints can and have been made by a third party. Second, there was clear evidence from A.M. that he and his wife prepared the complaint together.

- [18] The Appellant also made an assertion that the investigator delegated her function to V.M., A.M.'s wife. This assertion was based on the fact that V.M. provided the investigator with A.M.'s phone and text message records. The Appellant was free to cross-examine V.M. as to how she prepared these records and free to cross-examine A.M. as to the accuracy of these records. She was also free to produce her own records with respect to these contacts if they differed in any significant way. Thus, there was no unfairness caused by the fact that V.M. prepared and provided the record.
- [19] The allegation that the investigation was inadequate because it was based on hearsay evidence loses its force when it is clear that all of the people who provided relevant evidence to the investigator were called as witnesses. Thus, the College did not seek to base its case on hearsay evidence, thereby depriving the Appellant of the right to cross-examine the sources of that evidence.
- [20] The fact that the investigator's report was not filed as an exhibit also had no effect on the procedural fairness of the hearing. First, it is not clear that Appellant's counsel ever asked the Committee to rule on the question of whether the report should be filed as an exhibit. Second, the investigator was called as a witness and thus, the Appellant was given a full opportunity to cross-examine her about how she conducted her investigation. There was no need to file the report as an exhibit. If there were parts of the report that somehow undermined the investigator's evidence, they could have been put to her by the Appellant during cross-examination.
- [21] For these reasons I find that there is no merit to the argument that the manner in which the College conducted its investigation undermined the fairness of the hearing.

Was the Appellant denied procedural fairness because of College counsel's *Browne v. Dunn* objections?

- [22] Prior to calling the Appellant and after A.M. had testified, Appellant's counsel provided College counsel a summary of what the Appellant was going to say. College counsel objected, saying that a number of details in this summary had not been put to A.M. while he was being cross-examined and thus, he had not had an opportunity to deal with them. The matter was resolved by an agreement that College counsel would be given leave to recall A.M. in reply. When College counsel sought to recall A.M. in reply, he refused to appear. At one point during the hearing the Committee indicated that it could choose to give less weight to those aspects of the Appellant's evidence that A.M. had not had a chance to answer. However, in its reasons the Committee said the following with respect to the *Browne v. Dunn* issue:

The College objected to the use of lines of questioning that may contravene to the case law of *Brown & Dunn*. (sic)The panel however did not feel the need to re-examine certain witnesses in order to reach its decision despite these potential concerns.

- [23] In other words, the Committee was able to reach its decision without relying on those aspects of the Appellant's evidence that may have raised *Browne v. Dunn* concerns. This finding is consistent with the Committee's reasons as a whole. In the end, what was significant for the Committee was the amount and extent of the contact between A.M and the Appellant, the fact that the Appellant deleted the messages that could have proved her innocence and the fact that the Appellant admitted that when confronted by V.M. she did not deny that the relationship V.M. was upset about had occurred. The Appellant also admitted that she called A.M. to instruct him to tell his wife that the relationship was over.
- [24] The Appellant argues that because of College counsel's position on *Browne v. Dunn* she was not allowed to tell her story. This is clearly not true. The Committee allowed her to testify and gave the College the right to recall A.M.
- [25] In the end when A.M. refused to reattend the College did not ask the Committee to compel him to do so. This was a choice it was entitled to make. However, it did ask the Committee to put less weight on certain aspects of the Appellant's testimony and the Committee stated that it might do so. However, if this could have caused the Appellant prejudice, the Committee was clear that it did not. It was able to resolve the case without having to deal with the potential *Browne v. Dunn* concerns. Furthermore, if there were *Browne v. Dunn* concerns, this was the fault of the Appellant who failed to put certain aspects of the Appellant's testimony to A.M.
- [26] Finally, the Appellant asserts that she was prejudiced by A.M.'s failure to testify on reply. According to the Appellant, if he had reappeared, she would have had a second opportunity to cross-examine him. Procedural fairness does not demand that a registrant be given two opportunities to cross-examine the College's key witness.
- [27] In summary, there was no procedural unfairness caused by the College's *Browne v. Dunn* objections.

The 911 Call Records

- [28] A.M. testified that on the night his wife confronted him with her suspicions about his affair and he refused to show her his phone she threatened to go to the Appellant's house and confront her. When V.M. left the house at around midnight A.M. called 911 as he was afraid of how the Appellant's husband would react to the accusations. No record was filed with respect to this 911 call.
- [29] The Appellant argued that the failure of the College to file any record regarding the 911 call caused her unfairness as this was the only prior statement of A.M.'s concerning the events of the night when his wife accused him of having an affair.. This argument cannot be sustained. First the College did not have a record of the 911 call in its possession. Second, if the Appellant thought that the 911 call was relevant, she could have sought to have the record produced.

Exclusion of Witnesses

- [30] At the beginning of the hearing counsel for the College requested an order excluding witnesses. When he did so, counsel for the Appellant expressed concern about how the order could be enforced as against A.M and V.M., who were both participating by zoom from their home. In order to ensure that both parties abided by the witness exclusion order counsel for the Appellant requested that the Committee make an order that A.M. and V.M. testify from a location other than their home where they could be supervised by a security guard. The Committee made an order excluding witnesses and to ensure its enforcement ordered witnesses from time to time to swivel their laptops or monitors to see if anyone else was in the room they were testifying in.
- [31] There were dental hygienist students who were given a private YouTube link to watch the hearing. Counsel for the Appellant raised the concern that either A.M. or V.M. could access the link while the other was testifying. Other than making an order that any witness who was testifying turn off their cellphone the Committee gave no further direction to control possible access to the link.
- [32] The Appellant submits that the fairness of the hearing was compromised because of possible breaches of the witness exclusion order by either A.M. or V.M. According to the Appellant, A.M. testified the way he did because he was forced to do so by V.M.
- [33] First, and most importantly, there is no evidence of any breach of the order excluding witnesses by either A.M. or V.M. There is no evidence that either A.M. or V.M. logged on to the private YouTube account used by the students to watch the hearing. When they were asked to randomly scan the room, they were testifying in they were alone with the door shut.
- [34] Second, almost all orders excluding witnesses rely on trust for their efficacy. Courts cannot supervise the behaviour of witnesses outside of the courtroom and, thus, there is always the possibility that a witness who testified (or someone else) will contact a witness who was excluded to tell them what was said while they were excluded.
- [35] Third, as the Committee found, the fact that V.M. may have pressured A.M. to testify against the Appellant did not mean that he was lying when he testified that he had an affair with the Appellant. The Committee found that A.M. had no motivation to lie about the affair and found that he “presented as a credible witness who, quite understandably, would have much preferred not to testify...The alleged pressure from [V.M.] to make a complaint against the [Appellant] has no bearing on whether the events actually occurred.” Thus, it is clear that the Committee did not accept the Appellant’s argument that if V.M. pressured A.M. to make the complaint this undermined his credibility with respect to the central issue it had to determine.
- [36] Given the above, there is no merit to the argument that the Committee compromised the fairness of the hearing by not taking further steps to enforce its order excluding witnesses.

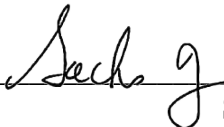
The Committee's Credibility Assessments and Uneven Scrutiny

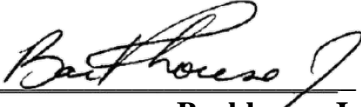
- [37] The Appellant alleged that the Committee subjected her and her witnesses to a different level of scrutiny than it applied to the College's witnesses. Examples cited to support this proposition included:
- (a) The Committee found the Appellant's husband and her best friend to be less credible because in its view the two witnesses took steps to "match" their testimony to that of the Appellant and each other. On the other hand, it was not concerned with taking the steps necessary to ensure that V.M and A.M. did not match their stories by making a forceful enough exclusion order.
 - (b) The Committee found that A.M. had no interest in the outcome of the case. In doing so it ignored the evidence that the police told V.M. that she would go to jail if she did not leave the Appellant and her husband alone when she attended at their house to confront the Appellant. This was a clear motive for A.M. to support his wife's complaint.
 - (c) The Committee was very favourable in its assessment of A.M.'s demeanour, describing it as "calm and heartfelt". This stood in stark contrast to its assessment of the Appellant's demeanour, which it described as "defensive". According to the Appellant, A.M. was not calm when he discovered that the proceedings were being streamed on YouTube. He insisted that steps be taken to protect his identity.
 - (d) The Committee made an adverse finding of credibility against the Appellant because she deleted the text messages between her and A.M. A.M. deleted the same text messages and yet the Committee did not criticize him for failing to produce the text messages.
- [38] None of these examples or any of the Appellant's other submissions rise to the high threshold necessary to make out a case of procedural unfairness based on uneven scrutiny. Specifically, the Committee did not find that V.M. and A.M. took steps to match their stories in the way that the Appellant's witnesses did, nor did it find that they breached the order excluding witnesses. The fact that the police may have threatened V.M. with jail does not constitute a motive for A.M. to support V.M.'s complaint to the College about the Appellant's concurrent sexual relationship with him. There is no evidence that the police's actions would have been affected in any way by A.M. making a complaint to the College. While A.M. may have been concerned about protecting his privacy when he found out about the YouTube streaming, this was an understandable reaction and did not undermine the Committee's description of his demeanour. A.M. deleted the text messages because he was trying to hide the fact of his affair from his wife – something that accords with ordinary expectations of human behaviour. The Appellant deleted the messages when those messages could have supported her version of events – that her relationship with A. M. was not a sexual one.


[39] The Appellant also alleged that the Committee unfairly dismissed or misconstrued her evidence and her explanations for her behaviour. In order to succeed on this ground the Appellant must establish a palpable and overriding error, which she failed to do. The Committee heard the Appellant's evidence about why the first sexual encounter with A.M. did not occur (because she was at Costco) and found that there was still time for the Appellant to have been with A.M. in the way A.M. said she was. Given the fact that the Appellant's confirmatory evidence put her at Costco near 5pm and A.M. described spending an hour with the Appellant at midday or early afternoon, this finding was available to the Committee. The Appellant testified that she did not deny the affair when she was confronted by V.M. because she was in "shock". She also gave an explanation for why she deleted the texts – her husband asked her to; and an explanation for why she asked A.M. to call his wife and tell her the relationship was over (she thought this was what V.M. needed to hear). The Committee heard and considered her explanations and rejected them. This was part of the Committee's function and there is no basis on which to set aside its conclusions on appeal. The same is true of the Committee's assessment that V.M.'s testimony about the facts giving rise to her filing a complaint against the Appellant was not rendered incredible by the fact that she had once improperly complained about a previous employer who reported her for certifying instruments as having been sterilized when they were not. The Committee considered the Appellant's argument on this point and rejected it. This was a decision it was entitled to make and there is no reason for this court to set it aside. Finally, the Appellant submitted that the Committee "misconstrued" her husband's evidence when he said that the Appellant "immediately" denied the affair when V.M. confronted her. The Appellant is correct that her husband did not use the word "immediately", but the Committee's use of this word, taken in context, did not constitute either an overriding or a palpable error.

Conclusion

[40] For these reasons, the appeal is dismissed. As agreed, the Appellant is to pay the College its costs of the appeal, fixed in the amount of \$6000.00, all inclusive.

I agree  _____ **Sachs J.**

I agree  _____ **Backhouse J.**

I agree  _____ **Lederer J.**

CITATION: MacDonald v. College of Dental Hygienists of Ontario, 2022 ONSC 632
DIVISIONAL COURT FILE NO.: DC185/21
DATE: 2022/01/31

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Backhouse and Lederer JJ.

BETWEEN:

Sherry Lynn MacDonald

Appellant

– and –

College of Dental Hygienists of Ontario

Respondent

REASONS FOR JUDGMENT

Sachs J.

Released: January 31, 2022