

NOTICE OF PUBLICATION BAN

In the *College of Optometrists of Ontario and Dr. Gregory Miller*, this is notice that the Discipline committee has issued an order under subsection 47(1) of the *Health Professions Procedural Code* (the Code), being Schedule 2 to the *Regulated Health Professions Act, 1991*.

Subsection 47(1) provides for a mandatory publication ban which the Panel shall make if a witness, whose testimony is in relation to allegations of a member's misconduct of a sexual nature involving the witness, requests it. The Panel accordingly made the order prohibiting any person from publishing the identity of Patient A or any information that could disclose the identity of Patient A.

Additionally the Panel granted, a ban under subsection 45(3) of the Code on the publication, broadcasting or disclosure of the names of any patients and/or any information that would disclose the identity of any patients, referred to during the hearing or in the documents filed at the hearing.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

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 DISCIPLINE COMMITTEE OF THE COLLEGE
OF OPTOMETRISTS OF ONTARIO**

Panel: Mr. John Van Bastelaar, Chair
Dr. Mark Eltis
Dr. Vivian Habib
Dr. Patricia Hrynychak
Mr. Hsien Ping (Albert) Liang

B E T W E E N:

The College of Optometrists of Ontario)	Ms. Julia Martin
)	Counsel for the College
)	of Optometrists of Ontario
)	
- and -)	
)	
Dr. Gregory Miller)	Self-represented
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)	
)	
)	
)	Ms. Julie Maciura
)	Independent Legal Counsel
)	
)	Heard on October 10 and 11, 2018

DECISION AND REASONS ON FINDING

This matter came before a Panel of the Discipline Committee of the College of Optometrists of Ontario (the “College”) on October 10 and 11, 2018, at Victory Verbatim, 222 Bay Street, Suite 900, Toronto, Ontario.

The purpose of the hearing was to consider allegations of professional misconduct referred by the Inquiries, Complaints and Reports Committee against Dr. Gregory Miller (the “Member”).

The five members of the Discipline Panel referred to above were in attendance, as well as Dr. Gregory Miller; Ms. Julia Martin, counsel for the College, accompanied by Dr. Paula Garshowitz, Registrar; and Ms. Julie Maciura, independent legal counsel to the Discipline Panel. Ms. Michelle Gibbs was present on October 10, 2018 (assisted by Ms. Kathryn Ball), and acting for the limited purposes of cross-examining the College's witness on behalf of Dr. Miller, who was otherwise self-represented.

The hearing was called to order at approximately 9:40 a.m. on October 10, 2018. The Chair introduced the Panel and the other people present in the room.

Publication Ban

College counsel requested, on behalf of Patient A, that the Panel order a publication ban pursuant to subsection 47(1) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991* (the "*Code*"). Subsection 47(1) provides for a mandatory publication ban which the Panel shall make if a witness, whose testimony is in relation to allegations of a member's misconduct of a sexual nature involving the witness, requests it. The Panel accordingly made the order prohibiting any person from publishing the identity of Patient A or any information that could disclose the identity of Patient A.

Additionally, on the consent of Dr. Miller, College counsel requested and the Panel granted, a ban under subsection 45(3) of the *Code* on the publication, broadcasting or disclosure of the names of any patients and/or any information that would disclose the identity of any patients, referred to during the hearing or in the documents filed at the hearing.

The Panel's reasons for granting the publication ban under 45(3) are that personal health information or other matters may be disclosed at the hearing, which are of such a nature that the harm created by disclosure would outweigh the desirability of adhering to the principle that hearings be open to the public.

Allegations

College counsel took the Panel through the Notice of Hearing, which was filed as Exhibit 1.

The Notice of Hearing included the following allegation against Dr. Miller:

You committed an act or acts of professional misconduct as provided by subsection 51(1)(b.1) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as amended, in that, you sexually abused your patient, Patient A as set out in the particulars to this Notice of Hearing which are attached as Schedule "A".

The particulars of the allegation in Schedule A were as follows:

1. Dr. Gregory Miller is an optometrist who has practised in Ontario since in or about June 17, 1968.
2. On or about November 30, 2006, Patient A attended at Dr. Miller's office for an eye examination.
3. During that appointment, Dr. Miller sexually abused Patient A by taking her hand and placing it on his genital area on top of his pants.
4. Patient A removed her hand from Dr. Miller's genital area.
5. Dr. Miller again sexually abused Patient A when he shortly thereafter took her hand and placed it on his genital area on top of his pants.

Plea

Dr. Miller pleaded not guilty to the allegations.

Agreed Statement of Facts re Ms. McKenzie

College counsel submitted a Statement of Agreed Facts (which was marked as Exhibit 2) which included the evidence of Ms. Valjean McKenzie, who was the administrative assistant for Dr. Miller from approximately 1998 to 2008.

The Agreed Statement of Facts dated October 10, 2008 reads as follows:

1. The College of Optometrists and Dr. Gregory Miller agree to the following facts.
2. Valjean McKenzie worked for Dr. Miller as an administrative assistant from approximately 1998 to 2008.
3. Ms. McKenzie now lives in Trinidad and is unable to travel to the hearing. She is also unable to attend the hearing by way of videoconference.
4. If she were called to testify she would say that in August of 2005, Dr. Miller operated out of an office at 1800 Sheppard Avenue East in Toronto and she worked with him there.
5. In November of 2006, Dr. Miller operated out of an office at 2028 Sheppard Avenue East in Toronto and Ms. Valjean McKenzie worked with him there.
6. The name "Patient A" sounds familiar to her but she cannot recall the specifics of this patient.
7. In 2006 her hours were as follows:
 - a. Monday and Wednesday from 9 am to 5 pm;
 - b. Tuesday and Thursday from 9 am to 7 pm; and
 - c. Friday from 9 am to 2 pm.
8. Ms. McKenzie was always the first one in office in the morning and the last one to leave.
9. The office at 2028 Sheppard Avenue East also had a walk-in medical clinic which two doctors operated from: Dr. Almas Adatia and Dr. Howard Platnick.
10. Since November 30, 2006, was a Thursday, Ms. McKenzie would have been the one to process Patient A's payment following her appointment with Dr. Miller.

11. Based on the typical hours of the two doctors one of the doctors would have been in their office in the walk-in clinic office on November 30, 2006, at the end of the day.
12. She is unaware of Dr Miller ever placing a patient's hands on his genitals, or engaging in any sort of sexual behaviour with a patient.
13. She has never received a complaint about Dr. Miller and has never observed a patient being upset after their visit and that Dr. Miller always acted in a professional manner in the office.
14. Ms. McKenzie does not recall if Patient A returned to the office on September 6, 2007, and paid for a copy of her 2006 prescription. She would say that this is possible and the fee would have been \$10.00.

Opening Submissions

College counsel made brief opening remarks, stating that she would be calling one witness, Patient A. College counsel advised the Panel that she anticipated Patient A would describe the incident in November 2006 when Dr. Miller took her hand and placed it on top of his genital area on top of his pants. Patient A was shocked and removed her hand and then Dr. Miller took her hand a second time and placed it again on his genital area. Patient A then fled the office; she was shocked and humiliated.

College counsel anticipated Patient A testifying that she was unable to confront Dr. Miller in the moment or complain to anyone given the difficult circumstances in her life at the time.

College counsel advised the Panel that they would hear from Dr. Miller who denies the allegations. She summarized the evidence of Dr. Miller's assistant in Exhibit 2 noting that Ms. McKenzie had no specific memories of Patient A and did not remember details of the November 30, 2006 appointment.

College counsel advised that at the end of the hearing the Panel would be required to conduct a credibility assessment of the witnesses, including the evidence of Ms. McKenzie in Exhibit 2. In College counsel's submissions, once the Panel completed that analysis it would be able to find that Dr. Miller did in fact sexually abuse Patient A and would be able to find him guilty of professional misconduct.

Ms. Martin then tendered a documents brief, which the Panel marked as Exhibit 3. She advised that Dr. Miller agreed to the documents in the brief.

Evidence

Examination-in-Chief of Patient A

Patient A was called as a witness by the College. She testified that she lives in Toronto. She currently is not able to work due to health problems. Patient A was diagnosed in 2005 with

Chronic Lymphocytic Leukemia (“CLL”) and she also suffers from depression. She believes her depression is related to her CLL diagnosis and also to the breakdown of her marriage.

Patient A recalls that she first came into contact with Dr. Miller in 2005 or 2006 and her first appointment with him was at the Fairview Mall (1800 Sheppard Avenue East). She does not remember anything of note that occurred at that first appointment.

Patient A then saw Dr. Miller again on November 30, 2006.

Patient A described how she arrived for her appointment that day and went into the room for the examination. During the examination, Dr. Miller took her hand and put it on top of his genital area. Patient A said that she was shocked, and could not believe that this was being done by an optometrist. She removed her hand. Patient A described that she was not able to confront Dr. Miller at the time. She was in shock and tried to ignore what he was doing and pretend that nothing had happened.

Patient A then described how Dr. Miller took her hand again and again put it on his genital area and how she removed her hand the second time. Again she could not believe what was happening but she tried to ignore it.

Patient A again said that she was not able to confront Dr. Miller at the time; she didn’t feel strong enough to and said she had no confidence in speaking in English. Her marriage was breaking down and she had recently been diagnosed with CLL. Patient A said that she was trying to maintain a peaceful life and was avoiding confrontation in stressful situations. Patient A described feeling trapped and feeling unable to do anything when Dr. Miller put her hand on his genital area.

When Dr. Miller did this to her, Patient A tried to ignore it and pretend that nothing had happened. She said that Dr. Miller completed the examination and then she fled. Patient A said she had left the office but as soon as she stepped outside she realized that she had forgotten her jacket in the reception area. She came back in and grabbed her jacket because it was cold outside; she said that she knew that she had to take care of her health.

Patient A felt that she could not confront Dr. Miller in the middle of the examination because he might have reacted or confronted her physically. She said that she was afraid of what Dr. Miller might or might not do and she was not able to predict what his reaction might be if she had confronted him.

Patient A said she does not remember anything about paying for the appointment; she just remembered how fast she tried to get out of the office. When College counsel asked what she would say if it was suggested that she did in fact pay for the examination, Patient A said if she did then it was just a result of her trying to ignore what had happened and finish the process and flee.

Patient A does not remember seeing any other people in the clinic when she left. Patient A said that if it was suggested that people were in fact in the clinic when she left, she said she simply does not remember seeing anyone.

Patient A said that she is 100% sure that the appointment was in the late afternoon and said that if there were patients seen after her then they might have come in to the clinic after she left. She does not remember seeing anyone there that day.

Patient A said that while she was in the appointment with Dr. Miller the door to his office was closed.

Patient A was referred to a copy of her spectacle prescription (Tab 1 of Exhibit 3) and she agreed that it was a copy of the prescription that she received from Dr. Miller's office. Patient A believes that she got the prescription from the receptionist when she went back for it at a later date and does not believe that she got it on November 30, 2006. Patient A did not see Dr. Miller on that second occasion when she went back to get the prescription.

Patient A described keeping the original of the prescription (the original prescription was marked as Exhibit 4) because she thought that one day she would feel better and stronger and would be able to report what Dr. Miller did to her.

When asked where the incident happened on November 30, 2006, Patient A said that she was "200% sure" that it happened at 2028 Sheppard Avenue East. Patient A described remembering the location and how she got there.

Patient A was asked about the very last sentence in the letter of complaint written by the doctors at Sunnybrook Hospital (at Tab 5 of Exhibit 3, page 9) and she said that she did find a new optometrist following the incident and never did return to Dr. Miller for eye care. Patient A said that when she went back to Dr. Miller's office to get the prescription she only saw the receptionist.

Patient A described taking the bus to get to the appointment on November 30, 2006 and a map of 2028 Sheppard Avenue East was marked as Exhibit 5. She said that she got off the bus on Sheppard Avenue East and turned onto Brian Drive, which is the other side of Consumers Road. She was coming from west to east that day. She then crossed Sheppard Avenue and onto Brian Drive and then she had to turn right onto a small street where the entrance to the clinic was located.

Patient A was asked about the complaint form that is found at Tab 5 of Exhibit 3. She agreed that she had seen the document before and she had also signed it (on page 12).

With respect to the address (1800 Sheppard Avenue East) that is on the 'consent to release of medical information' part of the complaint form, Patient A said that address is not in her handwriting. Dr. Miller's name and address is not in her handwriting. Patient A said that is the handwriting of the medical student Jennie Pouget, who was a student of Dr. Moss.

Patient A explained that she had an appointment with Dr. Moss in 2017 at Sunnybrook Hospital. She had earlier been taken to the Sunnybrook emergency room by her son due to acid reflux which made it difficult for her to breathe. The doctor who assessed her realized that she had issues relating to depression and so referred her to Dr. Moss.

Patient A later had an appointment with Dr. Moss and when Dr. Moss interviewed her, the medical student was observing and helping out. During the interview Dr. Moss asked if Patient A had ever been sexually abused and at that point Patient A told them what happened with Dr. Miller. They told her that she had to report it to the College of Optometrists and they asked her to go to the website to do that. Later Dr. Moss and the PhD student changed their mind and decided to take care of it themselves.

The medical student, Jennie Pouget, contacted Patient A and asked her to scan and send her prescription to them, which Patient A did. Later she had another short appointment with the medical student during which Patient A signed the complaint form consenting to the release of medical information (page 12 of Tab 5, Exhibit 3). Patient A said that she does not remember seeing the address on the consent to release page of the complaint form and believes that the address was put on the form after she signed it.

Patient A points out that the address on the form does not say that this is where the incident occurred; it simply notes that this is the address for the optometrist. Patient A said that she told the medical student that her first appointment with Dr. Miller was at Fairview Mall and so the medical student probably mixed up the addresses.

Patient A described how Dr. Miller's actions affected her. She described feeling humiliated because Dr. Miller used her hand and body for his purpose without her permission. She felt that being a newcomer to the country, a sick woman, with limited confidence in speaking English might have caused him to think he could do whatever he wanted to her.

Patient A said that to this day she cannot forget the stress and fear that she felt. She felt shocked. Patient A described she has not forgotten the feeling of being trapped because she was not able to do anything about it or confront Dr. Miller. She believes that the incident has added to her depression as she has carried in her head those feelings all of these years. Patient A said that she doesn't think she has ever been able to deal with what happened.

Patient A herself did not make a complaint to the College because at the time of the incident she simply did not feel strong enough because of her disease and the breakdown of her marriage.

Cross-Examination of Patient A

Ms. Gibbs carried out the cross-examination of Patient A. Ms. Gibbs was retained solely for this purpose and was not otherwise representing Dr. Miller.

Patient A agreed that the November 30, 2006 appointment with Dr. Miller was not her first visit to his office. Patient A agreed that Dr. Miller's records indicate that she saw him for an appointment on August 2, 2005. Patient A agreed that nothing inappropriate happened during the first appointment and that Dr. Miller never said anything sexual to her during that appointment.

Patient A was 44 years old when she saw Dr. Miller in August 2005. Patient A believes that she had been wearing glasses before coming to Canada in 2001. She does not remember if she saw any other optometrists in Canada before Dr. Miller and she may have been wearing her original glasses that day. She believes that when she started working in 2005 she had one pair for reading and one pair for distance. And at some point she decided to wear contact lenses.

When Patient A saw Dr. Miller in 2005, she believes that she was working part-time as a community worker. She agrees that she completed a diploma in community work at George Brown College and the program was conducted in English. She graduated with honours and had good marks in the program. Patient A started a part-time job that led to a full-time job, which was also carried out in English.

When asked about her ability to speak English, Patient A said that she did in fact have some trouble speaking English. The difficulty was not with her vocabulary or grammar but it was simply about having the opportunity to speak the language. She said that in a foreign country there are lots of opportunities to write and read in English but not many opportunities to speak English. While she spoke English before she came to Canada, it was mostly her vocabulary and grammar that were good. Patient A described that while she was working at the YMCA as an employment consultant a coworker noticed her lack of confidence in speaking in English and said that it was because she was new and that as she worked and talked and communicated she would gain more confidence.

In relation to the November 30, 2006 appointment, Patient A said that she did not remember the exact time of the appointment but she remembers it was late afternoon or early evening. While Patient A does not recall exactly how long the appointment took she knows that it was not as long as one hour; she thinks that the appointment probably took 20 minutes or so.

When asked whether she told Dr. Moss and the medical student that she was the last appointment of the day on November 30, 2006, Patient A agreed that she might have told them that it was the last appointment of the day because she remembers it was late afternoon or early evening when she was leaving and she did not recall seeing any other patients or the receptionist. It could have been getting dark when she left the examination.

Patient A believes that she may have come to the appointment from work. Her work hours at the time were usually from 8:30 am to 4:30 pm, and she would have been working at the YMCA location at Finch Avenue West and Dufferin.

Patient A said that she probably took the Finch Avenue West bus number 36 to Finch Station and then the number 39 bus on Finch Avenue East. She would have had to go to a subway station. She

does not remember exactly which route she took that day as there are several different ways to get to 2028 Sheppard Avenue East from the YMCA.

Patient A agreed that she had no way of knowing whether she actually was the last appointment of the day and she might have said that because she does not remember seeing anyone else there that day. Patient A agreed that she had no knowledge one way or the other how late the clinic was open that day. She said that if there were other patients who were seen by Dr. Miller after her then they may have come after she left the office. She reiterated that this was a very stressful situation for her and she wanted to escape as soon as she could.

Patient A said that she believes the receptionist was there when she arrived but she is not 100% certain about that. She agreed that she did not know if other staff were in the clinic when she arrived for her appointment that day.

She does recall that there was a reception area and a doctor's room and hangers for hanging her jacket in the reception area. Patient A did not remember seeing more than one receptionist that day. She agreed that there might have been other doctors in the clinic and if they were in their rooms and didn't come out she would have had no way of knowing that.

Patient A disagreed with the suggestion that Dr. Miller's receptionist was at her desk when Patient A left that day. She does not remember seeing the receptionist and she doesn't remember paying. Patient A said that she just wanted to ignore everything and get out of there which is why she used the word "flee". Patient A said that even if she did pay this would have just been her trying to ignore the situation and not do anything that might lead to Dr. Miller confronting her. She does not remember anything about paying but she agrees that it is possible she did pay after her examination.

Patient A said she does not remember taking the prescription at that date and instead remembers going back some months later to pick it up.

When asked if she told the College investigator that she got the prescription from Dr. Miller that day, Patient A said that when the investigator interviewed her on the phone it was the first time she had had to think about the details of what happened. Patient A said that as she was waiting for Dr. Miller to finish the examination he might have written the prescription or he might not have. Patient A said she might have left and not waited for him to give her the prescription. Either way, she simply does not remember.

Patient A also does not remember whether it was Dr. Miller who took the payment from her that day; she agreed that it could have been him. When asked why she would have been willing to wait and pay for the treatment with Dr. Miller if he had just sexually touched her, Patient A said that she just would have wanted to get out of there. All she knows is that she strongly wanted to escape as soon as possible. Patient A said that if she was required to pay she would have paid no matter what; she couldn't leave without paying if she was required to pay.

When shown the records that demonstrate payment was made with a debit card on November 30, 2006, Patient A agreed that she might have paid with a debit card. When it was pointed out to her that the payment was made at 4:04 p.m., Patient A said that she doesn't remember but that in her memory it was later than 4 p.m. In her memory it was closer to 6 p.m. and it was getting dark outside.

When asked about going back for her jacket, Patient A said that she was just a couple of steps outside of the office when she remembered that she had forgotten it and she immediately went back in to get it. She does not remember if there is a hallway before the entrance to the office or if the entrance went straight out to the street. What she does know is that when she stepped out she came back immediately to get her jacket because it was cold.

When asked why she was willing to go back into the office to get her jacket when Dr. Miller had just assaulted her, Patient A said that she was either brave or stupid to do that but she cared about her health and she couldn't go home on the bus without her jacket in the winter. At that point her priority was to care for her health. Patient A said that the coat hanger in the office was close to the door.

Patient A was diagnosed with cancer in January 2005. As of November 2006 she was not taking medication for her cancer nor was she taking medication for depression. She believes she started taking medication for depression in January 2017. She was resisting taking medication because she did not want to become addicted to it. She said it was possible that she had already been diagnosed with cancer by the time of her first appointment with Dr. Miller and she would have put it on the health history form.

When pressured about details of the appointment Patient A said that she does not remember all of the details of all of her medical appointments. She became upset at Ms. Gibbs and felt pressured as she was being asked about sensitive things.

In relation to her November 30, 2006 appointment, she recalls that she was sitting for most of the appointment. Dr. Miller was sitting opposite to her during the examination. She recalls that he picked up her right hand and placed it on his genitals (over his pants) almost as soon as she sat down for the examination. She does not recall which hand Dr. Miller used to pick up her hand. She thinks her hands were probably in her lap when he picked her hand up the first time. She both saw and felt Dr. Miller pick up her hand. She does not recall if the lights in the room were on or not. She does not recall her vision being blurry from any drops in her eyes or if her glasses were on or off.

Patient A does not remember what equipment Dr. Miller used during the examination and does not remember any details of the actual examination he performed on her. She does not recall if he reached around any equipment to pick up her hand.

Patient A does not know if Dr. Miller had an erection or not when he put her hand on his genital area. She did not say anything to him when he did it because she did not feel able to confront him. She does not remember Dr. Miller saying anything to her when she removed his hand.

Patient A agreed that nothing prevented her from leaving the room when he did this but she repeated that she did not act at that time because she decided to pretend nothing was happening.

When it was suggested to Patient A that her English was indeed good enough to confront Dr. Miller, she disagreed and said that just because a person has gone to college doesn't mean that they can argue in English.

Patient A agreed that there was no incident of unprofessional behavior on the first visit and there were no verbal sexual comments on the second visit.

Patient A agreed that she had no memory of returning to Dr. Miller's office on August 30, 2007, to pick up her prescription. She agreed that it was possible she might see Dr. Miller that day but she felt that she wouldn't have to deal with him, as it is usually the receptionist who takes care of something like a prescription.

Dr. Moss at Sunnybrook is the one who asked if Patient A had ever been sexually abused. Patient A answered Ms. Gibbs' numerous questions about her history of depression and anxiety and the medication she had taken in the past and denied that she had taken any medication that could affect how alert or awake she was. She said she has never been prescribed medication for delusional or disordered thinking. Patient A said she has had no breaks from reality. She said she had thoughts of suicide which she did not act upon and she described an episode on a bus when she wanted to scream (but didn't).

Patient A disagreed with the suggestion that she built up the incident in her mind and disagreed that it could have been anyone other than Dr. Miller who did it.

With respect to the complaint form and the 1800 Sheppard Avenue East address on it, Patient A repeated that she believes the medical student put the address on the form. She thinks the medical student may have looked online to find Dr. Miller's address. Patient A doesn't remember the address being on the form when she signed it.

Re-Examination of Patient A

Patient A was re-examined by College counsel during which she clarified the comments she made during cross-examination about her culture. She said that because of her culture she cannot imagine sharing the incident with any of her family members, especially her brothers or her father. Her family would be very sad and very worried and would feel humiliated.

Patient A stated that she herself has "googled" Dr. Miller and when she did, his 1800 Sheppard Avenue East address came up.

Patient A said that it would not have made a difference whether or not she was wearing her glasses when Dr. Miller put her hand in his lap. She clearly remembers the incident; she remembers what Dr. Miller did and she saw what he did.

After the examination of Patient A concluded, Ms. Gibbs left the hearing and Dr. Miller represented himself for the remainder of the proceedings.

Dr. Miller's Opening Submissions

The hearing resumed on October 11, 2018, at 8:45 a.m.

College counsel advised that she had no further witnesses and so Dr. Miller made brief opening remarks in which he denied the alleged conduct and said he was going to tell the truth. He said he knew in his heart that he did not sexually abuse Patient A and that it would not occur to him to sexually abuse a patient. Dr. Miller then took the stand.

Examination-in-Chief of Dr. Miller

Dr. Miller briefly reviewed his history as an optometrist. He said he had been an optometrist for more than three decades. He graduated from the University of Waterloo and later surveyed a course on epidemiology at McMaster University.

Dr. Miller worked with the department of health when the drug list for optometry was being prepared.

Dr. Miller agreed that he did practice in 2005 at 1800 Shepard Avenue East. In November 2006, he moved his office to 2028 Sheppard Avenue East.

Dr. Miller tendered a diagram of his clinic offices at 2028 Sheppard Avenue East and it was marked as Exhibit 6. Dr. Miller described the diagram as representing the layout of the office where the alleged incident occurred. He said the clinic was on the main floor. The entrance is off the street level. He agreed that one entered his clinic off Brian Drive as Patient A described.

Dr. Miller's office was within the larger clinic. The other space is a medical reception area and there are two receptionists who sit there. There is also laboratory in the medical end (just above and to the left of his office on the diagram).

Dr. Miller said he had no independent recollection of Patient A's visit and so had to describe what he normally does.

Dr. Miller said that the red dots in the chairs on the diagram represent places where people were most likely sitting when Patient A came and went from the clinic on November 30, 2006. The day of the alleged incident was a Thursday evening and on Thursdays his office hours were until 7 p.m.

Ms. McKenzie was his receptionist at the time. Her duties included answering phones, filing, greeting clients and generally controlling the office. Dr. Miller said that Ms. McKenzie sat at a desk about 10 or 12 feet from his examining room and it is in view of the other medical reception desk.

On November 30, 2006, Patient A would have arrived at around 3:30 pm and she would have entered the office. The office has signs telling patients where to sit and so she would have moved into Dr. Miller's reception area from the main area.

Dr. Miller said that Ms. McKenzie would have taken Patient A's information and made a file and Patient A would have taken a seat in the waiting area.

After concluding with the patient before her, Dr. Miller said he would have invited Patient A to come into the examination room and he would motion for her to sit in the chair. He would then go to the sink and wash his hands and then return to the stool in front of the patient chair.

Dr. Miller said he would be close to the table because he would be making notes during the examination. Then he would have done a normal optometric examination, testing visual acuity, etc.

Dr. Miller then tendered as evidence some photographs that he had taken of the equipment and chairs in his office and those were marked as Exhibit 7A, 7B and 7C. Dr. Miller said the patient chair shown in the photograph is the same chair he has had since 2006. The photographs depict his wife sitting in the patient chair and Dr. Miller sitting on a stool in front of her.

Dr. Miller then referred to Patient A's "patient diary" at Tab 3 of Exhibit 3. Dr. Miller said that the patient diary shows that Patient A's examination was at 3:30 pm on November 30, 2006 and she paid for the examination at 4:04 p.m. that day. Dr. Miller said that Patient A was never alone in the office on November 30, 2006; there were many people in the office at the same time including his receptionist and two other receptionists.

Dr. Miller had the files for patients seen before and after Patient A on November 30, 2006 (those are found at Tabs 6-9 of Exhibit 3).

Dr. Miller said the photographs demonstrate that it would not be possible for him to pull a patient's hand onto his lap. Dr. Miller said that he placed his wife in the chair under different conditions and asked her to try to reach his body and to reach where Patient A said he put her hand. Dr. Miller said he was not able to do that without pulling his wife forward. In all three positions Dr. Miller said his wife could not reach him.

Dr. Miller said that the file (at Tab 2 of Exhibit 3) was made out originally with some basic information in it, which would have been written by Ms. McKenzie. The rest of the file is in Dr. Miller's writing.

Dr. Miller said Patient A left with her prescription and a receipt. Tab 3 of Exhibit 3 shows that she came back to get a copy of her prescription in 2007. Dr. Miller said that he wrote the prescription on August 30, 2007 and Patient A paid \$10 for it and she got a receipt.

Dr. Miller testified that he felt devastated when he heard about the complaint. He believed that one of his buddies was “giving him a ride” when the investigator showed up at his office. He believes he said “this is insane”.

The investigator came to Dr. Miller’s office at Pharmacy and Eglinton Avenue to get a copy of Patient A’s chart. Dr. Miller eventually found the 2006 chart which he said was in a store room in a building. The investigator asked Dr. Miller if he remembered Patient A and he said he did not and that if she were sitting in the waiting room right now he would not recognize her. The investigator asked Dr. Miller if he sexually abused Patient A and Dr. Miller said absolutely not.

Dr. Miller concluded his examination-in-chief by saying he doesn’t remember that woman.

Cross-Examination of Dr. Miller

College counsel commenced Dr. Miller’s cross-examination at approximately 9:50 am.

Dr. Miller said that he has been unable to find Patient A’s original chart (for her 2005 visit).

Dr. Miller was surprised to realize that he had been practising optometry for almost 50 years; he originally thought it was more like 30 years. Dr. Miller said that he sees an average of 10 or 12 patients a day and he agreed that over the past 12 years he has probably had about 24,000 patient visits.

College counsel asked Dr. Miller why he referred to Patient A as “that woman” and he said that if he did then it was because he had already referred to her by name during his testimony. He denied feeling any hostility toward Patient A.

Dr. Miller agreed that he had no independent recollection of the visit with Patient A and that without the documentation he would have no memory at all.

Dr. Miller agreed that during patient exams his door is closed and his door does not have a window in it. He agreed that no one else was in the room other than him and Patient A, so no one else in the clinic would have been able to see what was going on in his office.

Dr. Miller said that likely one of the two doctors was working on November 30, 2006 in the evening. He cannot say for certain that every chair on his diagram (which has a red dot indicating a patient) actually had a patient in it that day.

Dr. Miller eventually agreed that patients could exit from the clinic to the street if they went out through the pharmacy, which is located on the diagram just above his office.

Dr. Miller pointed out the two coat racks in the clinic, one of which is near his reception desk and one of which is near the entrance to the parking lot.

Dr. Miller agreed that when he was in his office with the door shut he did not know where Ms. McKenzie was and that if she stepped away from her desk he would not know it.

Ms. Martin asked Dr. Miller why the payment for the November 30, 2006 visit seems to have been processed on December 4, 2006 and Dr. Miller said that it was simply an accounting transaction. Dr. Miller disagreed with the suggestion that Ms. McKenzie was away from the office on November 30, 2006 and that Dr. Miller had processed Patient A's payment.

Dr. Miller said that normal eye exams take anywhere from 15, 20 or 30 minutes depending on what they are for. He agreed that if Patient A paid at 4:04 pm and an appointment is 20 minutes long that the next patient (who paid at 4:42 pm that day) would not yet have arrived when Patient A left the clinic.

When College counsel suggested to Dr. Miller that he sits close to a patient when he is doing an eye exam, Dr. Miller responded by saying "define 'close'". When pressed he agreed that he does sit close to the patient during eye exams.

Dr. Miller agreed that, in relation to the photographs at Exhibit 7, the patient chair is able to move up and down, as is the stool that Dr. Miller sits on.

When College counsel suggested that the patient chair in the photographs was raised up at a higher level than Dr. Miller's stool, Dr. Miller disagreed and said they were on the same level.

Dr. Miller disagreed with College counsel's suggestions that he could have taken Patient A's hand and put it on his genital area. He said that it would be physically impossible to put her hand on his "crotch" without breaking her hand during direct ophthalmoscopy.

Dr. Miller does not remember if Patient A told him in 2005 that she had chronic leukemia. Her file from 2005 has "gone by the wayside".

Dr. Miller agreed that someone who had been sexually abused would be very distraught and would feel shocked and humiliated and would want to escape from where the abuse had happened. He also agreed that someone who was in a shocked state might not be able to remember the details of what happened, especially 10 years later.

Dr. Miller agreed that the alleged conduct, if it were true, demonstrates the grossest breach of trust. He said that is why the allegation has devastated him.

Dr. Miller agreed that the alleged conduct, if true, was completely unprofessional and devastating for the victim.

Dr. Miller said that Patient A gave him no indication she was in distress.

Dr. Miller agreed that it was highly unusual for a patient to have kept an original prescription for 11 years.

College counsel finished her questioning at 10:50 am.

Dr. Miller briefly gave evidence in re-examination during which he apologized if he appeared angry or disrespectful to College counsel. He said that he felt that he was being abused himself during the cross-examination.

Panel Questions

The Panel asked Dr. Miller a number of questions including when he moved from 1800 Sheppard Avenue East to 2028 Sheppard Avenue East. Dr. Miller said that in 2005 he was at 1800 Sheppard Avenue East and then in 2006 he moved to 2028 Sheppard Avenue; he thinks he moved there three or four months before he saw Patient A.

The investigator attended Dr. Miller's offices at 1 Eglinton Square (at Pharmacy and Eglinton). The office at 2028 Sheppard Avenue does not exist anymore. Dr. Miller cannot remember when it closed. All of the patient files that were at 1800 Sheppard got moved to 2028 Sheppard. When 2028 Sheppard closed all the files from that office were moved to 648 Sheppard Avenue and that is where he located Patient A's file. Dr. Miller was never able to locate the original file for Patient A that would have included her 2005 visit.

Dr. Miller agreed that the patient files that are found at Tabs 7, 8 and 9 of Exhibit 3 are for patients who were first seen in 2002 and 2004. Dr. Miller was not able to explain why he could find those patients' files but was unable to find Patient A's original 2005 file.

Dr. Miller agreed that his normal pattern was to use the same chart for all patient visits and to use a different coloured ink at the top of the page when he saw the patient on a subsequent visit. He eventually said that he guessed he couldn't find Patient A's file.

Dr. Miller said that the files in the exhibit were all prepared by his secretary at the time, Ms. McKenzie, when questioned by Ms. Martin about the differences in the handwriting on the files.

Submissions of the Parties on Finding

College Counsel Closing Submissions

College counsel submitted that the onus of proving the allegations is on the College. The standard of proof is a balance of probabilities. Another way of saying that is whether it is more likely than not that the conduct occurred.

College counsel also reviewed the facts of *FH v McDougall*, 2008 SCC 53, which are that an Indigenous person who had been in a residential school as a child alleged for the first time in 2000 that he was abused by a priest while at the school many years earlier. The case involved a single complainant with no witnesses to the alleged conduct. The priest was found on the civil standard to have sexually abused the child. College counsel suggested that the Panel keep this in mind if they were wondering why Patient A had not come forward for so long and also demonstrated that it was possible to prove sexual abuse even if there were no corroborating witnesses.

College counsel also suggested that requiring corroboration to prove sexual abuse would elevate the evidentiary requirement above that of a criminal case. While corroboration is nice to have, it is not essential.

College counsel reviewed *Karkanis v College of Physicians and Surgeons*, 2014 ONSC 7018, and submitted that in order to assess credibility, a trier of fact must assess two factors, i.e., honesty and reliability. The honesty of the witness is their sincerity and willingness to speak the truth as he or she believes the truth to be. Their reliability is the witness' ability to accurately observe, recall and recount the events in issue. The Court's guidance is that the witness' credibility must be assessed along with whether his or her evidence is reliable and can be counted on to be accurate.

College counsel suggested, as the Supreme Court of Canada in *FH v McDougall* urged, that the Panel must look at the totality of the evidence and assess the impact of any inconsistencies, rather than look at evidence in isolation. Inconsistencies on minor matters are to be expected and the trier of fact need not resolve every alleged inconsistency in the evidence. Inconsistencies between evidence given on different occasions do not oblige a trier of fact to find that a witness lacks credibility as long as the trier of fact is alive to the inconsistencies.

On the other hand, where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate carelessness with the truth and the trier of fact must then decide whether it can rely on that witness' testimony (*R v MG* (1994), 73 OAC 356 (Ont. CA)).

College counsel reviewed the *Pitts and Director of Family Benefits*, 1985 CanLII 2053 (ONSC) decision which is still one of the leading cases on assessing credibility. The factors set out in that case should be considered when assessing credibility, particularly in cases where two witnesses are saying different things. Counsel also reviewed the factors reviewed by the Discipline Committee (as articulated by the court in *R v Chase*, 1987 CanLII 23 SCC) in *Re Beairsto*, 2016 ONCPSD 24.

College counsel reviewed the facts in the current hearing from her perspective. In her submission Patient A's evidence had a ring of truth to it. The fact that she held on to the original prescription for 11 years was very significant. Patient A said she kept it for the day when she felt strong enough to complain about what Dr. Miller had done to her. College Counsel said that people do not do that otherwise.

College counsel suggested that Patient A's evidence was not shaken on cross-examination. While she might have been unclear on minor details, her evidence was rock solid and unshakeable about the core complaint, i.e., that Dr. Miller twice placed her hand on his genital area.

College counsel suggested that the address on the complaint form was a red herring. Patient A did not write the address on that form. Patient A testified that the incident occurred at 2028 Sheppard Avenue East and Dr. Miller admits that was where he was practising as at November 30, 2006.

College counsel suggested that it stands to reason that Patient A cannot provide much detail about peripheral issues. When something is traumatic and devastating and inappropriate you remember the event itself but not the routine things that happened before or after it.

College counsel suggested that it made sense that Patient A would go back in to the office get her coat – she was sick and it was winter and so she needed her coat.

With respect to who else might have been in the clinic that day, College counsel suggested that it did not matter, because the abuse was silent and occurred in a closed room with no witnesses. Dr. Miller did not say anything during the incident nor did Patient A and Patient A did not say anything to anyone on her way out of the clinic.

College counsel suggested that the photographs submitted by Dr. Miller actually make it clear that the allegation could have happened as Patient A described it. If the client chair in the photograph was lowered and Dr. Miller's stool was raised then College counsel suggests that he absolutely could have put her hand on his genital area.

College counsel also suggested that the Panel should carefully consider Dr. Miller's demeanour when he testified. She suggested that he was evasive under cross-examination, argumentative at times and sometimes condescending. An example in her submission was when she asked if he sat close to patients during exams and he responded by saying "define close".

She also pointed out that Dr. Miller disagreed when she said he'd been practising for 50 years and he disputed that until she actually reminded him of the year he graduated. Similarly, he disputed that clients could leave the clinic through the pharmacy entry.

College counsel submitted that another area where Dr. Miller was not forthright was in relation to why he could not find Patient A's 2005 chart. Dr. Miller kept blaming it on the amount of time that had elapsed, but when he saw Patient A for the second time, only one year had elapsed. The questions repeatedly asked of Dr. Miller were not why could he not find her 2005 chart in 2018, but why could he not find her 2005 chart in 2006, and yet he kept saying that he couldn't find her 2005 chart because of the amount of time that had elapsed.

Similarly, College counsel suggested that Dr. Miller was not being forthright when he said that some of the handwriting on the records belonged to Ms. McKenzie whose handwriting was tidy and rounded, as compared to the more messy handwriting in other spots that counsel had asked Dr. Miller about. Counsel suggested that it was obviously not Ms. McKenzie's writing and this is an example of something where a credible witness will acknowledge obvious facts.

College counsel contrasted Dr. Miller's demeanour with Patient A, who would concede when she could not remember something.

College counsel said that Patient A had nothing to gain from coming forward and she did not come across as partisan when giving her evidence.

Dr. Miller Closing Submissions

In addition to his closing submissions, Dr. Miller provided written submissions to the Panel highlighting what he viewed as Patient A's memory gaps, inconsistencies in her evidence and things that simply did not make sense. The Panel reviewed these submissions very carefully.

Dr. Miller submitted that Patient A's evidence was not clear, cogent or convincing to meet the burden of proof. He said that she does not have a memory of many things, including the clinic set-up.

Dr. Miller does not recall Patient A and he submits that is normal because there was nothing surprising about her visit. As such, his testimony is based upon what his normal procedure is in his office.

Dr. Miller suggested that it was implausible that Patient A could complete her education at George Brown College and then try to explain that she lacked confidence in English.

College Reply

College counsel made brief submissions in reply including suggesting that in fact Ms. Gibbs' cross-examination of Patient A clearly demonstrated that Patient A does not understand English sufficiently to engage in confrontation. Numerous times Patient A had to ask Ms. Gibbs to explain what she meant or to paraphrase or ask the question in another way.

Finding on Misconduct

After considering the evidence tendered at the hearing as well as the submissions of College counsel and Dr. Miller, the Panel found that the facts are sufficient for the College to discharge its onus and prove the allegations and particulars in the Notice of Hearing.

The Panel believed that on a balance of probabilities, it is more likely than not that Dr. Miller took Patient A's hand and placed it on his genital area twice on November 30, 2006.

Furthermore, the Panel also believes that the conduct constitutes sexual abuse of a patient in that it involved touching of a sexual nature, of the patient by the member. The Panel finds that Dr. Miller engaged in professional misconduct pursuant to clause 51(1)(b.1) of the Code.

Reasons for Finding of Misconduct

Generally

The Panel carefully reviewed the evidence it heard as well as the submissions made. In assessing the credibility of Patient A and Dr. Miller, the Panel carefully considered the factors set out in the

Pitts and *Beairsto* decisions as well as the guidance from the Supreme Court of Canada in *FH v McDougall*.

The Panel agrees that corroborative evidence is not a legal requirement and is not always present when the act happened long in the past and furthermore that cases of sexual abuse normally occur in private.

When dealing with this type of case, credibility assessments of witnesses must be made and both the honesty of the witness (speaking the truth) and their reliability (ability to observe, recall and recount), must be assessed.

Assessment of Dr. Miller's Evidence

Generally

Dr. Miller testified that he had no recollection of the examination or of Patient A, which would be reasonable given the length of time that had elapsed if he had not acted inappropriately towards Patient A. But because of his lack of independent recollection, all that Dr. Miller could say was how he would normally carry out an assessment and how he normally treats patients. He was not able to say what actually happened that day because he said he has no memory of it.

Dr. Miller focused on trying to show that the alleged conduct was physically impossible. The Panel would have expected Dr. Miller to have spent more time explaining why he would not touch a patient inappropriately. It was really only when Dr. Miller was being cross-examined and was asked whether he agreed that it would be a gross breach of trust to touch a patient in the way Patient A described, that Dr. Miller said "that's why I would never do it".

Dr. Miller argued with College counsel when she suggested that a patient could leave through the pharmacy (and if they did, would not see patients sitting in the clinic waiting area). Dr. Miller insisted that patients never did leave that way and that they instead went out through the door by the parking lot. However, Patient A testified that she took the bus to the appointment and so would not have a car in the parking lot to go back out to. It was only after repeated questioning that Dr. Miller conceded that indeed a patient could leave the clinic by going through the pharmacy.

Similarly, Dr. Miller insisted that his secretary, Ms. McKenzie, was always at her desk, and initially would not concede such points as obvious as that she must sometimes be absent from her desk, such as for washroom breaks. These answers made him seem less forthright.

While the Panel found it odd that Dr. Miller disputed College counsel's suggestion that he had practised optometry for five decades, not much turned on this. While it seems unlikely that someone would forget two decades of practice (Dr. Miller initially said he had practiced for over three decades), he did eventually concede that he had practised for almost 50 years.

Dr. Miller's receptionist Ms. McKenzie stated in her evidence (via the Agreed Facts) that she had never received a complaint about Dr. Miller or witnessed inappropriate behavior. However, Patient A said she never did complain and she testified that she felt unable to complain about the conduct until she finally disclosed the incident to Dr. Moss in 2017.

Furthermore, Ms. McKenzie was never in the room with Dr. Miller and Patient A during the appointment and cannot say what happened. As such, Ms. McKenzie's evidence was not particularly helpful one way or the other to the Panel.

When asked about the handwriting in a number of the patient charts in evidence, Dr. Miller repeatedly claimed that certain handwriting – which to the Panel clearly appeared to be by two different people – was all the handwriting of his receptionist Ms. McKenzie. While nothing changed as a result of that particular point, it seemed to be an instance of Dr. Miller refusing to concede an obvious point and thus it affects the reliability of his evidence overall.

The Panel was also concerned that Dr. Miller would not concede that an optometrist sits close to a patient during a visual assessment, when that is obvious to anyone who has been to an optometrist and is even obvious from Dr. Miller's own photographs. Instead of conceding that point, however, Dr. Miller responded to College counsel's question by asking her to "define 'close'".

Photographs

Patient A testified that Dr. Miller was sitting in front of her and facing her when he took her hand and put in on his genital area. Dr. Miller agreed that when he conducts a patient examination, he sits close to the patient (again only after initially asking that "close" be defined).

By tendering the photographs (Exhibits 7A, 7B and 7C) of his patient chair and the stool on which he sits when carrying out examinations, Dr. Miller was trying to prove that while sitting, the alleged act could not physically occur. However, in the Panel's opinion the photographs looked as though they were staged to demonstrate his argument, and as such tended to make his evidence less persuasive.

It seemed clear to the Panel that the chair and stool upon which Dr. Miller and his wife were sitting in the photographs were at different heights, and yet on cross-examination Dr. Miller continued to maintain that the chair and stool were at the same height.

At one point College counsel asked if it was possible that he took Patient A's hand and committed the act as she described, Dr. Miller's answer was "I don't think so". That is an unusual response to the question. Dr. Miller then elaborated saying he doesn't think it would be possible to take someone's hand and do this while standing at their side, however Patient A testified that Dr. Miller was sitting facing her when he took her hand.

It seemed to the Panel that a forthright witness would concede that the act could physically have taken place, which concession would not have diminished an honest denial of having done it. But to deny that the act could physically have occurred tends to weakens Dr. Miller's denials. Based

on Dr. Miller's own photographs it seems obvious to the Panel that the conduct physically could have happened when an optometrist is sitting facing a patient.

Patient A's 2005 Chart

Perhaps one of the most difficult aspects of Dr. Miller's testimony for the Panel to reconcile was the evidence he gave about his inability to find Patient A's 2005 chart. It was clear from the other charts tendered in the hearing that subsequent visits were normally entered on the same chart (in different colour ink) for each patient.

When questioned about Patient A's 2005 appointment, Dr. Miller stated that the patient record for the appointment was either misplaced or lost. The loss of the 2005 record of the first visit is troubling given that Dr. Miller was able to find charts for other patients whose earlier visits actually pre-dated Patient A's 2005 visit.

Dr. Miller had no explanation as to why he could not find Patient A's first chart and his insistence that it was because of the age of the file did not ring true. Dr. Miller kept insisting that it was over 10 years old and so he did not need to keep it and that is why he could not find Patient A's 2005 chart. However, Patient A's first chart would only have been one year old by the time Dr. Miller saw her in 2006 (and Dr. Miller still had Patient A's 2006 chart when the investigator requested it in 2017).

Dr. Miller seemed to be confused about the fact that in 2006, the chart would have been a year old. Therefore, the explanation he gave, i.e., that he could not find the chart because it was old, did not make sense. He did not seem to comprehend this, or refused to acknowledge this, making himself seem less credible.

Dr. Miller's Demeanour

Dr. Miller did not look at Patient A while she was testifying and the Panel noticed that he made absolutely no eye contact at all with Patient A and seemed to have little interest in what she was saying. If Patient A had fabricated her story (which is essentially his defence) there would be no reason for Dr. Miller not to look at her.

Dr. Miller was sometimes defensive and would get upset while answering College Counsel's vigorous questions regarding the allegations. During his reply evidence Dr. Miller did apologize for his behaviour towards College counsel. However, during that apology he also defended his behavior during cross-examination saying that he was upset because "he felt like he was being abused himself" (i.e., during his cross-examination). While the Panel recognizes that a cross-examination can be a stressful experience, it would find it troubling if Dr. Miller was directly comparing it to being sexually abused by a health professional. First, College counsel was respectful towards Dr. Miller during her questioning and second, being asked questions in an open

hearing is not reasonably comparable to being sexually abused by a health professional in the confines of a closed office.

Photographs and Floor Plan

The Panel found that the floor plan of the office created by and tendered by Dr. Miller did not support his position.

First, the floor plan shows that Patient A could have left the clinic through the pharmacy door without walking through much of the clinic at all (and as such she may not have noticed other patients who may have been present in the waiting room).

Second, it shows that there are coat racks near both exits, which is consistent with Patient A's statement that when she came back to get her coat she was able to grab it quickly because it was just inside the door.

Third, the alleged incident took place in a closed examination room that had no window in the door and only Dr. Miller and Patient A were in the room during the appointment, so no one else had any opportunity to observe what occurred. As such, it does not matter how close the reception desk is to Dr. Miller's office because the receptionist was not in the examination room with Dr. Miller and Patient A.

Fourth, Patient A said that after the appointment she just wanted to get out of there and did not say anything to anyone about what happened. Even if she had left by the "usual" door, most patients would have been in seats that would be behind Patient A as she left the clinic.

Fifth, even if Patient A did have to pass the reception desk (and even if she did pay the receptionist), she testified that she did not say anything to anyone about what happened.

Sixth, Dr. Miller drew red dots in every single chair in the waiting room, to indicate where, as he claimed during his testimony, people would have been sitting. In the Panel's opinion it is unlikely that every single seat in a clinic would be occupied because Miller testified that only one of the other doctors in the clinic was working that evening (since it was a Thursday).

When College counsel suggested that Dr. Miller could not say that all of the chairs were filled with people, Dr. Miller said that the probability was that they were and that it "was like a zoo". Dr. Miller had earlier testified that he had absolutely no independent recollection of Patient A's appointment and so it does not make sense that he could remember that it was "like a zoo" in the waiting room that day. As such, his insistence that every chair was filled by a patient seemed to the Panel to be exaggeration on Dr. Miller's part when a more reasonable statement would have been that each chair "could" have been occupied by a patient.

In any event, if Patient A left through the pharmacy entrance she would not have gone through the main waiting area. And if she left by the "usual" entrance (by the parking lot), then the bulk of the seats in the waiting area would have been behind her as she walked towards the exit.

As well, Patient A testified that she was shocked and humiliated by what Dr. Miller had done and wanted to flee from the clinic. Even if patients had been present in the clinic waiting room, it would be reasonable for Patient A not to notice them if she was focused on getting away from Dr. Miller.

Self-Representation of Dr. Miller

The Panel did consider the fact that Dr. Miller was self-represented and that the hearing process may have been overwhelming for him. However, Dr. Miller clearly took the time to position, and have photographed, his wife in the patient chair and himself on the stool facing her. Dr. Miller's insistence that the conduct could not physically have occurred was troubling to the Panel because it seems obvious from the photographs that the conduct could have physically occurred. Conduct like this can occur when two people are in a room alone. Trying to prove it cannot physically occur is not an effective line of defence given the evidence provided.

The Panel has no way of knowing whether that line of defence would have been pursued if Dr. Miller had been represented by legal counsel, but the Panel must decide the case based on the evidence before it and the positions taken during the hearing.

Assessment of Patient A's Evidence

Delay in Reporting

The Panel finds plausible the explanation given by Patient A that she did not feel strong enough to confront Dr. Miller or complain about him at the time of the incident, given that she was dealing with her marriage breakdown and her recent diagnosis of leukemia. She had also only been living in Canada a few years by that point and she said she did not have the confidence to report the incident. In those circumstances, it seems plausible that the first person to whom Patient A ever disclosed the incident was a health care professional who specifically asked her if she had ever been sexually abused.

Other than Dr. Moss and his colleague, Patient A said that she has not told anyone about the incident. This is consistent with the shame and fear she described that she would have felt for her family's reaction (especially the men in the family). Patient A's concern regarding anonymity and the potential shame it could bring to the family based on what she described as the rules in her culture rang true to the Panel.

In the Panel's opinion Patient A's inability to confront Dr. Miller would reasonably have extended to her paying for the examination without saying anything at that time. Whether payment was taken by Dr. Miller or by his receptionist, it is reasonable to believe that the feelings of shock that Patient A described when Dr. Miller touched her would still be present when she was in the clinic area just outside of his office. Patient A said that if she paid she did it just to finish the visit so that

she could get out of there. She said that if she had been required to pay she would have paid. It is reasonable to believe that someone who was trying to avoid confrontation would pay if asked to pay, because otherwise that failure to pay would itself result in a confrontation.

Patient A's Demeanour

The Panel found that Patient A generally answered the questions asked of her without hesitation and if she was unclear about a question she asked for it to be repeated. Patient A did become upset and at one point wanted to stop for the day but after a short pause she was able to continue.

During questioning, the Panel observed that Patient A's demeanour was different than Dr. Miller's. When she was asked about whether certain things were plausible she agreed and did not argue. When she could not remember she would simply state "I'm not sure" or "it's possible", but she was not defensive. Patient A even disclosed things that could make her seem less stable, for example, the fact that she was under so much stress at certain points that she would want to scream while on the bus.

Patient A was also quick to agree with Ms. Gibbs that nothing inappropriate happened during her first appointment with Dr. Miller in 2005.

Patient A also gave her testimony in an understated way. She did not exaggerate, and she conceded when she could not remember something or when her actions seemed not to make sense (i.e., she said that coming back to get her coat was either stupid or brave).

The Panel finds that any inconsistencies in her evidence related to minor issues only, but Patient A was very clear about what the Member did to her. The Panel finds her account of the incident to be reliable and accurate. Her testimony was not contradicted by the testimony of Dr. Miller.

Returning to get Jacket

Patient A testified that she realized quickly after fleeing from Dr. Miller's office that she had forgotten her jacket and so she returned to the clinic and grabbed it from the coat rack. She is very clear that she did this and when cross-examined about it said that she was either brave or stupid to do it but that she cared about her health and could not go home on the bus in the winter without her coat.

Dr. Miller's drawing of the floorplan of his clinic demonstrates that the coat racks were near the exit doors, making it possible for Patient A to return very briefly to get her jacket with little risk of seeing Dr. Miller while she did it.

In the Panel's opinion, the evidence about forgetting her jacket and having to come back for it tends to make her story more believable. If her story had been fabricated, it seems unlikely that Patient A would add a detail that would invite her to be questioned about why she returned to the clinic. The Panel finds it believable that someone who had fairly recently been diagnosed with

leukemia would worry about her health and would not be prepared to take the bus home in late November without a coat even if that meant returning quickly to the clinic from which she was trying to flee.

The Panel also notes that the diagram of Dr. Miller's clinic was not shown to Patient A while she was on the stand, and as such the Panel has no way of knowing whether she would have agreed that it represented accurately the clinic as she remembers it or not. College Counsel did not object to the diagram being entered into evidence in light of Dr. Miller being self-represented and not knowing that he should have shown the diagram to Patient A, but College counsel did suggest that the Panel should carefully consider how much weight to give the diagram.

Returning to get Prescription

The Panel did struggle with Patient A's evidence that approximately one year later she returned to the clinic to get a signed copy of her prescription. While the Panel does find it somewhat odd that she was willing to possibly run into Dr. Miller by returning to the clinic, Patient A said that she knew it was usually the receptionist who handles this type of request.

When questioned about this in cross-examination, Patient A said that she is not normally a timid person and that while she did not want to confront Dr. Miller on November 30, 2006, she felt that there was no reason not to go see his receptionist in August 2007.

The Panel finds it reasonable that Patient A was prepared to see Dr. Miller's receptionist to get a copy of her prescription on August 30, 2007, even if she was afraid of seeing Dr. Miller himself. If she had gone to another optometrist she would have had to pay the examination fee again (which in Dr. Miller's case was \$70), rather than just the \$10 she was charged in August 2007 for a copy of the prescription.

Keeping Prescription

Patient A still had the original prescription that she had obtained from Dr. Miller's office and it was tendered as Exhibit 4. She testified that she kept the original prescription for all of this time in the event that someday she would feel strong enough to come forward and tell someone about what Dr. Miller did.

The Panel finds that it is unusual for someone to keep a single prescription for that length of time. The Panel has no reason to believe that Patient A kept the prescription for as long as she did other than for the reasons she expressed.

Memory of Details

The Panel did not find helpful the cross-examination of Patient A regarding which bus she took to get to the appointment on November 30, 2006. It was the events that occurred after she arrived at

the clinic that, if true, would have been shocking to her. As such, there would be no reason for a person to remember how they got to the appointment, 12 year later.

Patient A estimated that the appointment with Dr. Miller took approximately 20 minutes; she said it definitely did not last for an hour. Her estimate was consistent with Dr. Miller's evidence when he said that examinations took 15, 20 or 30 minutes depending on the type of examination. Dr. Miller also testified that Patient A's appointment was for 3:30 pm on November 30, 2006 and that she paid at 4:04 pm.

Patient A did not remember paying for the appointment but agrees that she might have. The Panel noted that the suggestion was put to Patient A that Dr. Miller might have taken the payment from Patient A that day, whereas the Agreed Statement of Facts suggested that Ms. McKenzie would have taken payment. Either way, Patient A said she has no memory of paying and was focused on trying to get out of the clinic.

Even though Patient A was not able to clearly recall, some 12 years later, the precise circumstances surrounding the incident, e.g. the exact time of day of the appointment, which bus route she took there, the presence of other patients/staff at the time (which is still unknown – while there were patients who saw Dr. Miller after Patient A, Dr. Miller conceded that they may have arrived at the clinic after Patient A had left), the examination itself, and whether she paid and received a copy of the prescription that day, Patient A was clear and in no uncertain terms described how twice the Member took her hand and put it on his genital area during the examination. She clearly recalled that and she expressed understandable shock at what she said Dr. Miller did to her. The Panel does not find that Patient A's lack of memory regarding the minor details is important in the circumstances.

Patient A described Dr. Miller's conduct in succinct terms and did not exaggerate or describe his putting her hand on his genital area in overly dramatic terms but instead simply described factually what happened.

Patient A was also clear that she pulled her hand away twice, and did not do or say anything at the time to Dr. Miller. She explained that she felt "trapped" and was not sure how to react, given she had only been in Canada for a short time and given her inadequacy in the English language. In fact, she said she pretended that nothing happened, trying to avoid any confrontation with Dr. Miller. Upon completion of the examination, she left immediately and in such a hurry forgot her jacket and had to come back to the waiting room to retrieve it.

Patient A believes that it was towards the start of the appointment when Dr. Miller took her hand. There is nothing that either supports or refutes this. Patient A testified that neither she nor Dr. Miller said anything during the appointment and it is just as plausible that something inappropriate would be done at the start of an appointment as at the end. Patient A testified that she believed that Dr. Miller may have felt he could do whatever he wished because she was a newcomer to Canada, she was ill, and she had limited confidence in speaking English. If that was Dr. Miller's motivation

then it would make just as much sense that he would do this at the start of the appointment as at the end.

Patient A believed that she went to work that day and she believed that it was early evening when she left the clinic. Her payment was processed at 4:04 p.m. and given that it was November when the days are shorter, it is plausible that it was already getting dark by then. Even when shown the diary entry showing payment was made at 4:04 p.m., Patient A said that in her mind she remembers it being later. In the Panel's opinion this does not negatively affect her credibility but simply reflects how memory works. It would have been more troubling to the Panel if Patient A had said she remembered it happening in early evening and then, when shown the diary entry demonstrating the 4:04 p.m. payment, saying "oh yes, I remember now that it was around 4:00 p.m.". Patient A said that she went to work that day, and her regular hours were 8:30-4:30 or so. If she were to leave work at a regular time and arrive at Dr. Miller's office for her appointment later that would not be consistent with saying that she attended a regular day of work. However, it is plausible that she took some time off for the appointment. This is a trivial detail in the Panel's mind as the facts are clear that she did attend the appointment and she was examined by Dr. Miller.

Patient A said that she did not remember paying but agrees that the record shows that she did. She does not remember who took her payment and she said that she simply did whatever it took to finish the transaction so she could get out of the clinic. It seems plausible to the Panel that if nothing untoward happened during the processing of the payment that Patient A would be unable to remember it, being shocked by what had just occurred in Dr. Miller's office and being focused on getting out of the clinic.

Facility with English Language

The Panel did not find persuasive the line of questioning about Patient A's facility with the English language. In the Panel's opinion it is possible that someone could write and read English better than they speak it; they are separate abilities and so Patient A's failure to confront Dr. Miller at the time due to ability with language in a stressful situation is consistent with that. As well, Patient A attributed her inaction not only to her facility with the English language but to how she was feeling because of the breakdown of her marriage and her recent leukemia diagnosis.

In any event, the Panel is aware that even those who are native English speakers are often unable to confront health professionals who act inappropriately towards them. The Panel does not find it surprising that Patient A felt unable to say or do anything in the moment given how shocking the conduct must have been to her.

Motivation for Coming Forward

The allegation in this case arose from a report which Patient A initially did not want to make and only agreed to when Dr. Moss and his medical student at Sunnybrook Hospital told her it would be

processed regardless of her cooperation. Patient A seems in fact to have been "pushed" by Dr. Moss's office to participate in the complaint that was filed with the College. This is consistent with Patient A's evidence that she has not told anyone else about the incident.

Patient A has nothing to gain from making the allegation against Dr. Miller and in fact, she testified that if her family learned about the incident it would be extremely difficult for her as it would be seen as shameful and humiliating in her culture.

It is unlikely that the placing of her hand in Dr. Miller's lap could have been misinterpreted by Patient A, particularly since she described it happening twice. As such, if Dr. Miller's denial is true, then the only explanation is that Patient A has fabricated the story (i.e., misinterpretation is not plausible). The Panel finds in all of the circumstances that in fact Patient A's story has the ring of truth to it and she has no motivation for fabricating what happened.

Conclusion

For the reasons set out above, the Panel finds that it prefers the evidence of Patient A over that of Dr. Miller and finds that the College has proven its case on a balance of probabilities based on clear, cogent and convincing evidence. In its opinion it is more likely than not that on November 30, 2006, Dr. Miller twice took Patient A's hand and put it on his genital area.

Even though Patient A was not able to recall the details surrounding the incident, she remembered the central event very clearly and the Panel found her to be a credible witness, and her testimony sufficiently clear, cogent and convincing to meet the burden of proof on the College.

The Panel finds that the actions of Dr. Miller constitute professional misconduct pursuant to clause 51(1)(b.1) of the Code. The Panel finds that Dr. Miller took Patient A's hand and put it on his genital area twice and that this constitutes both touching of a sexual nature of the patient by the member and behavior of a sexual nature by the member towards the patient, both of which constitute sexual abuse of a patient as defined in subsection 1(3) of the Code.

The Panel is prepared to reconvene the hearing to proceed with the penalty phase.

Dated this 11 day of January, 2019, at Toronto, Ontario.

(Signed)

Mr. John Van Bastelaar, Chair