

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. David Stuart Lambert, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity or any information that could disclose the identity of the patients and witnesses whose names are disclosed in the Agreed Statement of Facts filed at the Hearing under subsection 45(3) of the Health Professions Procedural Code (the “Code”), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

The Committee also made an order to prohibit the publication of the identity of the complainant witness or any information that could disclose the identity of the complainant witness under subsection 47(1) of the Code.

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.

Indexed as: Lambert, D.S. (Re)

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed
by the Inquiries, Complaints and Reports Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
being Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. DAVID STUART LAMBERT

PANEL MEMBERS:

**DR. T. MORIARITY
D. DOHERTY
DR. R. SHEPPARD
L. McCOOL-PHILBIN
DR. W. McCREADY**

Hearing Dates: June 27-28, June 30 and August 15, 2011

Decision Date: November 2, 2011

Release of Written Reasons: November 2, 2011

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on June 27-28, June 30 and August 15, 2011. At the conclusion of the hearing, the Committee reserved its decision on finding.

ALLEGATIONS

The Notice of Hearing alleged that Dr. David Stuart Lambert committed an act of professional misconduct:

1. under clause 51(1)(b.1) of the Health Professions Procedural Code (the “Code”), Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18, in that he sexually abused a patient;
2. under paragraph 1(1)1 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he contravened a term, condition or limitation on his certificate of registration;
3. under paragraph 1(1)5 of O. Reg. 856/93, in that he had a conflict of interest;
4. under paragraph 1(1)27 of O. Reg. 856/93, in that he contravened a regulation made under the *Medicine Act, 1991*, specifically paragraph 16(d) of Ontario Regulation 114/94; and
5. under paragraph 1(1)33 of O. Reg. 856/93, in that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

RESPONSE TO ALLEGATIONS

Dr. Lambert denied the first allegation in the Notice of Hearing, that he sexually abused a patient. Dr. Lambert admitted the second, third, fourth and fifth allegations in the Notice of Hearing, that he committed an act of professional misconduct in that he contravened a

term, condition or limitation on his certificate of registration; that he had a conflict of interest; that he contravened a regulation made under the *Medicine Act*, 1991, specifically paragraph 16(d) of Ontario Regulation 114/94; and that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

FACTS AND EVIDENCE

A. Overview of the Issues

Dr. David Stuart Lambert is a general practitioner. He received his first certificate of registration authorizing independent practice on July 11, 1979.

On August 2, 2002, the Discipline Committee found that Dr. Lambert had sexually abused three patients in the year 2000. As a result, his certificate of registration was revoked.

On March 25, 2008, Dr. Lambert applied for reinstatement of his certificate of registration. The Discipline Committee granted his application on June 30, 2009. Dr. Lambert's certificate of registration on reinstatement was subject to a number of terms, conditions and limitations.

The College alleges that Dr. Lambert subsequently violated these terms, conditions and limitations, that he had a conflict of interest, and that his conduct in this regard was disgraceful, dishonourable, or unprofessional. Dr. Lambert admits to these allegations.

In the course of its investigation into the above allegations, the College hired a team of private investigators to gather evidence. The College alleges that, during the course of this investigation, Dr. Lambert sexually abused one of the female private investigators who had been retained by the College. This is alleged to have occurred in October of

2009, during the course of the investigator's visit to Dr. Lambert's office, posing as a patient. Dr. Lambert denies this allegation.

B. Facts

The evidence pertaining to allegations 2, 3, 4 and 5 as set out in the Notice of Hearing, which were the allegations admitted to by Dr. Lambert, was presented to the Committee by way of the following Agreed Statement of Facts and Admission (Exhibit 2 to these proceedings):

1. Dr. David Stuart Lambert is a general practitioner, who received his first certificate of registration authorizing independent practice on July 11, 1979.

Previous finding of professional misconduct and subsequent reinstatement of Dr. Lambert's certificate of registration

2. On August 2, 2002 the Discipline Committee found that Dr. Lambert sexually abused three patients in the year 2000. As a result, his certificate of registration was revoked. Attached [to the Agreed Statement of Facts and Admission] at Tab 1 is a copy of the Discipline Committee's Decision and Reasons for Decision in this regard.

3. Dr. Lambert applied for reinstatement of his certificate of registration on March 25, 2008. The Discipline Committee granted this application on June 30, 2009. Attached [to the Agreed Statement of Facts and Admission] at Tab 2 is a copy of the Discipline Committee's Decision and Reasons for Decision granting Dr. Lambert's reinstatement application.

4. The Discipline Committee granting Dr. Lambert's application for reinstatement, the Committee ordered, among other things, that Dr. Lambert's reinstated certificate of registration should be subject to the following terms, conditions and limitations:

- a) Dr. Lambert will only be permitted to treat adult male patients. Dr. Lambert is not permitted to treat female patients, or male patients under the age of 18. The College will be entitled to monitor Dr. Lambert's OHIP billings and patient records as well as attend at Dr. Lambert's practice

location(s) to ensure that he is complying with this term of his certificate of registration;

- b) Dr. Lambert shall remain in compliance with the College's Conflict of Interest policy in respect of any sale of skin care products to his patients. He shall be precluded from any dealings with patients or members of patients' families in respect of the sale of skin care products; and
 - c) Dr. Lambert shall only see patients within the context of services listed on OHIP's Schedule of Benefits, with the following exception:
 - i. Dr. Lambert may work as a surgical assistant, under the direct supervision of a licensed surgeon in the Shouldice Hospital;
 - ii. Dr. Lambert may only assist in surgeries on adult male patients and may only attend with these patients in the operating room in the presence of a licensed surgeon; and
 - iii. Dr. Lambert may only practice at the Shouldice Hospital under the supervision of a monitor who is acceptable to the College and who will execute an undertaking which will include ensuring compliance with the terms set out above.
5. Dr. Lambert was represented by counsel at the hearing of the reinstatement application, and the above-mentioned terms, conditions and limitations were imposed pursuant to a joint submission by the College and Dr. Lambert.
6. Dr. Lambert's new certificate of registration has been suspended on an interim basis pursuant to s. 37 of the Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991* (the "Code") since January 29, 2010, following an investigation into various breaches by Dr. Lambert of the terms, conditions and limitations on his certificate of registration and other alleged professional misconduct. A copy of that Order is attached [to the Agreed Statement of Facts and Admission] at Tab 3.

Dr. Lambert's Professional MisconductMr. A and Mrs. O

7. Mr. A became Dr. Lambert's patient in the fall of 2009, when, following Dr. Lambert's reinstatement, he attended Dr. Lambert's practice at a walk-in clinic in Brampton, Ontario.
8. Mr. A informed Dr. Lambert that his wife, Ms O, had a skin condition. Dr. Lambert examined Ms O and he advised Mr. A and Ms O that they should purchase a cream from him that would cure Ms O's condition.
9. Ms O did not wish to purchase the product as it was very expensive and only her husband works. However, based on Dr. Lambert's recommendation, Mr. A agreed to purchase the cream at a cost of \$100.00. Dr. Lambert accepted payment from Mr. A by Visa credit card, using a portable machine that he had with him at the office for that purpose.

Mr. B

10. Mr. B became Dr. Lambert's patient in January 2010, when he attended Dr. Lambert's practice at 170 Queensway West, in Mississauga, Ontario. At that time, Dr. Lambert prescribed blood pressure medication.
11. During the course of the appointment with Mr. B, Dr. Lambert told Mr. B he had sunblock for sale at a cost of \$55.00 per jar. He also told Mr. B that he offered weight-reduction services for a fee and asked Mr. B if he was interested in losing weight. Mr. B declined to purchase either the sunblock or the weight loss products from Dr. Lambert.

Mr. C

12. Mr. C became Dr. Lambert's patient in October 2009, when he attended a medical appointment with Dr. Lambert at a clinic in Brampton, Ontario. Mr. C attended the appointment with his mother, Ms R. The appointment was in relation to weight loss.
13. During the course of the appointment, Dr. Lambert noticed some pimples on Mr. C's face, and he told Mr. C that he had some special face cream for sale that would cure

his acne. Mr. C had not been concerned with his pimples and had not mentioned them to Dr. Lambert. Ms R trusted Dr. Lambert's representations because he was a physician, and she purchased a bottle of the skin cream from Dr. Lambert for \$30.00 using her Visa card.

14. In addition to the skin cream, Dr. Lambert offered to sell Mr. C other products including products to prevent acne, and weight loss products, indicating that he had a "room full" of diet products such as light salad dressing and pasta. Dr. Lambert was very pushy in selling his products. Mr. C did not purchase any of these products from Dr. Lambert.

Ms D

15. Ms D met Dr. Lambert in the summer of 2009 through Dr. Lambert's son. Dr. Lambert attended at Ms D's business on several occasions, and he repeatedly invited her to visit his house for laser hair removal. Ms D eventually accepted Dr. Lambert's offer of services, receiving three laser hair removal treatments from Dr. Lambert at a cost of \$500.00 per session. Dr. Lambert tried to sell Ms D skin care products, but she advised Dr. Lambert she only used [a specific brand of] products.

16. On one of these occasions, Dr. Lambert offered to administer cosmetic injections around Ms D's lips, which procedure would constitute a "controlled act" under s. 27(2) 2 and 5 of the *Regulated Health Professions Act, 1991*, for a fee.

17. Ms D declined Dr. Lambert's offer to perform cosmetic injections.

Ms E

18. Ms E met Dr. Lambert in February 2010, at a meeting held by an acquaintance at her home.

19. The meeting was organized for the purpose of allowing Dr. Lambert to sell cosmetic products to the two women in attendance. Dr. Lambert performed chemical facial peels on both of the women, including Ms E. He also sold various cosmetic creams at that time.

20. In addition to the chemical peels and cosmetic products, Dr. Lambert offered to administer injectable cosmetic products for a fee.

21. Ms E did not agree to undergo an injectable cosmetic procedure.

Ms F

22. Ms F met Dr. Lambert in 2009 at an anti-aging show, where Dr. Lambert had rented a commercial booth and was promoting his line of skin care products. Ms F subsequently agreed to carry Dr. Lambert's products at her spa business. She did business with him for a period of time until terminating the relationship as a result of a business disagreement.

23. In or about October 2009, Ms F visited Dr. Lambert and his partner, Ms T, at their home. At that time, Dr. Lambert advised Ms F that he had performed Radiesse injections on Ms T. He took a photograph of Ms F's face using his blackberry device and offered to perform these cosmetic injections on her at a cost of \$800 per treatment.

24. Ms F declined Dr. Lambert's offer to perform cosmetic injections on her.

25. Dr. Lambert acknowledges that performing Radiesse injections is a "controlled act" under s. 27(2) 2 and 5 of the *Regulated Health Professions Act, 1991*.

Ms G

26. Ms G met Dr. Lambert socially through a friend in or about September 2010. Thereafter, she commenced an intimate relationship with him which lasted until approximately November 2010.

27. During the course of Ms G's relationship with Dr. Lambert, and while Dr. Lambert's certificate of registration was under suspension pursuant to s. 37 of the Code, Dr. Lambert offered to perform cosmetic injections, in particular Restylane, on Ms G.

28. Attached [to the Agreed Statement of Facts and Admission] at Tab 4 are copies of e-mail exchanges between Ms G and Dr. Lambert regarding his offer to perform cosmetic medical procedures on Ms G.

Purchasing Cosmetic Injectables

29. On September 4, 2008, Dr. Lambert contacted Mr. H, a representative of Pharmaceutical Company 1, to discuss purchasing cosmetic injectables, Radiesse, Evolence and Botox.
30. On September 9, 2008, Mr. H attended at Dr. Lambert's residence. Dr. Lambert told him that he was a GP who was reopening his practice. Mr. H discussed the two fillers that his company sells, being Radiesse and Evolence. He indicated that Dr. Lambert should complete training with Botox before using Radiesse and Evolence, and told Dr. Lambert to let him know once he was set up with a clinic and had done Botox training. Dr. Lambert advised him that they could use Dr. Lambert's girlfriend for training.
31. In March 2009, Dr. Lambert again contacted Mr. H asking him about the Radiesse and Evolence injectables. On March 30, 2009, Dr. Lambert again met with Mr. H. Dr. Lambert advised Mr. H that he was ready to move forward with Radiesse training. Mr. H inquired where Dr. Lambert's office was and Dr. Lambert advised that his office was located in Mississauga. In response, Mr. H informed him that the representative for that area was Ms V, and he would forward Dr. Lambert's information to her.
32. Ms V first spoke with Dr. Lambert in late August, early September, 2009. Dr. Lambert met with Ms V at his home on September 15, 2009. Ms V informed him about the nature of the product Radiesse. Ms V observed Dr. Lambert inject his fiancée, Ms T, with Radiesse. Dr. Lambert did not inform Ms V of any restrictions on his medical license.
33. Dr. Lambert placed an order with Ms V for ten Radiesse injectables and paid on his credit card. He requested that he make two payments, October 15 and October 30, 2009. The products were shipped to Dr. Lambert shortly after his order.
34. Ms V subsequently discovered that the terms, conditions and limitations on Dr. Lambert's certificate of registration prohibited him from administering Radiesse to patients, and she advised him that she could no longer assist him in this regard. Attached [to the Agreed Statement of Facts and Admission] at Tab 5 is a copy of Ms V's e-mail

exchange with Dr. Lambert, dated November 24, 2009. On the same date, a note was posted internally at Pharmaceutical Company 1 advising staff of Dr. Lambert's restrictions. A copy of this note is attached [to the Agreed Statement of Facts and Admission] at Tab 6.

35. Ms J is an employee of Pharmaceutical Company 2, which sells injectable cosmetics. Ms J obtained Dr. Lambert's contact information from Ms K, who advised that Dr. Lambert had started talking to her about fillers and injectables, which Ms K did not deal in, so she passed the information to Ms J.

36. Dr. Lambert told Ms J he was interested in purchasing Botox and Juvéderm. Dr. Lambert arranged an appointment with Ms J for Tuesday, October 27, 2009, at his office on the Queensway. Ms J cancelled the appointment when she learned of the restrictions on Dr. Lambert's certificate of registration.

37. In November, 2009, Dr. Lambert contacted Ms N, of Pharmaceutical Company 1, seeking to procure Radiesse. At that time, Ms N did not know of Dr. Lambert's restrictions. However, she was advised of the restrictions afterwards.

38. Subsequently, in April of 2010, Dr. Lambert e-mailed Ms N asking to buy Radiesse. Ms N copied and pasted this e-mail into Pharmaceutical Company 1's notes system, a copy of which is attached [to the Agreed Statement of Facts and Admission] at Tab 7. At the time he sent this correspondence to Ms N, Dr. Lambert's certificate of registration was under suspension pursuant to s. 37 of the Code.

Ms X and Ms Y

39. Following his reinstatement, Dr. Lambert maintained a website advertising cosmetic products and procedures to the public (the "Lambert Website"). Attached [to the Agreed Statement of Facts and Admission] at Tab 8 are copies of the information and advertising posted by Dr. Lambert on the Lambert Website. Among other things, Dr. Lambert advertised various cosmetic products, such as face-creams, as well as injectable cosmetic fillers.

40. The Lambert Website came to the attention of the College, and an investigation was commenced. In the course of this investigation, the College retained the services of several private investigators, including Ms X and Ms Y of Private Investigation Firm A.

41. In September 2009, Ms X telephoned Dr. Lambert to inquire about the cosmetic procedures advertised on his website. She did so under the auspices that she was a potential patient interested in having Dr. Lambert perform these procedures on her. Ms X had several telephone conversations with Dr. Lambert, transcripts of which are attached [to the Agreed Statement of Facts and Admission] at Tab 9. In the course of these conversations, Dr. Lambert agreed to meet Ms X in October 2009, for the purpose of administering “Radiesse”, a form of injectable cosmetic implant.

42. The administration of Radiesse involves the injection of a dermal filler below the dermis of the patient, and as such constitutes a “controlled act” under s. 27(2) 2 and 5 of the *Regulated Health Professions Act, 1991*.

43. At the October 2009 meeting, Ms X attended with Ms Y at Dr. Lambert’s office to receive the Radiesse procedure as previously agreed. At that time, Ms Y wore a concealed camera. An audio recording device was also used. Ms X and Ms Y’s interactions with Dr. Lambert were recorded using this equipment. Attached [to the Agreed Statement of Facts and Admission] at Tab 10 is a digital copy of that recording.

44. Dr. Lambert advised Ms X about the procedure and had her sign a patient consent form. He requested payment of \$650.00 as his fee for conducting the Radiesse procedure. Attached [to the Agreed Statement of Facts and Admission] at Tab 11 is a copy of Ms X’s patient consent form, signed under the assumed name, “Ms P” and witnessed by “Ms Q”.

45. Dr. Lambert admits that Ms X became his patient when he consulted with her regarding the Radiesse and agreed to perform the procedure.

46. During the same October 2009 medical appointment at his office, Dr. Lambert offered Ms X and Ms Y his line of skin care products for sale. He agreed to sell them jars of a product he referred to as “Vita Smooth” for a price of \$75.00 each.

47. Dr. Lambert then prepared the Radiesse injection for Ms X. He was about to administer the injection when College staff intervened.

Misrepresentations to College Staff

48. On October 16, 2009, Dr. Lambert met with Ms Z, College investigator, to retrieve items that were seized when College staff attended his office in October 2009.

49. At that time, Dr. Lambert told Ms Z that Ms X and Ms Y were his agents for the purpose of distributing cosmetic products and that they had been at his office at the October 2009 meeting to purchase these products in that capacity.

Admission

50. Dr. Lambert admits that his conduct as described above constitutes professional misconduct, particulars of which are as follows:

- a) under paragraph 1(1)1 of Ontario Regulation 856/93 made under the *Medicine Act*, 1991 (“O. Reg. 856/93”) in that he contravened a term, condition or limitation on his certificate of registration by:
 - (i) treating or offering to treat female patients;
 - (ii) seeing patients outside the context of services listed on OHIP’s Schedule of Benefits; and
 - (iii) having dealings with his patients in respect of the sale of skin care products;
- b) under paragraph 1(1)5 of O. Reg. 856/93, in that he had a conflict of interest, in that he recommended cosmetic products in which he held a personal commercial interest to his patients;
- c) under paragraph 1(1)27 of O. Reg. 856/93, in that he contravened a regulation made under the *Medicine Act*, 1991, specifically paragraph 16(d) of Ontario Regulation 114/94; and

- d) under paragraph 1(1)33 of O. Reg 856/93, in that his conduct, as described above, constitutes conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

C. Summary of the Evidence on the Allegation of Sexual Abuse

The College alleges that in the course of Dr. Lambert's appointment with Ms X and Ms Y in October 2009, he touched the right breast of Ms X, thereby committing sexual abuse of a patient. Dr. Lambert denies this allegation.

The parties are in agreement that Ms X became Dr. Lambert's patient when he consulted with her regarding the Radiesse procedure and agreed to perform the procedure. The only issue for the Committee to determine, therefore, was whether Dr. Lambert had intentionally touched Ms X's breast at the October 2009 meeting.

In making its finding on this one disputed allegation, the Committee relied on the testimonies of Ms X, Ms Y, Mr. W who is also a private investigator with Private Investigation Firm A, and Ms Z, the College investigator who conducted the investigation of Dr. Lambert. In addition, the Committee viewed the audio/visual record of the encounter with Dr. Lambert which had been obtained by Ms Y. Dr. Lambert did not testify and presented no evidence in his defence with respect to the sexual abuse allegation.

The College requested that the Committee draw an adverse inference from Dr. Lambert's failure to testify. This issue will be dealt with at a later stage in these reasons.

The evidence on which the Committee relied in making its finding on the sexual abuse allegation is summarized as follows.

The Evidence of Ms X

The Committee heard from Ms X that she has been a licensed private investigator since 1995, employed in this capacity at Private Investigation Firm A since 2002. She has had previous experience with covert surveillance and undercover operations. She informed the Committee of the nature of the investigation of Dr. Lambert, which was undertaken by her firm at the request of the College, in September 2009. She stated that she had contacted Dr. Lambert at the telephone number listed on his website, indicating an interest in having him perform a cosmetic procedure on her. After several telephone conversations, transcripts of which are contained in the Agreed Statement of Facts and Admission (Exhibit 2), a meeting at Dr. Lambert's office was arranged in October 2009. This meeting was purportedly for the purpose of having Dr. Lambert perform an injection of cosmetic filler on her.

Ms X stated that, at the outset of the investigation into Dr. Lambert, she had been informed by the College of his history of previous sexual abuse of patients, and of the fact that he was currently restricted from seeing female patients. She testified that there had been discussions with her colleagues and with the College about possible safety concerns that could arise during the course of her planned meeting with Dr. Lambert. She stated that safety concerns were always addressed in this type of operation, and acknowledged that they might be particularly important in this case, in light of Dr. Lambert's history of sexual misconduct. She confirmed that an "extraction plan" was in place which would have allowed immediate termination of the operation in case either she or Ms Y, who was to accompany her to Dr. Lambert's office, felt that they were in danger.

Ms X testified that she entered Dr. Lambert's examination room along with Ms Y. She had a discussion with him about the proposed procedure, including about potential adverse effects, and about the cost. Dr. Lambert also informed her of his line of skincare products, described them, and offered them for sale to Ms X and Ms Y.

Ms X stated that she was handed a patient consent form by Dr. Lambert, a copy of which is contained in the Agreed Statement of Facts and Admission (Exhibit 2). She stated that she rose from her chair to move to the examination table in order to sign the form, holding it in both hands in front of her chest, with her purse clutched under her left arm. Her evidence was that she turned towards Dr. Lambert and he stood up and abruptly grabbed the paper from her with his left hand, touching her right breast in the process. She described the touch as a sideways motion of his hand, “a swipe”, with his index finger contacting her nipple. She was wearing a cardigan and a canvass jacket over top of the sweater, and both were open at the front. Ms X admitted on cross-examination that she wasn’t sure if Dr. Lambert’s finger had gone underneath both her sweater and her jacket, or just underneath the jacket. She was certain, however, that her breast had been touched by Dr. Lambert’s hand.

Ms X stated that she momentarily wondered whether the touch had been intentional, but that she had almost immediately concluded that it had been. She stated that she felt angry at having been touched in this manner. She glanced briefly at Ms Y, who was surreptitiously recording the encounter, but otherwise gave no overt indication, at that time, that anything untoward had happened. Nor was there any discussion about the touch with Ms Y a few moments later, when the two of them were left alone in the examining room for a few minutes, after Dr. Lambert had left to retrieve samples of his skincare products from his car. She explained her lack of immediate reaction, and the lack of any discussion with Ms Y regarding what had occurred, as being on account of her desire not to jeopardize the covert operation. She stated that she still felt that she was playing a role, until the investigation had been concluded. Subsequently, Dr. Lambert returned to the room with his samples and proceeded to prepare to inject Ms X with the cosmetic injectable, Radiesse. At this point, the encounter was terminated by the College investigator, Ms Z, who had been waiting outside the office and who knocked on the examination room door in response to a phone call made by Ms Y on her cell phone. This had been the prearranged signal that the meeting with Dr. Lambert was to be terminated.

Ms X testified that, after she left the examination room, she was feeling “a little shaken up, angry” at being touched. Within minutes of leaving the room she informed her colleague, Mr. W, who had been waiting outside the office with Ms Z, that she had been sexually touched by Dr. Lambert. Subsequently, she included a description of the touching in her written statement to the College dated October 15, 2009 (Exhibit 3). This statement is consistent with Ms X’s testimony before the Committee, including with respect to her evidence that, immediately following the touching of her breast, she wondered if Dr. Lambert had meant to do it. In her testimony, Ms X stated unequivocally that the touch could not have occurred accidentally.

The Evidence of Ms Y

The Committee heard the testimony of Ms Y, private investigator with Private Investigation Firm A, who was involved in the covert surveillance operation described by Ms X. Ms Y testified regarding the preparations for the October 2009 visit to Dr. Lambert’s office, and regarding her role in the encounter with Dr. Lambert which took place in his examining room on that date. The primary role of Ms Y during the visit was to obtain a video and audio record of events. Ms Y stated that she did not observe Dr. Lambert touch Ms X’s breast. She did observe the momentary glance that Ms X had described in her testimony, and indicated that Ms X had an awkward, serious look on her face. She also stated that, after she and Ms X had exited the examination room at the conclusion of the meeting with Dr. Lambert, Ms X looked serious and that, at that point, Mr. W asked her if she was okay. It was at this point that she learned that Ms X had been touched. Ms Y acknowledged that, in her written statement to the College dated October 13, 2009 (Exhibit 4), she makes no mention of the alleged sexual touching.

The Evidence of Mr. W

The Committee heard the evidence of Mr. W, private investigator, currently the executive vice-president of Private Investigation Firm A. Mr. W confirmed that the firm had been contacted by the College to conduct an investigation of Dr. Lambert, in response to concerns that he might have been operating outside the restrictions which had previously been imposed by the College.

Mr. W testified that he had attended a meeting in September 2009 with Ms Z from the College, and two female private investigators from Private Investigation Firm A, including Ms X. The purpose of the meeting was to plan the covert operation which culminated in Ms X's meeting with Dr. Lambert in October 2009. Mr. W confirmed that Dr. Lambert's history of sexual misconduct had been made clear to the investigators by the College from the outset, although his recollection was that no specifics had been provided. He testified that Ms X, who was selected as the investigator to pose as Dr. Lambert's patient, didn't seem overly concerned about his history. Subsequently, at the October 2009 meeting, the three investigators from Private Investigation Firm A drove together to Mississauga, where Dr. Lambert's office was located. Mr. W testified that Ms X seemed confident and at ease in the timeframe shortly prior to the operation. The investigators met again with representatives from the College, including Ms Z, at a Starbucks in the area of Dr. Lambert's office shortly prior to their appointment with Dr. Lambert. The purpose of this meeting was to go over last minute plans, including the extraction plan, which would alert Mr. W and the College investigators, who would be waiting outside Dr. Lambert's office, to the conclusion of the operation. Mr. W confirmed the plan was for the operation to be terminated at the point where Dr. Lambert had drawn up the syringe in preparation for the procedure.

Mr. W testified that he received the pre-arranged phone call from Ms Y and that the operation was terminated as planned. When Ms X and Ms Y left the examination room, Mr. W testified that Ms X had a strange look on her face, which he described as "stressed, concerned, flushed". He asked her if she was okay, at which point Ms X told him that Dr. Lambert had touched her breast. Mr. W confirmed also that in his written report to the College dated October 29, 2009 (Exhibit 5), there is no reference to the alleged sexual touching or to the change in Ms X's demeanour, following her encounter with Dr. Lambert, which he had observed.

The Evidence of Ms Z

Ms Z testified before the Committee. She stated that she had been an investigator at the College since 1998. She testified that she had been appointed to conduct the College

investigation into Dr. Lambert, in response to concerns that he may have been in breach of the conditions attached to his certificate of registration. She informed the Committee of the scope of the proposed investigation, and of the decision to employ the private investigators from Private Investigation Firm A. She stated that the investigators who would be conducting the undercover operation were informed regarding Dr. Lambert's history of having previously sexually abused patients, as she felt that she had a moral obligation to disclose this information. Ms Z acknowledged that there were obvious concerns about sending a female investigator into an examination room with Dr. Lambert on account of his history, and that the safety of the investigators was a foremost consideration. Ms Z stated that it was made clear to Ms X that she was to terminate the investigation at any time if she felt unsafe. She testified that Ms X didn't seem unduly concerned about Dr. Lambert's history of sexual misconduct, and that she had accepted the assignment to portray herself as his patient.

Ms Z testified with respect to how the operation was conducted at the October 2009 meeting, and how it was terminated when Mr. W received the pre-planned phone call from Ms Y. She stated that she then knocked on the door of Dr. Lambert's examination room and identified herself. She informed him that he was under investigation by the College and that he had a right to call a lawyer. She then proceeded to photograph and take possession of a number of products and written materials present in Dr. Lambert's office. Copies of these items were entered into evidence (Exhibits 6 through 11).

Ms Z testified that she met with the investigators in the waiting room following the conclusion of the operation, and that Ms X seemed "not herself". Her demeanour had changed. Prior to her encounter with Dr. Lambert, Ms Z's evidence was that she had been outgoing and apparently in a good mood but, subsequently, she was described as subdued, anxious, and serious; "she seemed upset". Ms Z was informed at this time of the allegation that Dr. Lambert had touched Ms X's breast. Ms Z stated that she had made a memo to the College file later that day, in which she wrote that Ms X "wasn't sure what to make of it", referring to Dr. Lambert having allegedly touched her breast.

Ms Z testified that three days later, Dr. Lambert came to the College premises and asked for the skincare products which had been seized to be returned to him. He stated to Ms Z at that time that Ms X and Ms Y were agents working for him, and not patients, thus attempting to mislead the College, a fact to which Dr. Lambert subsequently admitted. Ms Z also gave evidence pertaining to subsequent correspondence between the College, Dr. Lambert, and his legal counsel over the course of the continuing investigation which remained ongoing for a year or more. Copies of some of this correspondence were entered into evidence (Exhibits 12 through 16). Ms Z stated that she was aware that the College issued an interim suspension of Dr. Lambert's certificate of registration in January 2010.

The Audio/Visual Recording of the October 2009 Meeting

The Committee viewed the audio/visual recording which had been made by Ms Y of the meeting between the two private investigators and Dr. Lambert in October 2009. This recording captures the entire encounter between the two investigators and Dr. Lambert, spanning a period of approximately 20 minutes. It shows the two investigators meeting Dr. Lambert in his office and accompanying him into his examining room. No receptionist or other office staff are present. The recording shows Dr. Lambert seated at the end of his examining table facing the two women. He explains the Radiesse procedure, briefly describes possible adverse effects, and indicates the cost. He describes also his line of skincare products and, at one point, leaves the examination room for several minutes, returning with a black bag containing skincare products. He gives some written material regarding his cosmetic products to the two women, and gives them also what appeared to be samples of product. Dr. Lambert's manner throughout the encounter is casual and pleasant. He answers a number of questions put to him by the investigators, both with respect to the Radiesse procedure and to the line of skincare products.

In the recording, Dr. Lambert is seen to hand Ms X a patient consent form. He then stands up and reaches with his left hand to take the form from Ms X's hands, apparently along with some other papers which she appears to be holding. Ms X appears to also be standing at this point. Dr. Lambert's left hand is momentarily off camera as he takes the

papers from Ms X's hands. It is at this moment that, according to Ms X, he touched her breast.

Following the alleged touching of her breast, Ms X displays no overt reaction. As she moves to the examining table to sign the patient consent form she does glance briefly over her shoulder, in the direction of Ms Y. Dr. Lambert proceeds to sign the consent form himself, then to prepare to administer the procedure, eventually drawing up a syringe of Xylocaine. At this point Ms Y makes a call on her cell phone, which the testimony of the witnesses confirms was a prearranged signal that the evidence had been obtained and that the covert operation should be concluded. Ms X requests to use the washroom, and shortly thereafter Dr. Lambert is interrupted by the College investigator who had been waiting outside his office.

FINDINGS

A. Sexual Abuse of a Patient

The Committee finds that it has been proven by the College, on a balance of probabilities, that Dr. Lambert sexually abused a patient. The reasons are as follows.

The victim, private investigator Ms X, was unequivocal in her testimony regarding what occurred at the October 2009 meeting. She stated that, in taking papers from her with his left hand, Dr. Lambert touched her right breast with his left index finger, brushing his finger across her nipple. She acknowledged momentarily, wondering if this could have been accidental, but she quickly concluded that it was not. Her evidence with respect to this incident was consistent throughout, and not shaken on cross-examination. It was consistent with her written report dated October 15, 2009.

Ms X stated that, in the timeframe immediately after the incident, she was "a little shaken-up, angry". Her demeanour was noticeably different, according to her two colleagues from Private Investigation Firm A and the College investigator, Ms Z. She

was variously described by these three witnesses as “concerned, stressed, anxious, flushed, subdued, upset” subsequent to the conclusion of her encounter with Dr. Lambert, to the point where her colleague, Mr. W, asked her if she was okay. The evidence of these three witnesses is consistent on this point and is consistent with Ms X’s testimony on this point.

Ms X acknowledges that she did not demonstrate any overt reaction at the time of the touching, apart from a quick glance at her colleague, Ms Y, who was in the room with her. The Committee accepts that this lack of immediate reaction is understandable under the circumstances. Ms X was a professional investigator who was doing her job. She didn’t want to jeopardize the investigation. Moreover, the circumstances were such that she would likely not have experienced serious fear for her safety. The sexual touch was brief, basically over before she realized what had happened, she had a colleague in the room with her and an “extraction plan” was in place in case safety concerns arose.

The defence submits that Ms X could have stated explicitly at the time, or shortly thereafter, that a sexual assault had taken place by documenting this on the audio/video recording, for example. The Committee finds that her failure to do so does not undermine her evidence. Sexual misconduct was not the focus of the investigation at that point. Ms X did inform her colleagues, and the College investigator, of what had occurred within a few minutes of the incident. Her report of the incident at the time was entirely consistent with her testimony before the Committee.

The defence submits that, because Ms X was aware of Dr. Lambert’s history of sexual misconduct, she either misinterpreted an accidental brush as having been intentional, or imagined that she had been touched when she hadn’t been. The evidence of Ms X was, however, that she was not overly concerned about Dr. Lambert’s history when she undertook the investigation. She was not particularly anxious or uneasy in the period of time leading up to the encounter with Dr. Lambert, as consistently stated by her colleagues in their evidence. The Committee finds that it is simply not reasonable to suggest that she would have imagined the incident.

The Committee finds that Ms X's evidence was consistent and credible, despite defence suggestions that she was argumentative and defensive. In our view, she was neither. Although Ms X admitted in her testimony that she wasn't sure whether Dr. Lambert's finger had gone under both her sweater and her jacket or just under the jacket, the Committee finds that her uncertainty does not affect her credibility. The touch was sudden and brief. It is entirely understandable that she wouldn't be certain about a minor detail. The defence also suggests that it is unlikely that the touch could have occurred in the manner described by Ms X, but the Committee finds otherwise.

The defence suggests that Dr. Lambert's manner with the two female investigators, throughout the course of his encounter with them at the October 2009 meeting was professional. While it is true that he is pleasant and courteous and that he is not behaving in a flirtatious or seductive fashion with the two women, the Committee would not describe his demeanour as entirely professional. His manner is more that of a salesman selling a product than a medical professional. There appears to be something of a lack of appropriate boundaries, both in Dr. Lambert's meeting with the two investigators and, earlier, in the content of his telephone conversations with Ms X. Moreover, the touch in question was surreptitious, and it would not necessarily be expected that this would have been preceded by an overtly flirtatious or seductive manner.

The Committee carefully considered the audio/video recording of Ms X's encounter with Dr. Lambert in deliberating on the issue of the alleged sexual touching. Unfortunately, the Committee finds that this evidence is not helpful with regard to this issue. The alleged touch occurs off-camera. It is, therefore, not captured on the video. It is apparent that a touch, as described by Ms X, could have occurred as Dr. Lambert reaches to take the papers from her hand, but it is not apparent that a touch did occur. Ms X's reaction, in the form of a backwards glance at her colleague, is captured on the video, and this corroborates the testimony of Ms X and Ms Y in this regard.

The Committee considered whether the touch, as described by Ms X, could have been accidental. There was, however, no evidence which the Committee found would support

a finding of an accidental touch. There was no acknowledgement of or apology for the touch by Dr. Lambert at the time, as confirmed by the video evidence, as would have been expected in the event of accidental contact between his hand and Ms X's breast. Ms X, in her evidence, acknowledged momentarily wondering whether the touch was accidental, but she quickly concluded that it hadn't been, and maintained that conviction. There is no evidence that her knowledge of Dr. Lambert's history impaired her judgement in this regard. Moreover, the Committee finds it inherently improbable that Dr. Lambert would have accidentally touched Ms X's breast in the simple action of reaching to take papers from her hand, as described in the evidence in this case. As indicated above, if the touch in question had been accidental, there would have been an apology or acknowledgement of having accidentally touched her, and there was none.

For these reasons, the Committee finds that the College has proven this allegation to the requisite standard. The evidence is clear, cogent and convincing. It is more likely than not that Dr. Lambert intentionally touched the breast of Ms X, thus constituting sexual abuse of a patient.

B. The Adverse Inference Issue

The College requested that the Committee draw an adverse inference from Dr. Lambert's failure to testify. The defence's position was that an adverse inference for failure to testify cannot be applied to disciplinary proceedings under the *RHPA* or, if it can, that such an inference should not be drawn in this case. The Committee received written submissions with respect to this issue, heard extensive argument from counsel, and reviewed the case law with which it was provided.

After considering the submissions of counsel and reviewing the case law provided, the Committee finds that an adverse inference can be drawn from a member's failure to testify in a disciplinary hearing under the *RHPA*. For the reasons that follow, however, in the particular circumstances of this case, the Committee did not draw an adverse inference from Dr. Lambert's failure to testify.

As stated by Justice Sopinka in *The Law of Evidence in Canada*, 3rd Edition, at paragraph 6.449, an adverse inference can be drawn in civil cases when,

“[I]n the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist the party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party’s case, or at least would not support it.”

The Committee also considered the case of *Golomb v College of Physicians and Surgeons (Ontario)*, of the Ontario Divisional Court (1976) which states at paragraph 82:

“It is a well established rule of evidence in Ontario that once a prima facie case has been made out against a defendant, if he (assuming he has knowledge of the circumstances of the case) declines to testify, the Court may draw the inference that any evidence that he would give would hurt his case and, for that reason, he did not testify.”

Defence counsel argues that the *Golomb* case should no longer be considered as a precedent with respect to this issue, because it dates to 1976 when s. 39(1) of the *Medicine Act* was the statute governing the Rules of Evidence in disciplinary proceedings, and that this Act has now been replaced by the *Regulated Health Professions Act* which contains different wording regarding the admissibility of evidence. Section 49 of the *RHPA* states, “nothing is admissible at a hearing that would be inadmissible in a court in a civil action...” The Committee finds no basis on which to conclude that adverse inference evidence would be inadmissible in a civil action. The Committee finds that adverse inference evidence is admissible in a disciplinary proceeding.

Defence counsel points out that in the recent Discipline Committee decision of *College of Physicians and Surgeons (Ontario) v. Rathe*, the Committee did not draw an adverse inference from Dr. Rathe’s failure to testify. This Committee is not bound by the *Rathe* decision, however, which, in any event, did not decide that an adverse inference cannot

be made by the Discipline Committee, only that, in the circumstances of that case, it did not draw such an inference. It is recognized that the drawing of an adverse inference will be discretionary, and will depend on the particular circumstances of the case. The Committee also considered the recent Discipline Committee decision of *College of Physicians and Surgeons (Ontario) v. Liberman*, in which that Committee did draw an adverse inference from Dr. Liberman's failure to testify.

Defence counsel submits that the *Charter of Rights and Freedoms* protects Dr. Lambert from the drawing of an adverse inference from his failure to testify. It is submitted that to do so would violate his rights to life, liberty and security of the person guaranteed by s. 7 of the *Charter*, and his right to remain silent contained in s.11. The Committee heard extensive argument on the applicability of the *Charter* to disciplinary proceedings.

The Committee considered the decision of the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)*, which established that s. 7 of the *Charter* does extend beyond the sphere of criminal law. It can apply to disciplinary proceedings. To engage s. 7 rights, however, the Committee must find that there has been a violation of life, liberty or security of the person caused by the action of the state and, if there has, that this is contrary to the principles of fundamental justice. This is the two-step process articulated by the Ontario Court of Appeal in *Mussani v. College of Physicians and Surgeons (Ontario)* (2004), on which the Committee relied.

If an adverse inference were to be drawn, the Committee was of the view that it would not have violated Dr. Lambert's life, liberty or security of the person. The Committee heard no evidence with respect to the actual impact on Dr. Lambert of this issue having been raised by the College. We simply do not know, at this stage in the proceedings, how his health, psychological equilibrium, finances, or reputation have been affected. It is possible to speculate that Dr. Lambert may be under some stress arising from these proceedings but, as stated by the Ontario Court of Appeal in *Mussani* (para. 51),

“A certain amount of stress, anxiety and stigma inevitably arises in the context of disciplinary proceedings relating to sexual abuse allegations. Just as the personal

trauma arising from delays in being investigated in human rights proceedings did not attract the protection of s. 7 in Blencoe, however, the difficulties experienced by a health professional who is disciplined for sexual abuse of a patient by loss of his or her certificate of registration do not deprive the doctor of his or her security of the person. As Bastarache, J. noted in Blencoe '[t]here is no constitutional right or freedom against such stigma protected by the s. 7 rights to 'liberty' or 'security of the person' (para. 96)''.

The issue in the *Mussani* case was whether the doctor's s. 7 rights were violated by mandatory revocation of his certificate of registration following a finding of sexual abuse, arguably a circumstance more likely to result in infringement on security of the person through stress, anxiety, and stigma than an adverse inference drawn from his decision not to testify.

Having found that any adverse inference that might be drawn from his silence would not violate Dr. Lambert's rights to life, liberty or security of the person, it was not necessary to consider whether such deprivation would have been contrary to the principles of fundamental justice. Simply put, the first branch of s. 7 would not be engaged if an adverse inference were to be drawn.

The defence submitted that Dr. Lambert has a right to remain silent in response to allegations before the Discipline Committee, guaranteed by s. 11 of the *Charter*. The Committee finds, however, that, although it is established that the application of the *Charter* is not confined to a criminal context, *Charter* rights that are guaranteed in criminal proceedings do not automatically apply to disciplinary proceedings. There are significant and fundamental differences between the criminal process and professional regulatory proceedings which must be considered in deciding the applicability of *Charter* rights. The primary goal of disciplinary proceedings is the protection of the public, which is achieved through adjudication on the member's continuing suitability to exercise the privilege of belonging to a self-regulating profession. Although a disciplinary proceeding is adversarial in nature, and although the consequences of a finding against a member can be severe, the process is regulatory and not punitive. As stated by the Supreme Court of Canada in *R. v Wigglesworth*, there is a "fundamental distinction between proceedings

undertaken to protect public order and welfare within a public sphere of activity, and proceedings undertaken to determine fitness to obtain or maintain a licence”. In this context, the Committee also considered the case of *Fang and the College of Physicians and Surgeons of Alberta* (Alberta Court of Appeal). Recognizing that it is not bound by this decision, the Committee agrees with the finding in *Fang* that “one cannot claim...the so-called right to silence and the privileged status as a professional”. The Committee finds that there is no constitutionally protected right to remain silent in disciplinary proceedings.

The Committee therefore finds that an adverse inference could be drawn from a member’s failure to testify in disciplinary proceedings under the *RHPA*. The Committee then considered whether, in the circumstances of this case, it would draw such an inference from Dr. Lambert’s failure to testify. For the following reasons, it was decided that it was not necessary to do so.

The Committee found that it was not necessary to draw an adverse inference from Dr. Lambert’s silence in order to arrive at a decision. The Committee found that the College had proven its case on a balance of probabilities based on the totality of the evidence presented. The evidence was sufficiently clear, cogent, and convincing. The testimony of the College’s witnesses was, in each case, credible and consistent with a high degree of corroboration with respect to the salient issues. Dr. Lambert’s decision not to testify meant that the evidence of the witnesses for the College was essentially uncontradicted.

While the lack of any cogent evidence supporting Dr. Lambert’s denial of the sexual abuse allegation was a factor taken into account by the Committee in its deliberation, it found it unnecessary to use his silence as further evidence against him.

The Committee also considered the issue of whether a *prima facie* case had been made by the College, which is a prerequisite for the drawing of an adverse inference from a failure to respond to the *prima facie* case. The Committee notes that a *prima facie* case is simply a case to be met, consisting of the presentation of evidence that, if accepted, could result

in a finding against the doctor. This distinguishes a *prima facie* case from a case that has been proven on a balance of probabilities. The Committee's finding was that a *prima facie* case had been made out by the College and, indeed, it went further and made a finding against Dr. Lambert on a balance of probabilities based on credible testimony.

In summary, as concerns the first allegation in the Notice of Hearing, the Committee has concluded that Dr. Lambert intentionally touched the breast of Ms X, thus sexually abusing a patient and committing professional misconduct. The College has proven this allegation of sexual abuse on a balance of probabilities. While the Committee is of the view that it could draw an adverse inference against Dr. Lambert by reason of his failure to testify, it has not done so in this case. As concerns the second, third, fourth and fifth allegations in the Notice of Hearing, we have received and accepted the Agreed Statement of Facts, we accept Dr. Lambert's admission with respect to these allegations and we find that these allegations have been proven and constitute professional misconduct.

The Committee directs that the Hearings Office schedule a penalty hearing pertaining to the findings made at the earliest opportunity.

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. David Stuart Lambert, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity or any information that could disclose the identity of the patients and witnesses whose names are disclosed in the Agreed Statement of Facts filed at the Hearing under subsection 45(3) of the Health Professions Procedural Code (the “Code”), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

The Committee also made an order to prohibit the publication of the identity of the complainant witness or any information that could disclose the identity of the complainant witness under subsection 47(1) of the Code.

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.

Indexed as: Lambert, D. S. (Re)

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed
by the Inquiries, Complaints and Reports Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
being Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. DAVID STUART LAMBERT

PANEL MEMBERS:

**DR. T. MORIARITY
D. DOHERTY
DR. R. SHEPPARD
DR. W. McCREADY**

Hearing Date: November 1 and December 5, 2012
Decision Date: December 5, 2012
Release of Written Reasons: March 1, 2013

PUBLICATION BAN

PENALTY AND REASONS FOR PENALTY

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario delivered its written decision and reasons on finding in this matter on November 2, 2012, and found that Dr. Lambert has committed an act of professional misconduct, in that he sexually abused a patient; in that he contravened a term, condition or limitation on his certificate of registration; in that he had a conflict of interest; in that he contravened a regulation made under the *Medicine Act*, 1991, specifically paragraph 16(d) of Ontario Regulation 114/94; and, in that his conduct, as described above, constitutes conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

The Committee heard evidence and submissions on penalty and costs on November 1, 2012, and December 5, 2012. At the conclusion of the hearing the Committee delivered its order on penalty and costs in writing, revoking Dr. Lambert’s certificate of registration, requiring Dr. Lambert to appear before the Panel to be reprimanded, and ordering Dr. Lambert to pay costs to the College.

EVIDENCE AND SUBMISSIONS ON PENALTY

In final submissions, counsel for the College proposed an order that the Registrar revoke Dr. Lambert’s certificate of registration effective immediately; that Dr. Lambert appear before the panel to be reprimanded within 60 days of the date of the order becoming final; and, that Dr. Lambert pay costs to the College in the amount of \$27,375.00 within 30 days of the date of the order.

Counsel for Dr. Lambert, on December 5, 2012 – the second day of the penalty hearing – joined counsel for the College in submitting that the proposed order was appropriate in the circumstances. In the end, then, the Committee was presented with a joint submission on penalty, with the joint position of the parties reflected in the proposed order.

The Committee heard evidence in support of the proposed penalty, in addition to the evidence admitted in the first part of the hearing relating to finding. Multiple documents were entered into evidence at the hearing and considered by the Committee. These include an Agreed Statement of Facts and Admission (Exhibit 17), the expert reports of Dr. X and Dr. Y (Exhibits 18 and 24, respectively), the brief of material reviewed by Drs. X and Y (Exhibit 20), the brief of reports from treating professionals tendered by Dr. David Lambert, and extensive clinical records and related documentation pertaining to Dr. Lambert's treatment with his therapists. In the penalty phase of the hearing, the Committee also heard the *viva voce* testimony of Dr. X and Dr. Y. A summary of the evidence relied on by the Committee in determining the appropriate penalty is as follows.

The Evidence of Dr. X

Dr. X is a psychologist with a background in forensic psychology. He currently works with the Law and Mental Health Program at the Centre for Addiction and Mental Health (CAMH), and at Waypoint Centre for Mental Health Care in Penetanguishene. He has extensive experience in the assessment and treatment of sexual offenders, but sees a broad range of clinical issues in his clinical practice. He has previously provided expert opinions for a number of regulatory bodies, including the CPSO. Dr. X was accepted as a qualified witness. A copy of his Curriculum Vitae is contained in Exhibit 18.

Dr. X's evidence indicates that he had assessed Dr. Lambert in 2009, in relation to Dr. Lambert's application at that time for reinstatement of his certificate of registration. Dr. X prepared a report dated February 18, 2009, which is contained in Exhibit 18. More recently Dr. X had prepared an updated report, dated October 18, 2012, also contained in Exhibit 18. This had been at the request of the College, in light of developments subsequent to Dr. Lambert's reinstatement. The College had requested Dr. X's opinion as to Dr. Lambert's capacity to practise medicine. Dr. X did not interview Dr. Lambert again, subsequent to his original 2009 assessment. However, in preparing his updated opinion of October 18, 2012, he had reviewed extensive documentation pertaining to issues and events subsequent to 2009. A list of his sources of information is contained in his written report; this material was also entered into evidence (Exhibit 20).

Dr. X, in his evidence, reviewed the results of psychometric testing administered in 2009. Although he found that Dr. Lambert had an IQ within the average range, he also found that Dr. Lambert had significant impairment in cognitive functioning, specifically, in what is referred to as “executive functioning.” Dr. X’s findings are encapsulated in the following excerpt from his 2009 report:

“Dr. Lambert has displayed difficulties in executive functioning, both behaviourally and during testing. These difficulties include impulsive behaviour, difficulties in affect regulation, difficulties in interpersonal judgment, cognitive inflexibility, lack of accurate self-monitoring and self-appraisal, as well as marked problems utilizing feedback.”

Dr. X explained that “executive functioning” essentially measures how well an individual can exert governance and control of his own behaviour. He reviewed Dr. Lambert’s scores on some of the specific psychometric instruments used to evaluate executive functioning. The results confirm that some aspects of Dr. Lambert’s executive functioning are quite severely impaired, at less than the 1st percentile in relation to the general population.

Dr. X stated that his opinion with respect to Dr. Lambert’s executive dysfunction has not changed since his initial assessment of 2009. In his view, in fact, subsequent developments confirm that Dr. Lambert has continued to display tendencies consistent with the original findings.

Dr. X testified also that, in his opinion, Dr. Lambert is a narcissistic individual. This was his opinion when he first assessed Dr. Lambert in 2009, and his opinion has not changed. Dr. X noted that several professionals had previously diagnosed Dr. Lambert with Narcissistic Personality Disorder. Narcissistic traits apparent from Dr. Lambert’s presentation, and a review of his history, include a high need for admiration, an unrealistically positive self-image, a tendency to devalue contrary opinions, labile affect, difficulties with empathy, and a pronounced tendency to externalize responsibility for his

problems. He lacks insight and self-awareness, and is heavily invested in his view of himself as a victim. Dr. X indicated that narcissistic personality features are typically resistant to change. Psychotropic medication is of no assistance and psychotherapy is of no proven benefit. A major obstacle in this regard is that narcissistic individuals generally see no need to change; they are unaware of their own deficiencies, and can't admit to having a problem.

Dr. X was asked his opinion regarding whether Dr. Lambert suffered from a Pervasive Developmental Disorder, such as Asperger's Disorder or Pervasive Developmental Disorder Not Otherwise Specified (NOS), as has been postulated by other clinicians who had assessed Dr. Lambert and whose reports Dr. X had reviewed. These reports, specifically, include those of Clinic A and Institute B; these reports are contained in Exhibit 20 to these proceedings, and were carefully reviewed by the Committee. It is Dr. X's opinion that, although some aspects of Dr. Lambert's history might suggest the presence of a Pervasive Developmental Disorder, notably his poor performance on measures of executive functioning and his extreme lack of self-awareness, other features of his presentation were not in keeping with a Pervasive Developmental Disorder diagnosis. These include the prosody of his speech, his ability to establish social relationships, his lack of preoccupation with peculiar narrow interests, and his reaction to the imposition of clear rules and guidelines for professional conduct, as had been imposed by the Discipline Committee at the time of his reinstatement in 2009. Patients with Pervasive Developmental Disorder typically thrive with clear rules, feel comfortable with these and follow them to the letter, according to Dr. X. Dr. Lambert's conduct over the years, primarily in relation to his involvement with the College, indicates that, on the contrary, he has been duplicitous and has not abided by the rules set out for him. This behaviour, in Dr. X's opinion, is not in keeping with a Pervasive Developmental Disorder diagnosis.

Dr. X testified that, in his opinion, Dr. Lambert's prospects for favourable change through treatment were low. The combination of executive dysfunction and Narcissistic Personality Disorder would appear to be particularly resistant to change; narcissistic

personality features would make it very difficult for Dr. Lambert to acknowledge any personal deficiencies, and would make it correspondingly unlikely that he could come to accept his cognitive limitations and his patterns of maladaptive behaviour. Dr. X found it difficult to envision effective self-monitoring, or the development of insight. Dr. X stated that, in his view, Dr. Lambert does not really seem to have benefitted from treatment to date, despite the fact that this has been ongoing for years. He continues to adopt an exculpatory stance, and doesn't take responsibility for his behaviour. His therapy appears to be primarily supportive, and does not address the underlying issues of Dr. Lambert's primary narcissistic orientation, and his executive dysfunction.

Finally, Dr. X stated his opinion that if further terms, conditions and limitations were imposed on Dr. Lambert's practice, the risk of him breaching these would be very high.

The Evidence of Dr. Y

Dr. Y is a Forensic psychiatrist who works at the Law and Mental Health Program at CAMH. He is the Head of the Sexual Behaviours Clinic at CAMH. He has extensive experience in the assessment of professionals presenting with issues of boundary violation, including of a sexual nature. He has done many risk assessments in this context. He has also done such assessments at the request of a number of governing bodies, including the College of Physicians and Surgeons of Ontario. A copy of Dr. Y's Curriculum Vitae is contained in Exhibit 24. The Committee accepted Dr. Y as a qualified expert witness in this case.

Dr. Y had previously assessed Dr. Lambert in 2009, at the request of the College, in the context of Dr. Lambert's application for reinstatement of his certificate of registration. At that time, Dr. Y had interviewed Dr. Lambert for a total of seven and one half hours. He had also reviewed extensive collateral information and had spoken to both Dr. Lambert's ex-wife and his brother. Dr. Y's findings and opinions are documented in his report to the College dated March 17, 2009, which is contained in Exhibit 24. More recently, again at the request of the College, Dr. Y had provided an updated report to the College dated October 22, 2012, also contained in Exhibit 24. This second report contained Dr. Y's

current opinion regarding the risk to the public posed by Dr. Lambert, and was based on Dr. Y's review of developments subsequent to Dr. Lambert's reinstatement, and on his review of further assessments and relevant clinical records generated subsequent to March 2009. These further assessments included the reports from Clinic A and Institute B, contained in Exhibit 20, which were also reviewed by the Committee.

In Dr. Y's testimony he confirmed his opinion that Dr. Lambert continued to demonstrate an inability to restrain his behaviour, including with respect to his sexual behaviour, which places the public at risk. He testified that, while in 2009 he had considered that Dr. Lambert presented a "moderate" risk for further sexual acting out, he now considered that his risk had slightly increased, to "the higher end of moderate." Although Dr. Y had believed in 2009 that Dr. Lambert's risk could be reduced by risk management strategies, he no longer believed this to be the case. His conclusion in this regard is based on the failure of risk management strategies, including clear and stringent conditions on Dr. Lambert's practice, that were in fact put in place at the time of the reinstatement of his certificate of registration. These were rapidly breached by Dr. Lambert. In Dr. Y's opinion, one of the best predictors for future behaviour is past behaviour, and there can simply be no confidence that Dr. Lambert would comply with similar conditions in the future.

Dr. Lambert's risk to the public, in Dr. Y's opinion, arises from his Narcissistic Personality Disorder; in addition, his documented cognitive impairment raises further concerns. Dr. Y reviewed the DSM-IV-TR diagnostic criteria for Narcissistic Personality Disorder and concluded that, of the nine criteria listed, most of these were met or likely met by Dr. Lambert; five or more criteria are required to establish the diagnosis. He based this opinion on his personal observations of Dr. Lambert during the course of seven and one half hours of interview time in 2009, and on a review and consideration of multiple sources of collateral information regarding Dr. Lambert's behaviour. Dr. Y described Dr. Lambert as glib and socially comfortable, self-aggrandizing and grandiose, with a need for admiration and an air of entitlement. His interpersonal behaviour can be characterized as exploitative, notably with respect to his history of repetitive boundary violations with

his patients. Dr. Y noted also Dr. Lambert's repeated mischaracterization of his actions, his manipulative tendencies and his deceit, and characterized these as manifestations of his narcissistic personality. In Dr. Y's view, Dr. Lambert continues to have difficulties taking responsibility for his behaviour, as seen in the content of recent clinical records provided by his therapists, and in a number of Dr. Lambert's emails contained in the Agreed Statement of Facts (Exhibit 29). Dr. Y concluded that Dr. Lambert's level of insight is lacking, "at best, it's fluctuating and superficial." He does not seem to have made any gains in therapy.

Dr. Y also reviewed the DSM-IV-TR diagnostic criteria for Asperger's Disorder, and the diagnostic conclusions contained in the Institute B report and raised also as a diagnostic consideration in the report from Clinic A, which suggested that Dr. Lambert did suffer from Asperger's Disorder or a related form of Pervasive Developmental Disorder. In Dr. Y's opinion, he does not. He stated that, for example, there is no evidence of "restrictive, repetitive, and stereotyped patterns of behaviour, interests and activities" as required for the diagnosis of Asperger's Disorder. Although Dr. Lambert does suffer from impairment in social functioning, this is qualitatively different from that usually seen in Asperger's Disorder. Dr. Y further stated that, even if Dr. Lambert did suffer from Asperger's Disorder or a related form of Pervasive Developmental Disorder, this would not change his opinion regarding the risk that Dr. Lambert presents to the public.

DECISION AND REASONS ON PENALTY

At the conclusion of the hearing, the Committee was presented with a joint submission on penalty, proposing revocation of Dr. Lambert's certificate of registration, a public reprimand within 60 days, and payment by Dr. Lambert of costs in the amount of \$27,375.00. The Committee is aware of the law that requires a joint submission to be accepted, unless to do so would be contrary to the public interest and would bring the administration of justice into disrepute.

The Committee agrees with the joint submission proposed by counsel for the College and counsel for Dr. Lambert. The Committee agrees that revocation of Dr. Lambert's

certificate of registration is the only penalty which could adequately address the protection of the public, maintenance of public confidence in the integrity of the profession, and issues of specific and general deterrence.

In coming to this conclusion, the Committee considered all the evidence before it, including that pertaining to Dr. Lambert's history with the College, extensive clinical records and reports from a variety of mental health professionals who have assessed and treated Dr. Lambert, both in the past and currently, and the expert opinion evidence of Dr. X and Dr. Y.

This is Dr. Lambert's third finding of professional misconduct by the Discipline Committee. His history of misconduct spans a period of over 20 years. The sexual abuse of his patients, leading to the earlier revocation of Dr. Lambert's certificate of registration in 2002, was extremely serious and entailed particularly egregious violations of boundaries with his patients.

It is the view of the Committee that the findings of the Discipline Committee in 2002, and the circumstances pertaining to the revocation of Dr. Lambert's certificate of registration at that time, remain highly relevant to the current proceedings. The terms, conditions and limitations on Dr. Lambert's certificate of registration which were imposed at the time of Dr. Lambert's reinstatement in 2009 were for the express purpose of protecting the public from the sort of abhorrent professional misconduct earlier committed by Dr. Lambert, which included the severe and repetitive sexual abuse of his patients. He was given a further opportunity to practise medicine in 2009, through the imposition of terms, conditions, and limitations. However, Dr. Lambert began breaching these conditions almost immediately, and continued to do so on a number of occasions with a number of different patients, eventually committing another act of sexual abuse. It is hard to imagine a clearer example of the abject failure of terms, conditions and limitations designed to protect the public, or a more blatant disregard for the authority of the College, than has been demonstrated by Dr. Lambert throughout this process. The terms, conditions and limitations which had been imposed were rendered meaningless by

Dr. Lambert's refusal to abide by them. The Committee believes that this historical context is important in assessing a suitable response to Dr. Lambert's subsequent professional misconduct in breaching the terms, conditions and limitations which had been imposed on him. Not only is it highly likely that future conditions would be similarly breached but, based on the nature of Dr. Lambert's past professional misconduct, the public would be at high risk as a result.

In consideration of the above, the Committee concludes that Dr. Lambert is ungovernable. The Committee is of the view that these circumstances would have compelled the revocation of his certificate of registration, even if a finding of repeat sexual abuse had not been made.

The Committee attached considerable weight to the expert opinions of Dr. X and Dr. Y, both of whom conducted very thorough and comprehensive assessments of Dr. Lambert which, in each case, have been updated to incorporate events subsequent to Dr. Lambert's reinstatement. The evidence of these experts was clear, cogent and convincing. The Committee accepts that Dr. Lambert's pattern of maladaptive behaviour over the years justifies a diagnosis of Narcissistic Personality Disorder which, in Dr. Lambert's case, is accompanied by cognitive deficits marked by significant executive dysfunction. The Committee accepts the expert evidence that, as a result, he is at moderately high risk for committing further acts of sexual abuse in the future. Moreover, he is arrogant, entitled, duplicitous, self-serving, and continues to take no responsibility for his misbehaviour. Despite years of therapy, there is no evidence that his inflexible attitudes and behavioural patterns have been ameliorated or modified in any way. Dr. Lambert's insight into the ways in which his functioning is impaired, and the corresponding risk to the safety of the public, appears to be virtually nil. Accordingly, he has no motivation to change, and continues to blame his problems on the attitudes and actions of others. Dr. Lambert cannot be trusted to respect future limits placed on him pursuant to the authority of the College. His immediate and repeated violations of the terms, conditions and limitations previously imposed at the time of his reinstatement bear this out. These breaches were

planned and premeditated, and, the evidence discloses, were being contemplated by Dr. Lambert even prior to the reinstatement of his certificate of registration.

The Committee considered the defence submission that Dr. Lambert's mental condition ought to be considered as a mitigating factor, the implication being that his mental condition reduces the extent of his personal responsibility with respect to the professional misconduct which he committed. The defence position is that Dr. Lambert's treatment at this point has not progressed satisfactorily and that, as a result, the risk which he presents to the public has not been reduced to the point where he should be permitted to return to practice. It was for this stated reason that Dr. Lambert joined with counsel for the College in the joint position that revocation of his certificate of registration was appropriate.

The Committee accepts that Dr. Lambert is a dysfunctional individual who has difficulties with mood regulation and behavioural control. The evidence is that he does suffer from cognitive impairment, specifically executive dysfunction, and he is properly regarded as impaired from this point of view. The Committee considered the differing diagnostic conclusions of previous assessors, particularly the debate over whether or not Dr. Lambert manifests characteristics of Asperger's Disorder or Pervasive Developmental Disorder NOS. In this regard, the Committee attached more weight to the evidence of Drs. X and Y than to the written reports from Institute B and Clinic A. The evidence for a Pervasive Developmental Disorder diagnosis, in the view of the Committee, is unconvincing at best.

The Committee is of the view that Dr. Lambert's mental health problems are most consistent with a diagnosis of Narcissistic Personality Disorder. He clearly meets most of the DSM-IV diagnostic criteria for this disorder, and the most problematic aspects of his behavioural history, his attitudes and personality style, are consistent with a Narcissistic Personality Disorder diagnosis. The Committee finds that the professional misconduct committed by Dr. Lambert is primarily a function of his personality. His demonstrated ungovernability flows from characteristics of entitlement, arrogance, self-absorption, externalization of responsibility, and lack of insight; these characteristics are all

personality-based. Thus, despite the fact that Narcissistic Personality Disorder is defined as a mental disorder in DSM-IV, it does not diminish Dr. Lambert's personal responsibility with respect to the acts of professional misconduct which he committed. We do not agree that it should properly be considered as a mitigating factor with respect to penalty.

The Committee does accept, as a mitigating factor, that Dr. Lambert eventually joined with the College in a joint submission on penalty. This contributed to a more expeditious resolution of the penalty issue than would otherwise have been the case. It might also signify a degree of insight on Dr. Lambert's part, as he apparently has recognized that he is not fit to return to medical practice at this time. Such insight has not been previously apparent. Whether it actually reflects insight or is a recognition by him of the likely legal conclusion to the hearing, we cannot say with any certainty.

The Committee finds that the most prominent aggravating factors with respect to penalty are as follows. This is Dr. Lambert's third finding of professional misconduct. Previous findings have included the sexual abuse of his patients, and he has again reoffended in a similar fashion. He breached the terms, conditions and limitations attached to his certificate of registration at the time of his reinstatement. He did so in a planned, deliberate, systematic and repetitive fashion, and was, in fact, preparing to commit these breaches even prior to his reinstatement. He has shown a lack of remorse and has refused to accept responsibility for his transgressions, throughout the College investigation leading to the current proceeding. He was given a second chance to practise medicine after earlier violating the public trust in a most serious fashion, and he failed completely, and immediately, to conduct himself in the responsible and professional manner which was required. His behaviour is a disgrace to himself and to the profession.

ORDER

Therefore, having stated its finding of professional misconduct in paragraph 1 of its written order of December 5, 2012, the Committee ordered and directed, on the matter of penalty and costs, that:

2. the Registrar revoke Dr. Lambert's certificate of registration, effective immediately.
3. Dr. Lambert appear before the panel to be reprimanded within sixty (60) days of the date of this Order becoming final.
4. Dr. Lambert pay costs to the College in the amount of \$27,375.00 within thirty (30) days of the date of this Order.