

**DISCIPLINE COMMITTEE OF
THE COLLEGE OF PHYSIOTHERAPISTS OF ONTARIO**

B E T W E E N :

COLLEGE OF PHYSIOTHERAPISTS OF ONTARIO

- and -

MICHAEL FONG, Registration Number 16156

NOTICE OF HEARING

The Inquiries, Complaints and Reports Committee of the College of Physiotherapists of Ontario has referred specified allegations against Michael Fong to the Discipline Committee of the College. The allegations were referred in accordance with paragraph 26(1)1 of the *Health Professions Procedural Code*. The statement of allegations is attached to this notice of hearing. A discipline panel will hold a hearing under the authority of sections 38 to 56 of the *Health Professions Procedural Code*, as amended, for the purposes of deciding whether the allegations are true. A **pre-hearing conference** may be held at the offices of the College of Physiotherapists of Ontario at 375 University Avenue, Suite 800, Toronto, Ontario, at a date and time to be fixed by the Registrar. A discipline panel will subsequently convene at the offices of the College of Physiotherapists of Ontario at 375 University Avenue, Suite 800, Toronto, Ontario, on October 3, 2019 at 9:30 AM, for the purposes of conducting the **hearing**.

IF YOU DO NOT ATTEND AT THE HEARING IN ACCORDANCE WITH THE PRECEDING PARAGRAPH, THE DISCIPLINE PANEL MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

If the discipline panel finds that you have engaged in professional misconduct, it may make one or more of the following orders:

1. Direct the Registrar to revoke the member's certificate of registration.

2. Direct the Registrar to suspend the member's certificate of registration for a specified period of time.
3. Direct the Registrar to impose specified terms, conditions and limitations on the member's certificate of registration for a specified or indefinite period of time.
4. Require the member to appear before the panel to be reprimanded.
5. Require the member to pay a fine of not more than \$35,000 to the Minister of Finance.

The discipline panel may, in an appropriate case, make an order requiring you to pay all or part of the College's costs and expenses pursuant to section 53.1 of the *Health Professions Procedural Code*.

You are entitled to disclosure of the evidence against you in accordance with section 42(1) of the *Health Professions Procedural Code*, as amended. You, or your representative, may contact the solicitor for the College, Joanna Birenbaum, in this matter at:

Ursel Phillips Fellows Hopkinson LLP
555 Richmond St. West, Suite 1200
Toronto, ON M5V 3B1

Telephone: (416) 968-3333
Facsimile: (416) 968-0325
Email: jbirenbaum@upfhlaw.ca

You must also make disclosure in accordance with section 42.1 of the *Health Professions Procedural Code*, which states as follows:

Evidence of an expert led by a person other than the College is not admissible unless the person gives the College, at least ten days before the hearing, the identity of the expert and a copy of the expert's written report or, if there is no written report, a written summary of the evidence.

Date: May 24, 2019



Rod Hamilton, Registrar
College of Physiotherapists of Ontario

TO: Michael Fong

Statement of Allegations

1. At all materials times, Michael Fong was a registered member of the College.

2. During the period October 1, 2016 and May 30, 2019, Mr. Fong engaged in professional misconduct within the meaning of the following paragraphs of section 1 of the *Professional Misconduct Regulation, O. Reg. 388/08*:
 - a. paragraph 1 (failing to maintain the standards of the profession);

 - b. paragraph 13 (failing to reply appropriately or within a reasonable time to a written inquiry from the College);

 - c. paragraph 14 (contravening, by act or omission, the *Physiotherapy Act*, the *Regulated Professional Act, 1991* or the regulations under either act); and

 - d. paragraph 18 (engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional).

PARTICULARS OF THE ALLEGATIONS

1. At all material times, Mr. Michael Fong (the "Member") was a registered member of the College and was practicing physiotherapy at a clinic in Toronto, Ontario (the "Clinic"). The Member is also the owner of the Clinic.
2. During the period October 1, 2016 and April 29, 2018 the Member practiced as a physiotherapist and delivered direct patient care to patients in Ontario. During this period, the Member did not hold professional liability insurance.
3. At all material times, section 17 of O. Reg 532/98 under the *Physiotherapy Act 1991* provided that it is a non-exemptible registration requirement for all certificates of registration that the applicant demonstrates that he or she holds professional liability insurance in accordance with the College by-laws.
4. At the material times, the College by-laws provided that:
 - (1) A registrant must hold professional liability insurance that provides coverage for physiotherapy practice that includes patient care, whether in a paid or volunteer capacity.
 - (2) The professional liability insurance coverage referred to in subsection (1) may be obtained by the individual physiotherapist directly or may be provided through the policy of an employing agency so long as it covers the entire practice of physiotherapy by the physiotherapist.
 - (3) The professional liability insurance referred to in subsection (1) must have,
 - (a) a liability limit of at least \$5,000,000 on any one incident; and
 - (b) a \$5,000,000 minimum for the annual policy period for each insured individual.
 - (4) The professional liability insurance referred to in subsection (1) must not be subject to a deductible.
 - (5) The professional liability insurance referred to in subsection (1) must provide coverage for incidents that occurred during physiotherapy practice, even if the claim is not reported until after the physiotherapist has ceased practice to a minimum of 10 years.
 - (6) The professional liability insurance referred to in subsection (1) is subject only to such exclusions and conditions and terms as are consistent with normal insurance industry practices.

(7) Within 30 days of any request by the College, a registrant required to hold the professional liability insurance referred to in subsection (1) shall provide current documentary proof, acceptable to the Registrar, that his/her professional liability insurance coverage complies with the requirements set out in this section.

5. At all material times, the College's Annual Renewal Form required the Member to acknowledge that "I have liability insurance that meets" the liability insurance requirements of the College, including providing information on the insurer and the policy number; and which required the Member to acknowledge that "I meet the professional liability insurance requirements as described in the College's by-laws."
6. At all material times, the Member knew or ought to have known that it was his professional obligation to hold professional liability insurance, yet for the period of October 1, 2016 and April 29, 2018 he failed to maintain professional liability insurance.
7. By Notice of Hearing dated November 7, 2018, the Inquiries, Complaints and Reports and Committee of the College referred specified allegations of misconduct relating to the practice of the Member to the Discipline Committee, in case number 2017-0119. The allegations included that the Member practiced physiotherapy during the period May 8, 2017 to April 29, 2018 while his certificate of registration was suspended and that he failed to respond to communications from the College. As set out in this Notice of Hearing in case number 2018-0237, the Member also practiced during this period without professional liability insurance.
8. The Member provided no acknowledgement or response to the College following service on him by email and personal service of the Notice of Hearing relating to case number 2017-0119, nor to communications from the College relating to the College's investigation of the allegations herein.
9. Between April 1, 2017 and the present date, the Member has failed to respond appropriately or at all to communications from the College, including communications sent by email and by letters served on him by way of personal service.

APPENDIX

1. Take notice that the documents that have been and will later be disclosed to you will be tendered as business documents pursuant to the *Evidence Act* of Ontario.

2. All documents that are disclosed to you in this matter are disclosed on the basis that they are to be used solely for the purpose of this proceeding and for no other purpose.

The Discipline Process

As part of its role to protect the public interest and ensure that patients receive quality care, the Inquiries, Complaints and Reports Committee (ICRC) may refer a matter involving a physiotherapist to the Discipline Committee for a hearing when they believe that a physiotherapist may have committed an act of professional misconduct or is incompetent.

Referrals to the Discipline Committee are made when:

- A physiotherapist has been found guilty of an offence that is relevant to his or her suitability to practise;
- A finding of professional misconduct has been made by a regulatory body outside of Ontario and the same act(s) would be considered professional misconduct in Ontario;
- A physiotherapist fails to cooperate with the Quality Management Program or any of its assessors;
- A physiotherapist has sexually abused a patient;
- A physiotherapist commits an act of professional misconduct as defined in the College's Professional Misconduct Regulation;
- A physiotherapist's professional care of a patient displayed a lack of knowledge, skill or judgment which is serious enough that they should no longer be able to practice or their practice should be restricted.

The Discipline Process

At the discipline hearing the College is represented by a lawyer who is also known as the prosecutor while the physiotherapist is generally represented by his or her own lawyer, known as the defence counsel. Physiotherapists sometimes choose to participate in the discipline hearing without a lawyer. If the physiotherapist is working with their own lawyer, the lawyer will speak on behalf of the physiotherapist.

The College is required to provide the physiotherapist / his or her lawyer with all of the information gathered by the College during the investigation. The College also lets the physiotherapist know the name(s) of any expert witnesses and the name(s) of any other witnesses who will appear.

The Pre-Hearing Conference

After a case has been referred to the Discipline Committee for a hearing, a first step may be to hold a pre-hearing conference. Through informal and unrecorded discussions, an attempt is made to see if the College and the physiotherapist can agree on any of the facts of the case or what a reasonable outcome could be.

The Pre-Hearing Conference is not a substitute for a discipline hearing.

The Hearing

A hearing is a formal process, much like that of a court of law. Hearings are open to the public, with few exceptions.

Three to five members of the Discipline Committee will form the panel that considers the matter. The panel's role is similar to that of a jury. Generally panels are composed of five people: three physiotherapists and two public members.



At the hearing, the panel will:

- consider the allegations, hear the evidence and determine the facts of the case;
- determine whether the evidence proves the allegations;
- determine whether the physiotherapist has committed an act of professional misconduct or is incompetent; and
- determine the outcome if there is a finding of professional misconduct or incompetence made.

Any proposed agreements that may have been reached during a pre-hearing conference or after the case was referred to the Discipline Committee for a hearing must be presented to the panel of the Discipline Committee for consideration. The panel does not have to accept the proposed agreement.

Testifying at a Discipline Hearing

The hearing starts with the College's lawyer presenting evidence about the College's case. If there are witnesses, the College's lawyer will ask witnesses who have information about the case to testify. The witnesses provide information that will assist the panel.

Once the College's lawyer is finished asking questions of the witness, the lawyer for the physiotherapist/ the physiotherapist will ask the witness some questions in order to clarify information and see if there are any gaps in the witness' information.

Once the College's lawyer has completed the presentation of the College's case, the lawyer for the physiotherapist / the physiotherapist will present information about their view of the College's case. The lawyer for the physiotherapist may have their own witnesses and the physiotherapist may also present their own information.

After the Discipline Hearing

If the panel finds that the physiotherapist has committed an act(s) of professional misconduct or is incompetent, the lawyer for the College and the lawyer for the physiotherapist will present information to the panel about what they think the outcome should be. The panel may decide to:

- revoke the physiotherapist's certificate of registration;
- suspend the physiotherapist's certificate of registration;
- impose terms, limits or conditions on the physiotherapist's certificate of registration (this means that the physiotherapist may be required to participate in remedial activities and/or may have their practice restricted in some way);
- require the physiotherapist to pay a fine to the Government of Ontario (professional misconduct);
- require the physiotherapist to appear before the panel to be reprimanded (professional misconduct);
- require the physiotherapist to pay for funding for counseling for a patient who has been sexually abused and/or
- require the physiotherapist to pay costs to the College (to offset the costs of the College's legal fees, the investigation and hearing costs and expenses)

At the end of the entire process, the panel will issue its written decision and reasons which is sent to the physiotherapist and the person who sent the complaint to the College (if applicable).



Appeals

The physiotherapist and/or the College may appeal the decision of the panel to the Divisional Court of Ontario.

Reinstatement

A physiotherapist whose Certificate of Registration was revoked or suspended (for a period longer than 12 months) by a panel of the Discipline Committee may apply to the Registrar for reinstatement of the certificate one year after the date of which the Certificate was revoked or suspended.

If revocation was ordered because of sexual abuse of a patient by the physiotherapist, the physiotherapist must wait five years after the date of revocation to apply for reinstatement.

Publication of Decisions

If the outcome of the discipline hearing is that a finding of professional misconduct or incompetence is made, the outcome of the hearing including the decision and reasons of the panel will be made available on the public register / website (www.collegept.org) and on canlii (www.canlii.org).