

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF EARLY CHILDHOOD EDUCATORS**

Citation: College of Early Childhood Educators vs James Mallais,
2013 ONCECE 7
Date: 2013-05-27

IN THE MATTER OF the *Early Childhood Educators Act, 2007*, S.O. 2007, c. 7, Sched. 8 (the
“ECE Act”) and the Regulation (Ontario Regulation 223/08) thereunder;

AND IN THE MATTER OF discipline proceedings against James Mallais, a member of the
College of Early Childhood Educators.

PANEL: Rosemary Fontaine, Chair
Nici Cole, RECE
Rosanne Marinaro, RECE

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| BETWEEN: |) | |
| |) | |
| COLLEGE OF EARLY CHILDHOOD EDUCATORS |) | M. Jill Dougherty & Jordan S. Glick, WeirFoulds LLP, |
| - and - |) | for College of Early Childhood Educators |
| |) | |
| JAMES MALLAIS REGISTRATION # 04063 |) | James Mallais was not present, nor was he represented |
| |) | |
| |) | David Leonard, McCarthy Tétrault LLP, Independent Legal Counsel |
| |) | |
| |) | Heard: May 27, 2013 |

REASONS FOR DECISION, DECISION AND ORDER(S)

This matter came on for hearing before a panel of the Discipline Committee (the
“Committee”) on May 27, 2013 at the College of Early Childhood Educators (the “College”) at
Toronto.

A Notice of Hearing, dated March 14, 2013 (Exhibit 1), was served on James Mallais (the
“Member”), specifying the charges and requesting his attendance before the Discipline
Committee of the College of Early Childhood Educators (the “Committee”) on April 16, 2013

to set date for a hearing. Counsel for the College submitted an Affidavit of Service sworn by Agatha Wong, Hearings Coordinator (Exhibit 1), and sworn April 16, 2013, confirming that the Notice of Hearing was sent to the Member's last known address for service. The affidavit further indicates that a number of attempts were made to contact the Member by telephone and email regarding the Notice of Hearing dated March 14, 2013 and the set-date hearing scheduled for April 16, 2013.

Counsel for the College tendered a document that indicated the hearing was scheduled for May 27 and 28, 2013 (Exhibit 3). The matter was adjudicated on May 27, 2013.

A second Notice of Hearing, dated April 22, 2013 (Exhibit 2), was served on the Member, specifying the charges and requesting the Member's attendance before the Committee on May 27, 2013 for a hearing. Counsel for the College submitted an Affidavit of Service sworn by Agatha Wong, Hearings Coordinator (Exhibit 2), and sworn May 21, 2013, confirming that the second Notice of Hearing was sent to the Member's last known address for service and indicating that a number of attempts were made to contact the Member by telephone and email regarding the Notice of Hearing dated April 22, 2013.

The hearing was scheduled to commence at 9:00 a.m. on May 27, 2013. The Member did not appear, nor was he represented by legal counsel. The Committee was satisfied that reasonable efforts had been made to serve the Member with the Notices of Hearing and to inform the Member of the time and date of the hearing. The Committee therefore proceeded to hear the matter in the absence of the Member and commenced the proceedings at approximately 10:00 a.m.

THE ALLEGATIONS

Counsel for the College advised the Committee that the College would be proceeding with the Notice of Hearing dated April 22, 2013 (Exhibit 2). The allegations against the Member, as stated in the Notice of Hearing dated April 22, 2013, are as follows:

IT IS ALLEGED that James Mallais (the “**Member**”) is guilty of professional misconduct as defined in subsection 33(2) of the ECE Act, in that:

- (a) he abused physically, sexually, verbally, psychologically or emotionally children who were under his professional supervision, namely [Child 1], [Child 2], [Child 3] and [Child 4], contrary to Ontario Regulation 223/08, subsection 2(3);
- (b) he failed to maintain the standards of the profession, contrary to Ontario Regulation 223/08, subsection 2(8), in that:
 - (i) he failed to maintain a safe and healthy learning environment, contrary to Standard III.A.1 of the College’s Standards of Practice;
 - (ii) he abused physically, sexually, verbally, psychologically or emotionally children who were under his professional supervision, namely [Child 1], [Child 2], [Child 3] and [Child 4], contrary to Standard V.A.1 of the College’s Standards of Practice; and
 - (iii) he failed to establish and/or maintain clear and appropriate boundaries in his professional relationships with children under his supervision, contrary to Standard V.B of the College’s Standards of Practice; and
- (c) he acted in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to Ontario Regulation 223/08, subsection 2(10).

PARTICULARS OF THESE ALLEGATIONS ARE AS FOLLOWS:

1. James Mallais is, and was at all times relevant to these allegations, a member of the College of Early Childhood Educators (Registration number 04063).
2. Between 1994 and 1997, Mr. Mallais worked at [...] (the “J[...] Centre”) as a part-time early childhood assistant. In 1998, Mr. Mallais graduated from the Early Childhood Education program at George Brown College. From March 2001 until June 2004, Mr. Mallais was employed at [...] (“the S[...] Centre”) as an early childhood educator. In or about August of 2004, Mr. Mallais returned to the J[...] Centre, where he was employed as an early childhood educator until 2011.
3. [Child 1] and [Child 2] attended the S[...] Centre in 2004 when they were seven or eight years old.

4. In February 2004, [Child 1]'s mother noticed two bruises on her daughter's right bicep. When asked about the bruises, [Child 1] disclosed to her mother that Mr. Mallais had pinched her and that he was always pinching her, although she asked him to stop because it hurt. [Child 1] also told her parents that Mr. Mallais had also pinched two of her friends.
5. [Child 1]'s mother contacted the Children's Aid Society (the "CAS"), and the CAS investigated. The CAS caseworker was not able to verify her concerns and reported that she would be closing the file.
6. In December 2010, [Child 1] and [Child 2], ages 14, came forward with allegations that Mr. Mallais had sexually abused them while they were under his care at the S[...] Centre in 2004.
7. During her interview with Detective Arruda from Toronto Police Services, [Child 1] recalled that Mr. Mallais had once put his hand down the back of her pants and patted her buttocks. She also recalled Mr. Mallais pinching her during a game. [Child 1] stated that she also remembered her two friends both sitting on Mr. Mallais' lap and that he had put his hands down their pants on multiple occasions.
8. During her interview with Detective Arruda, [Child 2] disclosed that when she was seven, Mr. Mallais would call her over, unzip her pants, put his hand down her pants, and fondle her vagina. [Child 2] estimated that he did it five to ten times over a period of one or two months. [Child 2] recalled that Mr. Mallais had also touched a friend of hers but could not recall whether he had touched [Child 1].
9. The CAS deemed [Child 2] and [Child 1]'s statements to be credible and determined that the allegations of sexual abuse were verified.
10. On January 12, 2011, Mr. Mallais was charged with two counts of sexual exploitation, two counts of sexual interference and two counts of sexual assault. Due to his arrest, Mr. Mallais was placed on an unpaid leave of absence from the J[...] Centre.
11. On January 19, 2011, a co-worker of Mr. Mallais reported that she witnessed Mr. Mallais on several occasions tickling and wrestling the girls under his care and that Mr. Mallais would have children, and predominantly certain girls in his class, sit on his lap.
12. On February 7, 2011, Detective Arruda informed the College that another alleged victim had come forward, [Child 6]. The alleged incidents also occurred around 2004.
13. On February 16, 2011, Mr. Mallais was charged with one count of sexual exploitation, one count of sexual interference and one count of sexual assault in respect of [Child 6].
14. On November 2, 2012, following a three-day trial, Justice Backhouse of the Superior Court of Justice found Mr. Mallais not guilty in respect of complainants [Child 1] and [Child 2].

15. The charges against Mr. Mallais in respect of [Child 6] were withdrawn because [Child 6] failed to show up at court.
16. During its investigation, the College received two other CAS reports about allegations made against Mr. Mallais:

CAS Report dated June 2005:

- In June 2005, [Child 3], age six, disclosed to her mother that during naptime, Mr. Mallais rubbed her back and then moved his hand down to her buttocks. When she moved his hand away, he put it back on her buttocks.
- On June 16, 2005, the incident was reported to the CAS. A joint police and CAS investigation was conducted. During the interview, [Child 3] recalled Mr. Mallais rubbing her back only and did not recall him touching her anywhere else.
- The CAS determined that the allegation was not verified but recommended to management that the J[...] Centre have more than one employee supervise naptime.

CAS Report dated August 2010

- In August 2010, [Child 4], age seven or eight, disclosed to her mother that while riding on a school bus with Mr. Mallais, he told her to put her head on his lap and then proceeded to rub her head and back.
- During the CAS interview, [Child 4] initially said that she had wanted to sit with Mr. Mallais in the back of the bus because she was tired, and it was quieter there. She did not recall Mr. Mallais specifically asking her to do anything. When the CAS investigator reminded her of what she had previously said, [Child 4] recalled what she had told her mother and confirmed that Mr. Mallais told her to put her head on his lap. She stated that he had rubbed her head and back, and she had fallen asleep. [Child 4] did not feel uncomfortable at the time, and there was no indication that Mr. Mallais had touched her anywhere.
- The CAS determined the allegation had not been verified. However, the CAS indicated that it had concerns about Mr. Mallais' boundaries with the children, even though sexually inappropriate behaviour had not been verified.

Counsel for the College advised the Committee that the College intended to withdraw the allegations and the particulars of the allegations regarding [Child 3] and [Child 6], stating that these individuals were not available to give testimony at the hearing. References to [Child 3]

and [Child 6] contained in allegations a) and b)ii) and particulars 12, 13, 15 and 16 of the allegations were subsequently withdrawn with the permission of the Committee.

ISSUE OF JURISDICTION

Subsection 33(2) of the ECE Act indicates that the Discipline Committee may find a member guilty of professional misconduct if, after a hearing, it believes the member engaged in conduct that contravenes the Professional Misconduct Regulation or a by-law of the College. Subsection 18(3), for its part, stipulates that the College has jurisdiction over professional misconduct, incompetence or incapacity that occurred while the perpetrator was a member of the College.

Counsel for the College submitted an affidavit sworn by the College Registrar on May 9, 2013 (Exhibit 4), which indicates that the Member was issued a Certificate of Registration on March 26, 2009 and that his current registration status is that of “Suspended for Nonpayment of Fees”. Given that the Member was originally registered in 2009 and that the College was not established until 2007, it follows that the Member was not a member of the College at the time of the alleged incidents involving [Child 1] and [Child 2], which are said to have occurred in 2004.

Counsel for the College submitted that the Committee does, however, have jurisdiction to deal with the 2004 incidents. Counsel for the College stated that while there is generally a presumption against the retrospective effect of law—meaning that legislation should not be applied to events that took place before the legislation was enacted—this principle is subject to an exception. A statute may be retrospectively applied if it is designed for public protection and if the goal of applying the statute is not simply to punish or discipline an individual but to protect the public.

In support of this concept, counsel for the College cited a 2003 Ontario College of Social Workers and Social Service Workers (the “OCSWSSW”) decision involving Michaela

Ackermann, who had been accused of professional misconduct for actions that she allegedly committed before she was registered with the OCSWSSW. The disciplinary panel determined that it had jurisdiction to deal with the matter as the conduct in question was so serious that it called into question the social worker's suitability to practise the profession. The OCSWSSW panel stated that the purpose of the *Social Work and Social Service Work Act, 1998* was to protect the public interest and so the presumption against retrospectivity did not apply. The OCSWSSW decision referred to a number of other cases in which legislation was applied retrospectively for similar reasons: *Re Knox; A Solicitor* (1914), 20 D.L.R. 546 (Alta S.C.), *Stolen v. British Columbia College of Teachers*, [1994] B.C.J. No. 1993 (B.C.S.C.), *Keppel v. Association of Professional Engineers, Geologists, and Geophysicists of the Northwest Territories*, [1996] N.W.T.J. No. 68 (N.W.T.S.C.) and *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301.

College counsel submitted that just as in the OCSWSSW decision and the decisions it cited, the presumption against retrospectivity does not apply in the present case. Subsection 7(1) of the ECE Act states that the College's primary duty in carrying out its objects is to serve and protect the public interest, and the Member's alleged conduct in 2004 is of such a serious nature that it reflects on his ability to practise as an early childhood educator and must be addressed by the Committee.

Independent legal counsel to the Committee agreed with the submissions made by College counsel, stating that he believed the Committee has jurisdiction in this matter. He advised the Committee members to examine the OCSWSSW decision involving Ms. Ackermann to determine whether they could deal with the allegations stemming from events in 2004.

After considering the submissions made by counsel for the College, the advice of independent legal counsel and the cited case law, the Committee feels that the presumption

against retrospectivity does not apply in this present case. The mandate of the College is to protect the public interest, and the Member's alleged conduct, if proven, could have implications for the public and would reflect on the Member's suitability to practise the profession and offer his services as an early childhood educator. As such, the Committee has determined that it has jurisdiction to deal with the incidents said to have occurred in 2004.

MEMBER'S PLEA

As the Member was not present, nor represented by counsel, the Committee proceeded on the basis that the Member denied the allegations set out in the Notice of Hearing dated April 22, 2013. The Chair, on behalf of the Member, entered a plea of not guilty to the allegations.

THE EVIDENCE

Counsel for the College called five witnesses: [...], Director at the J[...] Centre; [Child 1], [Child 2], [Child 4] and L., [Child 4]'s mother.

Evidence of [...]

[...], RECE, is Director of the J[...] Centre and has been in the role for about 10 years. The J[...] Centre is licensed for 170 children and employs approximately 20 staff members.

Ms. [...] was able to identify a document tendered by College counsel outlining the Member's employment and education history [Exhibit 5(b)]. According to this document, the Member worked at the J[...] Centre from June 1994 to December 1997, at the S[...] Centre from March 2001 to June 2004 and at the J[...] Centre again from August 2004 to 2011. Ms. [...] stated that to her knowledge, the information contained in the document was accurate, adding that she believed it was generated at the J[...] Centre.

Ms. [...] testified that she hired the Member for a position as an early childhood educator at the J[...] Centre in 2004. In this role, the Member worked in kindergarten programs as well as programs involving school-age children who were in grades 3 and 4.

Ms. [...] was asked by counsel for the College to identify a letter dated January 17, 2011 (Exhibit 5), and she was able to identify the letter as a mandatory report that she sent to the College regarding the Member's criminal charges. According to the letter, the Member was arrested on January 12, 2011 and was charged with sexual assault, sexual exploitation and sexual interference stemming from incidents that occurred in 2004 when the Member was employed at the S[...] Centre.

Ms. [...] spoke with the police after the Member's arrest and was informed that the charges were only related to incidents at the S[...] Centre and that there were no criminal charges arising from the Member's time at the J[...] Centre. The police advised Ms. [...] to send a letter to families informing them of the situation. On January 12, 2011, Ms. [...] sent a letter to families whose children were attending or had previously attended the J[...] Centre informing them of the Member's arrest and charges [Exhibit 5(a)]. The letter stated that the families could contact the lead investigator on the case, Detective Constable Sandra Arruda, if they had any information. Ms. [...] then sent a follow-up letter on January 14, 2011, reiterating the situation and inviting concerned parents to attend an information session about the matter [Exhibit 5(c)]. The two letters were submitted by College counsel as evidence, and Ms. [...] was able to identify the documents as the letters she had sent.

Ms. [...] testified that she was advised by legal counsel not to terminate immediately the Member's employment as people are innocent until proven guilty. The Member was placed on unpaid leave for about a month until the J[...] Centre received his bail conditions, which

prohibited him from being around children. Given that these conditions prevented the Member from fulfilling the terms of his employment, his employment with the J[...] Centre was terminated in or around February 2011.

Evidence of [Child 1]

[Child 1] is 16 years old and currently attends a secondary school in the Greater Toronto Area.

[Child 1] gave testimony that she attended the S[...] Centre from senior kindergarten to grade five. She stated that she believed the Member was at the S[...] Centre the entire time that she was there. She further indicated that at the time, [Child 2] was also attending the S[...] Centre.

[Child 1] stated that there were 10 to 15 children in the school-age room, where the Member and two or three other staff members were teachers. [Child 1] attended the S[...] Centre before school, after school and during lunch. Her mother would drive her to the centre in the morning for the before-school program, and after school, she would be at the S[...] Centre from approximately 3:30 p.m. to approximately 6:00 p.m. [Child 1] stated that parents would start showing up at the S[...] Centre to pick up their children around 4:00 p.m. She indicated that during lunch time, there were usually no parents coming in and out of the centre.

[Child 1] described the school-age room as having a large table, a kitchen area and bookshelves. She indicated that there was also a desk that had the appearance of a typical “teacher’s desk,” with panels covering the sides and the front of the desk. The desk was by the door, off to the right of the doorway, and walking into the room, a person would see the front part of the desk.

[Child 1] testified that she was close to the Member, stating that he was like a parent to her when her parents were not around. The Member would play card games, play with toys and

watch movies with her and the other children. [Child 1] stated that the Member was more “touchy” with children—in particular girls—and was closer to them than other centre staff. While other staff members would leave the lights on when they watched movies, the Member would watch movies with them in the dark, and some children would be on the couch with him. [Child 1] stated that certain girls would sit on the Member’s lap, in particular [Child 2] and another classmate, [Child 5].

[Child 1] gave testimony that on one occasion, when she was in grade 3 or 4, the Member pinched her arm when they were playing a game. She told her mother that night about the incident, and her mother contacted the CAS.

[Child 1] further testified that on another occasion, when she was in grade 3 or 4, she was sitting on the couch in the school-age room, and the Member asked her to sit on his lap. She went and sat on one of his knees while he was sitting on the couch. While she was sitting on his knee, the Member put his hand down the back of her pants and patted her buttocks.

[Child 1] indicated that the Member did this one time and did not do it again. After the incident, [Child 1] did not really want to sit on the Member’s lap anymore.

[Child 1] stated that at the time of the incident, she knew that what the Member was doing was wrong but did not argue since the Member was an adult and she was taught to listen to adults. She did not report the incident to anyone and did not discuss it with [Child 2] or [Child 5] when she was still at the S[...] Centre.

[Child 1] testified that in 2010, she was reminded of the buttock-patting incident when she heard her mother mention the Member’s name in a conversation. She then told her mother about the incident, and her mother said that they had to contact the police. [Child 1] was interviewed by the police and later went to court to testify.

[Child 2] was also involved in the court proceeding, but [Child 1] stated that she did not discuss the incidents with [Child 2] after she reported the buttock-patting incident to her mother. [Child 1] indicated that she only discussed the incident with [Child 2] after the criminal trial was over and the lawyer told them that they could talk about it.

Evidence of [Child 2]

[Child 2] is 17 years old and currently attends a secondary school in the Greater Toronto Area.

[Child 2] gave testimony that she attended the S[...] Centre from junior kindergarten to grade three. [Child 2] attended the before- and-after-school programs, and she was also there during lunch. After school, she would be at the child care centre from 3:30 p.m. until about 5:30 p.m. During her time there, [Child 2] would do crafts, play board games and play with dolls.

[Child 2] stated that she recalled the Member being her teacher in 2004, in the later part of her time at the child care centre, around the time she was in grade three. In his role, the Member supervised a room of about 10 to 15 children. [Child 2] indicated that there were one or two other early childhood educators who supervised the room, but the Member was sometimes the only staff member in the room with the children.

[Child 2] indicated that the Member gave her a “creepy” feeling as she felt he did not understand boundaries. She stated that he would give hugs to female students, usually girls in grades two or three and that the Member did not treat boys the same way that he treated girls.

[Child 2] described the room that she was in at the S[...] Centre, indicating that there was a table, couch, shelves, an old computer and a desk. The desk was made of either wood or metal, and there was a chair behind it. The desk faced the door at an angle, diagonal to the

door. A person walking into the room would be able to see the front of the desk but would not be able to see the open slot for the chair at the back.

[Child 2] testified that during her time at the S[...] Centre, the Member would call her over and sit her down with him in the chair behind the desk. She would be seated in front of him, with her back to him. While seated on the chair, they would both be facing the door. The Member would then unzip [Child 2]'s pants and fondle her vagina. [Child 2] stated that the Member did this approximately 10 times. She did not think anyone saw what the Member was doing to her as other early childhood educators were not in the room when he did this. [Child 2] indicated that she believed the other children were playing in various parts of the room at the time.

[Child 2] gave testimony that the Member later apologized to her for his actions and hugged her. After he hugged her, [Child 2] walked away. She stated that he did not touch her vagina again after he apologized.

At the time of the incidents, [Child 2] felt that what the Member was doing was wrong, but she listened to him and did not say anything because he was an adult and her teacher. [Child 2] also noted that the Member would frequently call [Child 5] over to sit on his lap.

[Child 2] testified that on Boxing Day 2010, she saw the Member again at a Best Buy store. She was with her mother at the time, and when she saw him, she was reminded of the incidents at the S[...] Centre. She panicked and went to the car. Later that day, [Child 2] told her mother what the Member had done to her, and her mother took her to speak with the police the following day. The police then took her statement, and the matter went to trial.

[Child 1] was also involved in the trial, but [Child 2] stated that she did not talk to [Child 1] about the specific incidents until the court proceedings were over.

After grade three, [Child 2] attended a different elementary school than [Child 1]. They later attended the same middle school and would sometimes say “hi” if they passed each other in the halls. They currently attend different secondary schools, but they are “friends” on Facebook. [Child 2] recalled a conversation in which she and [Child 1] said the Member was “creepy” but stated that she did not tell [Child 1] during this conversation what the Member had done to her.

Evidence of [Child 4]

[Child 4] is 11 years old and currently attends an elementary school in the Greater Toronto Area.

[Child 4] testified that she attended the J[...] Centre during the summer between grades two and three. From about 8:45 a.m. to 5:30 p.m., she was at the centre, where there were about 30 children and where the Member was one of her teachers.

[Child 4] gave testimony that on one occasion, late in the summer, the children were coming back from swimming at a local pool and were riding back together on a bus. [Child 4] was sitting with her friend when the Member asked her to come sit with him at the back corner of the bus. He then asked her to lie down on his lap and put her head on his lap. The Member told [Child 4] that she was tired, but she did not feel tired. The Member then patted and stroked [Child 4]’s head.

[Child 4] stated that she had never been asked to put her head on someone’s lap before. The incident made her feel uncomfortable and made her “gut feel weird”, so she told her mother what had happened on the bus.

[Child 4] indicated that after the incident, the Member was always accompanied by another supervisor at the centre.

Evidence of L., [Child 4]'s mother

L. is the mother of [Child 4]. She testified that her daughter told her about the incident on the bus the same day that it occurred. L. indicated that at the time of the events, [Child 4] had only been in the Member's class for a few weeks, and her daughter did not have a close connection with him.

The incident took place sometime in the summer of 2010, when [Child 4] was eight years old. L. came home from work, and her daughter told her about the Member's actions, indicating that she did not understand why she had not been allowed to sit with her friends as she had not done anything wrong. [Child 4] was upset as she felt that it was inappropriate for a man to ask her to lie on his lap and did not understand why she was asked to do so. The child indicated to her mother that she could have lain on her backpack instead of the Member's lap, but in fact, she was not tired when she was on the bus.

After hearing about the Member's behaviour toward her daughter, L. acted cautiously and asked clarifying questions. The next morning, L. went to the centre to speak with [...] about the Member's conduct, and Ms. [...], in turn, contacted the CAS.

Documentary Evidence

Counsel for the College also entered the following documents into evidence:

Letter of February 18: (Exhibit 6)

This letter, dated February 18, 2011, is correspondence from the College to the Member. The letter mentions that the College notified the Member in writing of the employer report filed against him on two occasions: the first time via courier and a second time by regular post. In the letter, the College requests that the Member sign an undertaking stating that he will refrain from engaging in the practice of early childhood education.

Undertaking and Acknowledgment (Exhibit 7)

This document, signed by the Member on October 11, 2011, indicates that the Member agreed to refrain from engaging in the practice of early childhood education until the completion of his criminal trial. According to the document, he consented to have the fact of this agreement published on the College's public register. The Member further agreed to advise the College Registrar of the nature and particulars of any employment that he was engaging in or planning to engage in during the period that the undertaking would be in effect.

The Member also undertook to provide the Registrar with a copy of his bail conditions [Exhibit 7(a)]. According to his bail conditions, the Member had to reside with his surety, follow a curfew and notify the police of his address. Furthermore, he had to abstain from being in the company of children under the age of 16 unless he was also in the presence of an adult. He could not go to places where children under 16 would reasonably be present, including parks, schools, swimming pools and stores. The Member was also prohibited from communicating with [Child 1] and [Child 2] and could not be near their homes and schools.

SUBMISSIONS OF COLLEGE COUNSEL AS TO FINDING

Counsel for the College submitted that the Member should be found guilty of professional misconduct as alleged, citing the irrelevance of the Member's acquittal in criminal court, the failure of the Member to attend the hearing and the credibility of the witnesses.

Irrelevance of Criminal Acquittal

Counsel for the College provided the Committee with a copy of the judgment from the Ontario Superior Court of Justice trial involving the Member. Although the judgment indicates that Justice Backhouse acquitted the Member of the sexual assault charges related to [Child 1] and [Child 2], College counsel argued that the acquittal is not relevant to the matter being

heard by the Committee. The Ontario Superior Court of Justice employs the criminal standard of proof beyond a reasonable doubt, meaning that a judge cannot convict the accused if there is even slight doubt in his or her mind that the defendant is guilty. By contrast, matters being heard in a professional discipline context are held to the civil standard of proof on a balance of probabilities (more likely than not). With this background, College counsel drew a distinction between legal innocence and factual innocence, indicating that an acquittal only indicates that the judge was not convinced beyond a reasonable doubt and does not establish that the alleged events did not occur. For this reason, a criminal acquittal is inadmissible in a subsequent trial as proof that a person did not commit an offence. College counsel stated that while the Committee was given the decision from the criminal trial so that it would have the complete narrative, the Committee should not interpret Justice Backhouse's conclusions as proof of the Member's innocence in this matter. Rather, the Committee should apply the standard of proof on a balance of probabilities and should make a decision based on the evidence provided.

Member's Failure to Attend

Counsel for the College submitted that the Member's failure to attend and testify at the hearing could have a bearing on the Committee's examination of the matter. In support of this assertion, College counsel cited the Divisional Court case *Golomb v. Physicians and Surgeons of Ontario*, [1976] O.J. No.1707. In this case, the judges state that although the onus of proof rests on prosecution, if prosecution has presented a *prima facie* case—that is, a case with enough evidence to support all its claims and is sufficient for a judgment to be made in its favour—and the defence declines to testify, the judging panel may draw the inference that any evidence the defendant could have given would have hurt his or her case. College counsel stated that this principle applies to the Member's failure to attend the hearing and that the Committee is entitled to infer that the Member did not testify because any

evidence he could have provided would not have supported his defence, provided that it believes the College has presented a *prima facie* case.

Credibility of Witnesses

Counsel for the College submitted that the College has tendered direct and unchallenged evidence that the Member is guilty of professional misconduct by engaging in a pattern of boundary violations and overt sexual misconduct. College counsel stated that the three young witnesses delivered testimonies that were consistent and credible and that their stories contained common threads. Each girl was approximately seven or eight when the Member touched them inappropriately, and they all reported behaviour that demonstrated a poor sense of boundaries or a suggestion of grooming. All the incidents took place in a discreet manner. College counsel stated that in the case of [Child 1] and [Child 2], the time of day is relevant as there were hours when other adults were not around at the S[...] Centre. With respect to [Child 4], she was at the back corner of a bus, isolated from other people.

Counsel for the College further submitted that minor inconsistencies in testimonies are to be expected when an incident occurred years ago and that the Committee should not dismiss the testimony of a witness on this basis. College counsel indicated that the important issue is that the Committee finds the evidence, as a whole, sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. College counsel stated that even if the Committee is left in doubt about whether the Member precisely touched the private areas of [Child 1] and [Child 2], there is ample evidence that he engaged in improper conduct that reflects clear boundary violations and was disgraceful, dishonourable and unprofessional.

DECISION

i. Onus and Standard of Proof

The College bears the onus of proving the allegations contained in the Notice of Hearing dated April 22, 2013 on a balance of probabilities (more likely than not), based on clear, convincing and cogent evidence, in accordance with the Supreme Court of Canada's decision in *F.H. v. McDougall*, [2008] 3 S.C.R. 41.

ii. Findings of Fact

The Committee finds the following as facts:

1. The Member has been a member of the College of Early Childhood Educators (Registration number 04063) since March 26, 2009.
2. From March 2001 until June 2004, the Member was employed at the S[...] Centre as an early childhood educator.
3. In or about August 2004, the Member was employed at the J[...] Centre until 2011.
4. [Child 1] and [Child 2] attended the S[...] Centre in 2004 when they were seven or eight years old.
5. In December 2010, [Child 1] and [Child 2], ages 14, came forward with allegations that the Member had sexually abused them while they were under his care at the S[...] Centre in 2004.
6. The Member once put his hand down the back of [Child 1]'s pants and patted her buttocks, and the Member pinched her during a game.
7. When [Child 2] was around seven, the Member called her over, unzipped her pants, put his hand down her pants and fondled her vagina on approximately ten occasions.
8. In 2010, [Child 4], age seven or eight, disclosed to her mother that while riding on a school bus with the Member, she put her head on his lap, and then the Member proceeded to rub or stroke her head.
9. On January 12, 2011, the Member was charged with two counts of sexual exploitation, two counts of sexual interference and two counts of sexual assault. Due to his arrest, the Member was placed on an unpaid leave of absence from the J[...] Centre.

10. On November 2, 2012, following a three-day trial, Justice Backhouse of the Superior Court of Justice found the Member not guilty in respect of complainants [Child 1] and [Child 2].

iii. Decision

Having considered the evidence and onus and standard of proof, and the submissions made by counsel for the College, the Committee finds that the facts support a finding of professional misconduct. In particular, the Committee finds that the Member committed acts of professional misconduct as alleged, more particularly breaches of Ontario Regulation 223/08, section 2, subsections (3), (8) and (10) and Standards III.A.I, V.A.I and V.B of the College's *Code of Ethics and Standards of Practice*.

REASONS FOR DECISION

The Committee found the witness testimonies to be, on the whole, credible and consistent. The evidence given by [Child 1] and [Child 2] contain a number of relevant similarities, including the Member's behaviour towards certain children at the centre and the arrangement of the school-age room.

[Child 1] and [Child 2] painted similar portraits of the Member, both describing him as physically demonstrative with young girls in his class. [Child 2] mentioned that the Member would give hugs to female students, and both witnesses stated that he had girls sit on his lap. In particular, [Child 1] testified that [Child 2] would sit on the Member's lap, which is consistent with [Child 2]'s own statement that the Member would call her over to sit on his lap and touch her vagina. Both girls recalled seeing their classmate [Child 5] sitting on the Member's lap.

Furthermore, both of their testimonies include factors that could have prevented the Member's actions from coming to light. [Child 1] and [Child 2] described the school-age room in a similar manner, both indicating that the "teacher's desk" was positioned across from the doorway so that a person walking into the room would only be able to see the front of the

desk and not necessarily anything happening behind it. The girls both testified that the number of adults in the room would vary throughout the day. [Child 1] alluded to periods when few parents would be coming in and out of the centre, and [Child 2] specified that there were times when the Member was the only staff member in the room. [Child 1] and [Child 2] indicated that the Member touched them inappropriately when they were approximately seven or eight years old, and they both stated that since he was an authority figure, they felt that they should not say anything.

Moreover, while the Member's failure to attend the hearing was not, in and of itself, a determining factor in the Committee's finding, the Committee notes that no evidence has been provided contradicting the statements made by [Child 1] and [Child 2]. As such, the Committee accepts the testimonies given by these witnesses and conclude that the Member touched the two girls in an inappropriate physical and sexual manner while they were under his professional supervision.

With respect to the evidence given by [Child 4], the Committee does have a few uncertainties. The Committee is not disputing the general particulars of her testimony—that she sat at the back of the bus with the Member, that she lay her head on his lap and that the Member rubbed or stroked her head in some manner. There are, however, certain inconsistencies between [Child 4]'s testimony and the 2010 CAS report summary in the Notice of Hearing dated April 22, 2013 (Exhibit 2). [Child 4] testified that the Member called her to sit with him and asked her to put her head on his lap, but a few statements in the CAS report summary seem to suggest that the child previously recalled going to sit with him on her own accord and that she did not remember the Member asking her to do anything. There also seems to be some discrepancy between the Notice of Hearing and [Child 4]'s testimony regarding whether the child felt uncomfortable at the time, and the Committee wonders if concerned adults unconsciously influenced how she later felt about the incident.

Even if the Committee accepts that the child laid her head on the Member's lap and that the Member proceeded to rub or stroke her head, the Committee is hesitant to state that such actions would indisputably constitute a boundary violation. While the Committee does not tolerate grooming of any kind, it does not want to qualify the act of rubbing or stroking heads as professional misconduct, given that there may be early childhood educators who nurture and comfort children this way without any malicious or sexual intent. The Committee understands that College counsel was, in all likelihood, attempting to establish a pattern of behaviour, but this incident may not be an ideal example of grooming.

Despite these reservations, the Committee believes that the evidence provided by [Child 1] and [Child 2] sufficiently demonstrates that the Member is guilty of all the allegations brought against him by the College. The Member committed acts of physical, sexual, psychological and emotional abuse, violating subsection 2(3) of Ontario Regulation 223/08. [Child 1] testified that the Member pinched her during a game, and the Committee considers such an act to be physical abuse. Furthermore, the Member engaged in sexual abuse by touching [Child 1]'s buttocks and fondling [Child 2]'s vagina when they were seven or eight, in contravention of Standard V.A.1 of the College's Standards of Practice. The Committee considers the Member's conduct to be psychological abuse as he took advantage of his position of authority in his relationships with the two girls. Both [Child 1] and [Child 2] stated that while they felt that what was happening to them was wrong, they did not report the Member's sexual conduct because he was an adult. There is also indication of emotional abuse as the incidents stayed with the witnesses over the years. In particular, the Committee notes that [Child 2] experienced feelings of panic when she saw the Member at a Best Buy.

By engaging in such abuse, the Member has failed to maintain the standards of the profession, contrary to Ontario Regulation 223/08, subsection 2(8). His acts of sexual abuse demonstrate his failure to maintain a safe and healthy learning environment, contrary to

Standard III.A.1, as well as his failure to maintain clear and appropriate boundaries in his professional relationships with children under his supervision, contrary to Standard V.B.

The conduct exhibited by the Member—sexual abuse of children under his care—is unacceptable for a member of the profession. This display of moral turpitude would reasonably be regarded by members as disgraceful, dishonourable and unprofessional, contrary to subsection 2(10) of Ontario Regulation 223/08.

SUBMISSIONS OF COLLEGE COUNSEL AS TO PENALTY

Counsel for the College submitted that the Committee should direct the Registrar to revoke the Member's Certificate of Registration, adding that the revocation should be reflected on the public register. College counsel further submitted that the Committee's decision be published on the College website and in the College newsletter with the Member's name but without any information identifying the witnesses.

College counsel stated that the proposed penalty is appropriate in light of the serious misconduct committed by the Member. Counsel for the College asserted that revocation is necessary as it would pose a real risk to the public if the Member were allowed to practise as an early childhood educator. College counsel cited aggravating factors, including the age and vulnerability of the children involved and the fact that multiple incidents occurred over a lengthy period of time, adding that there were no mitigating factors that suggest an educative penalty would be appropriate. Counsel for the College indicated that publication with the Member's name would act as a general deterrent, dissuading other members of the profession from engaging in similar conduct.

Counsel for the College stated that the College's submissions were in line with previous penalties imposed by the Committee and by other professional regulatory bodies, referencing

College of Early Childhood Educators v. Jeffrey Joseph, 2011 and Ontario College of Teachers v. Marcellini, 2004 LNONCTD 22.

PENALTY DECISION

After considering the submissions made by College counsel, the Committee makes the following order as to penalty:

1. The Registrar is directed to revoke immediately the Member's Certificate of Registration, and a notation of the revocation shall be recorded on the public register.
2. The Registrar is directed to record the results of this hearing on the public register.
3. The Discipline Committee's finding and order shall be published, with the Member's name, in full on the College's website and in summary in the College's official publication *Connexions* without any information identifying the children and families involved.

REASONS FOR PENALTY DECISION

The Committee has ordered a penalty consistent with the submissions made by College counsel, having determined that the proposed penalty is reasonable and serves to protect the public.

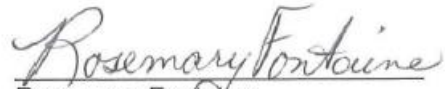
Revocation is appropriate in this matter, given that the Member failed to appreciate his position of trust and displayed no sense of appropriate boundaries. Through his egregious conduct, the Member has demonstrated that he is unsuitable to hold a Certificate of Registration. Sexual abuse is misconduct of a very serious nature, and to allow the Member to practise as an early childhood educator would be to create a risk for members of the public.

Publication on the public register, College website and in the newsletter *Connexions* promotes awareness of the high standards to which the College holds its members, indicating to the public that the profession will not tolerate this kind of conduct. Publication acts as a general deterrent, discouraging other early childhood educators from engaging in similar conduct. It informs members of the profession that sexual abuse will not be tolerated and will result in the harshest penalty—revocation. The Committee has chosen to publish the Member's name in order to enhance public protection: potential employers will be able to verify on the website and public register that the Member's registration was revoked following a disciplinary hearing. On the whole, publication with the Member's name serves the public interest by reassuring and informing the community that the profession acts decisively when matters of this nature are brought to its attention.

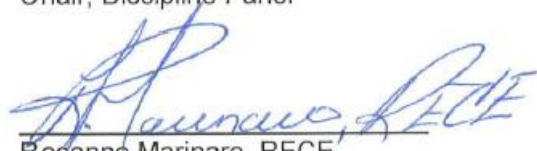
The Committee has, at the same time, ordered that its decision be published without any information identifying the children and families involved. This measure serves to protect the identity of the victims, and the Committee considers publication in this form to be consistent with its mandate to protect the public.

In conclusion, the Committee is confident that the penalty serves the interests of the public and the profession.

Date: May 27, 2013



Rosemary Fontaine
Chair, Discipline Panel



Rosanne Marinaro, RECE
Member, Discipline Panel



Nici Cole, RECE
Member, Discipline Panel