

**DISCIPLINE COMMITTEE  
OF THE ONTARIO COLLEGE OF TEACHERS**

**IN THE MATTER OF** the *Ontario College of Teachers Act, 1996*, and the Regulation (Ontario Regulation 437/97) thereunder;

**AND IN THE MATTER OF** a discipline proceeding against Phillip John Fernandez, a member of the Ontario College of Teachers.

PANEL:            Don Cattani, Chair  
                      Ted Coulson  
                      Amin Saab

BETWEEN:	)	
	)	Heather Meredith,
	)	McCarthy Tétrault LLP,
	)	for Ontario College of Teachers,
ONTARIO COLLEGE OF TEACHERS	)	assisted by Trevor Evans,
	)	Senior Law Clerk
- and -	)	
	)	Phillip John Fernandez
Phillip John Fernandez	)	was not present or represented
(CERTIFICATE # 259574	)	
	)	Scott Hutchison,
	)	Stockwoods LLP,
	)	Independent Legal Counsel
	)	
	)	Heard: September 20, 2006

**REASONS FOR DECISION, DECISION AND ORDERS**

This matter came on for hearing before a panel of the Discipline Committee (“the Committee”) on September 20, 2006 at the Ontario College of Teachers (“the College”) at Toronto.

A *Notice of Hearing (Exhibit 1A)*, dated July 14, 2006 was served on Phillip John Fernandez, requesting attendance before the Discipline Committee of the Ontario College of Teachers on September 13, 2006 to set a date for a hearing, and specifying the charges. The hearing was subsequently set for September 20, 2006. (*Exhibit 1 – Affidavit of Service of Audley Trevor Evans, sworn August 4, 2006*)

The Member was not in attendance at the hearing, nor was he represented by counsel. The Affidavit of Audley Trevor Evans (“Evans”), sworn September 19, 2006 (*Exhibit 2*) confirms that the Member received the *Notice of Hearing*, full disclosure documents and was aware that a hearing date would be set. A letter was sent to Evans from the Member confirming that he had received and read the materials described above and that the hearing should proceed in his absence. (*Exhibit 2, Tab C*) Thereafter Evans wrote to the Member advising of the date of the hearing. (*Exhibit 2, Tab D*). The Committee was satisfied that the Member was aware of the date of the hearing and proceeded in the Member’s absence.

### The Allegations

The allegations against Phillip John Fernandez (“the Member”) in the *Notice of Hearing* are as follows:

**IT IS ALLEGED** that Phillip John Fernandez is guilty of professional misconduct as defined in subsections 30(2) and 40 (1.1) of the *Ontario College of Teachers Act* (the “Act”), in that:

- (a) he failed to maintain the standards of the profession, contrary to Ontario Regulation 437/97, subsection 1(5);

- (b) he abused a student or students physically, sexually, verbally, psychologically or emotionally contrary to Ontario Regulation 437/97, subsection 1(7);
- (c) he failed to comply with the Act and the *Education Act*, Revised Statutes of Ontario, 1990, chapter E.2, and specifically section 264(1)(c) thereof or the Regulations made under those Acts, contrary to Ontario Regulation 437/97, subsections 1(14) and (15);
- (d) he contravened laws, the contravention of which is relevant to the Member's suitability to hold a certificate of qualification and registration, contrary to Ontario Regulation 437/97, subsection 1 (16);
- (e) he contravened a law, the contravention of which has caused students under the Member's professional supervision to be put at or to remain at risk contrary to Ontario Regulation 437/97, subsection 1(17);
- (f) he committed acts that having regard to all the circumstances would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to Ontario Regulation 437/97, subsection 1(18);
- (g) he engaged in conduct unbecoming a member, contrary to Ontario Regulation 437/97, subsection 1(19); and
- (h) he engaged in sexual abuse of a student or students of a nature defined in sections 1 and 40 (1.1) of the *Act*.

**PARTICULARS OF THESE ALLEGATIONS ARE AS FOLLOWS:**

1. Phillip John Fernandez (the "Member") is a member of the Ontario College of Teachers.
2. At all material times, the Member resided in [XXX] and was employed by the Durham Catholic District School Board (the "Board") as a teacher at [XXX].

3. At all material times, [XXX], whose date of birth is [XXX], was a female student of the Board at an [XXX] school in [XXX].

4. On or about 15 February 2006, the Member was found guilty in the Ontario Superior Court of Justice, of charges that he on or between 5 July 2001 and 20 February 2003, at the [XXX] in the Regional Municipality of Durham:

- (a) unlawfully did commit a sexual assault on [XXX] contrary to the Criminal Code (*Canada*);
- (b) unlawfully did, for a sexual purpose, invite [XXX], a person under the age of 14 years, to touch directly with a part of her body, to wit: vagina, the body of the Member, contrary to the Criminal Code (*Canada*); and
- (c) unlawfully did, for a sexual purpose, touch [XXX], a person under the age of 14 years, directly with a part of his body, to wit: penis, contrary to the Criminal Code (*Canada*).

5. As a result of that conviction, the Member was sentenced, on 26 April 2006, to three years imprisonment. The Court also ordered that:

- (a) his [XXX];
- (b) he [XXX] and
- (c) he be prohibited from using a computer system within the meaning of Section 342.1(2) of the *Criminal Code* (Canada) for the purpose of communicating with a person under the age of fourteen years, for a period of ten years from 26 April 2006.

6. The member has not appealed either the conviction or the sentence which was imposed on him.

7. On or about 27 March 2006, the employment of the Member by the Board, was terminated.

### 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*. The Chair, on behalf of the Member, entered a plea of not guilty to the allegations.

### The Evidence

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

#### *Registered Member Information* (Exhibit 3)

Phillip John Fernandez is a member of the Ontario College of Teachers as shown on the *Registered Member Information*.

#### *Brief of Court Documents – Her Majesty the Queen v. Phillip Fernandez*

(Exhibit 4)

A *Brief of Court Documents* (“*Exhibit 4*”) with respect to the criminal proceedings against the Member was submitted into evidence. This *Brief* consisted of:

- A. Certified copy of Indictment dated March 3, 2005
- B. Superior Court Justice – Excerpts of Proceedings before the Honourable Justice H. McLean and Jury on 25 February 2006 at Whitby, Ontario

- C. Superior Court of Justice - Transcript of Submissions on Sentence before the Honourable Justice H.R. McLean on April 10, 2006
- D. Superior Court of Justice Transcript of Reasons for Sentencing before the Honourable Mr. Justice McLean on April 26, 2006 at Whitby
- E. Prohibition Order dated April 26, 2006
- F. Order to [XXX] dated April 26, 2006
- G. Order [XXX] dated April 26, 2006
- H. Report to a Provincial Court Judge or the Court dated April 27, 2006.

The evidence presented in the Court Documents confirms that on or about 15 February 2006, the Member was found guilty in the Ontario Superior Court of Justice, of one charge of sexual assault and two charges of sexual touching, specifically that he on or between 5 July 2001 and 20 February 2003, at the [XXX] in the Regional Municipality of Durham:

- (a) unlawfully did commit a sexual assault on [XXX] contrary to the Criminal Code (*Canada*);
- (b) unlawfully did, for a sexual purpose, invite [XXX], a person under the age of 14 years, to touch directly with a part of her body, to wit: vagina, the body of the Member, contrary to the Criminal Code (*Canada*); and
- (c) unlawfully did, for a sexual purpose, touch [XXX], a person under the age of 14 years, directly with a part of his body, to wit: penis, contrary to the Criminal Code (*Canada*).

As a result of that conviction, the Member was sentenced, on 26 April 2006, to three years imprisonment. The Court also ordered that:

- (a) his [XXX];
- (b) he [XXX] and
- (c) he be prohibited from using a computer system within the meaning of Section 342.1(2) of the *Criminal Code* (Canada) for the purpose of communicating with a person under the age of fourteen years, for a period of ten years from 26 April 2006.

### Decision

#### (i) Onus and Standard of Proof

The College bears the onus of proving the allegations in accordance with the standard of proof with which the Committee is familiar as set out in *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977) 15 O.R. (2d) 477. The standard of proof applied by the Committee, in accordance with the *Bernstein* decision, was a balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the Committee. The Committee also recognized that the more serious the allegation to be proved, the more cogent must be the evidence. The Committee viewed the allegations in this case to be very serious.

#### (ii) 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 Phillip John Fernandez

committed acts of professional misconduct as alleged, more particularly breaches of Ontario Regulation 437/97, subsections 1(5), 1(7), 1(14), 1(15), 1(16), 1(17), 1(18), 1(19) and that he engaged in sexual abuse of a student of a nature defined in sections 1 and 40 (1.1) of the *Act*.

### Reasons for Decision

It is uncontested that on or about 15 February 2006 the Member was found guilty in the Ontario Superior Court of Justice, of one charge of sexual assault and two counts of sexual touching of a girl under the age of fourteen years, contrary to the provisions of s.151 of the *Criminal Code (Canada)*.

It is also uncontested that, as a result of that conviction, the Member was sentenced, on 26 April 2006, to three years imprisonment. The Court also ordered that [XXX]; he [XXX] and he be prohibited from using a computer system within the meaning of Section 342.1(2) of the *Criminal Code (Canada)* for the purpose of communicating with a person under the age of fourteen years, for a period of ten years from 26 April 2006. (*Exhibit 4, Tab D*)

Rule 13.05 and 13.06 of the *Rules of Procedure of the Discipline Committee of the Ontario College of Teachers* states as follows:

13.05            Proof of Prior Conviction or Discharge

13.05(1) Proof that a person has, in proceedings before a court in Canada, been convicted or discharged of an offence following a finding of guilt is proof, in the absence of evidence to the contrary, that the offence was committed by the person, if:

- (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
- (b) an appeal of the conviction or discharge was taken but dismissed or abandoned and no further appeal is available.

13.05(2) Sub-rule (1) applies whether or not the convicted or discharged person is a party to the proceeding.

13.05(3) A certificate of conviction or discharge or certified copy of a Court Information meeting the requirements of sub-section 22.1(3) of the *Evidence Act* (Ontario) shall be accepted by the Discipline Committee as proof that the person was convicted or discharged of the offence for purposes of sub-rule (1).

#### 13.06 Findings of Fact in Prior Proceedings

13.06(1) Where a certificate of conviction or discharge or certified copy of a Court Information has been admitted in evidence under sub-rule 13.05(3), the Discipline Committee shall also admit as ancillary to the certificate of conviction or discharge or certified copy of a Court Information the specific findings of fact contained in the court's reasons for judgment or reasons for sentence, which findings of fact are proof, in the absence of evidence to the contrary, of the facts so found.

The member has not appealed either the conviction or the sentence which was imposed on him. (*Exhibit 2, Affidavit of Audley Trevor Evans*)

Having no evidence to the contrary, the Committee accepts as proof that, the Member was found guilty of a charge that of unlawfully sexual assaulting and sexually touching [XXX], a person under the age of 14 years, contrary to the Criminal Code (*Canada*). (*Exhibit 4, Tab A*)

The Committee finds the Member's conviction of sexual assault and sexual touching constitutes acts of professional misconduct as alleged, more particularly breaches of

Ontario Regulation 437/97, subsections 1(5), 1(7), 1(14), 1(15), 1(16), 1(17), 1(18), 1(19) and he engaged in sexual abuse of a student or students of a nature defined in sections 1 and 40 (1.1) of the *Act*.

### Penalty

Counsel for the College submitted that the appropriate penalty be as follows:

1. revocation of the Member's certificate of qualification and registration; and
2. publication of the findings of the Discipline Committee, with the name of the Member in *Professionally Speaking/Pour parler profession*.

### Penalty Decision

The Committee makes the following order as to penalty:

1. The Registrar of the Ontario College of Teachers is directed to revoke the Member's certificate of qualification and registration, which the Member is to surrender immediately to the Registrar.
2. Pursuant to Section 30 (5) (3) of the Ontario College of Teachers Act, the findings and order of the Committee shall be published in summary, including the Member's name, in the official publication of the College, *Professionally Speaking/Pour parler profession*.

### Reasons for Penalty Decision

The Member is an [XXX] school teacher who was convicted of sexual assault and two counts of sexual touching of a person under the age of fourteen. The Member lured a [XXX] girl over the Internet and lied about his age, saying he was only 19 years old, when

in fact he was 35. This grooming behaviour led to a number of meetings at the Member's home with the victim over a twenty-month period. The Member engaged in sexual intercourse with the victim in his bedroom, telling his mother that he was tutoring the victim. (*Exhibit 4, Tab D*)

The Committee finds the Member's conduct to be heinous, particularly given the age and vulnerability of the victim. The interaction between the Member and the victim began on the victim's [XXX] birthday and continued for 20 months. Sexual assault began a week before her [XXX] birthday. The Member knew the victim's age and that sexual intercourse with the victim was wrong. (*Exhibit 4, Tab C*) The Member's actions violated the trust inherent to the role of a teacher by fostering an abusive relationship with a very young student for his own sexual gratification.

The Member was convicted of sexual assault of a person under the age of 14 years and sentenced to three years imprisonment. The Committee determined that the appropriate penalty is revocation of the Member's certificate of qualification and registration as well as publication of the findings and order of the Committee, with the name of the Member, in *Professionally Speaking/Pour parler profession*.

Revocation is a necessary penalty to demonstrate that the Member's conduct is unacceptable to the public and to the profession. Publication of the Member's name and a summary of the facts serves as a further rebuke of his actions.

Publication of the Committee's order also acts as a general deterrent to guide members of the profession and to inform that similar behaviour will result in a finding of professional misconduct and revocation of Certificate. The Committee is satisfied that the penalty serves to preserve the reputation of the profession and to protect the interest of the public.

Dated: September 21, 2006

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Don Cattani  
Chair, Discipline Panel

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Ted Coulson  
Member, Discipline Panel

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Amin Saab  
Member, Discipline Panel