

IN THE MATTER OF A HEARING BY  
THE DISCIPLINE COMMITTEE OF THE COLLEGE OF MASSAGE THERAPISTS  
OF BRITISH COLUMBIA CONVENED PURSUANT TO THE PROVISIONS OF  
THE *HEALTH PROFESSIONS ACT* RSBC 1996, c.183

BETWEEN:

The College of Massage Therapists of British Columbia  
(the "College")

AND:

Steven Anderson  
(the "Respondent")

**REASONS FOR DECISION**  
**(Application of the College)**

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| <b>Date and Place of Hearing:</b>                      | May 19, 2021<br>By video conference                              |
| <b>Panel of the Discipline Committee (the "Panel")</b> | Marilynne Waithman, Chair<br>Deborah Charrois<br>Evan Jeary, RMT |
| <b>Counsel for the College:</b>                        | Katrina Labun  |
| <b>For the Respondent:</b>                             | Steven Anderson  |

## **Introduction**

1. On October 8, 2020, the College issued a citation pursuant to section 37 of the *Health Professions Act* RSBC 1996, c.183 (the “HPA” or “Act”) naming Steven Anderson, former RMT, as Respondent. An amended citation was issued on April 8, 2021 (the “Amended Citation”).
2. This panel of the Discipline Committee (the “Panel”) of the College of Massage Therapists of British Columbia (the “College”) has been appointed to conduct a discipline hearing on June 14 to 25, 2021 (the “Discipline Hearing”).
3. The College has brought an application seeking orders pursuant to sections 38(3) and (4.2) of the HPA that:
  - a. The Discipline Hearing be held in private;
  - b. Any transcript of the Discipline Hearing that is made available to the public be redacted such that the names and all related identifying information of all non-expert witnesses and individuals whose treatment records are in evidence be withheld; and
  - c. The Discipline Hearing be conducted by video-conference in accordance with the “Hearing by Video-Conference Protocol” submitted by the College.
4. Prior to the pre-hearing conference, the Panel advised the Respondent that he would be provided with an opportunity to make written and/or oral submissions. He appeared at the pre-hearing conference and took no position on the College’s application.

## **Background**

5. The Amended Citation alleges that the Respondent committed professional misconduct in the course of providing massage therapy to four former patients, who are complainants (the “Complainants”). The Amended Citation alleges that the Respondent touched the Complainants in private areas without their consent and engaged in sexual touching of three of the Complainants.



8. On March 17, 2020, the Provincial Health Officer (“PHO”) declared a public health emergency due to COVID-19. On March 18, 2020, the Province declared a state of emergency, which has been extended approximately every two weeks since that time.
9. The PHO has made several orders and directives. On May 7, 2021, the PHO issued a ban on gatherings and events which has no expiration date.
10. The College provided a media article regarding the Respondent dated February 17, 2019 by Global News titled “B.C. massage therapist suspended over alleged sexual misconduct, ‘non-therapeutic’ touching.”

### **Legal Framework and Parties Submissions**

#### ***Hearing held in private***

11. The College seeks an order that the Discipline Hearing be held in private pursuant to section 38(3) of the HPA, which provides:

38 (3)A hearing of the discipline committee must be in public unless

(a)the complainant, the respondent or a witness requests the discipline committee to hold all or any part of the hearing in private, and

(b)the discipline committee is satisfied that holding all or any part of the hearing in private would be appropriate in the circumstances.

12. The College seeks an order that the transcript that is publicly available be redacted, pursuant to section 38(4.2) of the HPA, which provides:

38 (4.2)The discipline committee may

(a)grant an adjournment of a hearing,

(b)allow the introduction of evidence that is not admissible under subsection (4.1), or

(c)make any other direction it considers appropriate

if the discipline committee is satisfied that this is necessary to ensure that the legitimate interests of a party will not be unduly prejudiced.

13. The College submits that the requirements of section 38(3) are met. It submits that the Complainants have requested that the Discipline Hearing be held in private. At paragraph 20 of its submissions, the College submits that holding the hearing in private would be “appropriate in the circumstances” for the following reasons:

- a. The Citation includes allegations of, *inter alia*, sexual misconduct and inappropriate touching of sensitive and private areas of the body. Each of the Complainants is expected to testify that the Respondent touched them inappropriately in sensitive areas of the body, including the genital and anal regions. The Complainants will reasonably experience difficulty and anxiety in testifying about these subjects.
  - b. The allegations in the Citation arise in the context of a therapeutic relationship, in which the Complainants each had a reasonable expectation of privacy. The College intends to introduce as part of its case the confidential treatment records of each of the Complainants, as well as those of two other individuals.
  - c. The matter has already been the subject of media attention. It is reasonable to expect that the media will report on the Discipline Hearing. If the media is permitted to attend the Discipline Hearing, the Complainants' privacy will be compromised.
  - d. Unlike a court, the Panel has no authority under the HPA to order a publication ban of general application. The only practical way to protect the Complainants' identities and privacy is to conduct the Discipline Hearing in private.
  - e. Holding the Discipline Hearing in private will not prejudice the Respondent. He remains entitled to avail himself of all of the procedural safeguards in the HPA and available at common law.
14. The College argues that while discipline hearings are presumptively held in public, that must be read alongside the College's duties under section 16(1) in the HPA to serve and protect the public, and to exercise its powers and discharge its responsibilities in the public interest.
15. The College submits that the public interest includes encouraging the reporting of misconduct, including sexual misconduct, by College registrants. Reporting is encouraged where potential sexual complainants are not concerned that their identities, health records, and testimonies will be publicly disclosed. The College relies upon the Supreme Court of Canada's statement in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para 25, which it notes has been cited with approval by this Discipline Committee:
- In the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting: *Canadian Newspapers Co. v. Canada (Attorney General)*, 1988 CanLii 52 (SCC), [1988] 2 S.C.R. 122.
16. The College submits that its public interest objective of transparency can be achieved without compromising the privacy of the Complainants. The outcome of the Discipline Hearing will be public as required by the HPA. Further, members of the public can access a redacted record of the proceedings.

17. The College submits that orders that the Discipline Hearing be held in private and that the public transcript be redacted are consistent with prior decisions of this Discipline Committee: *Re Morgan* (December 16, 2019 and July 17, 2020), *Re Henniger* (October 30, 2020) and *Re Krekic* (February 17, 2021).

### ***Discipline Hearing held by video-conference***

18. The College seeks an order that the Discipline Hearing be held via video-conference pursuant to section 38(4.2) of the HPA.
19. The College submits that British Columbia has declared a State of Emergency due to the COVID-19 pandemic and in-person meetings and interior gatherings have been prohibited by the PHO's orders.
20. The College estimates that an in-person hearing would require the simultaneous attendance of at least 9 people in the hearing location at any one time (three panel members, two lawyers, one hearing reporter, one representative from the College, the Respondent, and one witness at a time). The gathering of this number of people in a boardroom would be contrary to PHO's orders.
21. The College submits that an order directing the Discipline Hearing proceed by video-conference is consistent with public health guidelines and the "legitimate interest" of the parties in ensuring that the Discipline Hearing is conducted in a manner that promotes the safety of participants. The College submits that the public interest includes the interest in conducting hearings in a timely manner and relies upon *Re Krekic* in that regard.
22. The College relies upon the following passage from *Law Society of Ontario v. Regan*, 2020 ONLSTA 15 in submitting that holding the hearing virtually is fair to the Respondent:

[10] The courts have found that videoconference hearings are necessary and appropriate during the present pandemic. In *Arconti v. Smith*, 2020 ONSC 2782, the court ordered that examinations for discovery take place remotely. In the Australian case of *Capic v. Ford Motor Company of Australia Limited*, [2020] FCA 486, cited with approval in *Arconti*, the court ordered that a six-week trial take place by videoconference. In *Association of Professional Engineers v. Rew*, 2020

ONSC 2589, and *Natco Pharma (Canada) Inc. v. Minister of Health*, 2020 FC 618, judicial reviews were ordered to take place by videoconference. In *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 ONCA 303, the Court of Appeal ordered that an appeal be heard in writing without any oral appearance.

[11] Several principles emerge from these decisions. First, and perhaps most important, the administration of justice should not wait for the pandemic to be over. While litigants may be concerned something will be lost in a videoconference hearing, “[s]omething will be lost if court business does not continue, as best as can be managed, during the COVID-19 crisis...”: *Rew* at para. 9.

[12] Second, using technology for hearings is here to stay, and legal professionals and litigants must adapt. As Justice Myers said in *Arconti* at paras. 19 and 33:

In my view, the simplest answer to this issue is, “It’s 2020”. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

...

In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education. Parties and counsel may require some delay to let one or both sides prepare to deal with unfamiliar surroundings.

[13] Third, the courts have emphasized that there is nothing unfair about a videoconference hearing. As noted in *Arconti* at para. 32, all parties have the same opportunity in a videoconference hearing to participate, be heard, put forward their evidence and challenge the evidence of the other side.

[14] Fourth, the courts recognize that videoconference technology has disadvantages. These can include technical problems like unstable internet, risks like a witness being coached off camera and the decrease in solemnity in a witness sitting in their home rather than in a formal hearing room. These concerns, the courts have held, generally do not outweigh the advantages of proceeding remotely or the effects of delaying proceedings on the administration of justice.

[15] Moreover, many of the disadvantages can be mitigated. For example, the affirmation and oath this Tribunal uses for videoconference hearings requires the witness to promise there is no one with them during their testimony and that they will not look at notes and materials without telling the panel. A participant can be asked to pan their camera around the room to show there is no one there. The Tribunal has produced a guide for parties and counsel to assist with using Zoom technology, and Tribunal staff will conduct a Zoom test session before the hearing upon request.

23. The College also noted that the Respondent had indicated in an email prior to the pre-hearing conference that he does not have a computer. The College indicated that it is prepared to provide the Respondent with access to a computer for the Discipline Hearing.

## **Analysis and Findings**

### **Private hearing**

24. In acting as the Panel of the Discipline Committee, the Panel discharges its duties and responsibilities under the HPA. The Panel must hear and determine a matter set for hearing by citation pursuant to section 37 of the HPA.
25. Section 38(3) of the HPA provides that discipline committee hearings are presumptively held in public. As was expressed in *Re Morgan* (December 16, 2019) at paragraph 54, this Panel “recognizes and appreciates the reasons a hearing is presumptively held in public, many of which are expressed in the “open court principle” which fosters public confidence and understanding in the administration of justice. The Panel also recognizes the importance of a public hearing in the professional regulation context to ensure that discipline procedures are transparent, objective, impartial and fair.”
26. Section 38(3) in the HPA expressly contemplates that while a public hearing is the default, it is not absolute, and there will be circumstances where discipline hearings are to be held in private.
27. There are two requirements for a hearing to be held in private. First, the complainant, respondent or a witness must request that the discipline committee hold all or any part of the hearing in private. Second, the discipline committee must be satisfied that holding all or any part of the hearing in private would be appropriate in the circumstances. Both requirements must be met.

### ***Request for private hearing***

28. The Panel finds that all of the Complainants requested that the Discipline Hearing be held in private.

29. The Panel is therefore satisfied that the first requirement of section 38(3) of the HPA has been met.

***Appropriate in the circumstances***

30. The second requirement is that the Panel must be satisfied that holding the hearing in private is appropriate in the circumstances.
31. The Complainants' requested that the Discipline Hearing be held in private because the matters are private, engage safety concerns in talking about alleged inappropriate touching, cause them difficulty and struggle in speaking about the incidents, and would reveal their identities publicly.
32. The Panel finds that there has been media attention to this matter, and it is reasonable to expect that the Discipline Hearing may also attract media attention.
33. The Panel agrees with the following reasoning set out in the *Re Morgan* (December 16, 2019) decision:

70. Section 38(3) of the Act provides the Panel with a broad discretion to decide whether holding all or any part of a hearing is appropriate in the circumstances. The Act does not provide any specific criteria by which appropriateness is to be determined. The Panel is to assess appropriateness "in the circumstances".

71. In considering the circumstances, the Panel notes that both Complainants requested the hearings be held in private because the details of their complaints are highly personal, and they do not want them to be publicly disclosed or available. The Panel recognizes the Complainants' personal privacy interests. The particulars of the allegations in this case are sexual in nature. In addition, the conduct at issue is alleged to have occurred during the course of providing massage therapy services and in the context of a confidential therapeutic patient / therapist relationship. The Panel accepts that the hearing will involve a review of the Complainants' clinical records and personal health information. The Panel does not find that the Complainants are requesting the hearing be held in private in order to simply avoid embarrassment or unwanted attention.

72. The Panel accepts the College's submission, which was uncontested, that the Citation is posted on the College's website in a form that identifies the Respondent but not the Complainants. The Panel has reviewed the media publications and accepts the College's submission that the past media coverage indicates that this hearing is likely to attract the interest of the public and the media. If that occurs, the Complainants' privacy interests would be compromised.

73. In addition to the Complainants' personal privacy interests, the Panel has also considered that there is a broader social interest in this case, given the sexual allegations. There is a public interest in encouraging the reporting of sexual misconduct and the participation of Complainants and witnesses in proceedings that

involve allegations of sexual misconduct. The Panel finds the Supreme Court of Canada's comments in *A.B. v. Bragg Communications Inc.* at para 25 convincing:

[25] In the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting: *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122.

34. The Panel finds that all of the above reasons apply with equal force in this case as well.
35. The Panel also agrees with the *Re Morgan* decision that holding the hearing in private but releasing a redacted transcript will achieve an appropriate balance of interests:

80. The Panel notes that not only is the Citation public, but the HPA requires public notification pursuant to section 39.3 of the HPA of a determination made pursuant to section 39(1) and any orders that follow under section 39.

81. Moreover, the Panel has considered that the panel in *Martin* directed that the transcripts of the closed portions of the hearing in that case be made available to the public, at the expense of the person wishing to purchase the transcripts, in redacted form with the names and any information that could reasonably be expected to identify the Complainants withheld. The Panel considers the same direction to be appropriate in these circumstances. This would address the desirability of public scrutiny of the discipline process, and the Respondent's desire that the public that learned of the allegations should also be able to learn the full extent of the matter.

82. Furthermore, the Panel considered whether a publication ban would be able to achieve the same result with a lesser impact. The College takes the position that in the criminal realm, publication bans are routinely ordered in cases of sexual assault when requested, which allow the Court to protect alleged victims of sexual assault and witnesses while maintaining an open hearing. The College takes the position that the Panel does not have jurisdiction to order a publication ban under the HPA. The Respondent did not challenge this position in his submissions and appears to agree with it. In this regard, the Respondent does not propose a publication ban as an alternate order but instead proposes that redactions be made to the hearing transcript and decision issued by the Discipline Committee after the fact. The Respondent argues such redactions "would be akin to a publication ban". The Panel disagrees. If the hearing were open to the public and the media, the Complainants' identities and personal information could be released prior to and in spite of any redactions that might follow to the transcript and the decision. There would be nothing preventing publication of that information, which would render any subsequent redactions meaningless.

36. The Panel is satisfied that holding the Discipline Hearing in private would be appropriate in the circumstances of this case. The Panel agrees with the finding at para 51 in *Re Krekic* that "This approach allows transparency so that the public may scrutinize the discipline proceeding, it respects the privacy interests of the

Complainants, and it fosters the public interest in encouraging the reporting of sexual misconduct and participating in disciplinary hearings relating to those complaints.” The Panel also notes that this approach is consistent with past orders made by the Discipline Committee.

### **Discipline Hearing by Video-Conference**

37. The College has a public interest mandate pursuant to section 16 of the HPA which includes investigating complaints about registrants and taking disciplinary action in certain circumstances. There is a legitimate interest in ensuring that the Discipline Hearing is conducted in a timely manner in furtherance of the College’s public protection mandate. The College must continue to serve its mandate and the Discipline Committee must continue to function during the COVID-19 pandemic.
38. The Panel recognizes that there is a public health emergency, a state of emergency and there are public health orders and guidelines presently in place on gatherings. All of those remain in place at the present time and it is impossible to predict the course of the pandemic in future. This Panel agrees with the College that there is a public interest in holding the Discipline Hearing in a manner which is safe for the participants.
39. The Panel finds that holding the hearing by video-conference is the most appropriate course in the circumstances.
40. Like prior panels of this Discipline Committee, this Panel also finds the passage quoted above in the *Regan* decision to be persuasive.
41. The Panel has reviewed the College’s proposed protocol and finds it appropriate.
42. The Panel also appreciates the College volunteering to provide the Respondent with access to a computer for the Discipline Hearing and agrees that would be appropriate in the circumstances of this case.

## **Summary**

43. The Panel directs:

- a. The Discipline Hearing be held in private;
- b. Any transcript of the Discipline Hearing that is made available to the public be redacted such that the names and all related identifying information of all non-expert witnesses and individuals whose treatment records are in evidence be withheld; and
- c. The Discipline Hearing be conducted by video-conference in accordance with the "Hearing by Video-Conference Protocol" submitted by the College.

Dated: May 27, 2021



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Marilynne Waithman, Chair

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Deborah Charrois

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Evan Jeary, RMT

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