

IN THE MATTER OF THE *HEALTH PROFESSIONS ACT* RSBC 1996, c.183

BETWEEN:

The College of Massage Therapists of British Columbia

(the "College")

AND:

Stephen Bartlett

(the "Respondent")

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

Date and Place of Application:

Pre-hearing conference (video-
conference)
January 11, 2022

Panel of the Discipline Committee

Marilynne Waithman, Chair
Emily Bissonnette, RMT
Michael Wiebe, RMT

Counsel for the College:

Elizabeth Allan

For the Respondent:

Appearing on his own behalf

Introduction

1. On August 25, 2021, the College issued a citation (the “Citation”) pursuant to section 37 of the *Health Professions Act* RSBC 1996, c.183 (the “HPA” or “Act”) naming Stephen Bartlett as Respondent.
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 March 7 to 11, 2022 (the “Discipline Hearing”).
3. The College has brought an application seeking the following orders pursuant to sections 38(3) and (4.2) of the HPA:
 - 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 be withheld;
 - c. the Discipline Hearing be conducted by video-conference in accordance with the “Hearing by Video-Conference Protocol” at Appendix “A” of the College’s written submission;
 - d. any witness may give their testimony by video-conference in accordance with the Protocol; and
 - e. The College be permitted to adduce the evidence of the College witnesses by affidavit.
4. The Respondent takes no objection to any of the above orders being sought by the College.

Background

5. The Citation was served on the Respondent on September 7, 2021. It alleges, broadly, that the Respondent engaged in inappropriate conversation and touched two former patients of the Respondent (collectively, the “Complainants”) without their consent. There are also allegations pertaining to online advertising by the Respondent.

6. The College anticipates calling both of the Complainants as witnesses at the Discipline Hearing.
7. The Complainants have both requested that the Discipline Hearing be held in private, as follows:
 - a. By email dated December 3, 2021 to Elizabeth Allan, the College's legal counsel, █████ stated, "I'm writing to request my part of CMTBC v. Bartlett be held in private due to the sensitive nature of the case (regarding physical assault, the specifics of my gender identity and medical information that was verbally given to the defendant.)"
 - b. By email dated December 6, 2021 to Ms. Allan, █████ stated, "After some consideration and due to nature of my complaint; including that it involves my medical history and relates to personal relationships, I request the discipline meeting to be held in private."
8. On July 1, 2021, the province entered into Step 3 of the pandemic restart plan. The Provincial Health Order continues to have guidance in place regarding wearing masks indoors and social distancing.
9. On December 20 and 22, 2021, additional restrictions were put into place, which include limits on the number of individuals permitted to gather indoors. While not all of these measures may apply to this hearing, the College notes that it is indicative of the types of measures being enacted to reduce the risk of transmission of COVID-19.
10. The College estimates that the Discipline Hearing will include at least 10 individuals present at any one time. The vaccination status of participants is unknown.
11. The public health measures relating to this pandemic are constantly changing and it is not possible to forecast the pandemic status or the measures which will be in place at the time of the Discipline Hearing.

Legal Framework and Parties Submissions

12. The College submits that sections 38(3) and (4.2) of the HPA provide the Panel with broad discretion to make the orders sought by the College.
13. 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.
14. The College submits that the requirements of section 38(3) are met because the Complainants have both requested that the Discipline Hearing be held in private, and that holding the hearing in private would be “appropriate in the circumstances” for the following reasons:
 - a. The Citation includes allegations of very personal topics. Both complaints involve discussions about medical history, including surgical history, descriptions of touching sensitive or potentially sexualized areas of the body and details about personal life circumstances. It is reasonable to anticipate that providing such testimony will be uncomfortable for the Complainants. There is no need to add another layer of anxiety and embarrassment for the Complainants by denying them the privacy they have requested.
 - b. The Complainants’ dealings with the Respondent, and the corresponding allegations in the Citation, arise in the context of a patient / therapist relationship, in which the Complainants each had a reasonable expectation of privacy.
 - c. 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.
 - d. 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. To the extent that the Respondent anticipates that the Discipline Hearing may vindicate him, and therefore seeks public attendance, the decision and reasons of the Panel will be public as required under section 39.3 of the HPA.
15. The College acknowledges that discipline hearings are presumptively held in public. It says that presumption must be read alongside the College’s only two duties in the HPA, which are to serve and protect the public, and to exercise its powers and discharge its responsibilities in the public interest. The College submits that the

public interest includes ensuring that those who would complain about misconduct by College registrants are not discouraged from doing so via public disclosure of their health records and personal and intimate details of their complaint.

16. The College submits that it can serve the public interest objective of transparency without doing so at the expense of the Complainants. The outcome of the Discipline Hearing will be public, as required by the HPA. The College submits that transparency can be enhanced by permitting any interested member of the public to access a redacted record of the proceedings. This would address the language in section 69(4) of the College's bylaws which provides that a transcript of the hearing is available only to the public if they were "entitled to attend" the Discipline Hearing.
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 involving allegations of touching of sensitive areas of the body and the discussion of treatment records. The College refers in particular to *Re Morgan* (December 16, 2019), *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 and that witnesses are permitted to appear and give evidence by video-conference, 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 appropriateif the discipline committee is satisfied that this is necessary to ensure that the legitimate interests of a party will not be unduly prejudiced.
19. The College submits that conducting the Discipline Hearing via video-conference is advisable due to the public health situation. It is consistent with public health guidelines and the legitimate interest of the parties in ensuring that the Discipline

Hearing is conducted in a timely manner and in a manner that promotes the safety of the participants.

20. The College submits that an order directing the Discipline Hearing proceed by video-conference is also consistent with past decisions of this Discipline Committee (*Re Morgan, Re Henniger and Re Krekic*).
21. The College submits it would be appropriate to adopt the protocol for a hearing by video-conference which was enclosed with the College's materials. The protocol is similar to that which has been adopted in past, with some minor process improvements.
22. The College argues that conducting the Discipline Hearing by video-conference presents no unfairness to the Respondent and relies upon the following passage from *Law Society of Ontario v. Regan*, 2020 ONLSTA 15:

[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 submits that it should be permitted to enter evidence by affidavit. The College submits that this will allow the hearing to be conducted expediently and allows it to be completed in a timely manner. Because affidavits are taken on oath, and the affiants could be available for cross-examination, the requirements set out in section 38(4) are met.

Analysis and Findings

Private hearing

- 24. In acting as a 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 stipulates that discipline committee hearings are presumptively held in public. As was expressed in *Morgan*, 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 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 both of the Complainants have made a request for the Discipline Hearing to be held in private.
29. The Panel is 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 “sensitive”, involve “physical assault”, “medical information”, “medical history”, “the specifics of [...] gender identity” and “relates to personal relationships.”
32. Each request to hold a discipline hearing in private will turn on its own individual facts. The Panel agrees with the approach and reasoning set out in the *Morgan* decision, and adopted in the *Krekic* 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.

33. The Panel also agrees with the *Morgan* decision that holding the Discipline Hearing in private but releasing a redacted transcript will adequately balance the competing 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.

34. The Panel further agrees with the College’s submission that releasing any transcript in the manner proposed by the College would comply with the College’s bylaw requirements.
35. The Panel has considered all of the College’s submissions, the fact that the Respondent does not oppose this request, and is satisfied that holding the Discipline Hearing in private would be appropriate in the circumstances of this case. 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 decision is also consistent with past rulings from this tribunal.

Discipline Hearing by Video-Conference

36. Section 38(4.2) also confers a broad discretion on the Panel with respect to the conduct of the Discipline Hearing if the Panel is satisfied that this is necessary to ensure that the legitimate interests of a party will not be unduly prejudiced.
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. Holding hearings that further the safety of participants aligns with the College's duties under the HPA.

38. The Panel recognizes that the COVID-19 pandemic continues, and that public health orders and guidelines presently remain in place on gatherings, masking and social distancing. It is not possible for the Panel to predict the status of the pandemic or of the public health guidelines that will be in place on the hearing dates. The Panel finds that holding the hearing by video-conference is the most appropriate course in the circumstances.
39. The Panel has reviewed the Protocol provided by the College and finds it to be appropriate and useful in the conduct of the hearing. The changes that have been made are minor improvements and are also appropriate. As such the Panel directs that the Discipline Hearing be conducted in accordance with the Video-Conference Protocol.
40. The Panel directs that any witness may give their testimony by video-conference in accordance with the Protocol.
41. The Panel agrees with the College's submissions that this is an appropriate case in which the evidence of the College's witnesses may be tendered by way of affidavit so long as any witnesses are made available for cross-examination by the Respondent and any questions from the Panel. That evidence would also need to be given under oath. In addition, the College is still required to provide an outline of anticipated evidence in accordance with the HPA requirements for witness testimony in accordance with section 38(4.1) of the HPA. In other words, all of the HPA requirements still apply in respect of the evidence of any witnesses that is given by way of affidavit.

Summary

42. Pursuant to sections 38(3) and (4.2) of the HPA, 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 be withheld;
 - c. the Discipline Hearing be conducted by video-conference in accordance with the "Hearing by Video-Conference Protocol" submitted by the College;
 - d. any witness may give their testimony by video-conference in accordance with the Protocol; and
 - e. The College be permitted to adduce the evidence of the College witnesses by affidavit.

Dated: January 31, 2022



Marilynne Waithman, Chair



Emily Bissonnette, RMT



Michael Wiebe, RMT