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:

Leonard Krekic

(the "Respondent")

REASONS FOR DECISION
(Application of the Respondent)

Date and Place of Hearing:	By written submissions
Panel of the Discipline Committee (the "Panel")	Arnold Abramson, Chair Elisa Peterson, RMT Michael Wiebe, RMT
Counsel for the College:	Elizabeth Allan Greg Cavouras
Counsel for the Respondent:	Scott Nicoll Gurleen Randhawa

Introduction

1. On August 5, 2020, 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 Leonard Krekic 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 8-12, 15-19 and 22-23, 2021 (the "Discipline Hearing").

3. The Citation in this matter involves complaints by six former patients of the Respondent (the "Complainants"). The Citation alleges that the Respondent engaged in inappropriate conversation and touched the Complainants inappropriately during the course of treatment. Specifically, it is alleged that the Respondent massaged or otherwise touched the complainants for non-therapeutic and/or sexual purposes, failed to obtain sufficient consent for treatments, failed to provide appropriate draping, and otherwise acted unprofessionally in various circumstances towards one or more of the complainants named in the Citation.

4. The Respondent has brought an application seeking the following orders:

    a. Patient 4 ("P4") shall produce to the Panel, counsel for the College, and Counsel for the Respondent all clinical records from her family doctor and counsellor pertaining to her treatments with the Respondent on February 8, 2019 and February 15, 2019 (the "P4 Clinical Records").

    b. P4 shall produce to the Panel, counsel for the College, and counsel for the Respondent any long-term disability file of P4 from February 8, 2019 to present (the "P4 Disability File").

    c. P4 shall produce to the Panel, counsel for the College and Counsel for the Respondent the Pharmanet records of P4 from February 8, 2019 to present.

    d. Patient 3 ("P3") shall produce to the Panel, counsel for the College and Counsel for the Respondent all clinical records from her counselor pertaining to her treatments with the Respondent on February 8, 2019 and February 15, 2019 (the "P3 Clinical Records").

e. The Respondent shall be permitted to continue the cross-examination of P4 and P3 upon receipt of documents sought under the above paragraphs of orders sought.

f. Any closing submissions in relation to the within Hearing is adjourned until the cross-examination of P4 and P3 is concluded.

5. The College opposes the Respondent's application.

6. The parties exchanged written submissions. The College sought leave to provide sur-reply submissions which the Panel has allowed as those submissions are in response to new issues that the Respondent raised in reply.

Background

7. The Respondent set out the following factual basis for this application.

8. On March 10, 2021, the College called P4 as a witness.

9. On direct examination, P4 testified that:

a. She received treatment from the Respondent on February 8, 2019 and February 15, 2019 (the "P4 Treatments").

b. She filed a complaint with the College with respect to the Respondent's conduct during the P4 Treatments on February 17, 2019.

c. She spoke about the P4 Treatments to Witness C, Witness D, her parents, [redacted], and another close friend (who is unidentified).

d. She is currently off work because she began to get panic attacks with some male patients after receiving treatment from the Respondent.

e. She is currently on medication for depression, anxiety and PTSD.

f. She sees a counsellor once or twice a week to deal with anxiety and trauma that she has gone through.

g. She was not on any medication for depression, anxiety and PTSD or seeing a counsellor prior to the P4 Treatments.

10. On cross-examination, P4 testified that:

a. She discussed the details of the P4 Treatments with her counsellor and with her family doctor. P4 also testified that she had not been requested by the College to produce the records of her counsellor or family doctor in relation to the P4 Treatments.

b. She has been off work since October 2020.

c. She is on long-term disability.

11. On March 15, 2021, the College called P3 as a witness.

12. On direct examination, P3 testified that:

a. She received treatment from the Respondent between November 2011 and August 2014 and on November 10, 2016 (the "P3 Treatments").

b. She filed a complaint with the College with respect to the Respondent's conduct during the P3 Treatments on February 18, 2018.

c. She had a panic attack when being reminded of the P3 Treatments.

13. She testified on cross examination that:

a. She sought counselling pertaining to the P3 Treatments.

b. She saw a counsellor, [redacted], at least 4 to 6 times pertaining to the P3 Treatments.

c. She mentioned the P3 Treatments to [redacted], who was a counsellor for her and her husband.

14. The College does not disagree with the facts set out by the Respondent. The Panel accepts this factual summary for the purposes of this application but in doing so, is not making any findings of fact. The Discipline Hearing is still ongoing.

Parties Submissions

15. The Respondent relies upon sections 38(4.2) and 38(6) of the HPA. He submits that section 38(4.2)(c) of the HPA provides the Discipline Committee with broad

discretion to make any direction it considers appropriate if it is satisfied that this is necessary to ensure that the legitimate interests of party will not be unduly prejudiced. He submits section 38(6) permits the Discipline Committee to order production of documents in the possession or control of the person.

16. Citing *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), the Respondent argues that procedural fairness requires "full and equal disclosure of all relevant evidence to the Respondent". The Respondent argues that given what is at stake, sections 38 (4.2)(c) and (6) should be read to provide broad disclosure.

17. The Respondent argues that the documents being sought are relevant. He relies upon *Este v. Blackburn,* 2016 BCCA 496 which defined relevance as "recorded information which could be used by any party to prove or disprove a material fact, or to which a party intends to refer at trial."

18. The Respondent argues that the records being sought are relevant because they go to the truth of the complainants' testimony:

> 10. P4 testified to the various conducts the Respondent allegedly performed on during the Treatments.
>
> 11. The College introduced the fact that P4 spoke about the Respondent's conducts to other parties for the truth of its contents.
>
> 12. The College introduced the fact that P4 took certain medications and were unable to engage in work after the Respondent's alleged conducts for the truth of its contents.
>
> 13. The P4 Clinical Cords, Disability file and the Pharmanet Records go to the truth of P4's testimony which the College introduced to prove the alleged conducts of the Respondent with respect to the citation that is in issue. The documents are therefore relevant to the Hearing.
>
> 14. P3 testified to the various conducts the Respondent allegedly performed on her during the P3's Treatments.
>
> 15. The College introduced the fact that P3 had an anxiety attack pertaining to the P3's Treatments for the truth of its contents.
>
> 16. The P3 Clinical Records go to the truth of P3's testimony which the College introduced to prove the alleged conducts of the Respondent with respect to the citation that is in issue. The documents are therefore relevant to the Hearing.

19. The Respondent also argues that the documents are necessary as "if the documents reveal inconsistencies or contradictions" in the Complainants' testimony, that information would be essential to "properly address the citation". In particular, he

argues that the Complainants did not disclose on direct examination that they spoke about the treatments to their treatment providers. The Respondent asserts these are prior inconsistent statements. He submits that if their testimony on cross-examination reflects the truth, "we know the records will reveal prior inconsistent statement [P4] and [P3] made during the hearing."

20. The Respondent says that the privacy interest of the Complainants does not overrule the Respondent's individual interest. The Respondent notes that the hearing is closed to the public, the documents would not be disclosed to the public, and submits that any irrelevant information could be redacted.

21. In reply, the Respondent raised another basis for disclosure arguing that the documents are relevant to "causation." He argues, "the College has introduced the witness' testimonies about the various symptoms and/or consequences they allege occurred due to the Treatments for the truth of its contents. The severity and timing of the alleged symptom and/or consequences speak to a number of issues such as the actual causation of the Respondent's alleged conducts to the witnesses."

22. The College submits that the process and criteria for access to medical records of a complainant is well established in the criminal law, notably in section 278 of the *Criminal Code* as well as the leading cases of *R. v. O'Connor*, (1995) 4 S.C.R. 411 and *R. v. Mills*, [1999] 3 S.C.R. 668. The issue engages privacy and public policy questions. The test is difficult to meet and rarely ordered.

23. The College notes that *O'Connor* set out the test for applications of this nature in the criminal context. The first step of the test requires the accused to demonstrate that the records sought are likely relevant. If that threshold is met, the second step requires the court to determine whether production should be ordered. This test was subsequently codified in Bill C-46 (now contained in section 278 of the *Criminal Code*), and was found to be constitutional in *Mills*. Bill C-46 not only listed criteria for production of records but also enumerated specific factors that do not support production. Additional changes were made in 2015 to section 278 of the *Criminal Code*.

24. The College submits the *O'Connor / Mills* approach ought to be recognized in a regulatory proceeding. A complainant is not less deserving of privacy protection in an HPA proceeding than in a criminal law proceeding. This is underscored by sections 16(1) and 16(2)(f) of the HPA which set out the public-protection role of the colleges and the colleges' object to protect professional misconduct of a sexual nature.

25. The College notes that the criminal approach has been adopted in the Ontario health professions context. Ontario's *Health Professions Procedural Code* is Schedule 2 to the *Regulated Health Professions Act* (the "Procedural Code"). The Procedural Code is substantially similar to the relevant criminal criteria, including, the list of factors which do not support production of complainants' records. The College relies on *College of Physicians and Surgeons of Ontario v. Pasternak*, 2021 ONCPSD 8, in which the CPSO Discipline Committee denied a physician's application for third party patient records.

26. The College submits that the Respondent has not met either of the criteria in *O'Connor / Mills*. With respect to whether the documents are relevant, the Respondent has simply asserted the records "go to the truth" of the Complainants' testimony. The College submits that this is an inadequate basis on which to order production. The College submits that at most, the Respondent's position might relate to the credibility of the Complainants or to prior inconsistent statements. Both of those factors are expressly listed as insufficient grounds for production.

27. The College also submits that even if the Respondent were able to surmount the high relevance threshold that is required, the records would still need to be provided to the Panel for review. The Complainants and whoever is in possession or control of the requested records should be given the opportunity to address the Panel.

28. The College submits that the cases relied upon by the Respondent are taken from the civil litigation context and should not be applied in these circumstances. This is not a lawsuit in which the Complainants are parties, the cases cited do not consider and balance the same public policy and privacy considerations, and the test does not accord with the body of law referenced by the College. Moreover, the

Respondent has cited no case in which that test has been applied. The Respondent replies that the criminal law provisions and caselaw have no application here.

29. The Respondent denied its application rests on a bare assertion of relevance. He quoted testimony from the Complainants' testimony which he says demonstrated inconsistent testimony with respect to not disclosing the alleged events to their treatment providers. The College submits that the Respondent misstated the Complainants' testimony and that they were not asked about that disclosure on direct examination. The College argues "The Respondent's quest to access the records of [the Complainants'] post-event therapy on this basis is precisely what the jurisprudence and Parliament warn against."

30. The Respondent also referred to the Health Profession Review Board Practice Directive #3. The College submits the HPRB directive has no application in this instance. That directive pertains to section 42 of the *Administrative Tribunals Act*, which is concerned with allowing a tribunal to receive materials in confidence not to compel production. As such, it operates to protect the privacy interests of third parties.

Analysis and Findings

The HPA

31. Section 38(4.2) and (6) of the HPA provide as follows:

> 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.
>
> …

> (6)The discipline committee may order a person to attend at a hearing to give evidence and to produce records in the possession of or under the control of the person.

32. The HPA does not include a list of criteria to consider in applications for production of Complainants' records in disciplinary committee proceedings involving sexual misconduct allegations.

33. The Panel finds the *O'Connor / Mills* approach outlined by the College in its submissions to be a useful framework in these circumstances. While these proceedings are not criminal in nature, an application for production of the Complainants' clinical records in this regulatory proceeding engages the balancing of similar privacy and public policy interests. The Panel finds the Supreme Court of Canada's criteria that inform likely relevance, as well as the factors that are not of themselves adequate to support production, to be helpful and appropriate in its task to determine relevance of the records being sought by the Respondent. The Panel also notes that this approach was adopted by another health profession college, the CPSO, in the recent *Pasternak* decision. While the Ontario regulatory framework is different from the HPA, most notably because of its Procedural Code, the Panel still finds the case to be informative in how that tribunal balanced the interests of a complainant in a health profession regulatory proceeding involving sexual misconduct allegations.

34. The two-step test was described in *Pasternak* as follows:

> [11*]* *Mills* sets out a two-stage test. At the first stage, Dr. Pasternak bears the onus of establishing, in the absence of the Committee's review of the record, both (a) that the records are likely relevant to an issue at the hearing or the competence of a witness to testify; and (b) that the production of the records in question is "necessary in the interests of justice," before the Committee may order any confidential health record be produced to it for inspection.
>
> [12] Assuming the criteria for the first stage are satisfied, the Committee then may advance to the second stage in which it reviews the record, and with the benefit of that review, once again determines whether the record: (a) is likely relevant to an issue at the hearing or to the competence of a

> witness to testify; and, if so, (b) whether production is necessary in the interests of justice. The onus remains on Dr. Pasternak at this stage of the test.
>
> [13] The term "likely relevant" means that there is a reasonable probability that the information is logically probative to an issue at trial or to the competence of a witness to testify.
>
> …
>
> [16] In *Mills*, the Supreme Court made it clear that the purpose of this section is to prevent speculative and unmeritorious requests for production. It does not entirely prevent the member from relying on the factors listed where there is an evidentiary or informational foundation to suggest that such factor may be related to likely relevance. However, merely asserting that a record is relevant to credibility or another issue will not satisfy the test of likely relevance. The physician must be able to point to case-specific evidence or information to show that the records in issue are likely relevant to an issue in the hearing or to the capacity of a witness to testify and that they contain information not already available to the defence.

35. The Panel finds that the Respondent has not satisfied the burden of demonstrating that the records sought are likely relevant to an issue in this hearing. None of the three bases asserted warrant production.

36. The first reason advanced by the Respondent that the records "go to the truth" of the Complainants' testimony is merely asserting that the records are relevant to credibility or another issue. This is insufficient.

37. The second reason advanced by the Respondent that the records are necessary as "if the documents reveal inconsistencies or contradictions" in the Complainants' testimony, that information would be essential to "properly address the citation" is also insufficient on its own. Production of documents because they may disclose a prior inconsistent statement is one of the enumerated factors that is considered inadequate to ground disclosure. The Panel finds it is likewise inadequate to ground disclosure in this case.

38. The Respondent's third reason for seeking disclosure of the Complainant's clinic records is that they are relevant to "causation." "Causation" has not been alleged in the citation and may be outside of the Discipline Committee's jurisdiction. In any

event, the Panel notes that the records being sought post-date the Complainants' treatments with the Respondent.

39. In *Pasternak*, the hearing panel denied the physician's application for third party patient records, and discussed the importance of preserving the confidence of complainants and that the inherent privacy of their health records will be preserved as much as possible, otherwise they will be discouraged from reporting alleged misconduct:

> [44] Given the Committee's finding that Dr. Pasternak has not established that the records are likely relevant, the Committee did not go on to consider whether or not it was necessary in the interests of justice that the documents be produced to the Committee for review. The Committee notes, however, that pursuant to s. 42.2(3) of the Code, the Committee must consider the regulatory nature of the proceedings, the primary purpose of the proceedings, which is to protect the public and regulate the profession in the public interest, the privacy interest of the complainant in the records sought, and the nature and purpose of the record sought. In applying those factors to this case, the Committee notes that it is essential that those who have a complaint about sexual misconduct by a physician have confidence that the inherent privacy of their sensitive personal health records will be preserved as much as possible, despite the investigation into the alleged misconduct. Otherwise, complainants will be discouraged from reporting.

40. The Panel agrees with this reasoning and adopts it in this case as well.

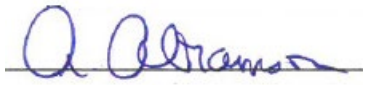
41. As the Respondent has not established that the records being sought are likely relevant, the Panel does not find it necessary to proceed to the second stage of the analysis and consider whether it is in the interests of justice that the documents be produced to the Panel for review.

42. Given the Panel's finding on production of records, the Panel also dismisses the Respondent's requests to cross-examine the Complainants on their records and to adjourn the closing submissions until their cross-examination is concluded.

Conclusion

43. The Panel dismisses the Respondent's application.

Dated: April 14, 2021



Arnold Abramson, Chair

_____

Elisa Peterson, RMT

_____

Michael Wiebe, RMT