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:

Robert Morgan

(the "Respondent")

REASONS FOR DECISION
(Application to Hold Discipline Committee Hearing in Private)

Date and Place of Hearing:	By written submissions
Panel of the Discipline Committee (the "Panel")	Jennifer Lie, RMT, Chair Arnold Abramson Audra Coton
Counsel for the College:	Jean Whittow, QC
Counsel for the Respondent:	Scott Nicoll

Background

1. On August 12, 2019, a Consolidated Citation was issued pursuant to section 37 of the *Health Professions Act* RSBC 1996, c.183 (the "HPA" or "Act") naming Robert Morgan as Respondent. The Citation provided notice, amongst others, of the nature of the complaints that are the subject of the Discipline Committee hearing, and that the hearing would be held on December 9 to 12, 2019.

2. The Citation sets out allegations against the Respondent with respect to conduct towards two patients, XX and ZZ (collectively, the "Complainants"), that is alleged to have taken place during the course of providing massage therapy services. The particulars of those allegations are:

    1. On or about September 18, 2015, in the course of providing massage therapy services to [XX[1]]:
        a) you massaged or otherwise touched the patient's breasts for a non-therapeutic and/or sexual purpose;
        b) you massaged the patient's breasts without obtaining her informed consent; and further, or in the alternative,
        c) you failed to provide appropriate draping, by lifting the drape and exposing the patient's breasts as the patient turned from a prone to an upward facing position.
    2. On or about April 20, 2017, in the course of providing massage therapy services to [ZZ]:
        a) in your communications with the patient prior to treatment, you
            i. failed to describe appropriate disrobing and/or draping options, and/or
            ii. stated words to the effect that "it is full body massage so clothes will get in the way";
        b) you massaged or otherwise touched the patient's buttocks for a non-therapeutic and/or sexual purpose;
        c) you massaged or otherwise touched the patient's breasts for a non-therapeutic and/or sexual purpose;
        d) you touched the patient's nipples;
        e) you massaged the patient's breasts, buttocks and/or abdominal area without obtaining her informed consent; and further, or in the alternative,

[1] The Complainants' full names appear in the Citation provided to the Panel as part of the Application Record but as initials in this decision.

f) you failed to provide appropriate draping, by leaving the patient's breasts and/or buttocks exposed when you were not treating that area of her body.

3. On November 29, 2019, the College brought an application pursuant to section 38(3) of the HPA after having received requests from the Complainants that the Discipline Committee hold the hearing in private.

4. Section 38(3) of the HPA 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.

5. The College seeks the following orders:

   a. That the hearing of citation be conducted in private, or, in the alternative,

   b. That the hearing be conducted in private except for the evidence of the expert witness.

6. On December 6, 2019, the Respondent delivered response materials and submissions opposing the College's application. On December 6, 2019, the College delivered a reply. On December 7, 2019, the Respondent delivered a further letter in sur - reply. The College took the position that it did "not see that the circumstances would permit a reply by the Respondent to the College's reply". The Panel exercised its discretion to admit the Respondent's December 7, 2019 letter.

7. The Panel carefully considered all of the College's and the Respondent's submissions. For the reasons provided, the Panel is satisfied that holding the hearing in private would be appropriate in the circumstances of this case. The Panel directs that the transcripts of the hearing are 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. This approach allows the public to scrutinize the discipline proceeding while respecting the privacy interests of the Complainants and the public interest in encouraging the reporting of sexual misconduct and the participation of

complainants and witnesses in proceedings that involve allegations of sexual misconduct.

8. In the interests of time, the Panel's decision to hold the hearing in private was communicated to the parties on December 8, 2019, advising that reasons for that decision would follow. These are the Panel's reasons.

The College's application and submissions

9. The College advised that it intends to call both Complainants to testify along with four additional witnesses, one of whom they intend to call as an expert witness.

10. The College advised that the Respondent has given notice that he intends to call an expert witness and presumes that the Respondent will also testify as a witness.

11. In support of the application, the College provided emails from the Complainants, which state as follows:

    a. On November 19, 2019, ZZ emailed Jean Whittow, QC, counsel for the College, stating: "*I request that my complaint be heard in private by the discipline committee. The details of my complaint are highly personal and I do not want my this information to be publicly disclosed or available to the media*.";

    b. On November 21, 2019, XX emailed Ms. Whittow stating: "*May I please request that my complaint be heard in private by the discipline committee. The details of my complaint are highly personal and I do not want them to be publicly disclosed or available*."

12. The College also provided copies of two media articles as part of its application materials:

    a. An article from the Vancouver Sun titled "Kelowna massage therapist accused of massaging breasts of female patient goes to court over suspension", dated July 7, 2017; and

b. An article by Infotel titled “Former Kelowna massage therapist faces disciplinary hearing for allegedly touching breasts” dated November 12, 2019.

13. The College submits that it would be difficult for the four additional witnesses to testify in a manner that does not identify the Complainants.

14. The College notes that if necessary, an expert's testimony could be given in a manner that does not personally identify the Complainants, or pseudonyms could be used, however, keeping those portions of the hearing open to the public would render the process cumbersome.

15. The College notes that the Citation is posted on its website in a form that identifies the Respondent, but not the Complainants.

16. The College submits that it is likely the hearing will attract media and public attention given the past media publications.

17. The College submits that the Complainants have both requested that the hearing be held in private, and holding the hearing in private would be appropriate in the circumstances. Accordingly, the legal requirements under section 38(3) of the HPA to grant the order have been met.

18. The College notes that there has been no judicial consideration of section 38(3) of the HPA, however, this provision has been considered by other discipline committee panels.

19. The College submits that it is appropriate for the hearing to be held in private for the following six reasons.

20. First, “The allegations against the Respondent are made in the context of a patient/therapist relationship where there not only exists the inherent vulnerability of a patient, but also their expectation of confidentiality.”

21. Second, “The evidence will necessarily involve a review of the Complainants' medical records. Courts have recognized the importance and public interest in maintaining confidentiality over patient records.” The College relies upon *Osif v College of Physicians and Surgeons of Nova Scotia*, 2008 NSCA 113, in that regard.

22. Third, the evidence of the Complainants is “highly personal.” The hearing process is difficult for the Complainants “without the added anxiety from the presence of members of the public at the hearing or publication or media coverage.”

23. Fourth, “A closed hearing will not only prevent the re-victimization of the complainants, but will also serve the public interest.” The College relies *upon A.B. v. Bragg Communications Inc.*, 2012 SCC 46 and submits that the Supreme Court of Canada has recognized that protecting a victim's privacy encourages reporting.

24. Fifth, the College submits that “conducting the hearing in private does not compromise the Respondent’s procedural rights in any way.”

25. Finally, the College submits that “Unlike the Courts, the Panel has no power to impose a publication ban during the course of the hearing.” A College is required to publish certain information about a decision after it has been released. While the College may redact the names of witnesses in public notification, that would hold no value in protecting the privacy of the Complainants or witnesses, if their evidence had been disclosed during the course of the hearing.

26. The College relies on *College of Massage Therapists of British Columbia v. Donald Martin* (2015 CMTBC 01), in which a discipline committee panel ordered that the evidence of two complainants be given in private. Both of those complainants had requested that the hearing be held in private due to "a desire to maintain privacy over [their] personal health matters" and "because of the sexual nature of the allegations”. The panel in *Martin* cited from *C.W. v. L.G.M.*, 2004 BCSC 1499:

> [9] I am satisfied, however, that this important principle of the openness of the court process is subject to an overarching principle: the fundamental object of the court is to see that justice is done between the parties. There are circumstances where the principle of the open court must give way in order to achieve justice. The question is what those circumstances are and, if they exist, how far the principle of an open court must yield in order to ensure that justice may be done...
>
> [26] I am of the opinion that there is a superordinate social value or public interest in protecting victims of sexual abuse from further injury. Victims of sexual abuse should not be deterred from seeking compensation in the court because the process will cause further harm...

27. The College points out that the panel in *Martin* held that conducting the proceedings in private did not undermine the Respondent's right to all procedural fairness in any way.

The Respondent's response to application and submissions

28. The Respondent opposes the application. He submits that "the presumptive nature of a hearing is that it is public" which "coincides with the general open court principle inherent in the judicial system". His position is, further, that "The fundamental importance of public hearings is trite law and is understood by all parties to this application. Private hearings are the exception to the rule."

29. He also alleges, amongst other things, that "The allegations in this matter were public and the hearing of this matter should also be public. It would be prejudicial to the Respondent if privacy were imposed at this point in the proceedings, after the public has already been informed of the allegations. The public that learned of the allegations should be able to attend and follow the hearing to learn the full extent of the matter."

30. The Respondent agrees that in order to have a private hearing, a party must satisfy the requirements in section 38(3) of HPA.

31. The Respondent acknowledges that "[t]here is no doubt that the complainants have satisfied the first part of the test in s.38(3) by making the request for a private hearing" and the "issue before the panel in this application is whether the second part of the test has been satisfied: whether a private hearing is "appropriate in the circumstances".

32. The Respondent argues that the panel in *Martin* adopted the reasoning in *C.W.* in determining what is "appropriate in the circumstances". The Respondent argues that "the panel in *Martin* made a point of noting its decision to grant part of the hearing to be conducted in private was in accordance with *C.W*." The Respondent notes that this is a "much smaller deviation from the presumptive public nature of a hearing than what the College seeks in this instance."

33. The Respondent takes the position that: “It is only “appropriate in the circumstances” to order a private hearing when the factors from *C.W.* are satisfied.” In *C.W.*, Mr. Justice Joyce described the factors as follows:

> [25] I think the following principles can be distilled from the cases I have referred to:
>
> 1. The principle that the court’s process must be open to public scrutiny must give way when it is necessary to ensure that justice is done.
>
> 2. There must be some social value or public interest of superordinate importance in order to curtail public accessibility.
>
> 3. The onus is on the person seeking to restrict public accessibility to demonstrate that the order is necessary in order to achieve justice. The test is not one of convenience but of necessity.
>
> 4. The mere private interest of a litigant to avoid embarrassment is not sufficient to displace the public interest in an open court process.
>
> 5. The categories of circumstances that may be viewed as constituting a social value of superordinate importance should not be considered closed. They include:
>
> (a) where disclosure of the litigant’s name or identity would effectively destroy the right of confidentially, which is the very relief sought in the proceeding;
>
> (b) where persons entitled to justice would be reasonably deterred from seeking it in the court if their names were disclosed;
>
> (c) where the administration of justice would be rendered impracticable if the public were not excluded;
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> (d) where anonymity is necessary in order to ensure a fair trial;
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> (e) where anonymity is necessary to protect innocent persons and little public benefit would be served by disclosure of the names of the innocent;
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> (f) where disclosure of the identity of the plaintiff would cause that person to suffer damages in addition to those already suffered as a result of the wrong for which the plaintiff is seeking compensation.

> 6. In my view there must be evidence related to the particular applicant to support the alleged necessity for anonymity rather than mere statements of generality.
>
> 7. Finally, it is my view that the principle of the open court should be displaced only to the extent that it is necessary to preserve the superordinate social value.

34. The Respondent says the *C.W.* factors are not satisfied in this case.

35. In particular, the Respondent relies on the sixth factor set out in *C.W.*: "there must be evidence related to the particular applicant to support the alleged necessity for anonymity rather than mere statements of generality". The Respondent further relies upon Mr. Justice Joyce's comment that "mere embarrassment through unnecessary or unwanted attention is not enough".

36. The Respondent also submits that the Complainants' emails "are not admissible on their face as to the truth of their contents" as they are unsworn statements. In this regard, the Respondent points to section 38(4) of the HPA and paragraph 30 of the *C.W.* decision to argue that sworn testimony is required for this preliminary application.

37. The Respondent argues that "the panel should be concerned about the veracity of the emails given their nearly identical content, from people who allegedly do not know one another." Moreover, the Respondent submits that the Complainants' statements "contain no specific information about how the public nature of the hearing would impact them or cause them further harm." The Respondent submits the Complainants' statements are "mere statements of generality." The Respondent requested the College submit additional evidence as to the additional harm that a public hearing would cause in this case but the College declined to do so. The Respondent enclosed correspondence between counsel relating to that request. The College indicated in that correspondence that it was not in a position to obtain affidavits at this late stage, but in any event, they were neither necessary nor appropriate.

38. The Respondent submits that all complainants in cases involving alleged sexual wrongdoing could say their matters are highly personal and that they would prefer

them not to be public. The Respondent argues to grant this application would be to "open the door to virtually any type of hearing to be held in private".

39. The Respondent says the fact that the hearing will entail a review of the Complainants' medical records is not a sufficient basis to order a private hearing.

40. The Respondent submits that the case of *A.B. v. Bragg Communications* has no applicability to this matter as authority for the proposition that a closed hearing can prevent re-victimization of a complainant, as that case involved cyber-bullying of a minor.

41. The Respondent submits that the mere nature of the allegations is not sufficient to justify an order for a private hearing.

42. Finally, the Respondent submits that there is a public interest in this matter and in holding the hearing in public, and that it would be prejudicial to him if privacy were imposed at this point in the proceedings, after the public has already been informed of the allegations.

The College's reply submissions

43. The College replies that the Respondent is applying the incorrect test. The College points out that the *C.W* case concerned litigation brought in the courts in which the plaintiff who sought to restrict access to the proceedings was seeking monetary damages. "In the present case, the Complainants are witnesses in a professional disciplinary proceeding governed by the HPA. The witnesses are not parties to the proceedings and receive no personal benefit from the outcome of the proceedings."

44. The College submits that if "this was a criminal case, it would likely be conducted in an open hearing but with a ban on publication." The College submits that the HPA does not permit a ban on publication. Instead, "it addresses this gap by protecting witnesses' privacy through s. 38(3)" of the Act.

45. The College submits that the "legal framework for privacy-related orders in the litigation context does not dictate the process applicable to a request made under section 38(3) of the HPA." As noted in *Martin,* "a panel operates within a specific

statutory context of the HPA and must follow the HPA before looking to the common law."

46. The College quotes the observation in *Martin* about the open court principle that "the legislature has chosen, in the Act, to make the "strong" common law presumption of full publication secondary to the protection of the complainant's privacy, at least insofar as publication is concerned".

47. The College submits that section 38(3) "sets out the applicable framework for determining whether to conduct the hearing entirely or partially in private" and that this section "does not provide any specific criteria by which appropriateness is determined (*Martin*, p.3) and does not require that a party making a request adduce evidence of harm."

48. The College submits that as was the case in *Martin*, "the primary issue in this case is whether or not the Registrant committed any of the conduct alleged in the Citation". There is no requirement under section 38(3) that the Complainants "provide evidence of continuing harm that they suffered as a consequence of the Respondent's actions, nor should they be required to do so. Requiring such evidence presupposes the outcome of this proceeding in that it is evidence that takes as fact that the Respondent in fact committed the conduct in the Citation." The College notes that *Martin* expressly dealt with and rejected that submission.

49. Finally, the College submits that "the nature of the allegations that are going to be canvassed at the hearing, including sexual misconduct, permits the Panel to come to the conclusion that it is appropriate in the circumstances to conduct the hearing in private."

The Respondent's sur-reply submissions

50. The Respondent emailed a further letter on the evening of Saturday, December 7, 2019. The College stated it did "not see that the circumstances would permit a reply by the Respondent to the College's reply". While the Respondent did not have leave to make sur - reply submissions, and the submissions arrived late in the day,

the Panel considered there was no prejudice to the College and exercised its discretion to admit the Respondent's sur - reply submissions.

51. In sur - reply, the Respondent submits that "redactions to the transcript and to the decision issued by the Discipline Committee are appropriate in the circumstances. These redactions would serve to protect the identity of the Complainants as their names would not be known by members of the public that read the documents." The Respondent submits those redactions "would be akin to a publication ban", which the Respondent agrees could be issued if this was a criminal matter.

52. Finally, the Respondent says the Complainants are not obligated to provide evidence of continuing harm as a result of the Respondent's actions. Rather, the Respondent submits what is required is "evidence that the *public* nature of the hearing would cause further harm than a *private* hearing", which would not presuppose the outcome of the hearing.

Analysis and Findings

53. 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.

54. Section 38(3) of the HPA requires that discipline committee hearings are held in public. The 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.

55. While a public hearing is the default, it is not absolute. The inclusion of section 38(3) in the HPA expressly contemplates that there will be circumstances where those hearings are to be held in private.

56. There are two requirements to make such an order. 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

57. Both parties agree that the first step of the test in section 38(3) is satisfied as both Complainants made requests for a private hearing. Indeed, the Respondent states that "[t]here is no doubt that the complainants have satisfied the first part of the test in s.38(3) by making the request for a private hearing".

58. The Panel considered the Complainants' requests.

59. ZZ's request was made in writing and delivered by email. The email shows ZZ's full name as the sender and the recipient as being counsel for the College. The subject of the email is "privacy matter". The email contains a date and time stamp of "November-19-19 12:21:40 PM".

60. The request itself is clearly set out in writing, in the body of the email where she states: "I request that my complaint be heard in private by the discipline committee. The details of my complaint are highly personal and I do not want my this information to be publicly disclosed or available to the media".

61. ZZ signs off at the bottom of her email with her full name and digits which would appear to be her phone number.

62. The Panel is satisfied that ZZ is both a complainant and a witness. The Panel is satisfied that she has made a request for the hearing to be held in private.

63. XX's request was also made in writing and delivered by email. The email shows XX's full name as the sender and the recipient as being counsel for the College. The subject of the email is "private". The email contains a date and time stamp of "November-21-19 7:46:11 AM".

64. The request is also clearly set out in writing, in the body of the email, where XX states: "May I please request that my complaint be heard in private by the discipline committee. The details of my complaint are highly personal and I do not want them to be publicly disclosed or available."

65. XX signs off at the bottom of her email with her full name.

66. The Panel is satisfied that XX is both a complainant and a witness. The Panel is satisfied that she has made a request for the hearing to be held in private.

67. The Panel agrees with the parties and is satisfied that the first requirement of section 38(3) of the HPA has been met.

Appropriate in the circumstances

68. The second requirement is that the Panel must be satisfied that holding the hearing in private is appropriate in the circumstances.

69. The Panel has considered and is mindful of the *C.W.* decision. However, the Panel does not accept the Respondent's submission that "[i]t is only "appropriate in the circumstances" to order a private hearing when the factors from *C.W.* are satisfied" [emphasis added]. The Panel finds the factors in *C.W*. are satisfied in any event.

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. […]

74. The Panel has considered the Respondent's position that the *A.B. v. Bragg* decision has no application in this instance because it involved cyber-bullying of a minor. The Panel does not agree that this undermines the applicability of the quote above as the Supreme Court of Canada was reiterating a statement it had previously articulated in an earlier sexual assault decision which did not involve a minor.

75. Further, the Panel has also considered the Respondent's argument that the Complainants' emails are problematic, and that this preliminary application requires the Complainants' sworn testimony. The Panel agrees that the requests by the Complainants are brief and are substantially similar. While the statements are brief, they are, however, specific and clear. Moreover, the Panel does not accept the Respondent's suggestion that the veracity of the emails is at issue. The Respondent already conceded there was no doubt that the first requirement of section 38(3) was met by the Complainants' emails. In light of this, it would be inconsistent to accept the Respondent's position that the veracity of the emails could then be at issue for purposes of the second requirement under section 38(3) test.

76. The Panel also does not accept the Respondent's position that sworn testimony is required. First, there is nothing in section 38(3) which requires sworn testimony. If that was required, it would have been specifically stated by the legislation. The HPA

specifies elsewhere where evidence must be given under oath. Second, the Panel agrees with the reasoning at page 4 of the *Martin* decision which rejected a similar argument that sworn testimony and cross-examination were required prior to the Panel making a section 38(3) determination:

> […] The Panel does not agree with the Registrant's submission that the validity of D.K.'s and L.T.'s assertions as to the harm they would suffer if required to testify in public should be tested by cross-examination before the Panel makes a discretionary decision under section 38(3) of the Act. One consequence of doing so, in the Panel's view, would be to cause exactly the situation the Registrant's counsel said he wishes to avoid: namely, a consideration of the letters for the truth (or otherwise) of the sexual conduct allegations referred to in them - which the Panel considers to be a matter that is appropriately determined only by means of direct witness testimony and cross-examination, and not by means of the contents of the letters.

77. The Panel has considered whether holding the hearing in private would jeopardize the Respondent's procedural fairness. The Panel does not consider that the Respondent's entitlements to procedural fairness are compromised by holding the hearing in private as he will be able to continue to exercise those entitlements, some examples of which are: the Respondent's ability to hear all of the witness testimony, conduct direct and cross-examination of witnesses, and make oral and written submissions.

78. The Panel does not accept the Respondent's submission that holding this particular hearing in private would open the door to virtually any type of hearing being held in private. First, in order for there to be an order for the hearing to be held partly or completely in private, there must be a request made by one of the closed group of listed individuals in section 38(3). If there is no request, no order will be made as the hearings are presumptively held in public. Second, each request will be considered on its particular facts and circumstances. The relevant interests to balance will express themselves differently in each case and must be taken into account on a case by case basis. Many circumstances would not justify a private hearing. By contrast, the Panel considers the circumstances of this case to be precisely the type of circumstances section 38(3) was intended to address. As indicated above, this case involves allegations of sexual misconduct and this matter has already attracted media attention.

79. Further, the Panel considered if it would be possible to order that part of the hearing be conducted in private and part of the hearing be conducted in public. The Panel accepts the College's submission that it would be difficult for its additional witnesses to testify in a manner that does not identify a complainant. The Panel is not satisfied that the Complainants would not be identified if it ordered part of the hearing to be conducted in private. The identity and testimony of the other witnesses could reasonably be expected to identify the Complainants and compromise their personal and private information. The Panel finds this to be the case with both parties' witnesses, and with the lay and expert witnesses. In making that determination, the Panel is not doing so on the basis that it would be cumbersome to use initials, as it is not persuaded that would be a justification for closing the other parts of the hearing, but on the basis that the Complainants' privacy interests would be compromised.

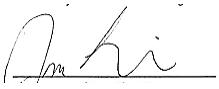
80. The Panel notes that not only is the Citation public, but the HPA requires public notification pursuant to section 39.3 of the HPA of a determination made pursuant to section 39(1) and any orders that follow under section 39.

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

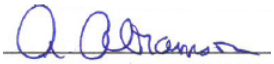
that the Panel does not have jurisdiction to order a publication ban under the HPA. The Respondent did not challenge this position in his submissions and appears to agree with it. In this regard, the Respondent does not propose a publication ban as an alternate order but instead proposes that redactions 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.

83. The Panel has carefully considered all of the College's and the Respondent's submissions. For the reasons provided above, the Panel is satisfied that holding all of the hearing in private would be appropriate in the circumstances of this case. The Panel further directs that the transcripts of the hearing are 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. This approach allows the public to scrutinize the discipline proceeding while respecting the privacy interests of the Complainants, and the public interest in encouraging the reporting of sexual misconduct and the participation of complainants and witnesses in proceedings that involve allegations of sexual misconduct.



December 16, 2019

Jennifer Lie, RMT, Chair — Date



December 16, 2019

Arnold Abramson — Date

December 16, 2019

Audra Coton — Date