

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  
Maya Ollek

**Counsel for the Respondent:**

Scott Nicoll  
Gurleen Randhawa

## **Background**

1. There is no dispute between the parties as to background facts.
2. 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 set out allegations pertaining to complaints from two patients, ■■■ and ■■■. The allegations are that in the course of providing massage therapy services, the Respondent massaged or otherwise touched ■■■ and ■■■ breasts for a non-therapeutic and/or sexual purpose, failed to obtain informed consent, and failed to provide appropriate draping.
3. The discipline committee hearing (the “Discipline Hearing”) was originally scheduled for December 9 to 12, 2019 but did not proceed due to the illness of a Panel member. The Discipline Hearing was adjourned until June 1 to 5, 2020. On May 7, 2020, the Panel adjourned the June 2020 Discipline Hearing dates on consent of both of the parties. The rescheduling of new Discipline Hearing dates is the subject of other applications, to be dealt with separately.
4. Following a November 29, 2019 application by the College, the Panel directed on December 8, 2019, that it would be appropriate in the circumstances of the case for the Discipline Hearing to be conducted in private. On December 16, 2019, the Panel delivered its reasons for that decision (the “Decision”).
5. The College subsequently received a third complaint against the Respondent from ■■■■■■■■■ ( “■■■”). The allegations are that in the course of providing massage therapy services, the Respondent told her that it was necessary to expose her breast to provide treatment, when this was untrue; touched her breast in an inappropriate and/or sexualized manner; and failed to provide appropriate draping.
6. On March 4, 2020, the Inquiry Committee directed the issuance of a citation, and directed the Registrar to join ■■■’s complaint with ■■■’s and ■■■’s complaints to be heard in one citation. On March 31, 2020, the College issued an amended citation (the “Amended Citation”).

7. ■ also requested that the hearing of her complaint be held in private. On April 27, 2020, the College brought an application pursuant to section 38(3) of the HPA to hold portions of the Discipline Hearing relating to her complaint in private. This decision relates to that application only.
8. 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.
9. The College seeks the following orders:
  - a. That the portions of the Discipline Hearing relating to the complaint of ■ be conducted in private, or, in the alternative,
  - b. That the portions of the Discipline Hearing relating to the complaint of ■ be conducted in private except for the evidence of the expert witness.
10. On May 4, 2020, the Respondent delivered response materials and submissions opposing the College's application. On May 8, 2020, the College delivered a reply.

### **The College's application and submissions**

11. The College will post the Amended Citation on its website four weeks in advance of the Discipline Hearing. The Respondent will be identified. The names of the three complainants, including ■, will not be identified.
12. In terms of witnesses, the College will call ■ to testify, and the same expert with respect to ■'s and ■'s complaints. The College advises that the expert will address professional standards regarding draping and massage techniques relating to ■'s complaint. The College anticipates the Respondent will also testify.
13. On March 18, 2020, ■ emailed the College requesting that the Discipline Hearing be held in private because the evidence will be of a personal and intimate nature,

and to avoid public attention before the civil jury trial relating to her injuries commences, which is scheduled to start on [REDACTED]:

I would like to request that the hearing concerning my complaint be held in private because the evidence will be of a personal and intimate nature, and because there is an outstanding civil case that is scheduled before the Supreme Court of British Columbia regarding the accident I was in which caused the injuries that Mr. Morgan was supposed to be treating. The civil case is currently scheduled to be before a judge and jury commencing [REDACTED]. I do not want my evidence to be the subject of public attention for those reasons.

14. The College notes that the Discipline Hearing has already attracted the interest of the public and the media. The College provided:
  - a. An article from the Vancouver Sun titled “Kelowna massage therapist accused of massaging breasts of female patient goes to court over suspension”, (July 7, 2017);
  - b. An article by Infotel titled “Former Kelowna massage therapist faces disciplinary hearing for allegedly touching breasts” (November 12, 2019);
  - c. An article by Kelowna News titled “Former registered massage therapist in Kelowna wants hearing made public” (December 17, 2019); and
  - d. An article by Castanet News titled “RMT wants public hearing: RMT accused of sexual touching wants hearing held in public” (December 17, 2019).
15. The College anticipates the hearing will continue to attract media attention.
16. The College seeks an order that any additional portions of the Discipline Hearing pertaining to [REDACTED] be heard in private. If this application is granted, the result in combination with the Decision would be that the entire hearing is held in private.
17. The College submits that while this is a separate application to that which led to the Decision, the legal basis and analysis from the Decision is substantially similar.
18. The College submits that “Section 38(3) of the HPA provides that a hearing is conducted 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.”

19. The College notes, and in support, cites paragraph 70 of the Decision, that section 38(3) provides broad discretion and does not prescribe any specific criteria or list of factors by which appropriateness is determined.
20. There has been no judicial consideration of section 38(3) of the HPA by the Supreme Court. The College points out that this section has been cited by other discipline hearing panels. In *College of Massage Therapists of British Columbia v. Donald Martin* (2015 CMTBC 01), 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...

21. In this case, the College submits that ■■■'s email request of March 18, 2020 has satisfied the first requirement of the test.
22. The College submits that the second requirement, that it is appropriate for the hearing to be held in private, is also met because of a number of contextual factors:
  - a. ■■■ requested the Discipline Hearing be held in private because her complaint is highly personal and she does not want these details to be publicly disclosed or

available. The College also submitted that the hearing process is plainly difficult for her in such circumstances, with the added anxiety attendant upon the presence of members of the public at the hearing or media coverage.

b. ■ sought treatment by the Respondent in relation to injuries sustained during an accident about which there is a civil jury trial set to proceed on August 10, 2020.

c. The particulars of the allegation are of a sexual nature.

d. The conduct at issue is alleged to have occurred in the course of providing massage therapy services and in the context of a therapeutic patient/therapist relationship where there exists not only inherent vulnerability of a patient, but also an expectation of confidentiality.

e. The evidence will necessarily review ■'s 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.

f. The Amended Citation will be posted on the College's website in a form that identifies the Respondent but not the three complainants.

g. The past media coverage of the Discipline Hearing indicates that this hearing is likely to attract further interest of the public and the media. If this occurs, ■'s privacy interests would be compromised.

23. The College notes that the Panel must make an independent determination of whether the portions of the Discipline Hearing relating to ■'s complaint should be conducted in private. The College relies upon the Decision as additional context to inform that analysis, as well as the following additional contextual factors:

a. While it is possible to hold only part of the Discipline Hearing in public and the balance in private, the College submits this would unduly complicate the hearing process.

b. ■'s complaint is interwoven with the existing hearing relating to ■'s and ■'s complaints as it was joined in the Amended Citation.

- c. The College will call the same expert for all three complainants. While the expert could testify to ■■■'s complaint using a pseudonym, keeping only ■■■'s portion of that testimony public would be cumbersome.
  - d. Likewise, argument could be done in public using pseudonyms however that too would also be cumbersome.
24. The College also argues that there is a broader societal interest that weighs in favour of a direction that the Discipline Hearing, as related to ■■■'s complaint, be held in private. The College submitted and cited the Decision at paragraph 73 which held that, 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 College argues that a closed hearing will prevent re-victimization and 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.
25. The College argues that a direction that the Discipline Hearing be conducted in private does not jeopardize the Respondent's entitlement to procedural fairness. It relies upon the Decision at paragraph 77 and on the *Martin* decision.
26. 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, the College argues that would hold no value in protecting ■■■'s privacy, if evidence of her complaint and identity are already disclosed during the course of the hearing.

### **The Respondent's response to application and submissions**

27. The Respondent opposes the application. Like the College, the Respondent's position is substantially similar to its position articulated on December 6, 2019.
28. The Respondent 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. The Respondent agrees with the College that section 38(3) of the HPA sets out a two-part test. The Respondent also agrees that the first part of that test has been met as ■■■ has made a request for a private hearing. The Respondent submits that the issue before this Panel is whether a private hearing is “appropriate in the circumstances.’
30. To that end, the Respondent also relies upon the *Martin* decision. He argues the *Martin* decision represents a “much less significant deviation from the presumptive public hearing than the completely private hearing that ■■■ seeks.”
31. 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 confidentiality, 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;
  - (d) where anonymity is necessary in order to ensure a fair trial;
  - (e) where anonymity is necessary to protect innocent persons and little public benefit would be served by disclosure of the names of the innocent;
  - (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.
32. The Respondent says the *C.W.* factors are not satisfied in this case.
33. The Respondent pointed out that in the *Martin* decision, that discipline committee panel recognized that it did not have the power to impose a publication ban:
- [52] As the College forcefully argued, the Panel has no such powers. As a regulatory tribunal, it has only the power and authority conferred on it by the Act. It cannot order a ban on publication of identifying information. Where protection of a person's name or other identifying information is appropriate, the Panel has only one means open to it of protecting a person's privacy, which is to order that the hearing, or the portion of it at which that person gives evidence, be closed to the public. If a hearing is not held in private, the Panel has no means of preventing any evidence given in the hearing room from being disseminated or published by anyone in attendance at the hearing.
34. The Respondent notes that despite this, the panel in *Martin* still relied upon the factors in the *CW* decision in its reasons to direct that part of the hearing be conducted in private.
35. The Respondent argues that the sixth factor in the *CW* decision is applicable in this case. He says that there is no evidence related to ■■■ that supports the alleged

necessity for anonymity rather than mere statements of generality. He submits that ■■■'s email is brief and general and there is no other evidence. He argues there is no information about how a public hearing would impact her civil case, be difficult for her, or cause her further harm. The Respondent argues that all complainants in sexual misconduct matters could say their matters are highly personal and that they would prefer the hearings to be in private.

36. The Respondent also references Mr. Justice Joyce's comments that "mere embarrassment through unnecessary or unwanted attention is not enough". The Respondent says that there is no evidence from ■■■ that the hearing process is plainly difficult for her or that there is added anxiety due to the media coverage. He says that there is no evidence of additional harm that would be suffered if the hearing were to be conducted in public.
37. The Respondent argues that ■■■'s email is inadmissible as to the truth of its contents as it is an unsworn statement. He references section 38(4) of the HPA which provides that at a hearing of the discipline committee, the testimony of witnesses must be taken under oath. The Respondent argues that testimony provided on a preliminary matter should also be under oath.
38. The Respondent argues that a review of ■■■'s medical records would also be undertaken in her civil action. He says that has been found not to be a sufficient basis on which to deviate from the presumption of a public hearing.
39. The Respondent distinguishes the case relied upon by the College for its argument on "re-victimization" of complainants. He notes that *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 involves a minor and cyber-bullying, and has no precedential value for this case.
40. Finally, the Respondent agrees there is a public interest in this matter as evidenced by the media reports. However, he says that is reason to maintain the public nature of the hearing. The Respondent argues that it would be prejudicial for the Respondent if privacy were imposed at this point in the proceedings as the public has already been informed of the allegations. He says that the "public that learned

of the allegations should be able to attend and follow the hearing to learn the full extent of the matter.”

### **The College’s reply submissions**

41. The College strongly denies that the *CW* case applies in the manner asserted by the Respondent. The College submits that the *C.W* case concerned a civil litigation action in which the plaintiff who sought to restrict access to the proceedings was seeking monetary damages. In this case, ■■■ is not a party to the proceedings. It is the College that advances the case against the Respondent. ■■■ does not stand to benefit personally in these disciplinary proceedings. The College submits that its position on *CW* is consistent with the Panel’s Decision in that the *CW* decision does not govern this analysis but in any event, the factors are met.
42. The College submits that the legal framework for privacy orders in the civil litigation realm does not apply to a request made under section 38(3) of the HPA.
43. With respect to the admissibility of ■■■’s email, the College relies upon the Panel’s Decision. The Panel found that having conceded that section 38(3)(a) was satisfied, it was inconsistent to accept the Respondent’s position that the veracity of the email was at issue for the purposes of section 38(3)(b). The Panel also found that there is no requirement for sworn evidence in section 38(3).
44. The College disputes the Respondent’s position that there is a requirement to show continuing harm. The College relies upon the following passage from *Martin* in that regard:

The Panel does not agree with the Registrant’s submission that the validity of ■■■’s and ■■■’s assertions 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.

45. 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.
46. The College argues that anonymous publication of a transcript or of a decision is of no value in protecting the privacy of ■■■ if her evidence (including her identity) has already been disclosed in the course of the hearing. The College submits that a direction releasing transcripts which redact identifying information relating to ■■■’s complaint, including her identity, is a sufficient method by which the public interest in the process and outcome of these proceedings can be addressed.

### **Analysis**

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

47. Both parties agree that the first step of the test in section 38(3) is satisfied as ■■■ has made a request for a private hearing.
48. The Panel is satisfied that ■■■ 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. ■■■’s request was made in writing and delivered by email. The email shows ■■■’s full name as the sender and the recipient as being counsel for the College. The subject of the email is “RE: CMTBC Hearing”. The email contains a date and time stamp of “Wednesday, March 18, 2020 4:02:24 PM”. In the body of her email, ■■■ states: “I would like to request that the hearing concerning my complaint be held in private...”.

#### **Appropriate in the circumstances**

49. The second requirement is that the Panel must be satisfied that holding the hearing in private is appropriate in the circumstances.
50. The Panel notes the Decision (as to whether the hearing of the ■■■ and ■■■ complaints be held in private) is relevant both for the fact that it represents a prior decision from this discipline committee that is directly on point, and because of the Amended Citation, it will involve the same Discipline Hearing as ■■■’s complaint. The Panel recognizes a desirability in consistency of decisions.

51. The Panel has considered the *C.W.* decision. As was the case in the Decision, 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.
52. 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".
53. In considering the circumstances, the Panel notes that ■ provided two reasons for her request that the hearing be held in private. The first reason was because the evidence will be of a "personal and intimate nature." The Panel recognizes ■'s personal privacy interests. The particulars of the allegations in this case are sexual in nature. The conduct at issue is alleged to have occurred while the Respondent provided massage therapy services and in the context of a confidential therapeutic patient / therapist relationship. The Panel accepts that the Discipline Hearing will involve a review of ■'s clinical records and personal health information. The Panel does not find that ■ is requesting the hearing be held in private to simply avoid embarrassment or unwanted attention.
54. The Panel accepts the College's submission, which was uncontested, that the Amended Citation will be posted on the College's website in a form that identifies the Respondent but not the complainants. The Panel has reviewed the media publications filed as part of this application, and notes, from the filed materials, that there have been additional media articles since the time of the Decision. The Panel finds that the past media coverage indicates that this Discipline Hearing is likely to attract the interest of the public and the media. If that occurs, ■'s privacy interests would be compromised.
55. In addition to ■'s personal privacy interests, the Panel has also considered that there is a broader social interest in this case, given the sexual allegations. As stated in paragraph 73 of the Decision, 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. [...]

56. 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 in paragraph 55 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.
57. The second reason [REDACTED] has requested the hearing be held in private is because there is an outstanding civil jury case regarding an accident that is scheduled to proceed before a judge and jury on [REDACTED]. The Panel is less convinced that this is a reason to hold the discipline committee hearing in private. The Panel is not convinced that the Discipline Hearing will proceed before her civil matter which is currently scheduled to commence on [REDACTED]. In addition, the question of when this Discipline Hearing will be rescheduled is currently under determination on applications by both parties. The Respondent has asked that the hearing dates be stayed pending a judicial review of the Decision. The College has asked the Panel to reset the hearing to specific dates. In either case, it is very unlikely that the hearing will proceed before [REDACTED]. Second, [REDACTED]'s civil jury matter relates to personal injuries from an accident, which occurred prior to her massage therapy appointments with the Respondent. If the civil matter was a parallel action involving sexual assault in which there was a publication ban, such fact may have been more relevant. However, the existence of this unrelated civil action, in and of itself, does not persuade the Panel to hold the Discipline Hearing in private.
58. The Panel has considered the Respondent's argument that this preliminary application requires [REDACTED]'s sworn testimony. The Respondent already conceded there

was no doubt that the first requirement of section 38(3) was met by ■■■'s email. It would therefore be inconsistent to accept the Respondent's position that the admissibility of her email could then be at issue for purposes of the second requirement under section 38(3) test.

59. As in the Decision, the Panel does not accept the Respondent's position that sworn testimony is required for the section 38(3) test. 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 ■■■'s and ■■■'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.

60. The Panel has considered whether holding the hearing in private would jeopardize the Respondent's procedural fairness. As was the case in the Decision, 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.
61. The Panel does not accept the Respondent's submission that holding this Discipline Hearing in private would open the door to virtually any type of hearing being held in private and adopts its reasoning in the Decision on the same issue. 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.

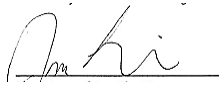
62. Further, as was the case in the Decision, the Panel considered if it would be possible to order that part of the hearing be conducted in private and part of the hearing be conducted in public. The Panel accepts the College's submission that it would be difficult for the other witnesses, including the expert, to testify in a manner that does not identify a complainant. The Panel is not satisfied that ■■■ 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 ■■■ and compromise her 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 ■■■'s initials in testimony and argument, but on the basis that ■■■'s privacy interests would be compromised. The Panel is not persuaded that the fact that it would be cumbersome to use initials would be a justification for closing the other parts of the hearing.
63. 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.
64. The Panel has considered that both previous decisions from this discipline committee (*Martin* and the Decision) directed that the transcripts of the closed portions of the hearings be made available to the public, at the expense of the person wishing to purchase the transcripts, in redacted form with the name 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 as well. 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. Transcripts can be made available in real time, which would make the disclosure almost immediate.

65. 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 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. As the Panel noted in the Decision, if the hearing were open to the public and the media, ■■■'s identity 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. The legislature has clearly intended to provide the discipline committee with a means to balance these interests by expressly granting it the power and broad discretion to hold a portion or all of a Discipline Hearing in private. It did not provide the express statutory power to order a publication ban.
66. The Panel has carefully considered both the College's and the Respondent's submissions. For the reasons provided above, the Panel is satisfied that holding the portions of the hearing relating to the complaint of ■■■ 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 name and any

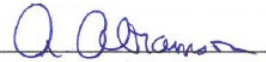
information that could reasonably be expected to identify [REDACTED] withheld. This approach allows the public to scrutinize the discipline proceeding while respecting the privacy interests of [REDACTED], and the public interest in encouraging the reporting of sexual misconduct and the participation of complainants and witnesses in proceedings that involve allegations of sexual misconduct.



Jennifer Lie, RMT, Chair

July 17, 2020

Date



Arnold Abramson

July 17, 2020

Date



Audra Coton

July 17, 2020

Date