

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
(College's Application)

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| Date and Place of Hearing: | October 26, 2020 Charest Reporting (Zoom) |
| Panel of the Discipline Committee (the "Panel") | Arnold Abramson, Chair Jennifer Lie, RMT Evan Jeary, RMT |
| Counsel for the College: | Jean Whittow, QC |
| Respondent: | No one appearing |

Background

1. The College seeks an order pursuant to s. 38 (4.2) of the *Health Professions Act*, RSBC 1996, c. 183 (the “HPA”), that:
 - a. The discipline hearing scheduled to proceed December 14 to 18, 2020 (the “Discipline Hearing”) be conducted by video-conference; and
 - b. The College be permitted to adduce the evidence of College witnesses by affidavit.
2. The Discipline Hearing relates to a citation issued by the College to the Respondent, on August 12, 2019, pursuant to s. 37 of the HPA, and subsequently amended on March 31, 2020 (the “Amended Citation”). The Amended Citation relates to three complaints against the Respondent concerning the Respondent’s conduct during the provision of massage therapy treatments:
 - a. a complaint relating to treatment on September 18, 2015, received from ■■■ in 2017;
 - b. a complaint relating to treatment on February 3, 2017, received from ■■■ in 2019; and
 - c. a complaint relating to treatment on April 20, 2017, received from ■■■ in 2017. (collectively, the “Complainants”)
3. All three of these complaints involve allegations that, amongst others, in the course of providing massage therapy services, the Respondent massaged or otherwise touched the Complainants’ breasts for a non-therapeutic services and/or sexual purpose, failed to obtain informed consent, and failed to provide appropriate draping.
4. On July 23, 2020, a Panel ordered that (the “July 23, 2020 Decision”):
 - a. the Discipline Hearing be rescheduled to specific dates to be scheduled as soon as practicably possible after October 12, 2020 (the “Hearing Date”);

- b. if, by 21 days prior to the Hearing Date, the Discipline Hearing cannot proceed as an in-person hearing on the Hearing Date due to public health directives relating to the COVID-19 pandemic, the Discipline Hearing will proceed on the Hearing Date using video-conferencing;
 - c. at any time, if the Discipline Hearing will occur in-person and any Panel member or Participant¹ who would otherwise be able to participate on the Hearing Date is precluded from attending in-person due to COVID-19 public health directives, that Panel member or Participant may participate by video-conference; and
 - d. at any time, any witness other than the Complainants and Respondent may give their testimony by video-conference.
5. The Panel also directed that the College's "Hearing by Video-Conference Protocol" be used for the Discipline Hearing (the "Protocol").
 6. The Discipline Hearing has been rescheduled for December 14 to 18, 2020.
 7. By letter dated October 8, 2020, the Respondent notified the Panel that

Mr. Morgan will not contest the Amended Citation of March 31, 2020 (the "Amended Citation"). Mr. Morgan does not admit the allegations contained therein, however, and will be making no admissions respecting the same. Mr. Morgan is taking this position expressly to reduce the costs of these proceedings for all parties involved.

...Mr. Morgan, does, however, reserve his right to make submissions on the appropriate penalty and Costs if a finding is made against him under s.39(1) of the Health Professions Act ("HPA").
 8. The College noted that if the Respondent does not contest the allegations in the Amended Citation, he would not cross-examine College witnesses, lead evidence in his own defence or make submissions to the Panel on the findings to be made. Similarly, the College would not compel the Respondent's witnesses for cross-examination.

¹ "Participant" was defined in the July 23, 2020 Decision as "any one or more of the individuals listed in the complete list of participants including counsel, support staff, parties, and witnesses provided each party in accordance with the Hearing by Videoconference Protocol."

9. On October 13, 2020, the Respondent advised that he took no position with respect to the College's application to submit evidence by affidavit and that there would be no need for the Respondent or his counsel to attend this pre-hearing conference unless the Panel would like him to attend. The Panel advised the Respondent that his attendance was not mandatory, and whether he attends or not is his decision..
10. In light of the Respondent's position not to contest the Amended Citation, the College advised that it intends to lead evidence in the following manner:
 - a. Affidavits from the Complainants;
 - b. Affidavits from the secondary fact witnesses;
 - c. Affidavit from a College representative; and
 - d. Oral testimony from the expert witness.
11. The College noted that all three of the Complainants are located outside of the Lower Mainland (in Kelowna and in Edmonton).
12. The College noted that the provincial state of emergency remains in place, as well as numerous public health orders, including social distancing measures. Travel arrangements remain a challenge.
13. Following the pre-hearing conference in this matter, counsel for Mr. Morgan confirmed by email on October 26, 2020 that: "Mr. Morgan will not be attending the hearing scheduled for Dec. 14 - 18, 2020."

Legal basis for College's application

14. The College submitted that section 38(4.2) of the HPA provides the Panel with discretion in the conduct of discipline hearings.
15. The College submitted that a decision that the Discipline Hearing proceed entirely by video-conference is consistent with the Panel's July 23, 2020 Decision.
16. The College submitted that section 38(4) of the HPA generally contemplates an oral hearing, where the testimony of a witness is taken under oath. The College noted that an affidavit is taken under oath or affirmation, and the effect of the

evidence is the same as oral testimony. The College submitted that section 38(4.2) provides the Panel with broad discretion to “make any other direction it considers appropriate.”

17. The College submitted that there is no impediment to receipt of the witnesses’ testimony in the form of affidavit. The College further submitted that there would be no prejudice to the Respondent, particularly given his advice that he does not intend to contest the allegations against him. The College also noted that it has already provided notice to the Respondent of the documents and anticipated witness evidence in preparation for the December 2019 hearing. Moreover, the College would deliver any affidavits to the Respondent at least two weeks in advance of the hearing.
18. The College also outlined a number of benefits which would flow from the admission of affidavit evidence. The witnesses, and in particular, the Complainants, would be alleviated of the burden of both preparing for the hearing and of testifying. The hearing itself, which is presently set for five days, could likely be reduced to two days (one day for evidence and one day for closing submissions).

Analysis

19. The Panel has decided to grant both of the College’s requests and directs the Discipline Hearing to proceed by video-conference and permits the College to adduce its evidence by way of affidavits.
20. The Panel’s July 23, 2020 Decision had already contemplated that the Discipline Hearing may need to proceed entirely by video-conference depending upon the status of the COVID-19 pandemic at the time of the Discipline Hearing. The Panel’s order on that point stated:

79. The Panel orders that:

b. if, by 21 days prior to the Hearing Date, the Discipline Hearing cannot proceed as an in-person hearing on the Hearing Date due to public health directives relating to the COVID-19 pandemic, the Discipline Hearing will proceed on the Hearing Date using video-conferencing;

21. The term set out in para 20 was requested by the College because the College considered that it would be impossible to predict the status of the pandemic and the public health orders and directives which would be in place at the time of the Discipline Hearing. The Panel agreed and found:

63. The College agrees that it is very difficult, if not impossible, to predict the status of the COVID-19 pandemic, and the public health directives that will be in place at the time the hearing will take place. The Panel appreciates the College's efforts to seek directions for a hearing to be conducted in-person or by video conference so that the parties and the participants can plan for both eventualities.

22. In essence, the College is requesting that the Panel's 21-day determination be made earlier. The Panel considers that it is appropriate to make that determination now for the following reasons.

23. First, the College has requested that order be made now, and the Respondent did not oppose the College's request.

24. Second, the Panel sees no benefit in waiting until November 23, 2020 (21 days prior to December 14, 2020) to achieve certainty on this point. The province of British Columbia continues to be in a state of a public health emergency and a state of emergency due to the COVID-19 pandemic. Public health orders and directives remain very much in place. The Complainants would be required to travel from communities outside of Vancouver. If the Discipline Hearing were conducted in person, it would be held inside; thereby requiring adequate ventilation, social distancing, mask-wearing, and/or hand hygiene. The Panel is not satisfied that an in-person Discipline Hearing would be safe enough or feasible given the present status of the pandemic and the potential risks to the hearing participants. As such, it considers that pursuant to section 79(b) of its July 23, 2020 Decision that the Discipline Hearing cannot proceed as an in-person hearing due to public health directives relating to the COVID-19 pandemic, and directs that the Discipline Hearing proceed by video-conference.

25. The Panel agrees with the College's submission that section 39(4) of the HPA provides that at a hearing of the discipline committee, the testimony of witnesses must be taken on oath. That provision, however, does not preclude the Panel from

permitting the admission of affidavit evidence pursuant to its broad power in section 39(4.2) of the HPA. The Panel is satisfied in this case that to admit affidavit evidence would be appropriate given that the Respondent has indicated that he does not contest the allegations in the Amended Citation and he will not be attending the Discipline Hearing. The Panel considers he would not be prejudiced by the admission of affidavit evidence. The Respondent has already received notice of the majority of the expected content of the affidavit evidence through prior disclosure under section 38(4.1) of the HPA, leading up to the December 2019 hearing. Moreover, the College has indicated that it will deliver the sworn affidavits to the Respondent at least two weeks prior to the Discipline Hearing.

26. The Panel will permit the admission of affidavit evidence from the College witnesses; however, the affiants must be available to answer any Panel questions should the Panel require any clarification of their evidence. It seems unlikely that the Respondent would have cross-examination of the affidavits given that he has indicated he will not be contesting the allegations or attending the Discipline Hearing. If he had expressed an intention to cross-examine on the affidavits, provision for that would have been required. While the Panel may not have any clarification questions, it is impossible for the Panel to know that without having seen the affidavits. As such, the Panel asks the affiants to be available by video-conference to provide any responses to Panel questions, under oath, either during the days already set for the Discipline Hearing, or very shortly thereafter. The Panel appreciates that in the event that occurs, some preparation and logistics would be required. In the event the Panel does have questions, it will not be providing advance notice of those questions to the parties or the affiants, or the potential areas of questioning, to the affiants.
27. Given that the Discipline Hearing will be conducted by video-conference, the Panel and its independent legal counsel will require hard copies and electronic copies of any affidavits from the College, and any other hearing materials from the parties, in advance of the Discipline Hearing. The Panel asks the parties to consider that some of its members are not located in the Greater Vancouver area and therefore a courier will take additional time to reach them.

Order

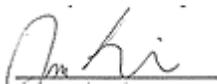
28. The Panel directs that:

- a. The Discipline Hearing scheduled to proceed December 14 to 18, 2020 be conducted by video-conference;
- b. The College be permitted to adduce the evidence of College witnesses by affidavit;
- c. The College deliver any affidavits to the Respondent on or before November 30, 2020; and
- d. The parties deliver to the Panel and its independent legal counsel, hard copies and electronic versions of any "Witness Book of Documents" and "Witness Book of Relevant Materials" (as those terms are defined in the Protocol), on or before December 11, 2020.

Dated: October 27, 2020



Arnold Abramson, Chair



Jennifer Lie, RMT



Evan Jeary, RMT