

IN THE MATTER OF A PRE-HEARING CONFERENCE BY
THE DISCIPLINE COMMITTEE OF THE COLLEGE OF MASSAGE THERAPISTS
OF BRITISH COLUMBIA CONVENE 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:

Michael Henniger

(the "Respondent")

REASONS FOR DECISION

(Application for Pre-Hearing Orders)

Date and Place of Pre-Hearing Conference:	October 22, 2020 Charest Reporting (Zoom)
Panel of the Discipline Committee (the "Panel"):	Arnold Abramson, Chair Carol Williams, Public Member Rachel Shiu, RMT
Counsel for the College:	Elizabeth Allan
Respondent:	No one appearing

Background

1. A panel of the Discipline Committee (the "**Panel**") convened via a Zoom video link on October 22, 2020 from 2:00pm to 3:40pm to hear a preliminary application brought by the College pursuant to ss. 38(3) and 38(4.2) of the *Health Professions Act*, RSBC 1996 c 183. The purpose of the pre-hearing conference was to address an application by the College for certain procedural orders respecting the discipline hearing involving the Respondent (the "**Discipline Hearing**") set to proceed from November 30 to December 2, 2020 (inclusive).
2. The Respondent was not present at the pre-hearing conference. It was confirmed by Counsel for the College that Mr. Henniger received notice of the date, time and video link for the pre-hearing conference. The Panel waited approximately 5 minutes prior to calling the meeting to order. Mr. Henniger did not attend.
3. The College was represented by its legal counsel, Elizabeth Allan, of Sugden, McFee & Roos LLP. The College sought orders that:
 - a. The Discipline Hearing be conducted by video-conference in accordance with the protocol submitted by the College and attached as Appendix "A" to the Notice of Application (the "**Protocol**");
 - b. The Discipline Hearing be conducted in private;
 - c. The College be permitted to adduce the evidence of the College witnesses by affidavit; and
 - d. Any witness may give their testimony by video-conference in accordance with the Protocol.
4. For the reasons set out below, the Panel has granted Orders #1, #2 and #4 as stated above, and has granted Order #3 in part, as described below.

Jurisdiction Of The Panel To Make Orders And Decision

5. Sections 38(3) and 38(4.2) of the *Health Professions Act*, RSBC 1996, c 183 (the “**Act**”), provide the following with respect to discipline committee hearings:

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.

(4)At a hearing of the discipline committee,

(a)the testimony of witnesses must be taken on oath, which may be administered by any member of the discipline committee, and

(b)the college and the respondent have the right to cross examine witnesses and to call evidence in reply.

...

38 (4.2)The discipline committee may ...

(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. On August 5, 2020 the College issued a citation to the Respondent pursuant to s. 37 of the Act (the “**Citation**”). The Citation relates to a complaint made by [REDACTED] (the “**Complainant**”) against the Respondent regarding conduct alleged to have occurred while the Respondent was providing massage therapy treatment to her. Specifically, that on or about October 31, 2017, in the course of providing massage therapy services to the Complainant, the Respondent is alleged to have failed to adequately communicate the treatment plan to treat the Complainant’s pectoral

muscles, including that he would treat at or near the Complainant's breasts and failed to obtain informed consent to treat at or near the Complainant's breasts.

7. The Respondent has been personally served with the Citation and Notice of Discipline Hearing.
8. **The first order requested by the College is that the Discipline Hearing be conducted by video-conferencing in accordance with the protocol submitted by the College and attached as Appendix "A" to the Notice of Application.**
9. The Panel acknowledges the unprecedented times currently being faced on account of the global COVID-19 pandemic. A public health emergency was declared by the Public Health Officer for British Columbia on March 17, 2020, and the following day the Province of British Columbia declared a state of emergency due to the pandemic, which state of emergency has been extended and continues to be in effect. Various orders and directives have been issued to the public in relation thereto, including restrictions on travel, the size of gatherings and physical distancing mandates. The courts, tribunals and various regulatory bodies have responded by proceeding with virtual hearings for many types of matters.
10. Remarks by the President of the Law Society of British Columbia, Craig Ferris, QC, in *Re: Long*, 2020 LSBC 16, are persuasive when considering whether to grant an adjournment of a disciplinary hearing or continue with the proceedings remotely. At paragraphs 2 to 3, the decision reads:

... As a Tribunal, we have a public duty to continue to function as best we can during the current COVID-19 public health emergency. We cannot shut our doors and allow these issues to remain outstanding. Hearings by video or telephone conference may have imperfections, but at times such as these, we cannot simply accept general misconceptions about the usefulness of these technologies,

The courts of many jurisdictions are continuing to serve the public through this emergency by the use of these

technologies, and the Law Society of British Columbia Tribunal ought to be no different.

11. It is worth noting that s. 16 of the Act imposes a public interest mandate on the Panel:

16 (1) It is the duty of a college at all times

(a) to serve and protect the public, and

(b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

12. The College submits that directing the hearing to proceed by video-conference would be in furtherance of this public interest mandate. The College relies on s. 38(4.2)(c) of the Act, which empowers a discipline committee to “make any other direction it considers appropriate” if it is satisfied that this is necessary to ensure the legitimate interests of a party will not be unduly prejudiced – arguing that such an order would ensure the Discipline Hearing is still conducted in a timely manner.
13. The Panel accepts the College’s submissions regarding its public interest mandate concerning both protection of the public in these extraordinary times, as well as the legitimate interest in ensuring that the hearing is conducted in a procedurally fair and timely manner. A hearing can be conducted virtually and still ensure procedural fairness is afforded to all of the parties involved. As such, the Panel orders that the Discipline Hearing proceed by way of video-conference, including any and all witness testimony. This hearing will proceed in accordance with the College’s video-conference Protocol (copy enclosed).
14. In addition, the proposed Protocol was recently approved for the conducting of discipline hearings by another panel of the College’s Discipline Committee in *Re Morgan* (December 16, 2019) (see, at para 64), in which case the panel found the words in paragraphs 2 and 3 of the statement by Craig Ferris, QC, (referenced above) particularly compelling, as does this Panel.

15. **The second order requested by the College was that the Discipline Hearing be conducted in private.**
16. Section 38(3) of the Act directs that discipline committee hearings are to be held in public. Exception to this rule may, in accordance with s. 38(4) of the Act, be made upon request of the complainant, the respondent or a witness. Such a request is contingent on the discipline committee being satisfied that holding all or any part of the hearing in private would be appropriate in the circumstances.
17. The issue of a privacy order in the context of complaints involving inappropriate touching of a sexual nature was discussed in *College of Massage Therapists of British Columbia v Donald Martin*, 2015 CMTBC 01 (“*Martin*”). There, the discipline hearing was ordered to be given in private where the complainants made such request due to “a desire to maintain privacy over personal health matters” and “because of the sexual nature of the allegations.” The panel cited the following passage from *C.W. v L.G.M.*, 2004 BCSC 1499 at paras 9 and 26, in support of the privacy order:

[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 [...]

18. The College also cites the recent decision in *Re Morgan* (December 16, 2019), wherein various considerations relevant to a hearing being appropriately held in private were discussed. Starting at paragraph 20, that panel considered as follows:

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 NSCA113, 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.

19. In this instance, the Complainant requested that “my information/complaint be kept private during this hearing”; in other words, that the Discipline Hearing be held in private. The College adduced evidence of the Complainant’s request at Exhibit 4 of its Application Record, setting out that such request was based on her job as a high school teacher. The College further submits that maintaining privacy of the proceedings is appropriate in the circumstances given: the sexual nature of the complaint at issue; the fact that disclosure of the Complainant’s health records is an inevitable part of the proceedings; and to protect the Complainant from any potential media attention and/or revictimization during the proceedings.
20. The Panel is satisfied that holding the entire Discipline Hearing in private is appropriate. The allegations set out in the Citation are in the context of a patient/therapist relationship where the Complainant had a reasonable expectation of privacy. The particulars of the allegation will also necessarily involve a review of the Complainant’s medical records, over which she has an interest in maintaining confidentiality. The nature of the Complainant’s occupation is further support for the appropriateness of a privacy order in the circumstances – in that the potential for details of the proceedings being accessible by her students would cause undue distress. Lastly, holding the Discipline Hearing in private will not undermine the Respondent’s right to a fair hearing.
21. The Panel therefore orders that the Discipline Hearing be held in private. The transcripts of the hearing will be made available to the public, at the expense of the person wishing to purchase the transcripts (as ordered in *Re Morgan, supra* at para 83), in redacted form, with names and all related identifying information respecting the Complainant being withheld. This approach will afford the Complainant an appropriate amount of privacy in the circumstances, while allowing public access to the proceedings and upholding the public interest in encouraging the reporting of sexual misconduct.

22. **The third order requested by the College was that the College be permitted to adduce the evidence of the College witnesses by affidavit.**
23. Section 38(4) of the Act provides that testimony of witnesses at a hearing must be taken on oath and that both the college and the respondent have a right to cross-examine any witness and to call evidence in reply. Notwithstanding, s. 38(4.2) of the Act empowers the Panel to order otherwise if appropriate in the circumstances.
24. The College seeks to have its evidence adduced by affidavit only. The College submits that an affidavit meets the Act's requirement that evidence be given under oath since an affidavit is simply a written statement confirmed by oath or affirmation in the presence of a lawyer or other authorized person. The College also submits that proceeding by way of affidavit evidence alone would ensure an expeditious completion of the hearing.
25. In specific relation to the affidavits it intends to adduce, the College submits that it anticipates such evidence will come from three individuals, including the Complainant, a registered massage therapist (other than the Respondent), and a representative of the College, and that such evidence is conveniently given by affidavit.
26. The College anticipates the Complainant's affidavit to adopt the summary of her interview with the College, as well as providing evidence on "a few other points", such as attaching the email confirmation of her appointment with the Respondent, all of which has been already disclosed to the Respondent.
27. It is also anticipated by the College that the affidavit of the RMT will adopt the summary of her interview with the College as her evidence, and attach her treatment records from three appointments she had with the Complainant in 2018, all of which has also been disclosed to the Respondent.
28. Although a sworn affidavit meets the requirements of evidence being provided under oath for the purpose of s. 38(4)(a) of the Act, the Panel is cognisant of both the right of the Respondent and the College to cross-examine any witness and/or

call evidence in reply pursuant to s. 38(4)(b) of the Act. The Panel acknowledges that the right to call and cross-examine a witness is a key component of the procedure protected by the duty of fairness. The panel accepts that the nature of the evidence the College anticipates adducing can be accommodated via affidavit, but only makes this order on the condition that the witnesses be made available – on short notice – for cross-examination or questioning by the Respondent or the Panel, should the need arise. The responsibility for ensuring availability of their witnesses for production will fall to the College.

29. The Panel orders that the College be permitted to adduce its evidence by affidavit, with all witnesses being available (at short notice) to attend for cross-examination and/or questioning by the Panel, should the need arise. As ordered above, if *viva voce* testimony is required it would proceed by way of video-conference.
30. **The fourth order requested by the College was that any witness may give their testimony by video-conferencing in accordance with the Protocol.**
31. The Panel has indicated in its reasons above relating to conducting the Discipline Hearing and the first order requested that witness testimony may be by video-conference and that any witness may give their testimony by video-conference in accordance with the Protocol.

Summary Of Orders

32. The Panel orders as follows respecting the Discipline Hearing of Michael Henniger scheduled to take place from November 30 to December 2, 2020 (inclusive):
 - a. The Discipline Hearing proceed by way of video-conference, including any and all witness testimony, in accordance with the College's video-conference Protocol (copy attached).
 - b. The Discipline Hearing be held in private.

- c. The College shall be permitted to adduce the evidence of the College witnesses by affidavit, with all witnesses being available at short notice to attend for cross-examination and/or questioning, should the need arise; and
- d. Any witness may give their testimony by video-conference in accordance with the Protocol.



Arnold Abramson (Chair)



Carol Williams (Public Member)



Rachel Shiu (RMT)

Hearing by Video-Conference Protocol

1. An administrator shall be designated the "Hearing Administrator".
2. The Hearing Administrator will act as the "host" of the Discipline Hearing, control admission to the Discipline Hearing, exercise control over the video-conferencing platform settings, and manage the handling of exhibits and other documents.
3. Video-conferences will proceed by Zoom platform unless otherwise determined by the Panel, with these modifications:
 - a. the "break out room" function will not be available, except to the hearing panel;
 - b. The "waiting room" function will be used for all participants;
 - c. The "chat" function will not be used; and
 - d. The "record" function will not be used.
4. At least 14 days before the Hearing Date, each party must submit to the Hearing Administrator and the other party a complete list of participants including counsel, support staff, parties, and witnesses (the "Participants"). For each Participant, the list must include:
 - a. Full name;
 - b. Contact information including email address and telephone number for use during the Discipline Hearing; and
 - c. The user name to appear when joining the video conference.
5. Each party is responsible to ensure that each of their Participants and intended witnesses is properly equipped with the hardware, software, technical support and a suitable venue so that the Discipline Hearing can proceed in an orderly fashion. It is preferable but not required that each Participant have two screens available, so that one may be used to display the videoconference proceeding and the other may be used to display documentary and demonstrative exhibits.
6. Each party shall be responsible for preparing and providing to each of their witnesses the following:
 - a. A book containing all intended exhibits pertaining to that witness (a "Witness Book of Documents"); and

- b. All other materials relating to that witness (a “Witness Book of Relevant Materials”).
7. A Witness Book of Documents and Witness Book of Relevant Materials will be provided to each witness in accordance with the following terms:
 - a. These books will be delivered to that witness by the party intending to call that witness in a sealed envelope;
 - b. These books must be accompanied by instructions to not open the sealed envelope until in the presence of the Panel during the Discipline Hearing;
 - c. Documents in both the Witness Book of Documents and the Witness Book of Relevant Materials must be provided in a clean and unannotated form;
 - d. This does not preclude the party calling the witness, the Panel, or counsel for the other party from referring any witness to documents available by electronic means only, such as through the screen sharing function on Zoom; and,
 - e. This does not preclude the provision by a party to their witnesses of materials for preparation purposes.
8. At least 14 days before the Hearing Date, each party must submit to the other party all Witness Books of Documents and all Witness Books of Relevant Materials.
9. At least 14 days before the Hearing Date, each party must submit to the Hearing Administrator all Witness Books of Documents and all Witness Books of Relevant Material, in accordance with the following terms:
 - a. Parties shall provide encrypted PDFs of each of these books. These PDFs will be in a clean and unannotated condition. The Hearing Administrator shall provide the password for these encrypted PDFs to the Panel during the Discipline Hearing in the presence of the parties; and,
 - b. Parties shall provide to the Hearing Administrator, for each witness, a sealed envelope containing hard copies of the Witness Book of Documents and the Witness Book of Relevant Material for that witness. Panel members shall not open the sealed envelope until in the presence of the parties during the Discipline Hearing.
10. At least 5 days before the Hearing Date, the Hearing Administrator will conduct a test session of the video-conference arrangement with the parties.
11. Parties are responsible for testing the video-conferencing platform with each of their Participants on their own and ensuring that all of their Participants have suitable equipment to participate in the proceeding without delays attributable to inadequate familiarity with the platform or inappropriate equipment.

12. No recording of the proceeding is permitted except for any used by the court reporter and the official transcript.
13. For security reasons, the Hearing Administrator will notify the Participants of the information needed to join the video conference only shortly before the beginning of each session.
14. The Hearing Panel will govern the admission of evidence, but counsel should be prepared to meet the following guidelines:
 - a. Documentary evidence not provided 14 days before the hearing and in PDF format and in hard copy format to the Panel via the Hearing Administrator, in accordance with paragraphs 6-9 above, will not be admitted except by leave of the Panel; and
 - b. Witnesses:
 - i. Must be clearly visible, face the camera and speak directly and audibly into the microphone;
 - ii. Must sit at a clear desk or table;
 - iii. Must be unaccompanied in the room except as permitted by the Panel;
 - iv. Must not use a virtual background so that the surroundings of the witness are at least partially visible at all times;
 - v. Will be excluded when not giving evidence (except the Respondent); and
 - vi. May be asked to scan with the camera in the room in which they are giving their evidence.
15. The Panel may modify this Protocol in its discretion to protect the fairness and integrity of the Discipline Hearing.
16. If the videoconference is to be conducted with related Participants in groups at separate locations, the parties shall be responsible for making arrangements to deal with the specific procedural matters required, such as the positioning of the cameras to ensure every Participant is visible and avoiding audio feedback from multiple devices.
17. In the event that a Participant is disconnected from the video-conference or experiences some other technical failure and connection cannot be re-established within approximately 5 minutes:
 - a. The Panel may take steps to “pause” the Discipline Hearing, which may include

directing the Hearing Administrator to move Participants into the virtual Waiting Room;

- b. The Hearing Administrator shall contact the Participant experiencing the technical failure; and,
- c. If the Panel deems it unfair to any party to continue with video-conferencing hearing because of a technical failure, the Panel may pause or terminate the video-conference at anytime and take such other steps as may be necessary to ensure the fairness and integrity of the proceedings.