

IN THE MATTER OF A HEARING BEFORE THE HEARING TRIBUNAL  
OF THE COLLEGE OF CHIROPRACTORS OF ALBERTA ("CCOA")  
into the conduct of Dr. Curtis Wall,  
a Regulated Member of CCOA, pursuant to the  
Health Professions Act, R.S.A. 2000, c. P-14

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INTERIM APPLICATION REGARDING PUBLICATION  
OF TRANSCRIPTS  
VIA VIDEOCONFERENCE

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April 12, 2022

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1 Proceedings taken via Videoconference

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3 April 12, 2022

Morning Session

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5 HEARING TRIBUNAL

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[REDACTED]

Tribunal Chair

7

[REDACTED]

Internal Legal Counsel

8

Dr. [REDACTED]

CCOA Registered Member

9

Dr. [REDACTED]

CCOA Registered Member

10

[REDACTED]

Public Member

11

[REDACTED]

CCOA Hearings Director

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13 ALBERTA COLLEGE AND ASSOCIATION OF CHIROPRACTORS

14

[REDACTED]

CCOA Legal Counsel

15

16 FOR DR. CURTIS WALL

17

J.S.M. Kitchen

Legal Counsel

18

19

[REDACTED]

CSR(A)

Official Court Reporter

20

21 (PROCEEDINGS COMMENCED AT 9:24 AM)

22

Discussion

23

THE CHAIR:

Welcome, everybody. Good

24

morning. We have a bit of a different agenda today

25

than first anticipated. The first matter I'd like to

26

deal with is the concern over Dr. Wall not appearing on

1 camera, and we have discussed this over the past few  
2 minutes. We are aware of the College rule, which  
3 states that all parties, whether participants or  
4 observers, must be visible on the screen and that  
5 anyone who does not follow this requirement will be  
6 removed from the hearing.

7 The Hearing Tribunal has a couple of concerns with  
8 this. The first one is that if we remove Dr. Wall from  
9 the hearing because he's not on the screen, that  
10 violates a principle of natural justice. He has a  
11 right to attend his hearing.

12 So the second more practical comment that I would  
13 make is that we have been meeting on several occasions  
14 and -- in this matter, and there have been times when  
15 Dr. Wall has not appeared, and this was not raised as  
16 an issue. So I think we have, in practice, we have  
17 accepted that he is only visible -- or he is only  
18 attending by audio. I understand and I accept that  
19 he's making his best efforts to arrange the camera.  
20 However, in the interest of moving forward, the Hearing  
21 Tribunal has decided that we will proceed. We don't  
22 feel that we can enforce the rule now, given that we've  
23 not enforced it in the past, and that in removing  
24 Dr. Wall from the screen, we would jeopardize a  
25 fairness to Dr. Wall to be here. So --

26 MR. [REDACTED] Mr. Chair, I just want to make

1 one comment, certainly I understand your ruling, we  
2 haven't raised this as an issue in the past though  
3 because we were advised that Dr. Wall had technical  
4 issues with his camera, and I want to be very clear  
5 that the College does expect compliance with its  
6 observer/participant policy with turning on cameras,  
7 and again, there was no waiver of that or, I suppose,  
8 consent to a different approach by the Complaints  
9 Director because we were told there were technical  
10 difficulties, which is very different than saying, on  
11 behalf of the College, we agree to that or we think  
12 that's fine.

13 The Complaints Director does believe that there is  
14 an obligation on the member to fully participate, and  
15 part of that is, you know, consistent with the policy,  
16 is having the camera on. So I just want to be clear  
17 that we haven't -- the Complaints Director hasn't  
18 waived that, that policy. We've been advised there was  
19 a technical problem with Dr. Wall having a camera, and  
20 that's a little different than saying we haven't  
21 enforced it. We didn't raise it as an issue, because  
22 we thought it was impossible to address. It seems like  
23 there's a continuing, you know, technical issue today,  
24 which is of concern to the Complaints Director, but  
25 here we are.

26 THE CHAIR: Thank you, Mr. [REDACTED] and I

1 will say it's a concern to me as well, to the Hearing  
2 Tribunal. I think the larger concern is fairness here.  
3 I will say that we are hopeful that Dr. Wall will be  
4 able to address his technical issues, if not for  
5 today's hearing, certainly for our next scheduled date.

6 Mr. Kitchen, is there anything you wanted to add?

7 MR. KITCHEN: Yes, please. Just in  
8 response, you know, I've heard this talk of concerns,  
9 but these concerns are not articulated. I don't think  
10 it's appropriate to put out on the record unspecified  
11 concerns that impugn Dr. Wall's conduct and his  
12 character in these proceedings, and I don't appreciate  
13 that. And I heard my friend, Dr. Wall will fully  
14 participate. He's here, he's listening, he's watching,  
15 and you can hear him, so he's fully participating, and  
16 he would like to appear by video, but as I think it's  
17 clear on the record, he is unable to due to no fault of  
18 this own, but because of technical difficulties.

19 I just would note that, and I appreciate your  
20 ruling, I just would remind my friend that, of course,  
21 any rule of the College, it's trite law that those are  
22 subject to fundamental rights and constitutional  
23 obligations, one of which, as you mentioned, Mr. Chair,  
24 is that Dr. Wall has a fundamental right to be here, to  
25 be present. And if he was removed, it would fatally  
26 wound the proceedings such that they could not be cured

1 procedurally.

2 He has a right to be here, and, you know, we'll do  
3 our best to get his camera working. I will work with  
4 him to do a test run, to try to get it working for next  
5 time, but we shouldn't have to deal with this again in  
6 any event. I haven't heard any actual concerns; I've  
7 only heard allusions to concerns. And unless they're  
8 specified, I think they shouldn't be mentioned, and we  
9 should just proceed.

10 Because this is how things have been done for two  
11 years at the Court of Queen's Bench, at the Court of  
12 Appeal in this province, people show up, they're not  
13 required to put their video on, they're not required to  
14 go through any process other than to say what their  
15 name is and then put it up on the screen, and then  
16 they're allowed to attend. And I see no reason for  
17 this Tribunal to, or the College for that matter, to  
18 act any differently. They should take their cues from  
19 the highest courts in this province.

20 THE CHAIR: I will just say that this is a  
21 rule, and it's on the College website under the  
22 "Complaints dismissal/hearings". I'm not going to  
23 speak to the listing of the rule. I'm just telling you  
24 that is the basis for the concern. I think we dealt  
25 with it. I think we should use our time and move on to  
26 the issues that we have to deal with today.



1           So we were initially scheduled to hear final  
2 arguments yesterday and today. That did not occur.  
3 There was an application, a submission from Mr. [REDACTED]  
4 regarding publication of transcripts, and I think  
5 everybody has seen that.

6           The Hearing Tribunal asked Mr. Kitchen for any  
7 reply submissions, which he has provided, and I believe  
8 people have copies of that. And in correspondence,  
9 we've been advised that there are no more written  
10 submissions on this, that the parties will make oral  
11 submissions today.

12           And I will note that Mr. Kitchen did raise a  
13 second issue in his submission, and that concerns --  
14 identifies some concerns regarding prosecution --  
15 prosecution procedures, I'll just say that. I'll let  
16 Mr. Kitchen explain that.

17           So my anticipation is that we will deal with both  
18 of these matters together, and I would ask that, unless  
19 the parties prefer to split them and deal with them  
20 separately, Mr. [REDACTED] what's your preference?

21 MR. [REDACTED]                   I've got some comments on  
22 this, and I will invite Mr. Kitchen's comments right  
23 now though as well, but I had anticipated that the  
24 matter of clarification of your publication order would  
25 be dealt with first, and I have some new information  
26 that I conveyed to Mr. Kitchen, which I think makes

1 his, I'll call it, his cross-application about  
2 Complaints Director concerns academic, and I will  
3 inform you about that shortly, but I think we need to  
4 deal with them separately, Mr. Chair, even though the  
5 second one I think is not proceeding today.

6 MR. KITCHEN: Mr. Chair, sorry, if I may, I  
7 suggest we just deal with that now as a housekeeping  
8 matter, get it out of the way, and then we can get on  
9 with the only application that we're going to actually  
10 deal with.

11 I'll invite my friend to put this on the record,  
12 just so it's clear, but he's informed me that the  
13 current Complaints Director, Mr. [REDACTED] is retiring  
14 in any event tomorrow, and I would just ask him to  
15 clarify if that means he will cease to have any  
16 involvement in Dr. Wall's case, because I want to know  
17 that.

18 In the event, he will cease to have any  
19 involvement in Dr. Wall's case, Dr. Wall withdraws his  
20 application to have Mr. [REDACTED] removed as Complaints  
21 Director, because, as my friend has said, it's  
22 academic, or another way to put it is it's moot,  
23 because basically Dr. Wall will be getting what he  
24 wants in any event, and it would be not a good use of  
25 resources to go through that process today to have that  
26 application heard. So I'll pass it over to my friend.

1 MR. [REDACTED] Yeah, I think that's  
2 substantially correct. I can clarify that Mr. [REDACTED]  
3 will no longer be the Complaints Director effective  
4 tomorrow. He's staying on with the College for a brief  
5 period of time to assist with transition, and I will be  
6 getting instructions from a new Complaints Director  
7 effective tomorrow on this matter. So I was going to  
8 take you through that in a little more detail,  
9 Mr. Chair, but Mr. Kitchen has explained that, and,  
10 again, I entirely agree that I think that  
11 cross-application is now moot, it's now academic, and I  
12 don't think we need to spend any time on it today.

13 MR. KITCHEN: Just for clarification though,  
14 will you be taking instructions exclusively from the  
15 new Complaints Director?

16 MR. [REDACTED] I think that's probably  
17 accurate, but I'm certain Mr. [REDACTED] will have some,  
18 you know, transition involvement with the new  
19 Complaints Director, but I anticipate, effective  
20 tomorrow, I'm getting instructions from the new  
21 Complaints Director.

22 MR. [REDACTED] The -- if I can just add onto  
23 that, the CCOA council appoints the Complaints Director  
24 under the HPA, and our council has appointed the new  
25 Complaints Director effective tomorrow, so instructions  
26 would be received from the new Complaints Director to

1 Mr. [REDACTED] starting on the 13th.

2 MR. KITCHEN: All right, well, with that,  
3 Dr. Wall withdraws his application to have Mr. [REDACTED]  
4 removed as prosecutor. So we only have one  
5 application, and that's the Complaints Director's  
6 application.

7 THE CHAIR: Okay, well, thank you both for  
8 that. Mr. [REDACTED] on behalf of the Hearing Tribunal  
9 certainly, congratulations on your retirement, pending  
10 retirement, and all the best for the future, and thank  
11 you for your service.

12 MR. [REDACTED] Thank you, Mr. Chair.

13 THE CHAIR: So, Mr. [REDACTED] just one  
14 last question -- no, we'll proceed with your  
15 application, your submission, Mr. [REDACTED] You wish to  
16 make an oral submission?

17 MR. [REDACTED] I do. I have a couple of  
18 quick housekeeping comments I want to make on just some  
19 procedural and logistic issues that the Complaints  
20 Director has identified with me, and I just want to --  
21 I hope we're not going to have a sort of a continuing  
22 stream of these interim applications, but there were  
23 some internal and logistical challenges that the  
24 College encountered in terms of getting everything  
25 together today, and I just want to hopefully avoid some  
26 unnecessary difficulties in the future by just making a

1 couple of quick comments.

2       When we were dealing with emails on this matter  
3 previously, when I emailed your independent legal  
4 counsel, Mr. Kitchen had emailed you and your  
5 independent legal counsel, and I think from the  
6 College's perspective -- pardon me, the Complaints  
7 Director's perspective, we would prefer that those  
8 types of emails go between legal counsel and not to  
9 you, Mr. Chair, your colleagues, since you're  
10 represented by Mr. [REDACTED] I think there was some  
11 confusion potentially about next steps and how we were  
12 going to move ahead with this, and I think having  
13 lawyers communicating with lawyers is consistent with  
14 Law Society requirements. I'd just like to streamline  
15 that and move that forward in that fashion.

16       And similarly, I think there was potentially a  
17 communication gap with the Hearings Director, once  
18 Mr. Kitchen and I had -- or I agreed with Mr. Kitchen's  
19 suggestion that we only needed a half day or one day  
20 for the hearing, I'm not sure that was communicated to  
21 the Hearings Director, and that I think there was some  
22 logistical challenge for her as a result. So we just  
23 ask Mr. [REDACTED] to be, I guess, mindful of that, moving  
24 forward, and try to keep the Hearings Director up to  
25 speed.

26       I don't think Mr. Kitchen and I should have direct

1 communication with the Hearings Director on matters of  
2 scheduling and that type of thing once we've conveyed  
3 that to Mr. [REDACTED] So just moving forward, I'd like  
4 to try and streamline processes, be consistent with Law  
5 Society requirements, and make sure we avoid some  
6 challenges for the Hearings Director, who I think, in  
7 fairness, I understand had to scramble to get things  
8 together today.

9 So anyhow, I wanted to put that on the record as  
10 some preliminary comments.

11 THE CHAIR: Just before Mr. Kitchen  
12 comments, I will say I was out of country at the time,  
13 and that I will take responsibility for the confusion.  
14 There was some communication back and forth, and  
15 telephone was not the preferred option, in view of the  
16 significant long-distance charges.

17 But at any rate, your comments are noted, and we  
18 will do better in the future. Hopefully we won't have  
19 to do it in the future, but if we do, we will not  
20 deviate from standard procedure.

21 Mr. Kitchen?

22 MR. KITCHEN: My learned friend, it sounds  
23 like he has said that I've sent an email to the  
24 Tribunal Members that I shouldn't have, and I'm unaware  
25 of that. It's the first I've heard of this --

26 MR. [REDACTED] Mr. Kitchen, I'm sorry, I

1 think you emailed -- my comment was you emailed  
2 Mr. [REDACTED] and Mr. [REDACTED] and I think probably better to  
3 email Mr. [REDACTED] alone. You didn't communicate with  
4 the Tribunal.

5 THE CHAIR: And in his defence, I  
6 requested his reply, so he was responding to my  
7 request, so -- and that is my responsibility.

8 MR. KITCHEN: Yes, that was in a chain of  
9 emails, Mr. [REDACTED] I believe you started, and  
10 Mr. [REDACTED] was copying with Mr. [REDACTED] yourself, and I,  
11 and we all sent a few emails back and forth. So I  
12 agree with you that that's not ideal. I agree that it  
13 was good that you, me, and Mr. [REDACTED] dealt with that  
14 over a phone call. And I just want to make sure that  
15 there's no -- somehow any allegation that I acted, you  
16 know, inappropriately by copying somebody on an email.

17 I agree with you that things need to be dealt with  
18 lawyer to lawyer to lawyer, and I want to do that, and  
19 I think we've tried to do that. So I just want to make  
20 sure that's clarified.

21 As far as the Hearings Director, I mean the -- I  
22 guess if you say that she's part of your client as the  
23 College, I hadn't thought of her that way, but if  
24 that's the case, then, you know, of course I understand  
25 you don't want me communicating with her directly, and  
26 that's fine. I think you and I ought to talk about it,

1 a protocol for that, so that maybe we copy Mr. [REDACTED]  
2 or we say everything to him, and he can send it to her,  
3 however, you want to deal with it --

4 MR. [REDACTED] Yeah, and I --

5 MR. KITCHEN: -- I would have thought that  
6 Mr. [REDACTED] was counsel only to the --

7 MR. [REDACTED] No, no --

8 MR. KITCHEN: -- Tribunal --

9 MR. [REDACTED] -- I'm sorry -- yeah,  
10 Mr. Kitchen, just to be very clear, she's not my  
11 client, but the Complaints Director is. I think there  
12 was a communication gap here that occurred where  
13 today's hearing, only being one day, not two, she  
14 wasn't advised of that, and I think she had to scramble  
15 to pull it together. That's what I hear from  
16 Mr. [REDACTED] So she's not my client. I'm not having  
17 private, you know, communications with her. I think we  
18 just have to do a better job of keeping her up to  
19 speed, because there were some challenges for her today  
20 to bring everyone together.

21 MR. KITCHEN: Certainly I agree. And in  
22 response to that, if it's possible, at the end of this  
23 hearing, for us to actually set those dates, the two  
24 closing argument dates, that would certainly be  
25 Dr. Wall's preference, so that we can get that nailed  
26 down. And like my friend said, hopefully we can get



1 onto that and not have any more interim applications.

2 THE CHAIR: On that note, I have heard, we  
3 might as well deal with this now since it's been  
4 brought up, the only potential date at the moment that  
5 works for everybody is Friday, June 17th. What I would  
6 like to ask, it appears that June 16th will work for  
7 everybody except your client, Mr. Kitchen, and we're  
8 wondering if that -- if there's some way, with notice,  
9 that that could be arranged.

10 The alternative, Saturday, June 18th, is  
11 impossible as there are people who are out of country  
12 on that date. And keeping in mind the desire to have  
13 two days consecutive or very close together, the only  
14 alternatives will be in the fall of this year or,  
15 unfortunately, early 2023.

16 So I'll raise this now, and maybe some  
17 consideration can be given to it, and we can talk about  
18 it at the end of our discussions today, but what's  
19 being proposed is June 16th and June 17th if Dr. Wall  
20 can adjust his schedule to meet those dates.

21 So that's where we're at with that. There were  
22 several -- a few Doodle poles that went out, and those  
23 are the only -- the 17th is the only available date  
24 that works for everyone, and the 18th is out, so ...

25 MR. KITCHEN: Well, thank you, Chair, I  
26 appreciate that. I'm sure we'll have a chance for a

1 recess today before we're done, I will canvass that  
2 with my client, and if it's at all possible to make  
3 that work, I'll let you know, one way or the other, by  
4 the end of the hearing, so thank you.

5 THE CHAIR: Okay, are we done with  
6 housekeeping? Anything --

7 MR. [REDACTED] I think so --

8 THE CHAIR: -- further?

9 MR. [REDACTED] -- Mr. Chair.

10 THE CHAIR: Okay --

11 MR. KITCHEN: I just have one more item that  
12 I have to mention. I was contacted by two individuals  
13 that were not permitted to attend today. They were  
14 provided with the reason that they did not ask to  
15 attend more than five business days before the hearing.  
16 One of these individuals was, in fact, a journalist. I  
17 just want to put on the record that Dr. Wall finds that  
18 very concerning, and he objects to that on grounds of  
19 freedom of expression and freedom of the media. That  
20 five-day limit is purely arbitrary. No explanation or  
21 reason has been provided for why that five-day limit is  
22 there.

23 And so I have to put on the record that that's  
24 very concerning, and I don't know if we'll ever get a  
25 chance to properly deal with it, but I want it noted  
26 that Dr. Wall objects to it, and he may -- he reserves

1 his right to perhaps make an application to have that  
2 removed or varied, because it's an unlawful requirement  
3 that is preventing Dr. Wall from having his case fully  
4 heard openly and publicly, which is his right.

5 MR. [REDACTED] Mr. Chair, I don't want to  
6 take up more time than we need to, but I just have a  
7 couple of quick comments in response.

8 These hearings have been open from day one, so I  
9 think it's important to remember that the College's  
10 policy has not changed from day one. It's a policy  
11 that I think is fair and reasonable. The College has  
12 to know who is participating, they have to know  
13 logistically how many people are going to be involved,  
14 what the platform can and can't accommodate. There is  
15 a security consideration in terms of making sure that  
16 people aren't recording, that they acknowledge that  
17 they're not doing that.

18 So we have a difference of opinion here in terms  
19 of that policy, but that policy's been around since the  
20 beginning, and I think if you look at -- beginning of  
21 this hearing -- and if you look at other HPA colleges,  
22 I think you'll see very, very similar policies as well.

23 So, again, I think we've heard this before, but  
24 the policy is the policy, it's not overly onerous, and  
25 these have been open hearings from day one.

26 THE CHAIR: Okay, I think both of your

1 comments on this matter have been noted for the record,  
2 and I don't -- haven't paid any attention unless  
3 necessary, absolutely necessary, of getting involved in  
4 discussions on College policy at this point, so I'd  
5 like to move on to the matter at hand. And,  
6 Mr. [REDACTED] if you're prepared to proceed, we will do  
7 that.

8 Submissions by Mr. [REDACTED]

9 MR. [REDACTED] Thank you, Mr. Chair. The  
10 purpose of today's application is to obtain direction  
11 and clarification from you, your colleagues on the  
12 Tribunal, regarding the meaning and application of your  
13 March 16, 2022 decision, which arose from a February  
14 25, 2022 application or hearing before you about how  
15 and when hearing transcripts could be published by  
16 Dr. Wall.

17 As you know, your March 16, 2022 decision  
18 contained orders about how transcripts could be  
19 disclosed, and you issued orders as well restricting  
20 certain types of ancillary comments.

21 And I think it's important to remember that the  
22 Complaints Director today is seeking direction and  
23 clarification from you on both aspects of your order.  
24 First of all, what is the meaning and application of  
25 the publication order in terms of the naming of  
26 witnesses and similar matters and, frankly, whether

1     there's been a breach or hasn't been a breach of those  
2     orders by Dr. Wall; and secondly, whether there are any  
3     prohibited ancillary comments that have occurred, which  
4     also would breach your order. So we're looking for  
5     direction from you, clarification from you about the  
6     meaning and application of your original order.

7             I want to be clear that the Complaints Director  
8     did not ask for any restrictions about ancillary  
9     comments, but those were things that were set out in  
10    your order and it has become a live issue, so I think  
11    we need, again, clarification from you on both aspects  
12    of your order.

13            I anticipate the process for today's hearing, and  
14    we've kind of talked a little bit about this, will be  
15    that I will make some comments to you, some submissions  
16    to you, answer any questions you have; Mr. Kitchen  
17    would respond with comments, and you'll have questions  
18    for him potentially, and then I would have some reply  
19    submissions to you potentially. And I think we've been  
20    fairly informal at the conclusion of other hearings or  
21    other applications, where we've engaged in the  
22    dialogue, some questions back and forth, and I think  
23    that would probably be the same for today. We're in  
24    your hands in terms of making sure all your answers are  
25    answered.

26            Mr. Kitchen, are you comfortable with that

1 approach?

2 MR. KITCHEN: Yes, I had imagined we were  
3 proceeding just along those lines.

4 MR. [REDACTED] So, Mr. Chair and Hearing  
5 Tribunal Members, I want to just give you an idea of  
6 what I'm going speaking to you about today. I'm going  
7 to have essentially five parts to my submissions.

8 The first matter I'll deal with is a preliminary  
9 one, just confirming what the exhibits are before you,  
10 what the materials are before you that you should be  
11 reviewing.

12 The second thing I'm going to do is make some  
13 general comments about how we got here today and some  
14 very important considerations from the Complaints  
15 Director's perspective about self-regulating colleges  
16 and their mandatory public protection duties.

17 The third area I'm going to speak to, because it's  
18 been raised by both parties, is the matter of costs,  
19 and I'm going to speak to costs in terms of not only  
20 today's hearing but costs generally in terms of the  
21 hearing at large and what your authorities are, what  
22 your powers are under the Health Professions Act in  
23 terms of making costs orders.

24 The fourth thing I'm going to do is take you  
25 through some of the exhibits, the documents before you,  
26 refresh your memory about the -- some of the facts that

1 are in play, some of the issues that are in play, and  
2 why we need clarification from you on the meaning of  
3 your order.

4 And then the final thing I'm going to speak to is  
5 some concluding comments just to summarize my client's  
6 position.

7 So I'll turn to the first matter, and I believe  
8 the Hearings Director has provided these documents to  
9 you. I just want to be clear about what should be in  
10 front of you today. The first -- and I will ask that  
11 these be marked as exhibits by the court reporter  
12 during a break or after today's hearing, I think it's  
13 important we have those marked.

14 The first document or exhibit will be the  
15 transcript of the February 25, 2022 interim  
16 application.

17 EXHIBIT H-9 - February 25, 2022 interim  
18 application transcript

19 MR. [REDACTED] The second exhibit will be  
20 your March 16, 2022 four-page written decision.

21 EXHIBIT H-10 - Four-page March 16, 2022  
22 Hearing Tribunal decision regarding  
23 publication of transcripts

24 MR. [REDACTED] The third exhibit will be my  
25 email of March 28th to Mr. [REDACTED] and Mr. Kitchen,  
26 where we raised some concerns about the publication

1 order.

2 EXHIBIT H-11 - March 28, 2022 email from

3 Mr. [REDACTED] to Mr. Kitchen and to Mr. [REDACTED]

4 MR. [REDACTED] The fourth document, the  
5 fourth exhibit, will be the March 29, 2022 written  
6 submissions from Mr. Kitchen, including I think some  
7 attachments to it. I note that the -- part of those  
8 submissions, the second part that deals with the  
9 Complaints Director concerns is now academic, so I  
10 think we can -- you can disregard those parts of the  
11 submission.

12 EXHIBIT H-12 - March 29, 2022 Reply

13 Submissions and Notice of Application from

14 Mr. Kitchen, including attachments

15 MR. [REDACTED] And the fifth and final  
16 document that should be before you is my March 31, 2022  
17 email to Mr. [REDACTED] and Mr. Kitchen raising a concern  
18 about another potential breach of your initial  
19 publication order.

20 EXHIBIT H-13 - March 31, 2022 email from

21 Mr. [REDACTED] to Mr. [REDACTED] and Mr. Kitchen

22 MR. [REDACTED] Mr. Kitchen has confirmed with  
23 me that he believes those are the documents that should  
24 be before you, so I don't think that's contentious; I  
25 just want to be sure you do, in fact, have those.

26 THE CHAIR:

Mr. [REDACTED] I am not sure



1     that I have your March 31st -- that we have your March  
2     31st identifying a second issue.

3     MR. [REDACTED]                     I wonder, Mr. Chair, if we  
4     could ask, and I invite Mr. Kitchen's comments, but I  
5     wonder if we could ask, as I proceed with my  
6     submissions, I'm not going to get to that email for a  
7     little bit, perhaps we could ask Ms. -- well, the  
8     Hearings Director to forward that to you, if you don't  
9     have it.

10    THE CHAIR:                     I'm just -- I have some emails  
11    from March 31st, but I don't see that one. So if that  
12    could be done, that would be much appreciated; if it  
13    could be sent to Ms. [REDACTED] and she can forward it on  
14    to us.

15    MR. [REDACTED]                     I think Ms. [REDACTED] likely has  
16    it, Mr. Chair. If it's okay with you, I don't want to  
17    take some time to break and try to locate it and send  
18    it directly. If she has it, she can send it to you.

19    THE CHAIR:                     If we get to that point in the  
20    hearing where we don't have it, I'll raise it,  
21    otherwise, let's just proceed.

22    MR. [REDACTED]                     Thank you.

23             So I'll turn to the second part of my comments to  
24    you, which are some comments about where we're at and  
25    why we're here. And I'll just start by saying that my  
26    client has asked me to review some background, because

1 when you read the submissions from Dr. Wall and you  
2 hear his arguments, I think there's an implicit and, at  
3 times, explicit narrative that somehow today's  
4 application isn't necessary or there's no need to be  
5 here, and, of course, the Complaints Director believes  
6 that there is a very valid reason to be here, that we  
7 need to be certain about compliance generally and  
8 compliance with your orders in specific.

9 So I want to begin by I think reviewing what are  
10 really some uncontested facts, some things that really  
11 aren't in issue in this hearing, taking us back to the  
12 beginning of the hearing. The College, as you know,  
13 created a Pandemic Directive, and that was consistent  
14 with CMOH orders and the mandatory re-opening  
15 requirements from government. That was the law; there  
16 was no choice for the College; they were required to  
17 create a Pandemic Directive or to use the CMOH orders  
18 as a default, which required masking and social  
19 distancing.

20 So chiropractors couldn't re-open, chiropractors  
21 couldn't practice again, chiropractors couldn't earn  
22 income without that Pandemic Directive being created  
23 and established by the College.

24 And Dr. Wall, as he very fairly and candidly  
25 testified, chose not to observe the Pandemic Directive  
26 after a very brief period where he tried to comply and

1     said it wasn't possible to him. Dr. Wall also candidly  
2     admitted that he didn't tell the College he was  
3     breaching the Pandemic Directive and didn't, at any  
4     time, ask for any type of exemption. He didn't reach  
5     out to the College, he didn't let them know what was  
6     happening, didn't know about his decision to  
7     deliberately not comply with the Pandemic Directive.

8             You'll also recall his evidence that he told you,  
9     in response to a direct question, that he should have  
10    told the College that he wasn't doing this, that he  
11    wasn't complying, that he had an obligation to do that.

12            We also know from the evidence before you that it  
13    was a patient of Dr. Wall's, not the Complaints  
14    Director, not someone else at the College who  
15    complained, who raised a concern about the  
16    noncompliance. So I think it's important to remember  
17    that, because, again, there's this narrative or this  
18    argument that, in some way, the Complaints Director has  
19    acted inappropriately in pursuing this or the  
20    Complaints Director has been unfair. And, again, this  
21    was a complaint or a concern raised by a member of the  
22    public. The Complaints Director and the College had no  
23    awareness and no knowledge of the breach of the  
24    Pandemic Directive by Dr. Wall.

25            It's also I think uncontested that only after the  
26    Complaints Director became aware of Dr. Wall's breach

1 of the Pandemic Directive did they ask for medical  
2 evidence from Dr. Wall about his alleged exemption. It  
3 was only after the Complaints Director raised this that  
4 Dr. Wall requested a letter from a doctor speaking to  
5 his medical condition and other factors.

6 So, again, just to summarize, we have a mandatory  
7 Pandemic Directive that the College had no choice but  
8 to enact if it wanted its members to go back into  
9 active practice, and we have Dr. Wall choosing to not  
10 comply and doing so privately, without notifying the  
11 College.

12 And again, I think that's important to remember  
13 because it's very different from a simplified  
14 narrative, that Dr. Wall had some type of exemption,  
15 the College ignored it and was in some way acting  
16 unfairly towards him.

17 And I think it's equally important, and I'm going  
18 to repeat this again and again, I think it's equally  
19 important to remember that, from the Complaints  
20 Director's perspective, this hearing has never been  
21 about masking, the efficacy or science of masking, or  
22 social distancing. This is a hearing about the  
23 obligation of professionals who are members of a  
24 College to comply with a College's requirements. It is  
25 about compliance and nothing other than compliance with  
26 regulatory obligations.

1           There has been and there continues to be a fulsome  
2   and, at times, a very passionate debate about masking  
3   and social distancing and other restrictions, and the  
4   Complaints Director recognizes that. That's for the  
5   courts though, for the legislature and for public  
6   discourse. It's not what this hearing is about. This  
7   hearing is about compliance and the actions of Dr. Wall  
8   in not complying.

9           As I've said to you before, from the Complaints  
10   Director's perspective, we cannot have a situation  
11   where members of a profession selectively and, in this  
12   case, in private, without notifying the regulatory  
13   body, decide that they aren't going to follow  
14   particular requirements of a profession. You can't  
15   decide I'm not going to pay my fees this year, I'm not  
16   going to take my con. ed. this year, I'm not going to  
17   follow charting guidance, I'm not going to follow a  
18   Pandemic Directive. You have an obligation to do that,  
19   and you have an obligation to come forward and notify  
20   your College.

21           I think it's also important to remember that  
22   Mr. [REDACTED] testified that if he had received a  
23   request for an exemption from Dr. Wall, he really  
24   didn't know what would have happened. They hadn't had  
25   any. He didn't know how that would have been treated.  
26   But the College didn't even have, the Complaints

1 Director didn't even have an opportunity to consider  
2 any type of exemption because Dr. Wall didn't request  
3 it.

4         So I want to emphasize that this is not a personal  
5 or capricious choice by a Complaints Director to  
6 somehow unfairly invoke the discipline process. He's  
7 required to do so based on the information before him.  
8 There's a breach by a regulated member of a significant  
9 and clear professional obligation. And when any  
10 Complaints Director, not just this Complaints Director,  
11 when any College is faced with clear information about  
12 a significant breach like that, a noncompliance breach,  
13 noncompliance with CMOH orders -- remember, Dr. Wall's  
14 clinic was shut down by the CMOH, not the College, the  
15 Complaints Director has an obligation under the Health  
16 Professions Act to consider that information and to  
17 send it to investigation and to determine whether  
18 there's a threshold of unprofessional conduct, in this  
19 case, noncompliance.

20         Again, nothing untoward about that, and, in fact,  
21 it's a compelling duty that the Complaints Director  
22 had, and after that investigation, after referral to  
23 hearing, what's happening now is entirely appropriate.  
24 This Hearing Tribunal is receiving information,  
25 evidence, testimony, and is carefully considering all  
26 of the facts. And the Hearing Tribunal, not Complaints

1 Director, not lawyers, not members of the public, under  
2 the HPA, the Hearing Tribunal is going to decide  
3 whether there's unprofessional conduct. So this is  
4 nothing more and certainly nothing less than the  
5 Complaints Director carrying out his mandatory duties  
6 to take appropriate steps under the Health Professions  
7 Act. It's not a choice --

8 MR. [REDACTED] Please excuse me, I have a  
9 one-minute emergency. I need to go offline.

10 THE CHAIR: Thank you, Mr. [REDACTED] We'll  
11 just take a 5-minute break here so Mr. [REDACTED] can deal  
12 with whatever. So we'll just adjourn for 5 minutes,  
13 please, thank you. My apologies, Mr. [REDACTED]

14 (ADJOURNMENT)

15 THE CHAIR: All right, Mr. [REDACTED] you  
16 can continue with your submission, please.

17 MR. [REDACTED] Thank you. So I was just  
18 commenting on the fact that from the Complaints  
19 Director's perspective, moving this matter forward,  
20 addressing the concern raised by a member of the public  
21 in the face of an issue of serious noncompliance was,  
22 again, nothing more, certainly nothing less than the  
23 Complaints Director carrying out his HPA duties. And  
24 Dr. Wall, of course, is not being treated any  
25 differently than anyone else. When there is an issue  
26 of noncompliance, when there are serious facts that

1 comes from a Complaints Director, those matters need to  
2 be addressed, and the process under the HPA has been  
3 followed at all times.

4 I also want to comment, of course, as I was sort  
5 of mentioning when we had to take a break, that it's  
6 the Hearings Director who decides whether  
7 unprofessional conduct has occurred, not the Complaints  
8 Director, not the lawyers, again, not members of the  
9 public. Except that very importantly, there are 50  
10 percent public member representation on this Hearing  
11 Tribunal, who ensure that there's balance and fairness  
12 and that the public perspective is represented.

13 So the purpose of this hearing is as simple as it  
14 is significant: It is about compliance and of a  
15 professional's obligations in terms of his or her  
16 regulatory body.

17 Now, I've gone to some lengths to review the  
18 background facts here in what is an interim  
19 application, but I think it's fundamentally important  
20 to remember that context, because there are, I think  
21 again, arguments being made, assertions being made that  
22 somehow this is an improper exercise and that this  
23 hearing should not be occurring. The Complaints  
24 Director was strongly of the view that this should have  
25 been a very focused hearing that couldn't -- or didn't  
26 need to have large expenditure of time and resources,



1 and it could have been dealt with as a simple  
2 compliance issue, but that hasn't been the case,  
3 unfortunately.

4 I also want to comment in this part of my  
5 submissions about the open court arguments we've heard  
6 before, because I think those are important as well to  
7 bear in mind. We've heard a lot about open court and  
8 Dr. Wall being able to present his case, having the  
9 right to present his case, and certainly the Complaints  
10 Director would agree with that -- and I -- in general,  
11 as a principle.

12 And I would just remind you that, to date, we have  
13 had eight-and-a-half days of hearings plus today,  
14 eight-and-a-half days of hearings plus today. The  
15 Complaints Director has called only three witnesses,  
16 two lay witnesses and one expert, in response to  
17 because Dr. Wall chose to call experts. Over five days  
18 of hearings, Dr. Wall testified and he called eight  
19 other witnesses, four lay witnesses and four expert  
20 witnesses, for a total of nine witnesses being called  
21 by Dr. Wall. That's resulted in over 1300 pages of  
22 transcripts as a result of, again, an eight-and-a-half  
23 days of hearing. There can be no doubt that Dr. Wall  
24 has been given the full obligation to present a robust,  
25 detailed, and comprehensive defence. There's  
26 absolutely no doubt about that.

1           Just as importantly, at all times every hearing  
2   day has been an open hearing. It's been a hearing  
3   where anyone can observe, where anyone can hear all the  
4   evidence and testimony. There's been nothing to hide  
5   from the Complaints Director's perspective in terms of  
6   the day-to-day conduct of this hearing. And I want to  
7   be very clear that the Complaints Director has never  
8   requested that even a portion of the hearing themselves  
9   be held in private. That's never been requested.

10           A month or so ago, Dr. Wall advised that he wanted  
11   to publish transcripts. Well, that was when the  
12   Complaints Director raised legitimate questions about  
13   how and when publication could occur. As I said to you  
14   on February 25, it's unusual, midstream, to get a  
15   request to publish transcripts. When we look at the  
16   HPA, it talks about access to transcripts after a  
17   hearing has been concluded. So it was fair, it was  
18   reasonable for the Complaints Director to say, in light  
19   of this coming up several months into the hearing, we  
20   need some direction from the Hearing Tribunal. And  
21   that's why we had the application, and we got your  
22   order. You issued your order; you responded to the  
23   parties.

24           Now because of actions of Dr. Wall, we're in a  
25   position where both sides, frankly, need your  
26   assistance. We need you to clarify certain parts of

1 your order and tell us what may or may not be a breach  
2 of those orders. And, again, there's nothing improper  
3 or irregular about that. That is something that should  
4 be of concern to everybody, ensuring compliance with  
5 your orders.

6 I want to also make a comment that my client was  
7 of the expectation that this type of issue could be  
8 dealt with by a written direction from the Hearing  
9 Tribunal. It's not a particularly complex issue. The  
10 facts are, I don't think, in dispute. We have some  
11 publication of transcripts with names and other  
12 ancillary comments. My client was of the view that  
13 this could be dealt with by a written application and  
14 written decisions. Mr. Kitchen has requested that the  
15 closing submissions on behalf of his client, that the  
16 closing submissions be delayed and that we have an  
17 application to hear these matters. And from the  
18 Complaints Director's perspective that's unfortunate,  
19 because we've now had another half day or maybe longer,  
20 where we're going to have further delay and further  
21 costs on a matter that was very focused and could have  
22 been dealt with in writing by the Hearing Tribunal.

23 That leads me to the third area I want to speak  
24 about which is the matter of costs. And as I said to  
25 you before, this has been raised by the Complaints  
26 Director in my comments, in my emails, and it's

1 certainly been raised by Mr. Kitchen on behalf of his  
2 client in response to the Complaints Director's request  
3 for direction here.

4 If you go to my March 28th email, Mr. Chair and  
5 Tribunal Members, I'll just let you get to that, I  
6 think it's Exhibit 3 in today's proceedings. If you go  
7 to the last page of that email, I make some comments  
8 there on behalf of the Complaints Director about the  
9 matter of costs.

10 I'll just let each of you get to that. Take a  
11 little break. It's the third-last paragraph on page 4  
12 of that email. So if you look at that, I'm going to  
13 take you through this email in a little more detail in  
14 a few minutes, but I've got a paragraph there that  
15 says: (as read)

16 As well as and as part of any overall costs  
17 order by the made by the Tribunal.  
18 Because costs are up to the discretion of the Tribunal.  
19 This isn't like the Complaints Director controls this,  
20 but: (as read)

21 As part of any overall costs order made by  
22 the Tribunal, the Complaints Director  
23 reserves his right to request an order  
24 requiring payment by Dr. Wall of 100 percent  
25 of the Complaints Director's costs for the  
26 publication, interim application, and the

1           entirely avoidable steps to enforce your  
2           publication orders.

3       Well, that was stated to make it clear that if there's  
4       a breach, and you'll tell us if there's a breach, the  
5       Complaints Director is of the view that the breach  
6       should be the responsibility of Dr. Wall in terms of  
7       any costs to enforce it, all of the costs, 100 percent  
8       of the costs. And I put that on the record for a  
9       reason, because when we come to the matter of costs, if  
10      there are findings of unprofessional conduct, I'll want  
11      to rely on them. We wanted to notify Dr. Wall of the  
12      Complaints Director's views on costs. There should be  
13      no surprises, and we've been consistent on that.

14           I want to make some comments now about the  
15      question, the issue of costs and the parameters under  
16      which costs can be ordered under the Health Professions  
17      Act, because this is a live issue. It's continued to  
18      be a live issue for the Complaints Director. He's  
19      asked me to communicate that repeatedly to you because  
20      of ongoing concerns about increased costs, unnecessary  
21      costs, from his perspective, and I think there are some  
22      misunderstandings potentially about how costs are dealt  
23      with in an HPA hearing.

24           So I want to begin by saying the case law is very  
25      clear that a professional such as Dr. Wall should be  
26      able to provide a robust defence. I commented on that,

1 eight-and-a-half days of hearing, nine witnesses for  
2 Dr. Wall. Again, he's availed himself of that.

3 When I cross-examined Dr. Wall and asked him  
4 questions about the wording of the five charges, I  
5 think it's important to remember that, without  
6 exception, he agreed that all of the facts giving rise  
7 to the charges were not contested. He has other  
8 defences to those facts, but very early on in this  
9 hearing, we heard that the essential facts for those  
10 charges aren't in dispute. And that was very  
11 significant from the Complaints Director's perspective,  
12 again, thinking of time and cost and further steps that  
13 were taken.

14 The case law is also abundantly clear that if a  
15 member like Dr. Wall is wholly or partially  
16 unsuccessful in his defences, he can be ordered to pay  
17 all or a portion of the costs of the hearing. There's  
18 absolutely no dispute about that. A member can make a  
19 fulsome, robust defence, but there is a potential risk,  
20 a potential consequence that the member can be found to  
21 pay all or a portion of the hearing and investigation  
22 costs, and that's in the HPA. I won't take you through  
23 this, but Section 82(1) of the HPA expressly states at  
24 the beginning: (as read)

25 If the Hearing Tribunal decides that the  
26 conduct of an investigated person constitutes

1           unprofessional conduct, the Hearing Tribunal  
2           may make one or more of the following orders.

3   And then it talks about the member being required to  
4   pay all or a portion of the investigation and hearing  
5   costs, all or a portion. It's absolutely clear that  
6   you have the discretion to make that type of order.

7           If there are any findings of unprofessional  
8   conduct in these proceedings, and I've said this to you  
9   before, but I'm going to repeat it for clarity, the  
10   Complaints Director can request an order that Dr. Wall  
11   pay all of the costs. And that is, I suspect, going to  
12   be his position throughout these proceedings, there's  
13   going to be nothing that happens that will change that,  
14   that he will be seeking a costs order for 100 percent  
15   of the costs to be paid by Dr. Wall. Again, something  
16   that's within your discretion. And, of course, costs  
17   orders, like any other order made by a tribunal, are  
18   enforceable against an individual like Dr. Wall.

19          I want to stop and say that contrary to the  
20   written submissions from Dr. Wall, mentioning costs and  
21   the Complaints Director's intention to seek full  
22   reimbursement of costs, payment of costs by Dr. Wall,  
23   is not a threat in no way, shape, or form, and we take  
24   exception to that. It's a fact of litigation; it's a  
25   fact of hearings. If someone is unsuccessful, there is  
26   that risk. And we want to be very clear to Dr. Wall

1     that we've tried to make this hearing as efficient and  
2     less expensive as possible. And from the Complaints  
3     Director's perspective this hearing has become much  
4     larger, more inefficient, and more expensive than it  
5     needed to be.

6             Similarly and again contrary to the submissions  
7     from Dr. Wall, the matter of costs in an HPA discipline  
8     hearing aren't dealt with pursuant to the Rules of  
9     Court and the schedule to the Rules of Court that apply  
10    in normal litigation. Again, the HPA establishes that  
11    you have broad discretion to order costs all the way up  
12    to and including 100 percent of the costs. We don't  
13    default to the schedule under the Rules of Court where  
14    there's a percentage allocation of costs on less than  
15    fulsome order. That's not what we automatically  
16    default to in the HPA. In fact, it doesn't apply, and  
17    I want to be very, very clear about that.

18            The Complaints Director doesn't decide costs  
19    orders, the lawyers don't decide it; you do after  
20    you've made, if you make, any findings of  
21    unprofessional conduct. Again, it's not a threat; it's  
22    a fact of litigation; it's a fact of discipline  
23    hearings like this.

24            I also want to mention that the cases are equally  
25    clear that a costs order of any type against a member  
26    or unprofessional conduct is appropriate, it is



1 warranted. It's the member's conduct, if you make a  
2 finding of unprofessional conduct, that has required  
3 the discipline process because his or her conduct was  
4 wanting, and it's only appropriate the courts have said  
5 that a member should pay costs then if they're the  
6 cause of the discipline hearing.

7 Otherwise, and the cases are clear on this, those  
8 members of the profession who pay their fees and don't  
9 commit unprofessional conduct effectively subsidize the  
10 conduct of the members whose conduct is lacking and who  
11 haven't met their professional obligation.

12 And, again, contrary to what we hear in the  
13 submissions from Dr. Wall, this Tribunal at law cannot  
14 make an order of costs in favour of Dr. Wall if he's  
15 successful. I'll be taking you to case law when we  
16 come to the penalty phase of the hearing, if there are  
17 findings of unprofessional conduct, there's a  
18 relatively recent case from the Alberta Court of Appeal  
19 where the Court of Appeal says the legislature has  
20 spoken. And Section 82 of the HPA says there could be  
21 an order of costs made against the member, but it says  
22 nothing about orders or costs being made in favour of  
23 the member. And that's not this Complaints Director or  
24 this College making that decision, that's the courts  
25 telling us that the legislature says Dr. Wall, any  
26 other regulated member under an HPA hearing, can't get

1 a costs order in favour of him or her. That's just the  
2 way the legislation is drafted. And again, that's not  
3 a threat, that's not some boast by the Complaints  
4 Director; that's just the law, and we need to be clear  
5 about that.

6 So the Complaints Director has consistently been  
7 concerned about costs, and at his request, I've  
8 regularly commented on that to you, because it's his  
9 view that there have been unnecessary costs incurred as  
10 a result of an unnecessarily long and overcomplicated  
11 hearing, and that we could have done this in a much  
12 more cost-effective manner.

13 I can advise you that, to date, the College's  
14 costs on this hearing are over \$225,000 and they are  
15 increasing, of course, every day that we have to  
16 convene. And the Complaints Director has advised me  
17 that he estimates that the costs per day of convening  
18 this hearing are somewhere in the neighbourhood of 8 or  
19 \$10,000 per day. That tally keeps adding up.

20 And when the Complaints Director submits that the  
21 College's costs are over \$225,000 and are increasing,  
22 well, that's really not entirely accurate, because  
23 there's no such thing as \$225,000 in costs for the  
24 College. \$225,000 in costs are the costs that are  
25 going to be borne by the members of this profession.  
26 That's what they're currently doing; they're currently

1 funding this through their fees.

2 And of course, when the College's costs go up,  
3 that has to be borne by the membership. It's not a  
4 zero-sum game. This is not some amorphous entity; it's  
5 College members who fund discipline hearings like this  
6 while they're going on. So this isn't a theoretical  
7 exercise, it's not a simple cost of doing business,  
8 it's \$225,000 plus and increasing that are being borne  
9 by the members of this profession for the time being.  
10 And if there are findings of unprofessional conduct, it  
11 is entirely legitimate and appropriate for the  
12 Complaints Director to say, I want an order from this  
13 Tribunal requiring Dr. Wall to pay 100 percent of the  
14 costs of this hearing.

15 I'm going to take you to the case law in costs in  
16 the penalty phase of the hearing if there's findings of  
17 unprofessional conduct, and I spent a little bit of  
18 time today with you, a fair bit of time today with you,  
19 going through costs, but again I think it's important  
20 to really put this in its proper context. We're not  
21 dealing with costs in the framework of the Rules of  
22 Court. There's no ability for Dr. Wall to get an order  
23 from a hearing tribunal or the College council paying  
24 him costs in his favour. There's absolute discretion  
25 on the part of the College's Complaints Director to  
26 request personal payment from Dr. Wall of 100 percent

1 of the costs of the hearing. Again, not a threat, a  
2 reality in the litigation, and the Complaints Director  
3 has tried -- in hearings, I should say, and the  
4 Complaints Director has tried to maintain a focus on  
5 this hearing and minimize costs. That's been his  
6 position throughout.

7 Mr. Chair, I'm going to turn to the fourth part of  
8 my submissions, but I expect I'm going to be another  
9 half an hour or 45 minutes. Do you want to take a  
10 break now before I complete my submissions? We've been  
11 going since about 9:00.

12 THE CHAIR: I think that's a wise idea.  
13 Let's take a 10-minute break. I would like to try and  
14 keep this moving. So it's 10 -- let's return at 10:35.  
15 We'll adjourn till then. Thank you.

16 (ADJOURNMENT)

17 THE CHAIR: We will reconvene then, and,  
18 Mr. [REDACTED] you may continue with your submission.

19 MR. [REDACTED] Mr. Chair, I just finished the  
20 third part of my comments to you. I'm going to take  
21 you now to the fourth part of my comments, which are  
22 reviewing some of the documents that are before you and  
23 clarifying some specific issues that are being dealt  
24 with today.

25 I want to take you to the transcripts from the  
26 February 25, 2022 hearing, if you can get those handy,

1 if you and your colleagues can get those handy, because  
2 I want to make it very, very clear that contrary to  
3 what's being alleged by Dr. Wall, the Complaints  
4 Director has never really sought a complete publication  
5 ban. That was pretty clear based on submissions that  
6 were made during the hearing to you on February 25.

7 When you're ready, Mr. Chair, when you've all got  
8 the transcripts, I'm going to start by taking you to  
9 some comments on page 7 of those transcripts.

10 THE CHAIR: Just bear with me, please.  
11 I'm moving over to my laptop. Have the other Members  
12 been able to locate the transcripts that were sent out  
13 this morning? Okay, I think we're ready. Mr. [REDACTED]  
14 I think you said page 7?

15 MR. [REDACTED] Yeah, page 7. So I'm on line  
16 4, and I've got some comments there about: (as read)

17 This is an interim application, for lack of a  
18 better phrase, being brought by the  
19 Complaints Director pursuant to Section 78(1)  
20 for direction and, in fact, orders in terms  
21 of Dr. Wall's intention to publish  
22 transcripts of the hearings that have  
23 occurred to date.

24 And then it makes some references to Section 78 and  
25 your authority to do that.

26 Line 18: (as read)

1           You may be wondering why a privacy  
2           application request for order is being made  
3           now as opposed to when it would usually be  
4           made. In my experience, at the beginning of  
5           the hearing ...

6       And then I make some comments there again in context,  
7       indicating that this is a live issue that's just come  
8       up, that Mr. Kitchen candidly admitted -- or not  
9       admitted, advised that there was going to be  
10      publication, and that was the reason for having this  
11      interim application.

12           I'm going to ask you to go ahead to page 9, and  
13      right on the top of the page, there's line 2, it says:  
14      (as read)

15           Today's application -- [this is all me  
16           speaking of course] -- today's application is  
17           about three things: First, it's about  
18           whether to allow publication of the  
19           transcripts, secondly, if that is to occur --  
20           [and then I think the words should be in  
21           there "how to publish"], and then third, if  
22           that is to occur, when this should be  
23           published. So whether to publish, how to  
24           publish -- and I'm speaking of redactions of  
25           names there -- and then, lastly, the issue of  
26           when to publish.

1 If you go on to page 10 on line 16, and again just for  
2 context, I talk there about the fact that you have this  
3 discretion under Section 78 to order that all or a  
4 portion of a hearing be held in private, which wasn't  
5 what we were asking for, but that it also gives you the  
6 discretion to control the flow of information, in this  
7 case transcripts, and that's your authority for making  
8 the application -- or for making the orders we were  
9 requesting.

10 I'm going to ask you to go to page 13 of the  
11 transcripts, a few pages ahead, and you'll see at the  
12 bottom of that page, starting at line 13, a quotation  
13 from an email that was exchanged, and I'm advising you  
14 on -- in that email, I'm stating on line 18: (as read)

15 Mr. Kitchen recently advised me that once the  
16 latest transcripts have been received,  
17 Dr. Wall intends to release the transcripts  
18 of questioning of the expert witnesses in  
19 this case to be made publicly available over  
20 the internet through the Liberty Coalition  
21 Canada website [and so forth].

22 If you go to the next page, you'll see that there are  
23 comments on line 5, "Mr. Kitchen also advised me" --  
24 pardon me, line 3: (as read)

25 Mr. Kitchen indicated that he will redact the  
26 names on any versions made public, but the

1 rest will remain visible. Mr. Kitchen also  
2 advised me that he will proceed to publish  
3 redacted copies of the transcripts of  
4 Dr. Wall's expert witnesses but not redacted  
5 copies of Dr. Blank's transcripts until the  
6 Tribunal issues a ruling on this. Dr. Wall's  
7 position is that he is permitted to publish  
8 Dr. Blank's transcripts unless and until the  
9 Hearing Tribunal rules otherwise.

10 So it's very clear that on February 25, one of the live  
11 issues was expert witnesses on both sides and  
12 Dr. Blank, who was a Complaints Director witness.

13 If you go to page 15 and line 13, there's some  
14 important comments I made about what was happening in  
15 the context of publication. So on line 13, I start:  
16 (as read)

17 I just want to make clear what the Complaints  
18 Director's position is, and he's requesting  
19 an order from the Hearing Tribunal stating  
20 that the transcripts of witness testimony  
21 [not expert, not lay witness, but witness  
22 testimony] are confidential and private.

23 And then I go on to say: (as read)

24 However, of course, and if you determine that  
25 they can be disclosed by Mr. Kitchen, that  
26 should occur only after the hearing has been



1           fully completed, that is, the liability phase  
2           has been completed, a written decision has  
3           been issued, and the penalty has been  
4           completed, and written decision has been  
5           issued, and I think even more so after any  
6           appeal internally to the College council has  
7           occurred. And finally, if there is  
8           publication, the Complaints Director seeks an  
9           order from you redacting the Hearing Tribunal  
10          names, the Complaints Director's witness  
11          names, that would be the Complaints Director  
12          himself and others I've mentioned, your  
13          independent legal counsel, and all College  
14          personnel.

15        I'm on page 16 there, and I think it's really important  
16        what I mentioned on line 19: (as read)

17           And I want to emphasize -- and I'll get into  
18           this in a few more minutes -- the timing is  
19           really the crucial point for the Complaints  
20           Director. I will express -- I suppose use  
21           more fulsomely, but we believe this is  
22           premature at this point.

23        So, again, we're not asking really for a publication  
24        ban. We're saying this is premature. We're saying  
25        this is a timing issue. This is what is important to  
26        the Complaints Director.

1           And if you go to page 19, if you go a few pages  
2 ahead, you'll see on line 16, I say: (as read)

3           The fifth comment I will make is -- and this  
4 is very, very important from the Complaints  
5 Director's perspective -- that the release of  
6 the transcripts now in whatever form is very,  
7 very premature.

8 We're in the middle of a hearing. We don't even have a  
9 decision yet. The HPA only speaks about release of  
10 transcripts after conclusion of a hearing, after a  
11 decision has been issued. Again, this is about timing.

12          If you go to page 21, line 7: (as read)

13          So for all of those reasons, the Complaints  
14 Director is requesting an order preventing  
15 publication of the transcripts. It will be  
16 up to you to determine whether to issue an  
17 order which allows them to be released in a  
18 redacted form, and it's up to you to  
19 determine whether that should occur now or,  
20 as the Complaints Director strongly urges  
21 you, after the completion of the proceedings.

22 Again, timing is the issue for the Complaints Director,  
23 not an outright ban.

24          And you go to the following page, page 22, line 3,  
25 I made some further submissions on that point: (as  
26 read)

1           And I think it's also important to remember  
2           that, as I mentioned to you before, this is  
3           has been an open hearing to date. So that  
4           open court principle, which says you want to  
5           have access to and transparency of hearing  
6           processes, well, that's been fulfilled, and  
7           access to transcripts now is not crucial to  
8           satisfy the open court principle. People  
9           have been able to sit in and listen if they  
10          want to. If you order distribution of  
11          transcripts in due course, hopefully, the  
12          Complaints Director would think, with  
13          redactions, well, you will be accommodating  
14          the open court principle. Again, the timing  
15          is what is very concerning to the Complaints  
16          Director.

17        I can't emphasize this enough. We've been sort of  
18        accused of wanting an outright publication ban when  
19        we've had an open hearing throughout it, and what we're  
20        really talking about, on February 25, was a timing  
21        issue, when can this happen.

22           The last comment I want to take you to in the  
23        transcript is on page 64, and this is me speaking in  
24        response after my friend, Mr. Kitchen, has made his  
25        comments. If you go to page 64, on line 17, I make the  
26        following comments: (as read)

1           Very, very brief response. I think we're  
2           asking you, the Complaints Director is asking  
3           you to strike a balance [strike a balance].  
4           So I think I was fairly candid in my  
5           submissions to you that it's a pretty high  
6           hurdle to get an outright complete privacy  
7           order from you, and we're not looking for  
8           secrecy here. I think what we're really  
9           asking you is even if the open court  
10          principle applies -- and I think, you know,  
11          we've heard a lot of information from  
12          Mr. Kitchen about that -- the real issue here  
13          is timing and the deliberate decision to  
14          release, again, piecemeal portions of  
15          evidence and doing that when the hearing is  
16          not completed, doing that when it's out of  
17          context, doing that when there are other  
18          larger issues that this Tribunal has to  
19          consider.

20        So I've taken you through that at some length,  
21        Mr. Chair and Tribunal Members, because I want to  
22        properly frame the Complaints Director's application  
23        that was originally made: Again, not an outright  
24        publication ban we were really asking for; we were  
25        asking for you to strike a balance. And you issued  
26        your decision, which favoured Dr. Wall in many ways,

1 but there was certainly nothing inappropriate about the  
2 request back on February 25 for clarification.

3 I won't take you through Exhibit 2, which is your  
4 decision on this because it's straightforward and  
5 self-explanatory, but I will want to take you through  
6 Exhibit 3 in some detail, which is my March 28, 2022,  
7 9:27, email to Mr. [REDACTED] and Mr. Kitchen, because this  
8 squarely deals with the issues that are in front of you  
9 today.

10 I'll just let each of you get to that. Again,  
11 it's what would be Exhibit 3 in these proceedings, a  
12 Monday, March 28, 2022 email to Mr. [REDACTED] copied to  
13 Mr. Kitchen.

14 So I begin by stating on the very top of that  
15 email: (as read)

16 I'm writing to you regarding a matter of  
17 great concern on the part of the Complaints  
18 Director arising from clear breaches by  
19 Dr. Wall of the Hearing Tribunal's March 16,  
20 2022 interim written decision.

21 And the next section is where I quote the actual orders  
22 from your decision, and I am going to read these now  
23 because they're very important.

24 So you had two orders, and I'm quoting them there  
25 in the middle of the page: (as read)

26 We find that the transcripts of the expert

1 witnesses who testified in this proceeding  
2 may be published on the condition that all  
3 identification of the witnesses -- [and I  
4 think it's not limited there, it says "the  
5 witnesses", witnesses generally] -- the  
6 Tribunal and the counsel be redacted from  
7 those transcripts. [Skip a line] That will  
8 be redaction -- [pardon me] -- a review will  
9 be necessary to ensure there is no reference  
10 to any of the names of the parties that  
11 testified nor the names of counsel.

12 So any of the parties that testified. It's not  
13 specific to one side's witnesses or another; it's any  
14 parties who have testified.

15 And then also: (as read)

16 We also direct that any publication does not  
17 contain any ancillary content or explanatory  
18 comment that could in any way bypass our  
19 decision and identify witnesses, et cetera.

20 And again, there's a live issue here, I suggest to you,  
21 that what is "ancillary" comment, what is "explanatory"  
22 comments, and is bypassing your decision, and that's  
23 why we're here today. We need clarification from you  
24 about what "witnesses" means, what names can or can't  
25 be published, and whether ancillary comments were  
26 allowed or restricted by you.

1           I think Dr. Wall's submissions are that your  
2 orders, specifically the first order, impliedly must  
3 mean that he can disclose his own witnesses' names and  
4 perhaps other witnesses' names, but I'm going to  
5 suggest to you that, when you look at that wording from  
6 the order, it doesn't say that at all.

7           We need interpretation from you about the meaning  
8 of this decision, and I think it's fair to say that  
9 Dr. Wall is taking a very liberal interpretation of  
10 this decision, whereas the Complaints Director, I think  
11 quite properly, took a literal interpretation of this  
12 decision and said, Wait a minute, those words are  
13 clear: All witnesses, all parties who testify, any  
14 ancillary comments. That's why we're here in front of  
15 you today, quite reasonably.

16          The next part of the email talks about the facts  
17 that -- I haven't heard any, at least to date from  
18 Mr. Kitchen, any dispute about them -- that the  
19 publications on the Liberty Coalition website have  
20 PDFs, which indicate names of two individuals. When  
21 you go through the PDFs, that's the titles of the PDFs,  
22 you go into the transcripts, there are names of expert  
23 witnesses and I think other witnesses perhaps in  
24 there -- I may be wrong, but certainly expert  
25 witnesses -- and from the Complaints Director, you read  
26 your -- from the Complaints Director's perspective,

1    when you read your orders, that must be caught by that,  
2    that must be prevented by that.  When you look at that,  
3    there's no other way to interpret it.  Your order said  
4    that that couldn't happen.  At least a clear literal  
5    review of it.

6           And then I've got some quotes on the bottom of  
7    that email from the Liberty Coalition Canada website,  
8    and what the Complaints Director is concerned about is  
9    that those are ancillary comments, which maybe are  
10   prevented by your second order.  And again, and you'll  
11   see this in Mr. Kitchen's submissions, he admits that  
12   there may be a lack of clarity in your orders, I think  
13   the Complaints Director's concerned about that, but  
14   that's why we are here is to understand what the  
15   meaning of your orders were and whether there was a  
16   breach.

17           You'll see in the balance of the email on page 3  
18   that I'm commenting there about the fact that what has  
19   occurred, why this is so concerning to the Complaints  
20   Director, and this is a strongly worded email, is the  
21   very issues we were trying to address, publication  
22   without some parameters is what appears to have  
23   occurred, publication with names, publication with some  
24   ancillary comments, and now we're having to go back and  
25   revisit this when we thought we had an understanding  
26   about what was prohibited, that there were some



1       unequivocal orders from the Tribunal.

2               And I'm going to suggest to you that if there's  
3       any ambiguity in those orders, the onus is on the  
4       person doing the publishing to seek clarification and  
5       to be certain of what they're doing complies with those  
6       orders.

7               I'm going to ask you to go to the top of the next  
8       page, page 4, where we set out the Complaints  
9       Director's requested relief or remedies that we were  
10      seeking from you, and I think, despite what you hear  
11      from Dr. Wall, these remedies are not disproportionate,  
12      they're not somehow unfair; they're a total publication  
13      ban, we're asking for your help, we're asking for your  
14      clarification.

15              So the first order we're requesting is, and I  
16      think it's very important here, if there's been a  
17      breach -- if you tell us there hasn't been a breach,  
18      well, then this is academic -- but if there's been a  
19      breach, immediate removal of the PDFs of the  
20      transcripts from the LCC website. Well, why do we want  
21      those to come down? Because if they're in breach, if  
22      they've got names, they shouldn't stay up. It's not  
23      been a publication ban, not about them totally being  
24      removed, it's if there's a breach, they have to come  
25      down.

26              Secondly, again, if there's been a breach,

1 immediate and until the entire hearing regarding  
2 Dr. Wall and all the written decisions by the Hearing  
3 Tribunal have been issued, removal of the ancillary  
4 comments from the LCC website. If you tell us there's  
5 been no breach, well, then those stay up there, but if  
6 there's been a breach, they have to come down. There's  
7 nothing inappropriate about asking for that.

8         And then order number 3, and this ties directly  
9 into order number 1, a review by the Tribunal of any  
10 further redacted versions of transcripts before any  
11 future publication to ensure all name redactions have  
12 been made. So, again, we're not saying you can never  
13 publish these. If you're telling Mr. Kitchen and  
14 myself, our respective clients, publication can occur,  
15 well, let's be sure that publication is proper, that  
16 there's some review process here so we avoid this very  
17 issue again, so that we don't have this concern about  
18 actual or potential breaches.

19         That's the purpose of these orders. It's not to  
20 shut down publication at all in the future, it's not to  
21 prevent these transcripts from ever coming out; it's  
22 saying we need you to guard against, even inadvertent  
23 disclosure of names, guard against even inadvertent  
24 breaches of your orders, and we're asking for those  
25 remedies if there have been breaches.

26         I next want to go to Mr. Kitchen's written

1 submissions -- and I may have further comments about  
2 these after he makes comments to you -- but this is  
3 Exhibit 4, I just want to touch on a few points he's  
4 made, and I'll ask you to go to page 2 of his written  
5 submissions.

6 I think quite candidly and fairly, Mr. Kitchen, at  
7 number 3, point number 3, said: (as read)

8 The Tribunal's decision, although perhaps not  
9 fully clear, indicated the following.

10 And I think my client would agree that it's perhaps not  
11 fully clear. There's a -- my client took the very  
12 literal interpretation of it, said witnesses and  
13 parties who testified can't be named, can't be  
14 publication, but if there's a lack of clarity, well, we  
15 need that today from you.

16 If you go to the top of page 3 of Mr. Kitchen's  
17 submissions, item number 6 says: (as read)

18 The issue then becomes what the scope of the  
19 term "witnesses" is. Dr. Wall is of the  
20 position that the Tribunal's order does not  
21 apply to his own expert witnesses. Dr. Wall  
22 submits that it is only reasonable to  
23 interpret the use by the Tribunal of the term  
24 "witnesses" and not refer to his own expert  
25 witnesses, who did not object to their names  
26 being published.

1 Well, I think the order doesn't say that, and we didn't  
2 get that kind of specificity from you. We, likely,  
3 need it now from you, but, again, reasonable  
4 expectation, reasonable interpretation, where someone's  
5 doing the disclosing, I think the onus is on them to be  
6 certain that the disclosure is in compliance with an  
7 order.

8 If you go to page 4 of Mr. Kitchen's submissions,  
9 and he's talking there about, again, these witness  
10 issues, and what they mean, et cetera, and then point  
11 11, he says: (as read)

12 The reality is that this issue was not  
13 canvassed by the parties on February 25  
14 because it was not raised. The only live  
15 issues were publication itself, and a  
16 publication was permitted, redacting the  
17 names of College staff and Tribunal Members  
18 so as to prevent any potential, however  
19 remote, risk to the integrity of the process,  
20 and risk to the unnamed individuals.

21 Well, in many ways, I couldn't agree more with part of  
22 that submission: It's to prevent any potential,  
23 however remote, risk to integrity of the process and  
24 risk to unnamed individuals. That's why we're here  
25 today.

26 If you go to page 6 of Mr. Kitchen's submissions,

1 I'd like to take you to paragraph 19 first, I've got a  
2 couple of other comments, but paragraph 19 is the  
3 starting point. Paragraph 19 says: (as read)

4 The Complaints Director has no good faith  
5 [quote] concerns. He has improperly,  
6 disingenuously claimed [quote] harm has been  
7 done by the publication of the names of  
8 Dr. Wall's expert witnesses but has provided  
9 absolutely no support for such a claim.

10 If look at my email, the one I took you through a few  
11 minutes ago, I did use "harm" in quotations because we  
12 don't have to actually prove actual harm. If someone  
13 has breached an order, the breach in and of itself is  
14 significant and important. Breaching an order is a  
15 serious, serious thing. And "harm", I used it  
16 deliberately in quotations, is the exact way to phrase  
17 that: It's the harm of someone failing to comply with  
18 lawful, enforceable directions of the Hearing Tribunal.  
19 Breaching a hearing tribunal order is serious in and of  
20 itself.

21 Paragraph 21, Mr. Kitchen mentions the requested  
22 remedy by the Complaints Director as a, quote,  
23 publication ban. We're not seeking that; I've taken  
24 you through that. Timing was the issue. We knew we  
25 weren't going to get a total publication ban. We were  
26 very candid in saying we needed you to strike a

1 balance. We're not seeking that.

2 And then there's a final comment: (as read)

3 This time, the Complaints Director is seeking

4 to even censor Dr. Wall and his counsel so

5 they cannot publicly discuss this case.

6 Again, that is not our intention. We don't know what

7 you meant by "ancillary" comments. "Ancillary"

8 comments that pop up a few days after your decision in

9 the context of names being used, which appear to be in

10 breach of your order, we're not trying to sort of limit

11 discussion by Dr. Wall and Mr. Kitchen, but we need,

12 other than what you've said, we need to know what you

13 meant in your order. That's all we're doing here.

14 We're asking for clarification.

15 And those same comments apply to paragraph 23 of

16 Mr. Kitchen's submissions. Again, we want those

17 ancillary comments removed if you tell us they're in

18 breach of your order. If you tell us they're not in

19 breach of your order, and they were not contemplated by

20 your order, then the Complaints Director is, of course,

21 prepared to abide by them. The question is are those

22 prohibited in some manner.

23 Mr. Chair, the next thing I want to go to is the

24 email that was just sent to you. It's Exhibit 5, it's

25 my March 31 email to Mr. [REDACTED] copied to Mr. Kitchen,

26 and I'm going to take you through that email in

1 reverse, because we have to start at the beginning, so  
2 to speak. It's an email thread. And if you go to page  
3 4, about a third of the way down the page, you'll see  
4 an email from Mr. Kitchen to me, March 30th, 2022, at  
5 10:48 AM. Do you have this email? Mr. Kitchen, you  
6 have it, I'm assuming?

7 Okay, Mr. Chair, I'll assume you all have it then,  
8 that the Hearings Director sent that to you.

9 So, again, in fairness to Mr. Kitchen, he's being  
10 very candid here on the part of his client: (as read)

11 Hi [REDACTED] attached is a redacted version of  
12 the written submissions [that's the March 29,  
13 2022 submissions that are in front of you  
14 today, Exhibit 4] I provided you with  
15 yesterday. You will notice that no names  
16 appear except myself and Dr. Wall. I've also  
17 redacted references to the names of  
18 Dr. Wall's expert witnesses. This is done  
19 out of courtesy and in the unlikely event the  
20 Tribunal agrees with the Complaints Director  
21 that the names of Dr. Wall's expert witnesses  
22 should not have been published in the first  
23 place. I am herein providing you notice that  
24 submissions will be posted and publicly be  
25 disseminated this week.

26 So if you go to page 2 of the email, you'll see, about

1 a quarter of the way down the page, it says "Original  
2 message", and then it has on Wednesday, March 3, 2022,  
3 [REDACTED] this is me, writes to James: (as read)

4 I appreciate you sending your email in  
5 advance of any publication, as I'm certain my  
6 client will have serious concerns about this.

7 [Next paragraph] Given that the issue of  
8 publication and the meaning and effect of  
9 their earlier order is one of the matters  
10 that the Tribunal will be ruling on at the  
11 April 12th, 2022 application, I would  
12 respectfully submit that this is the precise  
13 type of publication that they must authorize  
14 or prohibit. Depending on the ruling that  
15 the Tribunal makes, publishing this now may  
16 be a further breach of their initial order on  
17 publication, which would, of course, continue  
18 to, in my view unnecessarily, complicate this  
19 matter. Can you please consult with your  
20 client and ask him to reconsider his  
21 position? If he maintains that he will carry  
22 out this publication, I fully expect my  
23 client will ask you to contact Mr. [REDACTED] to  
24 advise of this and ask the Tribunal to issue  
25 an interim ruling about whether this  
26 publication can occur. Although requesting



1           an interim order would, I am sure in my  
2           client's view, be required, it is an  
3           absolutely unnecessary expenditure of time  
4           and resources. For obvious reasons, a  
5           request for an interim order should be  
6           avoided.

7       Well, we never actually asked for an interim order; we  
8       were content to deal with this today.

9           And then my final comments: (as read)  
10          I see no harm or prejudice to your client  
11          whatsoever in waiting until after the April  
12          12th, 2022 application, which will be an open  
13          hearing, to refrain from this publication.  
14          Taking this step now further aggravates the  
15          situation, and may be, if my client receives  
16          a favourable ruling from the Tribunal after  
17          the April 12th hearing, may be [that's why  
18          we're here in front of you] a further breach  
19          of their original order.

20       And then we've got some comments there about this being  
21       a potential further breach.

22           Then we have, if you go to page 1 of the email,  
23       right at the bottom, you have Mr. Kitchen writing back  
24       to me on March 30th: (as read)

25           Hi [REDACTED] to follow up on our phone call  
26       today, Dr. Wall is going to proceed with

1 publication of the written submissions in the  
2 redacted form provided to you earlier today.

3 If you look at the very top of that email, there's a  
4 comment from me to Mr. [REDACTED] this is an overall  
5 email, saying we're concerned that this might be an  
6 another breach of the original order.

7 So I've taken you through those emails, Mr. Chair  
8 and Tribunal Members, to frame, again, the context of  
9 this and I think the Complaints Director's overtures  
10 reaching out to Mr. Kitchen and his client to try and  
11 avoid time and cost and an application that, hopefully,  
12 you know, wouldn't have had to have happened.

13 So I've been a while here, Mr. Chair, I'm going to  
14 close my comment now with some brief final submissions,  
15 and I appreciate your patience and your colleagues'  
16 patience, but I've spoken to you today at some length  
17 about this because context is everything today.

18 So these are my final closing comments to you in  
19 short form. This hearing generally and this  
20 application today are about professional regulation and  
21 the duty of a member of a profession to comply with the  
22 requirements of this profession, again compliance.

23 Secondly, members of a profession can't  
24 selectively and privately, when it came to the Pandemic  
25 Directive of Dr. Wall, decide what they will or won't  
26 abide by. The compliance principles that we're broadly

1 speaking about in this hearing at large apply equally  
2 to your Hearing Tribunal orders about publication.  
3 They're just as important in that context.

4 Third, this has always been an open hearing, as it  
5 is today. The Complaints Director has never sought to  
6 close the hearing and prohibit observers. The  
7 Complaints Director wanted direction about publication,  
8 wanted you to strike a balance, was very candid in  
9 admitting that they couldn't get a whole publication  
10 ban that wasn't warranted, and I've taken you through  
11 my numerous comments to that effect on February 25 but  
12 wanted direction and assurance about an unusual  
13 request, an unusual step being taken well into a  
14 hearing where we needed direction from the Tribunal.  
15 You issued a decision, and we now need you to clarify  
16 that. And of course, it's reasonable, on the face of  
17 your decision, to need that direction from you so we  
18 don't have past or future noncompliance.

19 And so finally, if after considering the facts and  
20 submissions, you issue a decision clarifying your  
21 publication order, and you advise Dr. Wall that his  
22 actions did not breach your order, well, that's fine;  
23 that's what we're here for. We're here to have you let  
24 us know what's happened. If, however, you determine  
25 that there's a breach, we urge you to issue direction  
26 about those breaches and to prevent any future

1 breaches. That is all we're asking for. It's that  
2 simple and that significant.

3 Thank you for your time in listening to my  
4 submissions, Mr. Chair. I don't know if you have any  
5 questions for me or if we want to just proceed with  
6 Mr. Kitchen, but I'm in your hands

7 THE CHAIR: Thank you, Mr. [REDACTED] Just  
8 before we come to the questions, possibility of  
9 questions, I just want to clarify, because it did catch  
10 me off guard, my name is James also, and some of these  
11 emails were addressed to James, and initially that did  
12 confuse me a bit, and that's strictly a reading problem  
13 on my part. So anything in Exhibit 3 -- or, pardon me,  
14 your March 30th email, the "James" that's referred to,  
15 it's not me, it's Mr. Kitchen.

16 MR. [REDACTED] That's exactly right, and  
17 maybe I should use the -- be clear that it's James  
18 Kitchen and [REDACTED] [REDACTED] maybe that's a way to avoid some  
19 confusion in the future, but you're quite right, those  
20 are emails between James Kitchen and myself.

21 THE CHAIR: Yeah, and, unfortunately, my  
22 email address is James. So anyway, as far as questions  
23 go, I think we will take a -- Mr. Kitchen, would you  
24 like a short break before your response?

25 MR. KITCHEN: Yeah, just a 5- or 10-minute  
26 break is all I need, but --

1 THE CHAIR: Okay.

2 MR. KITCHEN: -- did you want to break to  
3 consider asking questions as well?

4 THE CHAIR: Well, I think what we'll do is  
5 we'll break for 10 minutes. We'll decide whether we  
6 want to reserve our questions until you've finished  
7 or -- which I anticipate we probably will. In any  
8 event, we'll reconvene in 10 minutes then, and if  
9 you're prepared to go ahead, absent any questions,  
10 we'll turn the floor over to you.

11 MR. KITCHEN: That sounds good.

12 THE CHAIR: So we'll adjourn for 10  
13 minutes. We'll return at 11:20.

14 (ADJOURNMENT)

15 THE CHAIR: We will reconvene. We're back  
16 in session, and just before I ask Mr. Kitchen to  
17 continue with his -- present his oral submission,  
18 there's one question that has come up amongst the  
19 Hearing Tribunal regarding the ancillary documents,  
20 which we have limited knowledge of, and I'll just ask  
21 our counsel, Mr. [REDACTED] to outline our question.

22 Questions by the Tribunal

23 MR. [REDACTED] Thank you. While we were  
24 caucusing, a question arose, and I was asked to pose  
25 the question, and at this point, the question's for  
26 Mr. [REDACTED] With respect to ancillary comments, which

1     comments are you referring to specifically? And what I  
2     want -- the comment I want to make here on that is  
3     there is reference to an extract titled "Case Update"  
4     that appears in Exhibit 4, and then there is the  
5     actual -- Exhibit 3 rather, and then there is the  
6     submissions that Mr. Kitchen indicated that he was  
7     going to publish. That, of course, arises from the  
8     March 31st email. Are those the ancillary documents  
9     you're referring to, or is there something else that  
10    we're talking about? And I'm just talking at this  
11    point in time.

12   MR. [REDACTED]                   Yeah, yeah, I think I should  
13   have been more clear on that if I wasn't. On Exhibit  
14   3, on page 2, there is that quotation, the case update,  
15   and that's the ancillary comment that I think is the --  
16   you know, of potential concern to the Complaints  
17   Director, again, needing to know what do you mean by  
18   ancillary comments, what do you mean by  
19   supplementing -- you know, not being able to supplement  
20   the disclosure. So, yeah, that's principally what  
21   we're concerned with.

22   MR. [REDACTED]                   Okay. Thank you.

23   THE CHAIR:                       Thank you. Okay, we'll ask --  
24   we will reserve on any further questions, Mr. [REDACTED]  
25   until we've heard the remaining submission from  
26   Mr. Kitchen, and I'll turn the floor over to -- the

1 screen over to Mr. Kitchen.

2 Submissions by Mr. Kitchen

3 MR. KITCHEN: Thank you, Mr. Chair. I'm  
4 going to start with responses to Mr. [REDACTED]  
5 comments. I'll be quite lengthy with that, and then I  
6 will launch into my preplanned submissions.

7 My learned friend went through a number of facts,  
8 as he has does many times in this case, and he says  
9 they're uncontested facts; I find that a bit  
10 surprising, considering some of the facts that he said  
11 and the way he characterized them.

12 Just quickly in response, I will say Dr. Wall does  
13 contest many of these facts. The first fact referred  
14 to was that the College of Chiropractors had to or  
15 absolutely must have put in place a Pandemic Directive.  
16 Well, that depends how you look at it. The CMOH  
17 commanded the College to do that, but that doesn't mean  
18 the College had to. So it depends what you mean by  
19 that, because it's within the ability of the College to  
20 simply say, no, we're self-governed, we won't do that;  
21 just because you want to breach the Charter and the  
22 Human Rights Act doesn't mean we want to, and we'll do  
23 what we have to do under the Health Professions Act,  
24 and if you take an issue with that, you can do  
25 something about it.

26 That's unusual, of course, but I think this whole

1     thing is unusual, and I think it misses the point to  
2     simply say that, look, whatever, you know, the CMOH  
3     says we have to do, no questions asked. I think that  
4     is at odds with the very concept of self-governance.  
5     If the Justice Minister told the Law Society it had to  
6     do something, and the Law Society didn't like it and  
7     didn't agree with it, it might say, no, you can ask the  
8     courts to make us do this because we don't want to, we  
9     don't think we should, and we have the authority in the  
10    Law Society Act to self-govern. Otherwise, it's not  
11    self-government, it's governed by government, and  
12    everything else after that is a facade.

13           Furthermore, the Pandemic Directive that was put  
14    in place did not have to be put in place the way it was  
15    or with the particular means that it had. The Pandemic  
16    Directive could have accounted for the Alberta Human  
17    Rights Act, it could have provided for exceptions or  
18    accommodations for masking pursuant to protected  
19    grounds under the Alberta Human Rights Act. The  
20    College chose not to do that, and there's nothing on  
21    the record that says, clearly, that if they had have  
22    honoured their obligations under the Alberta Human  
23    Rights Act that the CMOH would have then not accepted  
24    the Pandemic Directive.

25           In fact, there's every evidence to the contrary,  
26    because the CMOH herself, for the first few months of



1 this situation and certainly in May of 2020 when the  
2 Pandemic Directive came out, included in her own  
3 reports, exemptions for masking -- sorry, not reports,  
4 orders, CMOH orders, exemptions for masking along  
5 protected grounds in the Alberta Human Rights Act. So  
6 what the College did was actually different than what  
7 the CMOH herself did.

8 Then we go to the fact that Mr. [REDACTED] had said  
9 he doesn't know what he would have done if Dr. Wall had  
10 made a request to be accommodated pursuant to his  
11 medical inability to wear a mask. Well, of course  
12 that's a contested fact Dr. Wall will be contesting.  
13 It's unfortunate we have to contest it today, but in  
14 the sense it was brought up, we have to.

15 I think we know what Mr. [REDACTED] would have done,  
16 because Dr. Wall did request accommodation.  
17 Mr. [REDACTED] responded by asking that Dr. Wall's  
18 licence be suspended on an emergency basis. That  
19 suspension was, of course, denied and rightfully so.  
20 But I think we know from that behaviour, actions speak  
21 louder than words, I think we know how Mr. [REDACTED]  
22 would have reacted, because that's how he did react  
23 when Dr. Wall did make a request for an exemption. He  
24 backed up that request with medical documentation,  
25 showing that his -- he had a physical and mental  
26 disability, which on protective grounds under the

1 Alberta Human Rights Act, Mr. [REDACTED] didn't even  
2 contemplate, didn't entertain human rights  
3 accommodation, he immediately launched into an  
4 emergency suspension proceeding.

5 Then my learned friend walked you through some  
6 comments about the conduct of Mr. [REDACTED] as the  
7 prosecutor in this case so far, which are really a  
8 response to Dr. Wall's application that he has  
9 withdrawn to have Mr. [REDACTED] removed. I just want to  
10 note though that the conduct that is defended is  
11 actually not conduct that's been attacked by Dr. Wall,  
12 so it's a bit of a red herring. Dr. Wall has not said  
13 that any prosecutorial misconduct has been engaged in  
14 insofar as the Complaints Director has actually  
15 launched an investigation and prosecuted itself.  
16 That's something he takes issue with.

17 He takes issue with some of the things he's said  
18 and done as part of that prosecution, and what  
19 Mr. [REDACTED] was defending is actually that it had  
20 happened at all. Right -- such -- you know, the -- for  
21 example, in the beginning, of course, it was  
22 Mr. [REDACTED] who appointed himself as an investigator,  
23 investigated it, then asked for a suspension, then  
24 appointed himself as prosecutor, and decided to proceed  
25 with a prosecution.

26 Obviously, Dr. Wall, you know, would argue that

1     those decisions were unnecessary and unfortunate and  
2     have led to all of this, and this could have been  
3     resolved in a much more reasonable manner. But  
4     nonetheless, we don't say that it's prosecutorial  
5     misconduct to make those decisions. Those are his  
6     decisions to make. That's within his realm of  
7     legitimate discretion.

8             The issues that we have are with the scandalous  
9     acquisitions that are made, the repeated assertions  
10    that Dr. Wall's defence is essentially, you know, a  
11    filibuster or intentionally designed to waste time,  
12    that it's not done in good faith, you know, that it's  
13    Dr. Wall's fault that we have all these extra costs,  
14    that he -- you know, that this is all just a big waste  
15    of time. It's those types of allegations and conduct  
16    very recently that Dr. Wall is alleging as  
17    prosecutorial misconduct, not the choice itself to have  
18    this proceeding.

19            Then Mr. [REDACTED] went -- he said that the  
20    Complaints Director made legitimate arguments for the  
21    publication ban sought, and he used the word  
22    "appropriate" a lot or the word "inappropriate".  
23    Dr. Wall has not alleged that it was inappropriate to  
24    bring the application for a publication ban that was  
25    brought on February 25th, simply that it was  
26    essentially a waste of time, it was hopeless.

1           And I say that because the law is so abundantly  
2 clear, as I walked you through the last time. We spent  
3 a great deal of time, I probably read to you 500 words  
4 spoken by the Supreme Court of Canada at various points  
5 about the law in this area; it's just so abundantly  
6 clear. I understand that Mr. [REDACTED] is not a lawyer,  
7 and that he may not know his legal obligations.  
8 However, he has counsel, experienced counsel, who can  
9 tell him of the law, and then -- so he's presumed to  
10 know the law in his position, okay, and he's presumed  
11 to understand how hopeless some applications are going  
12 to be.

13           And based on the law, the application that was  
14 brought to make the transcript secret for the duration  
15 of the hearing was really a hopeless application that  
16 should never have been sought. He couldn't have  
17 reasonably expected a tribunal to rule in his favour on  
18 that, given the state of the law.

19           So I'm not saying that they were improper, I'm not  
20 saying that those applications were brought in bad  
21 faith. I have said that, you know, some of the more  
22 recent applications are brought in bad faith, but the  
23 actual publication ban itself, I'm not saying it was  
24 brought in bad faith, I'm just saying it was really a  
25 waste of time; it was quite hopeless for him to expect  
26 to get anything other than redacted names.

1           There was a question about, in Mr. [REDACTED]  
2    comments, about whether or not we should be here today  
3    and why we are here today, and it was indicated that  
4    we're here today because Dr. Wall demanded a hearing.  
5    Well, Dr. Wall did ask for a hearing, but that was only  
6    because of the March 28th email that was sent by  
7    Mr. [REDACTED] It was -- in Dr. Wall's submissions, it  
8    was unnecessary to go through all this.

9           We had a very -- as my learned friend said -- a  
10   very strongly worded email that contained a lot of  
11   scandalous accusations that were completely  
12   unnecessary, and this could have been resolved with --  
13   in an amicable, reasonable manner --

14   (AUDIO/VIDEO FEED LOST)

15   MS. [REDACTED]                       Sorry, Mr. Kitchen, I need to  
16   interrupt you, Dr. [REDACTED] dropped off the call, so if  
17   we could just pause for a moment while I get her back  
18   in.

19   MR. KITCHEN:                        Sure. Thank you.

20   THE CHAIR:                          Thank you, Ms. [REDACTED]

21   MS. [REDACTED]                       So I do see Dr. [REDACTED] on the  
22   screen. Dr. [REDACTED] can you hear me? I'm going to  
23   assume not.

24   (AUDIO/VIDEO FEED RESUMED)

25   THE CHAIR:                          The Hearing Panel is intact  
26   again, so, Mr. Kitchen, my apologies for the

1 interruption, please continue.

2 MR. KITCHEN: I think, just before  
3 Dr. [REDACTED] fell off, I was starting to talk about why  
4 we are hear today and, ultimately, who brought us here,  
5 because that seems to be an open question.

6 I'll just remind the Tribunal that, you know, I  
7 had no notice from my learned friend that this email,  
8 March 28th, was going to be sent. I had no indication  
9 that there were concerns or issues on the side of the  
10 Complaints Director. It was, as he admitted, a very  
11 strongly worded email, made a lot of accusations, and  
12 certainly Dr. Wall felt that the air had to be cleared  
13 on a lot of these things, and, of course, a lot of  
14 those things have gone away now because Mr. [REDACTED] is  
15 retiring, but, at the time, we didn't know that.

16 So I want it to be clear that Dr. Wall feels that  
17 we're here today because the Complaints Director really  
18 made a mountain out of a molehill. If he had've simply  
19 reached out and said, Look, we don't think those names  
20 should be on there, we don't think they should be  
21 published; and do you know what Dr. Wall would have  
22 done? He would have said, Okay, I'll take them down,  
23 let's ask the Tribunal what they meant by their word,  
24 they'll give us some clarification, and added the names  
25 to go back up or they can stay down. That would have  
26 been a reasonable, amicable way to deal with that. But

1     instead, we get accusations that Dr. Wall willfully  
2     breached the order. If he did breach it, it was not  
3     willful.

4             Just briefly on the issue of costs, I know my  
5     learned friend -- I agree with my learned friend that  
6     Dr. Wall cannot positively receive costs. So if we get  
7     to the end of this proceeding, Dr. Wall is successful,  
8     there are no findings of professional discipline,  
9     misconduct, he is unable to seek positive costs.

10            What he is asking for though is costs insofar as,  
11     if we get to the end, there's a finding of liability  
12     and some costs, a portion or all, on the merits are  
13     awarded against Dr. Wall in favour of the Complaints  
14     Director that those costs be less these applications.

15            The first application, Dr. Wall was entirely  
16     successful, and he would say it was actually  
17     unnecessary. Same with this application, if he's  
18     successful, and he'll again say it was completely  
19     unnecessary, the cost of these two applications have to  
20     be subtracted from any costs awarded against him on the  
21     merits at the end of these proceedings.

22            That was (INDISCERNIBLE) by having costs awarded  
23     against him, not positively awarded against him, such  
24     that he will receive funds at the end of this, but just  
25     that what he will have to pay, if he loses in any  
26     manner, will actually be reduced. It will be less

1     what -- the cost of these two applications.

2             I heard again the familiar comments from my  
3     learned friend that this whole thing was unnecessary,  
4     it's been overly complex, it's been distorted, it  
5     didn't have to go this way, and Dr. Wall's the one  
6     that's made it go this way, it's his fault, it's his  
7     fault for mounting a robust defence. And, you know, my  
8     learned friend has acknowledged that Dr. Wall has a  
9     right to do that, and he says that right has been  
10    exercised. And I would say it has, but it's now -- it  
11    has been threatened by the accusations and comments and  
12    threats that the Complaints Director has made.

13            Again, I think it's a bit odd that we have this  
14    (INDISCERNIBLE) --

15    THE COURT REPORTER:           Mr. Kitchen, it's the court  
16    reporter here; you're breaking up; could you please  
17    repeat what you said? I'm sorry.

18    MR. KITCHEN:                   I'll back up a little bit.

19            I think what the plain language statement that the  
20    Complaints Director wants to make is that, you know,  
21    this didn't have to happen because Dr. Wall could have  
22    just admitted guilt, he could have just said, sorry, he  
23    could have just accepted our punishment, and we could  
24    have just called it a day. That's what I keep hearing  
25    when I hear that we didn't have to have this overly  
26    complex, overly long hearing, but that's not how it



1 works. If we're going to give substance to the  
2 acknowledged right of a full answer in defence, then  
3 that needs to be permitted, unless there's evidence  
4 that it is in bad faith, and it is a filibuster, it  
5 needs to be allowed.

6 And there needs to -- the Complaints Director, who  
7 was the prosecutor in this case, needs to refrain from  
8 constantly alleging that the defence is frivolous,  
9 which is what he's doing. He may not be using that  
10 word, but that's what he's doing, and that is  
11 prosecutorial misconduct. That's not his role to say  
12 that.

13 As far as the publication ban and whether or not  
14 it's complete or total, my friend is saying -- my  
15 learned friend is saying that it's all about timing,  
16 and, therefore, they didn't -- the Complaints Director  
17 did not seek a full publication ban. While I agree  
18 with my learned friend that the Complaints Director was  
19 not seeking a publication that would extend beyond the  
20 final resolution of this case, that means a final  
21 hearing and determination from the Tribunal on both  
22 liability and penalty, he is seeking a total or was  
23 seeking a total publication ban during the hearing. He  
24 is seeking to make the written record of this  
25 proceeding secret while it is ongoing, and I would  
26 submit that is a complete or total publication ban.

1 That is -- if there's going to be any benefit to  
2 keeping the hearing under the eyes of the public,  
3 that's where it's going to be found is while it's  
4 ongoing.

5 It doesn't mean much for a hearing to become  
6 public after the fact, because, as the Supreme Court  
7 has acknowledged, one of the big reasons we have an  
8 open court is so that, while it is ongoing, the public  
9 can know about it, can express criticism of the  
10 process, can hold the decision-maker accountable. They  
11 can't do that afterwards, none of that can happen after  
12 the fact; it has to be during the hearing.

13 So when I say or when Dr. Wall says the complete  
14 publication ban, he's referring to the fact that what  
15 was sought was complete secrecy regarding the  
16 transcripts during our proceeding.

17 And I'll just -- I'm going to have go here  
18 anyways -- I'll take you to page 15 of the transcripts  
19 from February 25 --

20 THE CHAIR: Mr. Kitchen, just give us 15  
21 seconds to locate the document, please. Okay.

22 MR. KITCHEN: So I'm down on line 14 of page  
23 15. This is Mr. [REDACTED] speaking, and I'm starting at  
24 the beginning of the sentence there on line 14: (as  
25 read)

26 And he's -- [that's the Complaints

1 Director] -- he's requesting an order from  
2 the Hearing Tribunal stating that the  
3 transcripts of witness testimony are  
4 confidential and private. That's the  
5 starting point. And if you determine that  
6 they can be disclosed by Mr. Kitchen, that  
7 should occur only after the hearing is fully  
8 completed.

9 Okay, so the starting position for the Complaints  
10 Director was a full publication ban of indefinite  
11 length, okay, that's the starting point. You see that  
12 on line 17, and the second position is if you determine  
13 they can be disclosed only after the hearing is  
14 completed. Okay, so what the Complaints Director asked  
15 for was secrecy of the written record indefinitely or  
16 at least for the length of the hearing. So when  
17 Dr. Wall says full or complete publication ban, that's  
18 what he's referring to.

19 I think it's very reasonable to call that a full  
20 or complete publication ban. That's not a partial  
21 publication ban. A partial publication ban is when  
22 part of the record is permitted for weeks, which is  
23 actually exactly what did happen. What did happen is  
24 that Dr. Wall consented to a partial publication ban,  
25 partial insofar as names were redacted.

26 Mr. [REDACTED] made comments about how the Complaints

1 Director doesn't want secrecy, but that begs the  
2 question why there was -- he asked for exactly that on  
3 February 25th, and it begs the question as to why we're  
4 again here today. If it's merely an issue of an  
5 unintentional breach of an order, we could spend 8 to  
6 \$10,000 a day to deal with that at a hearing, or an  
7 email could have been sent, saying, Look, we need  
8 clarification from the Tribunal, can you agree to take  
9 those names down until we get it. And my learned  
10 friend knows that Dr. Wall would have agreed to that,  
11 because Dr. Wall has been civil and courteous  
12 throughout these proceedings, and he's agreed to all  
13 kinds of things that he didn't have to.

14 Mr. [REDACTED] asked me to withhold the publication  
15 of the transcripts of the expert testimony prior to the  
16 February 25th hearing. We received those transcripts  
17 on about February 22nd or 23rd. Dr. Wall has a  
18 constitutional right to publish them. He would have  
19 done nothing untoward had he published them. He  
20 didn't, because he was asked not to, and he complied  
21 with that request, and he's complied with other  
22 requests even though he didn't have to.

23 So why are we here today if it's not to make the  
24 names of Dr. Wall's experts secret? Because that's  
25 going to be the outcome if the Complaints Director gets  
26 what he wants. Again, Dr. Wall is not saying that this

1 application is inappropriate. We're saying it's  
2 unnecessary. We're saying that portions of it are  
3 disingenuous and not brought in good faith.

4 I'll just remind the Tribunal that the onus is  
5 always on the side -- or the party that is asking for a  
6 publication ban. The presumption is publication. So  
7 the onus is not on Dr. Wall to say in this proceeding  
8 that he's permitted to publish the names of his own  
9 expert witnesses. The onus is on the party who is  
10 asserting that he cannot, because the presumption is  
11 that he can. That is the open court principle. I  
12 walked you through it last time we were here. There's  
13 a presumption in favour of publication, and I'm going  
14 to get into that more later.

15 The last comment on what my learned friend said  
16 before I launch into my preplanned comments, he said  
17 repeatedly that it's unusual to publish records of a  
18 court proceeding while that proceeding is ongoing. I  
19 think it's rather odd to be saying that, as, of course,  
20 it's not unusual; in fact, it's par for the course in  
21 public litigation that is a public interest. It's  
22 quite -- this case clearly falls into that category.  
23 This is a public prosecution matter; it's brought by a  
24 public body. It is public law in the very general  
25 sense, and it's a case of obvious interest to the  
26 public, seeing as what the substantive issue is in this

1 case.

2 It may be uncommon in the case of chiropractors,  
3 and I would grant that. I'm sure it is uncommon.  
4 Doesn't mean it's unusual, that doesn't mean that it is  
5 somehow strange or inappropriate to be asking for it.  
6 In fact, I shouldn't (INDISCERNIBLE) it anyways; as I  
7 said, there's a presumption of it. It's not done a  
8 lot, I grant that.

9 In fact, the Supreme Court of Canada mentioned in  
10 the case that I brought you to on February 25th that  
11 it's usually the accused that asks for a publication  
12 ban to protect their reputation or sensitive  
13 information or what have you, it's usually the other  
14 way around. And we had a case where the Supreme Court  
15 had to deal with it from the other way, where we had  
16 the prosecution asking for a publication ban.

17 I'm sure it is very unusual or uncommon for the  
18 Complaints Director at the College to be asking for a  
19 publication ban of any type. I'm sure that's the case.  
20 I'm sure it's usually the accused, and, of course, you  
21 know, it usually arises in the context that we've  
22 repeatedly discussed, the sexual misconduct context.

23 But it's not in any way unusual, especially in  
24 public cases like this. And it's not unusual for it to  
25 happen in the middle of proceedings. We keep getting  
26 these comments without any meat on the bones about how

1     it's so strange that Dr. Wall said, Well, look, now  
2     that the evidence is over, I'm going to publish this.  
3     That's par for the course, it's not strange. Maybe,  
4     had I thought my learned friend was going to find that  
5     strange, I would have told him from the get-go, because  
6     I would have thought the intention to publish would  
7     have been -- presumably would have been obvious.

8             With that, I'll get into my preplanned  
9     submissions. I know it's 10 to 12, Mr. Chair, did you  
10    want me to push through, or did you want to take some  
11    sort of short lunch break?

12   THE CHAIR:                     Well, I guess I would ask you,  
13   Mr. Kitchen, do you have a sense of how long you might  
14   require?

15   MR. KITCHEN:                   At least half an hour, likely  
16   45 minutes.

17   THE CHAIR:                     That would take us to 12:30  
18   roughly?

19   MR. KITCHEN:                   Yeah, 12:30 or more. I -- you  
20   know, I prefer to proceed, but I don't want to  
21   short-change people their lunch break.

22   THE CHAIR:                     What would the Tribunal  
23   Members prefer? Would you prefer to take a quick  
24   10-minute break now and push through or just keep  
25   going?

26             Okay, I think, Mr. Kitchen, we will just continue

1 on, and if we reach a point where we think a break is  
2 necessary, we will do it, but hopefully that won't  
3 arise, and we'll continue with your submission.

4 MR. KITCHEN: Thank you. In my submissions,  
5 I'm going to talk about the positions of the parties at  
6 February 25th, the positions of the parties today. I  
7 will talk about the March 16th Tribunal decision. I'll  
8 provide submissions on how that decision is reasonably  
9 interpreted, and how Dr. Wall interpreted it, and why  
10 his interpretation is reasonable. I'll talk about --  
11 I'll provide some submissions in the event that you  
12 find that a breach did occur. I'll provide submissions  
13 on ancillary content or explanatory comments that my  
14 friend brought you through quite a bit with those  
15 comments on the Liberty Coalition Canada website. And  
16 then, lastly, I'll discuss remedy and costs.

17 So to start with, the positions of the parties on  
18 February 25th, this is really important, and you might  
19 notice actually a lot of court cases, they do this, the  
20 decision-makers, the judges or the panels will go  
21 through what the positions of the parties are. There's  
22 an important legal reason for that.

23 So let's talk about the Complaints Director's  
24 position. I'm going to take you back to page 15 of the  
25 transcripts. Now, as we know, the Complaints Director  
26 has three positions. It's his third position that is



1 the most relevant. His first two positions were as I  
2 discussed, having a complete ban indefinitely or a  
3 complete ban until the end of the hearing, which is to  
4 say no publication of transcripts at all.

5 His third position is that if publication of  
6 transcripts is to occur, that identities of certain  
7 people must be redacted. And I'm going to start  
8 reading from line 24, page 15, of the February 25th  
9 transcript. This is Mr. [REDACTED] comments: (as read)

10 And finally, if there is publication, the  
11 Complaints Director seeks an order from you  
12 redacting the Hearing Tribunal names, the  
13 Complaints Director's witness names, that  
14 would be the Complaints Director himself,  
15 Dr. [REDACTED] Dr. [REDACTED] then Complaints  
16 Director legal counsel [that would be  
17 Mr. [REDACTED] himself], your independent legal  
18 counsel [that's Mr. [REDACTED] and all College  
19 personnel. So, for example, the Hearings  
20 Director.

21 That's his position. It's very specific about who he  
22 wants redacted, okay? In fact, it's clarified even  
23 further, because Mr. [REDACTED] goes back, and he  
24 summarizes his position. So I'm now down on line 15 of  
25 page 16 of the transcripts. Mr. [REDACTED] says: (as  
26 read)

1 And then again, finally, if there is a  
2 publication, there should be redaction of  
3 Hearing Tribunal names, legal counsel member  
4 names, the Complaints Director's witnesses,  
5 and all College personnel.

6 I'm sure you will note and agree with me that there is  
7 no mention of Dr. Wall's expert witnesses. The  
8 Complaints Director's position is not Dr. Wall's expert  
9 witnesses need to be redacted. The position is clear,  
10 it is everybody who is not on Dr. Wall's side of things  
11 in this case.

12 Now, I want to take you over to Dr. Wall's  
13 position. This is page 27 now of the transcripts.  
14 Page 27, line 6, I'm going to be reading. These are my  
15 comments, this is my oral submissions: (as read)

16 Dr. Wall is not asking to release transcripts  
17 at the moment that identify any of the people  
18 that don't need to be identified. What I  
19 mean by that is Tribunal Members, internal  
20 counsel [that's a reference to Mr. ██████████  
21 counsel for the Complaints Director [that's a  
22 reference to Mr. ██████████ the Complaints  
23 Director himself, any staff of the College,  
24 even Dr. ██████ himself, the Complaints  
25 Director's expert witness.

26 Dr. Wall's position on who should be redacted is

1 exactly the same as the Complaints Director's. To put  
2 it briefly, it is everybody who is not himself, his  
3 counsel, or his own witnesses. He says, look,  
4 everybody else who's not on my side of things, I'll  
5 redact. This is important. Initially, Dr. Wall's  
6 position, when he reached out through counsel to the  
7 Complaints Director, was that he wanted to publish  
8 Dr. [REDACTED] name, nobody else, not internal counsel, not  
9 Complaints Director counsel, not Complaints Director's  
10 witnesses, not Tribunal Members. That was the starting  
11 point for Dr. Wall. That was his initial position.  
12 Okay, there can be no doubt about that. I know my  
13 learned friend would agree with me, that was the  
14 initial starting point.

15 We had some discussion about that prior to the  
16 application, and then at the application itself,  
17 Dr. Wall took the position that he would also redact  
18 Dr. [REDACTED] name. That's why this is mentioned, that's  
19 why my comments and Dr. Wall's counsel's comments  
20 including Dr. [REDACTED] name on page 27 of the transcripts  
21 is to try to reduce the amount of differences that are  
22 being argued over. Because as you go down in that  
23 page, you'll see on line 15 in comments from Dr. Wall's  
24 counsel: (as read)

25 The purpose here is to release the  
26 substantive evidence and not to be clouded or

1           muddled in any way with identities of people  
2           that don't need to be released at this  
3           moment.

4   The purpose was to get the scientific evidence out, and  
5   if it was important to the Complaints Director that  
6   Dr. [REDACTED] name be redacted, so be it; Dr. Wall can agree  
7   to that.

8           This is really important. There's, again, no  
9   discussion of Dr. Wall's expert witnesses. And by the  
10   way, there's no discussion of himself or his counsel.  
11   That's important to keep in mind for my comments later.

12          So as far as positions of the parties and whose  
13   names are going to be redacted as a part of this  
14   application, we're in agreement, and because we were in  
15   agreement, there was no discussion following that about  
16   who exactly was going to be redacted. Everybody had  
17   the same position, everybody who wasn't Dr. Wall, his  
18   counsel or expert witnesses it was expected would be  
19   redacted. That's the context for this; that's the  
20   positions taken by the parties.

21          Now, let's look at the position of the parties  
22   today. The Complaints Director's position has now  
23   changed. Despite not asking for the names of  
24   Dr. Wall's expert witnesses be redacted, he takes the  
25   position that the Tribunal ordered that, that the  
26   Tribunal ordered something that he didn't ask for, that

1 the Tribunal gave him something he never requested.  
2 Interestingly, the Complaints Director has not taken  
3 the position that the Tribunal ordered the names of  
4 Dr. Wall himself or his counsel to be redacted.

5 Dr. Wall takes the same position now as he did on  
6 February 25th, that the Tribunal ordered exactly what  
7 Dr. Wall proposed and no more, that the Tribunal  
8 ordered the redaction of the names of individuals who  
9 are not Dr. Wall, his counsel, or his expert witnesses.  
10 His position is unchanged.

11 On March 16th, the Tribunal issued its decision, a  
12 four-page decision. There are some things in this  
13 decision that are abundantly clear. It's clear that  
14 the Tribunal decided the transcripts could be published  
15 in a redacted form, and that those redactions included  
16 the identities of the Tribunal Members, and reasons for  
17 that were discussed. Obviously, the Tribunal agreed  
18 that the open court principle required publication and  
19 found that it was important to redact the names of  
20 Tribunal Members to protect the integrity of the  
21 process, to make sure that there was no influence on  
22 Tribunal Members, which is great. That was not a live  
23 issue in the proceeding, because there was no  
24 disagreement on the parties on the fact that Tribunal  
25 Members' names need to be redacted and why they should  
26 be redacted.

1           After that, the identities of who must be redacted  
2 becomes somewhat unclear. Now, of course, only the  
3 Tribunal knows exactly what it meant in its March 16th  
4 decision. And obviously the parties are going to  
5 benefit today eventually from a ruling from the  
6 Tribunal on what it did mean on March 16th. But  
7 whatever the Tribunal, in fact, meant to convey in its  
8 March 16th order, Dr. Wall cannot be found to have  
9 willfully breached the Tribunal's orders.

10           What I mean by "willfully", because that's a bit  
11 of a legal term, is intentionally, okay. What the  
12 Complaints Director has alleged is that Dr. Wall knew  
13 it was going to be a breach to publish his expert  
14 witness names and did it anyways, in contempt of the  
15 Tribunal's orders; he willfully did it, he decided I  
16 don't care what the Tribunal has to say, I'm going to  
17 do what I want to do, damn the torpedoes. That's what  
18 he's alleging; he's alleging that Dr. Wall willfully  
19 breached the order.

20           But that cannot be a finding unless the meaning  
21 and scope of the order are abundantly clear, and it's  
22 plain and obvious that Dr. Wall's conduct constitutes a  
23 breach. That's the only way you get to the point where  
24 you find that the breach was willful, as the Complaints  
25 Director is alleging. I would submit that the  
26 Tribunal's order is very unclear when it comes to the

1 issue of expert witnesses, of Dr. Wall's own expert  
2 witnesses.

3 Dr. Wall determined the Tribunal to mean in its  
4 March 16th decision, and he would submit that his  
5 determination is reasonable, he determined the  
6 following: That the names of Tribunal Members, College  
7 staff, such as the Hearings Director, the Complaints  
8 Director's witnesses, including Dr. [REDACTED] and the two  
9 counsel for the Complaints Director and the Tribunal be  
10 redacted. And I'm going to get into why this is so,  
11 you can find this both in the text of the decision and,  
12 again, in the context, going back to the parties'  
13 positions. This is everybody that the Complaints  
14 Director wanted redacted. Dr. Wall read the Tribunal's  
15 decision to agree with the positions of the parties  
16 that the Complaints Director's witnesses, Tribunal  
17 Members, two counsel, and College staff, who don't want  
18 to be published, will not be published. And then, of  
19 course, you -- so he read the decision then to mean,  
20 inferentially, that the names of Dr. Wall himself, his  
21 counsel, and his expert witnesses were not required to  
22 be redacted.

23 Now, let's start with the actual decision itself.  
24 So of course leading up to the last three paragraphs  
25 that contain what my learned friend has called the  
26 orders, and I would agree with him that these are the

1 orders, we have quite a few comments that provide a  
2 little bit of context about the open court principle  
3 and about redacting Tribunal Members' names, et cetera,  
4 and we have interchangeably terms like "witnesses" and  
5 "parties" used in this decision. We get into the  
6 third-to-last paragraph, I'm reading from the last --  
7 second-to-last sentence: (as read)

8       The Tribunal says in its decision there will  
9       be no identification of the parties  
10       testifying and no identification of the Panel  
11       Members.

12 While it is clear what no identification of the Panel  
13 Members' names, it's not clear what no identification  
14 of the parties testifying means. Technically speaking,  
15 I know my learned friend has said that the Complaints  
16 Director took a literal reading of this, "parties"  
17 normally would mean, legally, technically, literally,  
18 the parties. The parties to this case are Dr. Wall and  
19 Mr. [REDACTED] There are no other parties to this case.  
20 Everybody else is something else, whether a witness,  
21 counsel, decision-maker, College staff, expert witness,  
22 what have you. Dr. [REDACTED] is not a party. I am not a  
23 party. Mr. [REDACTED] not a party. Mr. [REDACTED] not a  
24 party. The parties, Complaints Director, Dr. Wall.

25       Then we go down to the second-to-last paragraph,  
26       reading from the beginning: (as read)



1           We find that the transcripts of the expert  
2           witnesses who testified in this proceeding  
3           may be published on the condition that all  
4           identification of the witnesses, the  
5           Tribunal, and the counsel be redacted from  
6           those transcripts.

7   Now, unfortunately, we have no qualification or  
8   definition or clarification or explanation of what "the  
9   witnesses" and "the counsel" mean. We don't need one  
10   for "the Tribunal". That means the four members who  
11   sit on the Tribunal. Gratefully, that is easy to  
12   determine. But we don't know what "the witnesses"  
13   means.

14           If we read that literally, that would include  
15   Dr. Wall himself; he's a witness, and that would mean  
16   that the Tribunal has ordered that Dr. Wall can't  
17   publish his own name. Well, that's absurd, quite  
18   frankly, and I find it impossible to believe that the  
19   Tribunal meant that. And, in fact, I find it very  
20   telling that the Complaints Director has not alleged  
21   that. The Complaints Director has not alleged that  
22   Dr. Wall breached the order by publishing his own name  
23   even though he is a witness. You will notice in the  
24   transcripts that were published, Dr. Wall's name is  
25   mentioned. His name was not redacted, because given  
26   the context of this case, it is clear to a reasonable

1 person reading this that the witnesses, the witnesses,  
2 does not include Dr. Wall himself even though he's a  
3 witness.

4 Now, if we jump over to "the counsel", not  
5 defined, no parameters. Well, there's three counsel in  
6 this case: There's the Complaints Director's counsel,  
7 Mr. [REDACTED] there's the Tribunal Members' counsel,  
8 Mr. [REDACTED] and there's Dr. Wall's counsel,  
9 Mr. Kitchen. But the Complaints Director is not  
10 alleging that Dr. Wall breached the order because my  
11 name is published, because Mr. Kitchen's name is  
12 included in those expert witness transcripts. Indeed,  
13 it would be absurd to make such an allegation, given  
14 the context of this case, given the context of the  
15 submissions on February 25th, given the context of the  
16 application for a publication ban, it is plain and  
17 obvious that "the counsel" does not include  
18 Mr. Kitchen. It includes the names of the two lawyers  
19 who don't want their names published. That was  
20 obvious; it was inferred from the beginning in these  
21 proceedings that Mr. [REDACTED] and Mr. [REDACTED] didn't want  
22 their names published, and the Complaints Director  
23 didn't want their names published. Again, that was not  
24 a live issue on February 25th. We didn't have to go  
25 down that road because there was consent amongst the  
26 parties that the names of those two counsel would not

1 be published.

2 That context is important. When we try to think  
3 of what "the witnesses" really means, okay, well,  
4 clearly it doesn't mean every single witness. That's  
5 obvious. Just like "counsel" doesn't mean every single  
6 counsel. So if it doesn't mean every single witness,  
7 what witnesses does it mean? That's when we have to  
8 bring in context.

9 The positions of the parties brings a lot of  
10 context, okay. It's really important to understand  
11 that the Tribunal cannot order something that was not  
12 asked for by one of the parties and was not moved  
13 forward on its own. The Tribunal did not move to vary  
14 or put in place some sort of redaction order, okay,  
15 only the parties took positions on that. There was an  
16 application made by the Complaints Director to redact  
17 those names, to redact certain names that he listed,  
18 that he specified, okay. Dr. Wall consented to that  
19 list, a very clear list, okay. The Tribunal cannot  
20 order beyond that without moving to do so, without  
21 giving notice to the parties that it is considering to  
22 do so and inviting submissions on that. Had the  
23 Tribunal wanted to redact more names than what the  
24 Complaints Director wanted redacted or what Dr. Wall  
25 was agreeing to redact, it would be incumbent upon the  
26 Tribunal to give notice to the parties to say, We are

1 considering doing this, please provide submissions.

2 That wasn't done.

3 I'm not saying that wasn't done because the  
4 Tribunal decided they wanted to just do that and not  
5 get submissions, no. What I'm saying is that on a  
6 plain -- I don't know the minds of the Tribunal  
7 Members, but on a plain reading of this decision and  
8 the February 25th transcripts, the Tribunal was going  
9 with the context, going with the presumption, going  
10 with the consented-to names. It wasn't trying to  
11 redact more than the parties. It was agreeing with the  
12 parties. And so when it said "the witnesses", it was  
13 clear to them, and it was -- and they thought it would  
14 be clear to the reader of what "the witnesses" meant.

15 Remember the context of the case and of the  
16 publication ban is that Dr. Wall and his counsel will  
17 publish their own names. That was never called into  
18 question. It would be downright disingenuous for  
19 anybody to claim that they presumed Dr. Wall and his  
20 counsel were going to redact their own names. And  
21 remember, the Complaints Director has not alleged that  
22 Dr. Wall has breached the order by publishing the names  
23 of himself as a witness and his counsel, even though  
24 the Tribunal, on a particularly construed reading of  
25 that second-to-last paragraph and a particularly  
26 literal reading, it might seem the Tribunal is ordering

1     that Dr. Wall and Mr. Kitchen can't publish their own  
2     names. But the Complaints Director isn't alleging  
3     that. Instead what he's alleging is that the expert  
4     witness names, Dr. Wall's own expert witness names  
5     couldn't be published. So Dr. Wall submits that it is  
6     reasonable to read this decision as catching exactly  
7     what was discussed at the application on February 25th  
8     and no more.

9             And the last point, as far as that reasonable  
10    reading is this: Remember, the presumption is in  
11    favour of publication. The only way you redact the  
12    name that is presumptively publishable because of the  
13    constitutional right to do so and because of the open  
14    court principle is when you have clear contrary  
15    direction from the decision-maker. Absent clear  
16    contrary direction otherwise from the decision-maker  
17    that rebuts the presumption, the presumption is in  
18    favour of Dr. Wall to publish. The onus is on the  
19    person saying it shouldn't have been published to  
20    demonstrate that it should have been published, that  
21    the scope of what is supposed to be redacted includes  
22    those people.

23            I would say it is not -- far from being clear,  
24    that it is not even -- it is not even reasonable to  
25    read this order as catching the expert witnesses of  
26    Dr. Wall. So Dr. Wall submits that there is no breach.

1 The order allowed the publication of his own expert  
2 witnesses, and there's been no breach.

3 Now, again, no one knows the minds of the Tribunal  
4 Members except the Tribunal Members themselves and  
5 maybe we will get a decision that, in fact, what we  
6 meant on March 16th when we said "the witnesses" is  
7 Dr. Wall's own expert witnesses. Well, in that case,  
8 Dr. Wall has inadvertently or accidentally or  
9 unintentionally breached that order. Okay, so fine,  
10 there was a breach, but it was made in good faith. It  
11 was reasonable for Dr. Wall to do so. He had no  
12 intention of breaching the order. It didn't even cross  
13 his mind that he was breaching the order. That's  
14 important to keep in mind, that the furthest that we  
15 can get on this is a finding that Dr. Wall  
16 inadvertently breached the order because the order was  
17 not clear, and he acted on his presumption of  
18 publication and published what he reasonably thought he  
19 could based on the context of the case and the  
20 positions of the parties taken.

21 Equally important is that there is no real harm.  
22 The Complaints Director is saying there is harm to  
23 breaching the order, harm in and of itself. In a  
24 technical sense, I don't disagree with that. Orders  
25 need to be followed. Dr. Wall wants to follow them.  
26 He will follow them. In this case, the order was

1     unclear, and he may have made a good-faith mistake,  
2     he's arguing that he hasn't, but in the event you find  
3     that he has made a mistake, it was made in good faith,  
4     and no harm flowed from it.

5             I'll give an example of how there might have  
6     actually been harm. Let's say Dr. Wall had published  
7     Dr. [REDACTED] name, okay, and Dr. [REDACTED] got some threatening  
8     emails or his reputation was damaged, whatever, that  
9     would be real harm, okay. There's been no real harm  
10    besides the academic harm of violating the order in  
11    good faith, unintentionally. There is obviously no  
12    harm to Dr. Wall's own expert witnesses who consented  
13    to have their names published. And the Complaints  
14    Director isn't alleging that there's harm to them. He  
15    isn't alleging that there's harm to the public either  
16    by publishing these names of these three expert  
17    witnesses because there isn't, and that needs to be  
18    kept in mind if there is a finding that Dr. Wall  
19    unintentionally breached the order, that no real harm  
20    flowed from that breach.

21            I'll move on to the argument from the Complaints  
22    Director about ancillary content or explanatory  
23    comments. Dr. Wall submits that this allegation is  
24    actually disingenuous, and that's it's not reasonable  
25    to have brought this allegation.

26            I'm going to read for you -- I mean, I know you

1 wrote it, but I'm going to read it back to you, the  
2 last paragraph of your decision: (as read)

3 We also direct that any publication that does  
4 not contain any ancillary content or  
5 explanatory comments that could in any way  
6 bypass our decision and identify the  
7 witnesses, Tribunal Members, or counsel.

8 You don't need to have a Ph.D. in English to know that  
9 that sentence is referring to comments that would  
10 identify witnesses who are supposed to be redacted.  
11 There is no other reasonable way to read that.

12 That type of order is common, at least when you  
13 have an order to redact names. It's always going to  
14 come with that additional side order. It should be  
15 implied, but it's always going to come with that. I'm  
16 sure that's why the Tribunal included it. They were  
17 probably advised to include it because it would be  
18 included in any other order of this nature. I wasn't  
19 surprised to read it. I expected to read it. What's  
20 the point of ordering that Dr. [REDACTED] name must be  
21 redacted, meanwhile Dr. Wall goes and publishes an  
22 enormous amount of content that clearly identifies who  
23 Dr. Wall is, right? Well, that would defeat the  
24 purpose of ordering the redaction. So of course this  
25 is in here.

26 The Complaints Director's position is that the



1 Tribunal here is ordering that there can be no  
2 ancillary content or explanatory comments about the  
3 transcripts themselves at all, completely separate from  
4 the issue of identities, completely apart from not  
5 identifying witnesses, expert witnesses. That's  
6 absurd. No reasonable prosecutor would make such an  
7 absurd allegation. It's unreasonable to read this any  
8 differently than to say that, look, this is an  
9 additional order that not only are you to redact names,  
10 but also to not include details that would identify the  
11 person you are redacting. Like I said, it goes without  
12 saying.

13 And you will notice in the comments that the  
14 Complaints Director complains of, there isn't actually  
15 a mention of any expert witnesses. Not just that there  
16 isn't a comment in Dr. Wall's expert witnesses, there's  
17 no comment of expert witnesses at all.

18 Now, it's further absurd again because if the  
19 Tribunal was saying what the Complaints Director is  
20 saying it said, in this last paragraph, that would be  
21 an order that was never asked for. It would be an  
22 unlawful order. It would be an order that the  
23 Tribunal's not actually permitted to issue. It would  
24 be an order saying that Dr. Wall and his counsel cannot  
25 talk about the contents of the transcripts publicly.  
26 That would be a publication ban in itself, quite a

1     severe one. It would be impossible for the Tribunal to  
2     do that. And in fact, I'm confident the Tribunal  
3     didn't do that. I'm confident the Tribunal only issued  
4     orders that were based on the positions taken by the  
5     parties in this decision, because that's what a  
6     reasonable tribunal would do, and that's what I think  
7     was done.

8             It is unreasonable for the Complaints Director to  
9     come in and say that Tribunal must have ordered a  
10    publication ban, a silencing order on Dr. Wall and his  
11    counsel that they can't discuss the content of the  
12    transcripts, even though the Complaints Director didn't  
13    ask for that, even though we didn't discuss it, even  
14    though it would go against the open court principle;  
15    the Complaints Director is saying that the Tribunal  
16    ordered that. I think that's an insult to the  
17    reasonableness of the Tribunal. Of course, it didn't  
18    order that.

19            So if we look at the law, okay, the fact that a  
20    tribunal cannot order something that it did not move  
21    for itself or wasn't taken by the -- wasn't taken as a  
22    position by the parties, the fact that this order, in  
23    particular, would have gone against the open court  
24    principle, which is further absurd, because a good  
25    portion of this order actually talks about the open  
26    court principle, and the Tribunal acknowledges it and

1 actually grounds their decision in that, okay, and then  
2 we actually read the words themselves. All those  
3 things taken into consideration makes it so that no  
4 reasonable person could read this order to mean  
5 anything other than what it says, which is do not make  
6 comments that actually identify people. Do not go on  
7 about who Dr. Wall is even -- who Dr. ■ is even though  
8 you're not using his name so that people figure out who  
9 he is. That's what this means. It does not mean don't  
10 talk about the transcripts at all.

11 So why is the Complaints Director making such a  
12 disingenuous, hopeless, unreasonable application?  
13 Well, only he knows that, but I would say it's bad  
14 faith for a prosecutor to bring such an application.  
15 So not only am I saying that, obviously, the Complaints  
16 Director's position is wrong and that the Tribunal  
17 needs to find that it is wrong, but that this is a  
18 relevant issue for costs in this case, because we have  
19 the Complaints Director saying, Look, this is  
20 unnecessarily long, unnecessarily complex, why are we  
21 having all these interim applications. We're having  
22 some of these interim applications because the  
23 Complaints Director is asking for unreasonable things,  
24 and he's basically wasting everybody's time.

25 I'm going to go on to remedies. We know from  
26 Mr. ■ comments what those remedies are that the

1 Complaints Director is seeking. He's seeking the  
2 removal of the transcripts, and then he's seeking that  
3 the transcripts don't go back up until the Tribunal has  
4 verified that the right persons are redacted.

5 Well, that is over the top. That's too much.  
6 That's overreach. And that's involving the Tribunal in  
7 a way that it should not be involved. It's making the  
8 Tribunal a referee of something it shouldn't and  
9 doesn't need to be a referee of.

10 The proper order in this is much more limited if,  
11 in fact, the Complaints Director's position is correct.  
12 If, in fact, the Tribunal agrees with the Complaints  
13 Director that it did want the expert witnesses' names  
14 redacted, even though that wasn't the position of the  
15 parties, the proper order from that is to simply have  
16 those names redacted. That's it, go through and redact  
17 Dr. [REDACTED] and Dr. [REDACTED] and Mr. [REDACTED] names  
18 and any identifying details, the same as was done for  
19 Dr. [REDACTED] and Mr. [REDACTED] and Mr. [REDACTED] and et cetera,  
20 et cetera. That's the proper order to flow from this.  
21 Dr. Wall will gladly comply. He'll take down what's  
22 there. He'll redact the names, and he'll put it right  
23 back up. Take a couple hours.

24 Instead what the Complaints Director is asking is  
25 for transcripts to be removed completely and not put  
26 back up until the Tribunal reviews it. That's onerous

1 and unnecessary and constitutes more of a publication  
2 ban than is permitted. It constitutes more of a  
3 hindrance on the ability to publish than is needed or  
4 is permitted.

5 And of course the third remedy, and this is number  
6 two in the email from Mr. [REDACTED] but the third remedy  
7 is the removal of the ancillary comments. Again, I  
8 would say that that remedy cannot be granted, it's an  
9 impossible remedy, because that's the Complaints  
10 Director asking that Dr. Wall and Mr. Kitchen, his  
11 counsel, not comment on the content of the transcripts.  
12 Well, he's not entitled to take that position now.  
13 That in and of itself is a very serious publication ban  
14 and presumptively unlawful and makes absolutely no  
15 sense.

16 I know I've spoken on costs. I'll just mention a  
17 few more things about costs. The Complaints Director  
18 appears to take the position that costs should actually  
19 be awarded in his favour for the February 25th  
20 application even though he lost. It is trite law that  
21 the unsuccessful party pays costs. Now, of course,  
22 there is the caveat in this case that Dr. Wall can be  
23 successful on every application, and on the merits of  
24 the case, he still will get no costs. I don't dispute  
25 that.

26 But Dr. Wall -- that doesn't mean Dr. Wall pays

1 costs on applications that he's unsuccessful on. If  
2 Dr. Wall has three interim applications that he's  
3 successful on during these proceedings and ultimately  
4 loses on the merits and has to pay some costs because  
5 of that, well, he doesn't pay extra costs because of  
6 the interim applications that he was successful on.  
7 That's -- that much is still trite law. So if whatever  
8 applications he wins on, those costs must be deducted  
9 from whatever costs he may pay at the end if he was to  
10 ultimately lose on the merits.

11 So it's a bit odd for the Complaints Director to  
12 say that he wants costs on this February 25th  
13 application when, ultimately, he was unsuccessful. And  
14 just to clarify what "unsuccessful" means in this  
15 context, the Complaints Director asked for two things  
16 that were contested by Dr. Wall, okay: He asked for  
17 two things he was unsuccessful on, he applied for  
18 things he didn't need to apply for them, he lost when  
19 he applied for them, so he was the unsuccessful party  
20 in that application. What the Tribunal ordered was  
21 consistent with the position taken by Dr. Wall, which  
22 means that Dr. Wall was successful on February 25th  
23 because the Tribunal adopted his position, publishing  
24 the transcripts with redacted names.

25 Now for today, the Complaints Director has  
26 essentially made -- he has two grounds to his

1 application and has two different sets of remedies  
2 coming from those grounds. The first is that Dr. Wall  
3 published expert witness names, his own witness names  
4 when he shouldn't have; the second one is that he  
5 breached the order by commenting on the contents of the  
6 transcripts.

7 The Complaints Director may succeed on his first  
8 ground. He won't on his second ground, which means he  
9 will have partial success at best. In which case,  
10 there should be no costs one way or the other. I think  
11 my learned friend would agree with me, it's fairly  
12 trite, if you have an application where there is mixed  
13 success, half and half, one side wins one issue, the  
14 other side wins the other issues, no costs typically  
15 flow from that. It just -- each side, each party bears  
16 their own costs is the phrase that is often used.

17 So today, if you find in the Complaints Director's  
18 favour that his position is correct, Dr. Wall's own  
19 expert witnesses' names should have been redetected, it  
20 should be each party bears their own costs. However,  
21 if you were to side with Dr. Wall and to give a ruling  
22 saying that the publication of expert witnesses was  
23 permissible, of their names was permissible, then  
24 Dr. Wall will be the successful party today. And  
25 although he won't get positive costs, if there is any  
26 costs awarded against him at the end of these

1 proceedings, when there's a decision on the merits, the  
2 costs of today's application must weigh in Dr. Wall's  
3 favour, which is to say that he must pay less than he  
4 otherwise would when factored in today's costs.

5 Those are my submissions, of course subject to any  
6 questions you have. It looks like I was able to finish  
7 within almost half an hour.

8 THE CHAIR: Thank you, Mr. Kitchen.

9 Mr. [REDACTED] did you have some rebuttal reply  
10 submission?

11 Submissions by Mr. [REDACTED] (Reply)

12 MR. [REDACTED] I have a couple of very brief  
13 comments, Mr. Chair. I just want to -- I think, in  
14 many ways, I'm agreeing with Mr. Kitchen on one point  
15 in terms of the timing for disclosure. I would submit  
16 to you that in a discipline hearing faced with the  
17 wording of Section 85 of the Health Professions Act,  
18 disclosure of transcripts in a discipline hearing  
19 midway through is unusual. It may be that in a court  
20 proceeding, it is commonplace or more usual, but this  
21 is not something we would typically see, I typically  
22 see in a disciplinary proceeding.

23 I think the Complaints Director's position on the  
24 February 25 hearing offered you a range of options, but  
25 it hasn't changed today. We're looking for  
26 clarification, we're looking for direction about



1     whether breaches have or haven't occurred.

2             I think I would agree with Mr. Kitchen that his  
3     comment to the effect that, in the technical sense,  
4     orders must be complied with, and I think in the  
5     literal sense as well they must be complied with, and  
6     that's why we're here today looking for  
7     (INDISCERNIBLE). Those are my comments, Mr. Chair.

8     THE CHAIR:                     Thank you, Mr. [REDACTED] We'll  
9     take a short break so that the Hearing Tribunal can  
10    determine if we have any questions for either counsel,  
11    so let's come back in 10 minutes.

12    (ADJOURNMENT)

13    Questions by the Tribunal

14    THE CHAIR:                     Okay, we're back in session,  
15    reconvened. The Hearing Tribunal has one question of  
16    Mr. [REDACTED] and, Mr. [REDACTED] Mr. Kitchen made a  
17    comment that basically the position of the parties with  
18    respect to who should be excluded is the same, and we  
19    wanted to hear your response to that.

20    MR. [REDACTED]                     I'd have to go back and look  
21    at the transcripts, but I think the position of the  
22    Complaints Director was that we wanted certain  
23    individuals to not be named to shield them from any  
24    undue influence or outside factors, and we wanted to be  
25    very careful about who those people were and were not  
26    named. Again, I'd have to go back. Mr. Kitchen can

1 help me if he wants to but -- or if he can remember,  
2 but I think there was some general consensus about the  
3 individuals who would not be named. I think there was  
4 a lack of I think maybe clarity in terms of who could  
5 be named and then what happened ultimately with the  
6 posting on the website, because there were names and  
7 there were identification.

8 And I think Mr. Kitchen was pretty candid when he  
9 took you through the two paragraphs in your order,  
10 talking about the interchangeable use of parties and  
11 witnesses, that that led to potentially some confusion.  
12 So I think there was -- and, again, I'd have to go  
13 back -- there was probably some general consensus on  
14 what names shouldn't be published. I think there's a  
15 difference of opinion now on what the meaning and  
16 effect of your order was and how Dr. Wall responded to  
17 it.

18 MR. KITCHEN: Mr. Chair, I just want to  
19 respond to my learned friend's comments. The answer to  
20 that question is yes; the positions are precisely the  
21 same. There's a very specific list of which witnesses  
22 are to be redacted. That specific list is repeated by  
23 Mr. [REDACTED] when he's -- in his comments on February  
24 25th when he's saying who the Complaints Director wants  
25 redacted and in my comments when I'm saying who  
26 Dr. Wall is consenting to being redacted. They are

1     precisely the same individuals. The positions --

2     MR. [REDACTED]                             Yeah, and I'm --

3     MR. KITCHEN:                             -- are the same.

4     MR. [REDACTED]                             Yeah, and I'll just follow up  
5     with that. I think despite that consensus, and I'm not  
6     going to -- I'll go back and look at it, I don't have  
7     any reason to doubt what Mr. Kitchen is saying -- but  
8     despite that consensus, what's really important here is  
9     what happened with that order, what happens with  
10    Dr. Wall's publication. So whether we had consensus or  
11    not, whether we asked for a particular order or not,  
12    whether remedies were or were not sought on February  
13    25, we have an order. How does it apply to the facts?  
14    Was there a breach, wasn't there a breach? I think  
15    that's the key here.

16    MR. KITCHEN:                             And just for the record, the  
17    Complaints Director's position on who should be  
18    redacted is page 15 and 16 of the February 25th  
19    transcripts, and Dr. Wall's position is on page 27.

20    THE CHAIR:                             27, yeah. We have those  
21    references. Okay, we just wanted to get your input on  
22    that, Mr. [REDACTED]

23             Unless there's anything further from counsel, we  
24    will adjourn this hearing, and we will strive to get a  
25    decision out to you as quickly as possible.

26    Discussion

1 MR. [REDACTED] Can we just talk about the  
2 June dates? Sorry, Mr. Kitchen, if that's --  
3 THE CHAIR: Oh, yes.  
4 MR. KITCHEN: Yeah, that's exactly it.  
5 Dr. Wall consents to June 16th, so if we want to  
6 go ahead and schedule June 16th and 17th for closing  
7 argument, that works for the defence.  
8 THE CHAIR: Mr. [REDACTED] you're okay with  
9 that?  
10 MR. [REDACTED] I believe -- I can check my  
11 calendar, I'm sure they're available for me because I  
12 think I responded that they were, so that's fine. So  
13 which days of the week are those again, Mr. Chair? Is  
14 that Thursday, Friday?  
15 MR. [REDACTED] 16th and 17th.  
16 MR. [REDACTED] Are those Thursday, Friday?  
17 THE CHAIR: Just give me a second --  
18 MR. [REDACTED] Thursday, Friday.  
19 MR. [REDACTED] Yeah. You know what, I  
20 just -- if you can bear with me, I can access my  
21 calendar here currently. I just want to be absolutely  
22 sure on that. I don't believe -- yeah, I'm fine on  
23 those days, Mr. Chair and Mr. Kitchen.  
24 THE CHAIR: Okay, thank you both for  
25 agreeing to these dates. We will schedule final  
26 arguments on June 16th and June 17th. I think what we

1 discussed was that we would allow up to a half day for  
2 each party, and then the second day we would set aside  
3 for deliberations if -- as is needed. So we will get a  
4 decision out to you on this as quickly as possible,  
5 surely before those dates. It's --

6 MR. KITCHEN: Mr. Chair, I have to ask a  
7 request about that, because that's brand-new  
8 information to me at least. My understanding was for  
9 the two days that -- obviously, Mr. [REDACTED] goes first,  
10 it's his case to make, and then I respond. My response  
11 is going to be much more lengthy. It won't be  
12 contained in half a day. This is why I've asked for  
13 two days. It will go into the second day.

14 THE CHAIR: That's fine. That's not a --

15 MR. KITCHEN: Okay.

16 THE CHAIR: -- problem --

17 MR. KITCHEN: I may not.

18 THE CHAIR: -- and if further time is  
19 needed for deliberation, we will have to work with  
20 that, depending on how the two days go. So we have two  
21 consecutive days for you to use, and if you don't need  
22 all of them, we can certainly use them for our  
23 deliberations, and the important thing is we have dates  
24 in the near future, and hopefully we can conclude the  
25 hearings and evidence portion of this.

26 Anything else? Okay, thank you, everybody, and we

1 will see people on June 16th and 17th and --

2 MR. [REDACTED] Mr. Kitchen and I are just  
3 staying on with the court reporter, I understand,  
4 correct? Yeah.

5 MR. KITCHEN: Mr. Chair, am I correct then  
6 we are going to have a written decision based on  
7 today's application much prior to June 16th?

8 THE CHAIR: Yes.

9 MR. KITCHEN: Thank you. The hearing is  
10 closed.

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12 PROCEEDINGS CONCLUDED

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1 CERTIFICATE OF TRANSCRIPT:

2

3 I, [REDACTED] certify that the foregoing  
4 pages are a complete and accurate transcript of the  
5 proceedings, taken down by me in shorthand and  
6 transcribed from my shorthand notes to the best of my  
7 skill and ability.

8 Dated at the City of Calgary, Province of Alberta,  
9 this 26th day of April, 2022.

10

11

14 [REDACTED] CSR (A)

15 Official Court Reporter

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