

Clerk's Stamp:

COURT FILE NO.

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANT

CURTIS WALL

RESPONDENT

COLLEGE OF CHIROPRACTORS OF ALBERTA

DOCUMENT

**ORIGINATING APPLICATION FOR JUDICIAL
REVIEW**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

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NOTICE TO THE RESPONDENT

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date:

Time:

Where:

Calgary Courts Centre
601 5th Street SW Calgary Alberta

Before:

Justice in Chambers

Go to the end of this document to see what you can do and when you must do it.

STATEMENT OF FACTS RELIED ON

The Parties

1. The Applicant, Dr. Curtis Wall is a Calgary chiropractor and registered member of the Respondent, the College of Chiropractors of Alberta (the “College”). Dr. Wall works alone in his clinic where he treats many long-time patients through standard chiropractic care, such as manual manipulation of the musculoskeletal system.
2. The Respondent is the chiropractic regulatory body in Alberta. Its duties and powers are delineated in the *Health Professions Act*. The College initiated disciplinary proceedings against Dr. Wall in December 2020. A hearing before a disciplinary Tribunal has occurred, but no decision has yet been issued by the Tribunal.

Background

3. In May 2020, the College implemented a no-exceptions mask mandate for all Alberta chiropractors through its Pandemic Practice Directive. The College required chiropractors to wear a face mask while treating patients. Dr. Wall attempted to wear a mask for several weeks, but found that he was unable due to the severe anxiety and claustrophobia he experienced when wearing a mask. From June to December 2020, Dr. Wall did not wear a mask while treating patients.
4. In early December 2020, Alberta Health Services received a complaint that Dr. Wall was not wearing a mask, which was forwarded to the College.
5. The College contacted Dr. Wall, who acknowledged that he was not wearing a mask while treating patients. Dr. Wall asked the College for human rights accommodation on the basis of mental disability (the aforementioned anxiety and claustrophobia). Dr. Wall obtained a doctor’s note from a Calgary physician verifying his medical inability to wear a mask, and provided the note to the College.
6. The College refused to accommodate Dr. Wall, and, instead, immediately applied pursuant to section 65(1)(b) of the *Health Professions Act* (the *HPA*) to suspend Dr. Wall’s practice permit. A person appointed by the Council of the College pursuant to

section 65(1) of the *HPA* to decide applications to suspend practice permits denied the College's application on December 18, 2020. The person directed conditions be placed on Dr. Wall's practice permit that allowed Dr. Wall to treat patients without wearing a mask.

7. The College then issued a long list of charges of unprofessional conduct against Dr. Wall, most of which related to Dr. Wall not wearing a mask while treating patients.
8. In April 2021, as part of his defence against the charges, Dr. Wall provided the College with three expert opinion reports from Respiriologist Dr. Bao Dang, Viral Immunologist Dr. Byram Bridle, and infectious disease consultant, Dr. [REDACTED].
9. A disciplinary hearing before a Tribunal was scheduled to commence in July 2021.
10. The College sought an adjournment of the July 2021 hearing dates because it had not yet secured an expert witness. The College obtained an expert witness, physician Dr. [REDACTED] and submitted an expert opinion report. The hearing commenced on September 1, 2021. Prior to the hearing, Dr. Wall submitted a fourth expert opinion report from an occupational health and safety consultant, Chris Schaefer.
11. Eight days of evidence was heard by the Tribunal between September 1, 2021 and January 29, 2022. Transcripts of all eight days were produced. No portion of the virtual hearing was held in private and the hearing was at all times open to the public.

The February 25, 2022 Hearing of the College's Application for a Publication Ban

12. In February 2022, shortly before final transcripts were produced, Dr. Wall notified the College through counsel that he intended to exercise his constitutional rights to freedom of expression and a fair and public hearing by publicly sharing the transcripts of the testimony of all the expert witnesses. No legal obligation was on Dr. Wall to provide the College with said notification, it was done out of courtesy.
13. Anticipating the College may object to the publication of the transcripts of expert witnesses testimony, Dr. Wall offered to redact the names of all College personnel,

Tribunal members, lay witnesses, and lawyers besides Dr. Wall's. Dr. Wall's intention was to only publish the expert witness evidence and the identities of the expert witnesses.

14. The College objected to any form of publication and applied to the Tribunal for a publication ban of the entire record before the Tribunal. Dr. Wall contested the application, which was heard by the Tribunal on February 25, 2022 (the "February 25 Hearing").
15. At the February 25 Hearing, in an effort to narrow the issues and reach a consensus, Dr. Wall further consented to also redact the name of the College's expert witness, Dr. [REDACTED]. The effect of this was that no names would appear on the published expert evidence except for Dr. Wall himself, his counsel, and his four expert witnesses.
16. The only live issues at the February 25 Hearing were whether a total publication ban should be ordered, and, if so, for how long. Counsel for Dr. Wall made it clear what names would be redacted and not redacted, if publication of transcripts was not prohibited by the Tribunal. Counsel for the College provided no submissions about whose names should be redacted that differed from what counsel for Dr. Wall specified. The Tribunal asked no questions about which names would be redacted, if publication of the transcripts was to occur.
17. On March 16, 2022, The Tribunal issued its reasons for decision regarding the College's application for a publication ban. The Tribunal rejected a total publication ban and ordered that the expert witness transcripts could be released to the public by Dr. Wall (the "March 16 Order").
18. Unfortunately, the Tribunal's March 16 Order and reasons for decision was otherwise unclear. However, based on the positions of the parties taken at the February 25 Hearing, it was plain and obvious to Dr. Wall that he was permitted to publish *the names* of his four expert witnesses when he published *the evidence* of his expert witnesses.
19. Dr. Wall proceeded to publish the transcripts of expert testimony. He ensured the names of all individuals except his own expert witnesses were redacted.

The College's Second Application for a Publication Ban

20. On March 28, 2022, counsel for the College wrote to the Tribunal taking the position that Dr. Wall had breached the March 16 Order by ***publishing the names of his own expert witnesses***. The College further took the position that publicly describing the nature of the case also somehow breached the March 16 Order. The College again applied for a publication ban, this time to prevent Dr. Wall and his counsel from publicly discussing the College's disciplinary proceedings against Dr. Wall (the "March 28 Application").
21. On March 29, Dr. Wall provided the Tribunal with written submissions in response to the March 28 Application. Dr. Wall noted that the College did not take the position at the February 25 Hearing that the names of Dr. Wall's expert witnesses must be redacted. He further noted that the issue was not addressed at the February 25 Hearing and the Tribunal did not indicate that it was considering ordering the names of Dr. Wall's expert witnesses be redacted. Dr. Wall took the position that it was not open to the Tribunal to order the redaction of the names of Dr. Wall's expert witnesses.
22. The Tribunal convened on April 12, 2022 to hear submissions from counsel regarding the March 28 Application and the meaning of its March 16 Order (the "April 12 Hearing").

The Tribunal's June 1, 2022 Decision

23. On June 1, 2022, the Tribunal issued its reasons for decision regarding the College's March 28 Application (the "June 1 Order"). The Tribunal denied the College's request to ban Dr. Wall and his counsel from discussing the details of the case.
24. Regarding the issue of the names of Dr. Wall's four expert witnesses, the Tribunal found that Dr. Wall had "expressly stated" that the "authors of the evidence presented would have their names redacted". The Tribunal did not cite to where in the record Dr. Wall or his counsel made such a statement.
25. Dr. Wall submits to this Honourable Court that the Tribunal's finding on this point is a palpable and overriding error of fact. The transcripts of the February 25 Hearing are abundantly clear that Dr. Wall made no such representation. On the contrary, counsel for

Dr. Wall repeatedly asserted Dr. Wall's intention to publish the names of his own expert witnesses and to only redact the names of individuals on the College's side.

26. The Tribunal stated that its "intention" in its March 16 Order was that the identification of "*all* expert witnesses" and "*all* counsel" be redacted in any published transcripts.
27. The Tribunal then ruled that Dr. Wall "violated the *spirit* of the [March 16] Order". As a result, the Tribunal ordered that the transcripts already published by Dr. Wall be withdrawn and only re-published with the names of Dr. Wall's expert witnesses redacted.
28. Despite being raised by Dr. Wall at the April 12 Hearing, the Tribunal did not address the issue that purporting to prohibit the publication of the identities of "all counsel" necessarily meant that any publication of the identity of Dr. Wall's counsel in connection with the case would be a breach of the March 16 Order. The name of Dr. Wall's counsel has been published many times in connection with the College's disciplinary proceedings against Dr. Wall by Mr. Kitchen himself through comments provided to the media and on the Liberty Coalition Canada website, where Dr. Wall's case is discussed in detail.
29. Aside from the fact that it is impossible at law to make secret the identity of a lawyer representing a party in a legal proceeding without the consent of both the lawyer and his client, this ruling and the Tribunal's failure or refusal to address the issue in the June 1 Order highlights the unlawfulness of the March 16 Order and the Tribunal's subsequent attempt to clarify it. The Tribunal issued an unlawful order to ban the names of Dr. Wall's expert witnesses, without its own motion or any application from the parties, and an unlawful order to ban the publication of the name of Dr. Wall's counsel, Mr. Kitchen. Then, the Tribunal selectively enforced its Order against the names of Dr. Wall's expert witnesses, but ignored the issue of the publication of the name of Dr. Wall's counsel.

The June 16-17 Hearing and the Tribunal's Addendum to the June 1 Order

30. On June 16, the Tribunal convened virtually to hear closing arguments from the College and Dr. Wall. Members of the public attended as observers. As the hearing started, counsel for Dr. Wall asked the Tribunal to clarify that the observers were permitted to publish the names of expert witnesses they would hear during oral submissions.

31. In response, the Tribunal, of its own motion and without submissions from the parties, orally ordered observers must not publish the identities of “the expert witnesses, the tribunal witnesses, the tribunal members and legal counsel”. The Tribunal later issued a written Addendum to the June 1 Order to the same effect as its oral order issued on June 16.

LEGAL BASIS

Standard of Review

32. The standard of review to be applied to the Tribunal’s Orders regarding errors of law or mixed fact and law is reasonableness pursuant to the *Doré /Loyola* analysis for judicial review of administrative decisions that engage *Charter* rights.
33. Specifically, in addition to reviewing to ensure an impugned decision is transparent, intelligible, and justified, a court reviewing a decision of a tribunal that engages *Charter* protections must look to whether the *Charter* rights infringement occasioned by the decision is proportionately balanced *vis-à-vis* any objective claimed to be achieved by the decision. A decision that disproportionately limits *Charter* protections is unreasonable and therefore must be quashed.
34. Once, as here, a claimant has established that their *Charter* rights have been limited by the decision under review, the onus is on the Respondent to demonstrate that the limitation is proportionately balanced as against any benefit obtained by giving effect, as fully as possible, to the *Charter* protections at stake.
35. The standard of review for errors of fact is the well-known threshold of palpable and overriding error. The standard of review of on issues of procedural fairness is correctness.

Overview of the Law of Publication Bans

36. The law is clear that all proceedings before courts and tribunals are presumptively open and accessible by the public and the media, including the evidentiary record. Such is the open court principle that undergirds the Canadian legal system and is reflected in both

section 2(b) and 11(d) of the *Charter*. Publication bans are the exception to the rule and the onus is on the party seeking the ban to rebut the presumption against secrecy.

37. The decision to impose a publication ban is a discretionary one, however, as the Supreme Court of Canada has ruled, it is only lawful to do so when it is both necessary in order to prevent a serious risk to the proper administration of justice, and the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
38. If a tribunal disproportionately limits *Charter* rights by ordering a publication ban, it is a reversible error of law. Publication bans cannot be imposed for no reason, or in response to merely speculative concerns. To justify a publication ban, there must be a real and substantial risk, well-grounded in the evidence, that actually threatens the proper administration of justice. ***There must be a serious danger to be avoided, not merely a substantial benefit or advantage to the administration of justice.***
39. Publication bans always engage freedom of expression and freedom of the press insofar as the public has a right to receive information about court and tribunal proceedings and the media has a right to report on it. Publication bans also engage the *Charter* 11(d) right of a defendant like Dr. Wall to a fair and public hearing when it is the defendant seeking publication and the prosecution or decision-maker seeking the ban. Section 11(d) guarantees not only an open courtroom, but the right to have all forms of media access the evidentiary record and report on the proceedings. Publication bans cover professional disciplinary proceedings in secrecy, which prevents the public scrutiny necessary to ensure professional disciplinary tribunals remain in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that state actors like the College or the Tribunal do not abuse the right to be presumed innocent, and do not institute unfair procedures.

The Tribunal's Publication Ban Orders are Unreasonable

40. Insofar as the Tribunal ordered the redaction of the names of tribunal members, College staff, lay witnesses, the College's expert witness, and the two lawyers besides Mr. Kitchen, the Tribunal's Orders align with what Dr. Wall initially consented to on February 25. However, Dr. Wall did not take that position because he thought such redactions were consistent with the law or his rights, but because he was willing to compromise through concessions to the College in order to move forward. Dr. Wall wanted to avoid as many interim applications as possible and simply proceed with publication of the expert evidence in his case. Dr. Wall submits *any* redactions of names in this case is unwarranted and unlawful, not merely the redaction of the names of his expert witnesses, and therefore asks this Honourable Court to rule that the entire record before the Tribunal be open to the public, including the names of all witnesses, lawyers, and the Tribunal members.
41. By way of its three decisions on March 16, June 1, and June 16, the Tribunal ordered the identities of every individual involved in the College's disciplinary proceedings against Dr. Wall to be secret until the Tribunal issues a final decision (the "Publication Ban Orders"). Every lay witness, every expert witness, every lawyer, and each of the four Tribunal members. Such a broad publication ban and such a severe limitation of the open court principle could only be justified in the face of evidence that is utterly lacking in this case. There is no real evidence, for example, that the Tribunal members, lawyers, or expert witnesses—especially Dr. Wall's own expert witnesses—are likely to encounter any security concerns or other legitimate concerns that would threaten the administration of justice. The Publication Ban Orders are unreasonable and must be quashed.
42. Dr. Wall submits that, in addition to erring in law in ordering the names of his expert witnesses to be redacted, the Tribunal also erred in fact in finding that Dr. Wall represented to the Tribunal that he consented to redacting the names of his four expert witnesses. This error of fact is reversible because it meets the threshold of being palpable and overriding. The record is abundantly clear that Dr. Wall's counsel repeatedly stated what names should be redacted and those names did not include his own expert

witnesses, only the College's witnesses. This error runs through all the Publication Ban Orders. Had the Tribunal not made this error of fact, it may not have ordered the identities of Dr. Wall's own expert witnesses be redacted.

The Tribunal's Order to Redact the Identities of Dr. Wall's Experts is Tainted with Procedural Unfairness

43. It is a fundamental principle of fairness and natural justice that adjudicators cannot make a decision on an issue without hearing submissions from the parties on that issue. Further to this is the obligation on the part of decision-makers to inform counsel that it is considering a particular decision and to invite submissions. Further still, adjudicators cannot order a remedy that neither party asked for unless it moves to do so itself, in which case the above principles apply.
44. It was procedurally unfair for the Tribunal to order the redaction of the names of Dr. Wall's expert witnesses because neither party asked for such an order, the Tribunal made no motion to issue such an order, and Dr. Wall was not given the opportunity to provide submissions regarding such an order. This breach of procedural fairness fatally wounds the Tribunal's order to redact the names of Dr. Wall's expert witness. No deference is owed to the Tribunal regarding a breach of procedural fairness. For this reason alone, the Tribunal's orders to redact the names of Dr. Wall's expert witnesses must be quashed.

RELIEF SOUGHT

45. Dr. Wall applies to this Honourable Court for the following relief:
 - a. A Declaration pursuant to Rule 3.15(1)(b) and section 24(1) of the *Charter* that the Publication Ban Orders disproportionately limit freedom of expression as guaranteed by section 2(b) of the *Charter* and Dr. Wall's right to a fair and public hearing as guaranteed by section 11(d) of the *Charter*;
 - b. In the alternative, a Declaration pursuant to Rule 3.15(1)(b) and section 24(1) of the *Charter* that the Tribunal's orders to redact the names of Dr. Wall's expert witnesses disproportionately limit freedom of expression as guaranteed by section 2(b)

of the *Charter* and Dr. Wall's right to a fair and public hearing as guaranteed by section 11(d) of the *Charter*;

- c. In the further alternative, a Declaration pursuant to Rule 3.15(1)(b) that the Tribunal's orders to redact the names of Dr. Wall's expert witnesses was reached in a procedurally unfair manner;
- d. A Declaration pursuant to Rule 3.15(1)(b) that Dr. Wall did not breach the Tribunal's March 16 Order by publishing the names of his expert witnesses, in "spirit" or otherwise;
- e. An Order pursuant to Rule 3.15(1)(a) and section 24(1) of the *Charter* in the nature of *certiorari*, quashing the Publication Ban Orders;
- f. In the alternative, an Order pursuant to Rule 3.15(1)(a) and section 24(1) of the *Charter* in the nature of *certiorari*, quashing the Tribunal's orders to redact the names of Dr. Wall's expert witnesses;
- g. An Order pursuant to Rule 3.15(1)(a) and section 24(1) of the *Charter* in the nature of *prohibition* prohibiting the Tribunal from ordering any further publication bans on the identities of Dr. Wall's expert witnesses;
- h. Costs of this Application; and
- i. Such further and other relief as this Honourable Court deems just and equitable.

MATERIALS RELIED ON

- 46. The Certified Record of Proceedings, to be filed; and
- 47. Such further and other material as counsel may advise and as this Honourable Court may order or permit.

APPLICABLE ACTS AND RULES

- 48. *Alberta Rules of Court*, Alta Reg 124/2010;

49. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; and
50. *Health Professions Act*, RSA 2000, c H-7.

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).