

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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February 25, 2022

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TABLE OF CONTENTS

Description	Page
February 25, 2022 Morning Session	3
Discussion	4
Submissions by Mr. [REDACTED]	7
Submissions by Mr. Kitchen	23
Submissions by Mr. [REDACTED] (Reply)	64
Discussion	66
Certificate of Transcript	75

1 Proceedings taken via videoconference

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3 February 25, 2022

Morning Session

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5 HEARING TRIBUNAL

6

[REDACTED]

Tribunal Chair

7

[REDACTED] QC

Legal Counsel

8

Dr. [REDACTED]

CCOA Registered Member

9

Dr. [REDACTED]

CCOA Registered Member

10

[REDACTED]

Public Member

11

[REDACTED]

CCOA Hearings Director

12

13 COLLEGE OF CHIROPRACTORS OF ALBERTA

14

[REDACTED]

Complaints Director

15

[REDACTED]

Legal Counsel

16

17 FOR DR. CURTIS WALL

18

J.S.M. Kitchen

Legal Counsel

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20

[REDACTED] CSR(A)

Official Court Reporter

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1 (PROCEEDINGS COMMENCED AT 9:15 AM)

2 Discussion

3 THE CHAIR: I would like to call this  
4 meeting to order. Before we get started, Mr. Kitchen,  
5 the court reporter did not record any of our comments  
6 up until now. You wanted a comment on the record.  
7 Would you wish to do that now.

8 MR. KITCHEN: Sure. Thank you. My  
9 understanding is that there were a couple of  
10 chiropractors that wanted to attend today's hearing  
11 that have attempted to enter and -- I haven't spoken  
12 directly. I can't confirm this. This is simply what  
13 I've been told by my client, but that they wanted to  
14 enter, attempted to enter, and then were denied entry  
15 by whoever is facilitating the call today, which I  
16 assume is the hearings director.

17 I was not notified of whatever requirements need  
18 to be met as far as the College is concerned for people  
19 to attend. I don't necessarily object to those  
20 requirements. But I do think -- I do think it's  
21 unlawful for those people not to be able to enter if  
22 they're willing to go through whatever requirements the  
23 College has in the moment so that they could attend  
24 today's hearing. As we're going to discuss today, this  
25 hearing is presumptively open to the public, and that  
26 is a legal requirement and not merely a statutory one

1 but a constitutional one.

2 So whoever is trying to get in, if they are  
3 willing to fill out the paperwork and submit it in a  
4 timely fashion, I think it is incumbent upon the  
5 hearing's director to permit entry to those individuals  
6 as quickly as she can such that they can catch whatever  
7 part of this hearing that they can get into.

8 THE CHAIR: Duly noted. I will just say,  
9 Mr. Kitchen, that your concerns have been noted and  
10 that Mr. [REDACTED] has collaborated with the registrar's  
11 office, and they're dealing with it. I will say for  
12 further reference, there is public information on the  
13 website as to how observers gain access to these  
14 hearings. So I'll leave it at that.

15 So I would like to move forward with our agenda  
16 for today. Although I will say I'm not clear on  
17 exactly how we are going to proceed. My understanding  
18 is that -- and correct me if I'm wrong, Mr. [REDACTED] or  
19 Mr. Kitchen -- is that Mr. [REDACTED] wishes to bring an  
20 application forward to this hearing; is that correct?

21 MR. [REDACTED] That's correct, Mr. Chair. I  
22 didn't speak with Mr. Kitchen about this, but I tend to  
23 think -- and I welcome his comments after I'm finished  
24 speaking -- I tend to think that because this is the  
25 complaints director's application, the complaints  
26 director should present his case first, Mr. Kitchen

1 would respond. I will speak to that order in a few  
2 minutes, but I -- it's kind of a unique animal here,  
3 but I think likely I should be going first.

4 THE CHAIR: That was our -- that was the  
5 rationale behind me asking you first. It was our  
6 understanding as well. You would speak, Mr. Kitchen  
7 would make his submissions, there would be an  
8 opportunity for questions, including questions from the  
9 hearing tribunal, and we will see where we are at that  
10 point.

11 MR. [REDACTED] Sure. I'm prepared to begin  
12 then, Mr. Chair, if you're comfortable.

13 THE CHAIR: Please do.

14 MR. [REDACTED] Just as a housekeeping matter,  
15 yesterday I sent to Mr. [REDACTED] a PDF of the -- what I  
16 believe are the two relevant sections from the HPA for  
17 today's hearing. I'm assuming those have been sent to  
18 you or that PDF has, and Mr. Kitchen also provided some  
19 cases to Mr. [REDACTED] and I will just make sure those  
20 are also in your hands.

21 THE CHAIR: I believe we have received all  
22 of that information. Thank you both for that, and just  
23 before you start, Mr. [REDACTED] we have [REDACTED]  
24 here today as our court reporter. New to the  
25 proceedings. I don't think we need to go through the  
26 other introductions.



1 Submissions by Mr. [REDACTED]

2 MR. [REDACTED] Good morning, everyone. As  
3 you know, I act for the complaints director, and this  
4 is -- I'll call it an "interim application", for lack  
5 of a better phrase, being brought by the complaints  
6 director pursuant to Section 78(1) for direction and,  
7 in fact, orders in terms of Dr. Wall's intention to  
8 publish transcripts of the hearings, the hearings that  
9 have occurred to date, of course.

10 Section 78(1) indicates that a hearing is open to  
11 the public, but then creates some discretion for the  
12 hearing tribunal on the application of an individual to  
13 order that all or a part of the hearing be held in  
14 private, and I will be taking you through Section 78 in  
15 a little greater detail in a few minutes.

16 I'm next going to speak in terms of how I  
17 anticipate the order proceeding today, but as a  
18 preliminary comment, I just want to mention, you may be  
19 wondering why a privacy application request for order  
20 is being made now as opposed to when it would usually  
21 be made, in my experience, at the beginning of the  
22 hearing, and the answer to that or the reason for that  
23 is in early February, Mr. Kitchen conveyed his  
24 intention very openly to me on behalf of his client to  
25 publish transcripts, and we engaged in a dialogue, and,  
26 unfortunately, we were not able to agree on next steps

1 for publication. So this matter is being brought to  
2 you now sort of midstream, and I'll speak to that in a  
3 few minutes as well.

4 So as you mentioned in terms of process,  
5 Mr. Chair, I would anticipate that I will make some  
6 comments, answer any questions that you or your  
7 colleagues have, Mr. Kitchen would make some comments,  
8 and answer any questions from you or your colleagues.  
9 Perhaps there will be some supplemental responses from  
10 myself and Mr. Kitchen. We've been pretty liberal in  
11 that respect previously, and I think we'll have a good  
12 dialogue if we need to.

13 Mr. Kitchen, are you comfortable with that moving  
14 forward?

15 MR. KITCHEN: That sounds good to me.

16 MR. [REDACTED] Thank you.

17 So just in terms of my submissions, then, Mr. [REDACTED]  
18 and hearing tribunal members, I'm going to cover three  
19 areas. The first will be to review the relevant HPA  
20 sections; the second will be to review the complaint's  
21 director position regarding publication of transcripts;  
22 and the third thing I will do is provide some, I think,  
23 pretty brief comments in terms of what I anticipate you  
24 will hear from Mr. Kitchen regarding his client's  
25 position.

26 Before going any further, though, I do want to



1 confirm from the complaints director's perspective,  
2 today's application is about three things: First it's  
3 whether to allow publication of the transcripts;  
4 secondly, if that is to occur (INDISCERNIBLE - AUDIO  
5 FEEDBACK) publish; and third if that is to occur, when  
6 they should be published. So whether to publish, how  
7 to publish -- and I'm speaking of redactions of names  
8 there -- and then, lastly, the issue of when to  
9 publish.

10 So I'll be taking you through that as I go through  
11 things. So beginning with the first section of my  
12 submissions, I will ask you to open up the PDF of the  
13 HPA sections that I sent. And I'll ask you to go to  
14 the first page, and I will take you through  
15 Section 78(1). So we have opening wording saying,  
16 under 78(1): (as read)

17 A hearing is open to the public unless

18 (a) the hearing tribunal holds the  
19 hearing or part of the hearing in  
20 private on its own motion or on an  
21 application of any person at the  
22 hearing or part of the hearing  
23 should be in private.

24 So there's your legislative discretion to make all or  
25 part of the hearing in private. And the grounds for  
26 you doing that are enumerated in the rest of Section

1 78(1)(a), and from the complaints director's  
2 perspective, we think two of those sub-grounds are  
3 important. First is (ii): (as read)

4 Protect the safety of the person or the  
5 public.

6 And the last one is Item (v): (as read)

7 Because of other reasons satisfactory to the  
8 hearing tribunal.

9 And I'll just pause for a moment and say to you that  
10 that last section is very important. It gives you  
11 broad discretion. It allows you to deal with unique  
12 circumstances, and the complaints director's position  
13 is that today does involve unique circumstances and  
14 really gives you that discretion to make the order that  
15 you think is appropriate.

16 Now, carrying on, any ruling by a hearing tribunal  
17 under Section 78(a) that all or part of a hearing be  
18 held in private has a direct relation to publication of  
19 transcripts or access to transcripts, and that's  
20 because of the wording in Section 85(3) and 85(4) of  
21 the HPA.

22 So if you go to the second page of the PDF of the  
23 HPA sections, I'll just read you those sections.  
24 They're fairly brief. 85(3) says: (as read)

25 A member of the public may examine the  
26 decision and the testimony [that would be by

1 transcripts] given before the hearing  
2 tribunal, however recorded, except the part  
3 of the testimony that was given while the  
4 hearing was held in private.

5 And then Subsection 4: (as read)

6 A member of the public, on paying the  
7 reasonable costs of transcribing, copying,  
8 and delivering it, may receive a copy of the  
9 decision and the testimony [again, transcript  
10 presumably], however recorded, except the  
11 part of the testimony that was given while  
12 the hearing was held in private.

13 So the combined effect of those two sections, Mr. Chair  
14 and tribunal members, is that if you make an order to  
15 hold all or a part of the hearing in private, then it,  
16 in turn, restricts how access to transcripts can occur,  
17 and, of course, that means effectively how they can be  
18 published as well. So that's the legislative framework  
19 in front of you that you can exercise, that you can  
20 rely on.

21 I also want to mention in terms of jurisdiction  
22 that from the complaints director's perspective the  
23 question of publication of transcripts is part of what  
24 lawyers would call "the inherent jurisdiction of this  
25 tribunal as an administrative law decision-maker".  
26 "Inherent jurisdiction" means essentially you're the

1 master of your own process, and you can make whatever  
2 orders are appropriate in that process, provided they  
3 don't contravene your legislation.

4 I've already taken you to Section 78(1)(a)(v) that  
5 you can find whatever reasons you think are  
6 satisfactory to restrict publication in any manner, and  
7 I think you have absolute discretion in that, in whole  
8 or in part, when it occurs, how it occurs, those types  
9 of things. That's your inherent jurisdiction.

10 One other quick comment I will make about the HPA  
11 and your authority is that when I review Section 78 and  
12 your jurisdiction to make orders about private  
13 hearings, there is nothing in Section 78(1) that says a  
14 privacy application can only be made at the beginning  
15 of the hearing. There's nothing in there in terms of  
16 timelines, so it's not a procedural issue for you to be  
17 making this type of decision today. And, in fact, in  
18 my experience in discipline hearings, we might be  
19 two-thirds of the way through the hearing and have some  
20 testimony that's occurring, and someone says, Wait.  
21 This is sensitive, private information. We need to  
22 have an order now about this information. And the  
23 tribunal can wade in at any time and do what is right.

24 So, again, that's the legislative context, the  
25 legislative powers you have, in that relationship  
26 between Section 78(1) and Section 85 and the

1 publication access to transcripts issue.

2       So I'll now turn to the second part of my  
3 submissions, and that is the complaints director's  
4 position Re: publication and the grounds on which we're  
5 seeking to have you issue an order. And by way of  
6 background -- and Mr. Kitchen, I'm sure, will speak to  
7 this in greater detail -- Mr. Kitchen's position and  
8 his client's position are summarized in a February 7,  
9 '22, email that I sent to Mr. [REDACTED] after Mr. Kitchen  
10 had a chance to review it, and it's relatively brief.  
11 I think it's important that I read it in because it  
12 really does summarize the background here.

13       So, again, this is February 7, 2022: (as read)  
14 Hello, Mr. [REDACTED] I'm writing to you  
15 concerning a matter that has just arisen  
16 where my client strongly believes that the  
17 parties require direction from the hearing  
18 tribunal. Specifically, Mr. Kitchen recently  
19 advised me that once the latest transcripts  
20 have been received, Dr. Wall intends to  
21 release the transcripts of questioning of the  
22 expert witnesses in this case to be made  
23 publicly available on the internet. This  
24 will be done through the Liberty Coalition  
25 Canada website and potentially other sites.  
26 On the third page of these transcripts is the



1 list of tribunal members, internal counsel,  
2 the hearings director, et cetera.

3 Mr. Kitchen indicated that he will redact  
4 those names on any versions made public but  
5 the rest will remain visible. Mr. Kitchen  
6 also advised me that he will proceed to  
7 publish redacted copies of the transcripts of  
8 Dr. Wall's expert witnesses but not redacted  
9 copies of [REDACTED] transcripts until the  
10 tribunal issues a ruling on this. Dr. Wall's  
11 position is that he is permitted to publish  
12 [REDACTED] transcripts unless and until the  
13 tribunal rules otherwise.

14 And then I make some comments about the fact that the  
15 Section 78(1) applies and that we need a virtual  
16 interim hearing as soon as possible.

17 I think as well it's important for me to mention  
18 just in terms of background that I conveyed my position  
19 to Mr. Kitchen, knowing that this application was  
20 coming. I believe he had an ethical obligation to  
21 refrain from publishing any -- anything in any form in  
22 any websites yet until we had direction, and  
23 Mr. Kitchen, I believe, agreed to that, and there has  
24 not been any publication to date.

25 I think, Mr. Kitchen, that's accurate. I'll ask  
26 you to just let me know if that's not the case.

1 MR. KITCHEN: It is accurate that they have  
2 not been published. I wouldn't say it was accurate  
3 that I agree I have an ethical obligation. But in any  
4 event, they were only received two days ago. I have  
5 not published them. I didn't see that was helpful,  
6 so ...

7 MR. [REDACTED] I certainly didn't want to  
8 imply you were agreeing with my position, but I think  
9 you agreed that for the time being you had to refrain  
10 from publishing. So thank you for that clarification.  
11 So you've -- you've got the context here, then.  
12 Before I go into the complaints director's actual  
13 grounds, I just want to make clear what the complaints  
14 director's position is. And he's requesting an order  
15 from the hearing tribunal stating that the transcripts  
16 of witness testimony are confidential and private.  
17 That's the starting point. And if you determine that  
18 they can be disclosed by Mr. Kitchen, that should occur  
19 only after the hearing has fully completed; that is,  
20 the liability phase has completed, a written decision  
21 has been issued, and the penalty phase has been  
22 completed and a written decision has been issued, and I  
23 think even more so, after any appeal internally to the  
24 College's counsel has occurred. And, finally, if there  
25 is publication, the complaints director seeks an order  
26 from you redacting the hearing tribunal names, the

1 complaints director's witness names, that would be the  
2 complaints director himself, Dr. [REDACTED] Dr. [REDACTED]  
3 complaints director legal counsel, your independent  
4 legal counsel, and all College personnel. Those would  
5 be the hearing director, for example.

6 So I'll just review that again. Number 1, the  
7 complaints director's position is that he wants --  
8 requesting an order that the transcripts of witness  
9 testimony be made private. If you determine that they  
10 can be disclosed by Mr. Kitchen, that should occur only  
11 after this hearing has been fully completed with  
12 written decisions and after any appeal has been  
13 completed before the council of the College. There's  
14 an internal appeal to the council, as you may know.  
15 And, then, again, finally, if there is publication,  
16 there should be redaction of hearing tribunal member  
17 names, legal counsel member names, the complaints  
18 director's witnesses, and all College personnel.

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

24 So, again, what is the basis for the complaints  
25 director's position? I think you need to bear in mind  
26 that Section 78(1)(a) talks about protection and safety

1 of the person or the public and other reasons which  
2 satisfy you are compelling, and you also need to keep  
3 in mind that although this is a quasi-judicial, as  
4 lawyers would call it, administrative proceeding, it's  
5 not a court. It's a discipline hearing.

6 So the first comment I will make in support of the  
7 complaints director's position is that, as you all  
8 know, there's been a very lively and active debate  
9 about COVID-19, masking, social distances, and that at  
10 times has become a very passionate and even divisive  
11 debate. It's involved people expressing their views in  
12 very strong terms from both sides, and sometimes those  
13 views are highly, highly critical of other people.

14 I think it's fair to say that when the hearing  
15 tribunal members and perhaps others involved in this  
16 hearing agreed to be in the hearing, they really didn't  
17 sign up for being part of a public debate, and I think  
18 it can be, for those individuals if their names are not  
19 redacted -- it can be intimidating and very concerning  
20 to receive communications, receive criticism of them in  
21 their position. And I think that gives rise to a very  
22 legitimate concern on the part of the complaints  
23 director that people who are involved in the hearing,  
24 who are -- I will use the example of the hearing  
25 tribunal members volunteering their time, should not be  
26 subjected to that. That doesn't affect the merits of

1 the hearing at all.

2 The second ground that I'll mention is that there  
3 is no prejudice to Dr. Wall's case in this hearing if  
4 the transcripts are private or at least if the witness  
5 names are redacted. He's been able to present his case  
6 to you. It's been a fulsome case. He's had several  
7 lay witnesses. He's been given the -- at your  
8 direction, the ability to call a fourth expert witness.  
9 You have all that information, and it can be considered  
10 by you, and there's no prejudice to his case, nothing  
11 here in terms of publication. Any restrictions on it  
12 is going to affect his ability to present his position  
13 before you.

14 The third comment I'll make is that the hearing  
15 tribunal will make decisions about whether  
16 unprofessional conduct has occurred and if so, any  
17 penalty orders. And from the complaints director's  
18 perspective, these issues should not be dealt with in  
19 the court of public opinion. This is a discipline  
20 hearing about a regulated member of the chiropractic  
21 profession, and, again, it's not decided by a public  
22 poll, for example. People who see these postings don't  
23 get to vote on them. It's up to you as the hearing  
24 tribunal. That's your role. And your role should be  
25 carried out consistent with the HPA.

26 The fourth comment I want to make is -- and we



1    need to be very clear about this -- to date, the  
2    hearing has been open to the public.  Persons who may  
3    have wanted to have observed could have done that.  
4    There's a process to apply to the College.  There's  
5    some formality because we want to be sure that hearings  
6    are not recorded inappropriately or communicated  
7    inappropriately.  So there's -- yes, there's a bit of a  
8    process to go through, but it's not terribly onerous,  
9    and very, very importantly, as I said, this has been an  
10   open hearing to date.  So there's been no prejudice to  
11   Dr. Wall to date.  Anybody could have observed and  
12   would have gleaned all the information they might have  
13   needed, and that's individuals, members of the press,  
14   anyone in the profession.  There has been an open  
15   hearing to date.

16         The fifth comment I will make is -- and this is  
17   very, very important from the complaints director's  
18   perspective -- that the release of transcripts now in  
19   whatever form is very, very premature.  To begin with,  
20   I would ask you to go back and look at the wording in  
21   Section 85(3) and 85(4).  You look at those clauses  
22   where they talk about access to testimony and  
23   transcripts and decisions, they talk about the decision  
24   of the hearing tribunal.  And I think that's a key, key  
25   wording, and I think it reflects the legislature's  
26   intention to make it clear that you only get to examine

1 transcripts, get access to them after a hearing has  
2 been completed. The liability phase, which we're still  
3 in, the issuance of a written decision, and the finding  
4 stage and the issuance of a written decision. We don't  
5 have piecemeal access where things are released out of  
6 context, where there's an unfinished hearing without  
7 written decisions of any kind, and there may be appeals  
8 occurring as well.

9         So I think the wording in Section 85(3) and (4) is  
10 very deliberate. It implies -- I think has to imply --  
11 that that access is granted only after a hearing -- a  
12 full hearing has been completed and perhaps an appeal  
13 as well. But, again, releasing matters now in  
14 piecemeal fashion is highly irregular. No final  
15 decisions, no penalties, no findings. We don't know if  
16 there's going to be any appeals, and it just seems to  
17 be very, very concerning. And I think it could be  
18 prejudicial as well to members of this profession who  
19 might be involved in appeals and might be prejudging  
20 things based on limited information. As you know,  
21 chiropractors would have to sit on any appeal, so there  
22 is that concern as well.

23         So, again, the questions before you today are  
24 whether to release transcripts or allow for the  
25 release, how they should be released, and I've spoken  
26 to you about redactions the complaints director thinks

1 is appropriate -- would be appropriate, and when to  
2 release them. And, again, that's at the conclusion of  
3 at least all of the hearing proceedings and all of the  
4 written decisions in this hearing and perhaps even  
5 after an appeal to council of the College of  
6 Chiropractors' council.

7 So for all those reasons the complaints director  
8 is requesting an order preventing the publication of  
9 the transcripts. It will be up to you to determine  
10 whether to issue an order which allows them to be  
11 released in a redacted form, and it's up to you to  
12 determine whether that should occur now or, as the  
13 complaints director strongly urges you, after the  
14 completion of proceedings.

15 I'm going to close my submissions to you, and  
16 please don't -- I've been fairly brief, but the issues  
17 are fairly straightforward. Please don't confuse the  
18 brevity or briefness of the submissions with a lack of  
19 seriousness. The complaints director takes these  
20 matters very seriously, but I've tried to be as brief  
21 as possible, as I can.

22 The final thing I want to talk about is what I  
23 anticipate you will hear from Mr. Kitchen in terms of  
24 the open court principle. And, you know, there's good  
25 solid law about the open court principle that he will  
26 refer you to, but I think it's important to remember

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

17 Those are my submissions, Mr. Chair and tribunal  
18 members. I'm happy to answer any questions you have  
19 now or in future, and, as I said, I may have some  
20 submissions in response to Mr. Kitchen's comments.  
21 Thank you.

22 THE CHAIR: Thank you, Mr. [REDACTED] We  
23 will reserve on questions until we've heard the  
24 submissions of both parties.

25 One thing, perhaps. I haven't asked our counsel  
26 about this, but I'm wondering if we should ask the

1 parties to confirm that we, the hearing tribunal, has  
2 the jurisdiction to make a decision on this matter.

3 MR. [REDACTED] I can't see how you don't,  
4 Mr. Chair, in the face of Section 78. It's a  
5 fundamental and an appropriate question. But I think,  
6 as I said, between Section 78 and Section 85, it tells  
7 you that you are the -- you're doing the pitching, and  
8 everyone else is doing the catching, and you have this  
9 discretion.

10 If there's going to be a debate about  
11 jurisdiction -- and I will wait for Mr. Kitchen's  
12 comments -- I think I'd need to probably provide you  
13 with some supplemental written submissions, but I don't  
14 think jurisdiction is an issue here.

15 THE CHAIR: Thanks, Mr. [REDACTED]

16 Mr. Kitchen, any comment?

17 MR. KITCHEN: Jurisdiction is not an issue  
18 for Dr. Wall. In my submissions, I will take you  
19 through how that discretion of jurisdiction is  
20 circumscribed, but I'm not going to claim that it  
21 doesn't exist. The statute is a codification of the  
22 common law jurisdiction you would have in any event.

23 THE CHAIR: Thank you.

24 Okay. Mr. Kitchen, can you provide your  
25 submissions?

26 Submissions by Mr. Kitchen



1 MR. KITCHEN: I'm going to be a bit  
2 lengthier than my friend, Mr. [REDACTED] I have a number  
3 of cases to bring you through.

4 First, I will walk through some introductory  
5 comments I have. This is an application by the  
6 complaints director to prevent the publication of  
7 evidence, the transcripts, redacted or otherwise. This  
8 is, therefore, effectively an application for a  
9 publication ban. Publication bans are presumptively  
10 unlawful. The law is clear that all proceedings before  
11 courts and administrative tribunals are presumptively  
12 open and accessible by the media and the public, as my  
13 learned friend has just conceded. Court proceedings  
14 and tribunal proceedings like this one can be attended  
15 by any member of the public. The media can report on  
16 the evidence and arguments presented in the moment, and  
17 the parties to the litigation can openly discuss the  
18 proceedings without delay.

19 There are many forms through which the public may  
20 learn about the existence and nature of a legal  
21 proceeding such as this one. It may be through  
22 directly attending and observing in the moment. But  
23 more likely it will be through things like media  
24 reports or directly from speaking with the parties. It  
25 may be through obtaining and reading the written record  
26 of the proceedings, be they depositions, legal

1 arguments, or transcripts of questioning which are all  
2 presumptively accessible by the public and permissible  
3 to disseminate as is reflected in Section 85 of the  
4 Health Professions Act that my learned friend has  
5 brought you to.

6 Now, of course in this case, the dispute regards  
7 transcripts. As we've heard the name of the legal  
8 principle that protects all, this is called the "open  
9 court principle". It goes back hundreds of years and  
10 is a core feature of the English common law system in  
11 which we operate. It is an aspect both of our common  
12 law in Canada and our constitutional law through  
13 Sections 2(b) and 11(d) of the Canadian Charter of  
14 Rights and Freedoms. Those rights specifically are  
15 freedom of expression and the right to a fair trial.

16 And since this nation seems to be suffering from  
17 some sort of legal amnesia at the moment regarding the  
18 legal and political order that gives structure to our  
19 society, the Charter is Schedule B to the Constitution  
20 Act, 1982 and is, therefore, as the Supreme Court of  
21 Canada has repeatedly affirmed, the supreme law of the  
22 land to which all laws and decision-makers, such as  
23 this tribunal, are subject.

24 The open court principle is the default. It is  
25 presumed. The only way a proceedings such as a  
26 disciplinary professional hearing becomes less than

1 fully open, accessible, and reportable is if that  
2 presumption is rebutted. The onus to cover some or all  
3 of a proceeding in secrecy, which is what is being  
4 sought today, secrecy, temporary or otherwise, is on  
5 the parties seeking to import that secrecy, which in  
6 this case is the complaints director.

7 Now, as far as my submissions are concerned, I  
8 take you through the applicable legal test for  
9 determining when the issuing of a publication ban is  
10 warranted. And then I will walk you through some  
11 comments from the Supreme Court of Canada regarding the  
12 importance of the rights and interest that publications  
13 bans inevitably interfere with. And then, lastly, I  
14 will explain how the complaints director has failed to  
15 meet his onus to demonstrate a publication ban of the  
16 transcripts in question is justified when they were  
17 redacted as proposed by Dr. Wall.

18 Before I get into that, I feel it's important to  
19 clarify a few technical factual details. Dr. Wall has  
20 never suggested that transcripts should be published  
21 unredacted, at least at this moment. I'm quite  
22 honestly surprised to hear my learned friend say that  
23 redaction is something that you can order after the  
24 proceedings have closed. I think that would be  
25 extraordinary. It would be repugnant to the open court  
26 principle and to the lawful obligations of this

1 tribunal.

2 That's the first I've heard of that position, that  
3 redactions should continue permanently after this  
4 hearing has ended. And I may give more submissions to  
5 that at the end, but let's just back up and clarify  
6 that Dr. Wall is not asking to release transcripts at  
7 the moment that identify any of the people that don't  
8 need to be identified. What I mean by that is tribunal  
9 members, internal counsel, counsel for the complaints  
10 director, the complaints director himself, any staff at  
11 the College, even Dr. [REDACTED] himself, the complaints  
12 director's expert witness. Dr. Wall's motivation here  
13 is not to dox anyone. So any -- my learned friend has  
14 not alleged that, but I just -- I want to make sure  
15 that that is clearly communicated, that the purpose  
16 here is to release the substantive evidence and not to  
17 be clouded or muddled in any way with identities of  
18 people that don't need to be released at this moment.

19 Although I've heard no specific allegations of  
20 what types of public safety or security concerns or  
21 anything like that that could possibly arise, the fact  
22 is redaction of the names would, of course, fully  
23 address any of those concerns. And -- and Dr. Wall is  
24 sensitive to those concerns, and any reasonable person  
25 would be. And the Court is sensitive to those  
26 concerns.



1           So what's being asked for here is not the release  
2 of unredacted transcripts. It's only the release of  
3 redacted transcripts. So I want that to be very clear,  
4 and if you have any questions on what, you know, those  
5 redactions mean or what they look like, I would be  
6 happy to answer those. But I think it's clear that the  
7 names of everybody on this call today, on this hearing,  
8 would not would not appear in any publication.

9 MR. [REDACTED]                   I'm very sorry to interrupt  
10 and my apologies. I just want to be -- my  
11 understanding is, though, is that despite your  
12 comments -- and I think this maybe is important for the  
13 tribunal to know, and, again, I'm apologizing for  
14 interrupting -- I think your intention, though, is to  
15 disclose the transcripts with all names after the  
16 hearing has been concluded; is that correct? And I'll  
17 try not to interrupt again.

18 MR. KITCHEN:                   It is. You know, that's not  
19 something that Dr. Wall would ever normally need to ask  
20 for. That's just something he has a right to do, a  
21 right that's implicitly acknowledged in the Health  
22 Professions Act and a right that is protected by our  
23 constitution. So that would -- that would -- you know,  
24 that would be par for the course. You know, if we --  
25 the day after -- let's say we get to the final phase of  
26 sanction, there's liability to find, and there's



1 sanction, and, you know, the day that that decision  
2 comes out, that decision and the entire body of the  
3 transcripts could be published unredacted by Dr. Wall  
4 and that would be par for the course.

5 And, normally, again, unless it was something  
6 sensitive like a sexual misconduct hearing, nobody  
7 would -- nobody would bat an eye or raise an eyebrow,  
8 and nobody would reasonably seek to have any names  
9 redacted or content made secret or anything like that.  
10 That's just -- that's what the HPA contemplates, which  
11 is consistent with what our society expects and what  
12 the constitution protects.

13 So yeah, it's not like that's -- that's exactly  
14 his intention, as it would be anybody's intention. So  
15 there's nothing unusual there.

16 I will take you now through, to start with, the  
17 applicable legal test. I'm going to give those who  
18 want to follow along with my submissions and the cases  
19 I've provided some chances to keep up with me. I'm  
20 going to first take you to paragraph 45 of the Supreme  
21 Court of Canada case of *Sierra Club of Canada v.*  
22 *Canada*, 2002 SCC 41. Paragraph 45. I'm only going to  
23 be relying on three cases today. I know I provided  
24 four. I'm not going to actually take you to any  
25 comment in the *Edmonton Journal* case, just *Sierra Club*,  
26 the case, *R v. Mentuck*, and another case called

1 Dagenais v. CBC.

2 Starting at paragraph 45 of Sierra Club, which I  
3 submit to you is the best iteration of the applicable  
4 legal test that you are bound to fall on. Now, I'm at  
5 the -- at the bottom of that paragraph, where it says:  
6 (as read)

7 At paragraph 32, the Court reformulated the  
8 test as follows: A publication ban [which  
9 is -- that's what's being sought today]  
10 should only be ordered when:

11 (a) such an order is necessary in order  
12 to prevent a serious risk to the  
13 proper administration of justice  
14 because reasonably alternative  
15 measures will not prevent the risk;  
16 and

17 (b) the solitary effects of the  
18 publication ban outweigh the  
19 deleterious effects on the rights  
20 and interests of the parties and  
21 the public, including the effects  
22 on the right to free expression,  
23 the right of the accused to a fair  
24 and public trial, and the efficacy  
25 of the administration of justice.

26 That's the test. This is a two-part test, and the

1 parties seeking the publication ban must meet both.  
2 Even if necessity can be established, which it cannot  
3 in this case, the benefits must still outweigh the  
4 drawback. The drawbacks in this case come in the form  
5 of harm to the rights of Dr. Wall and the rights of the  
6 general public. We will see in two of the cases I will  
7 be referring to the Court ruled that second part of the  
8 test was not met even if the first part of the test  
9 could be met.

10 To articulate the open court principle, I will  
11 read you some comments from the Supreme Court of Canada  
12 starting at paragraph 1 of the case I've just been in,  
13 which is the Sierra Club, so it's the very first  
14 paragraph of the case, which is actually a few pages  
15 into it because of the head note. I'm reading from the  
16 second sentence, where Justice Iacobucci for the Court  
17 says: (as read)

18 One of the underlying principles of the  
19 judicial process is public openness, both in  
20 the proceedings of the dispute and in the  
21 material that is relevant to its resolution.

22 I'm going to take you over to paragraph 51 of the  
23 Mentuck case. The citation, 2001 SCC 76. That's  
24 paragraph 51. Reading from the beginning of the  
25 paragraph: (as read)

26 As this Court recognized in Irwin Toy, at

1           page 976, "participation in social and  
2           political decision-making is to be fostered  
3           and encouraged", a principle fundamental to a  
4           free and democratic society. [Continuing on  
5           to the next sentence] Such participation is  
6           an empty exercise without the information the  
7           press can provide about the practices of  
8           government, including the police.

9       I don't think it's in contest that this tribunal and  
10      the complaints director and the College of  
11      Chiropractors of Alberta fall under the umbrella term  
12      of "government", as it would be defined in Section 32  
13      of the Charter. So I would submit that all these  
14      apply.

15           Now, regarding the Charter, Section 2(b) right to  
16      freedom of expression as it relates to the open court  
17      principle, the Supreme Court of Canada has some things  
18      to say about that. I'm going to take you back to the  
19      Sierra Club at paragraph 36. Reading from paragraph 36  
20      of Sierra Club, starting at the beginning of the  
21      paragraph: (as read)

22           The link between openness in judicial  
23           proceedings and freedom of expression has  
24           been firmly established by this Court. [And,  
25           again, this is the Supreme Court of Canada]  
26           In Canadian Broadcast Corporation v. New

1 Brunswick 1996 3 SCR 480, at paragraph 23

2 La Forest expressed the relationship as

3 follows:

4           The principle of open courts is  
5           inextricably tied to the rights  
6           guaranteed by Section 2(b). Openness  
7           permits public access to information  
8           about the courts, which in turn permits  
9           the public to discuss and put forward  
10          opinions and criticisms of court  
11          practices and proceedings. While the  
12          freedom to express ideas and opinions  
13          about the operation of the courts is  
14          clearly within the ambit of the freedom  
15          guaranteed by Section 2(b), so too is  
16          the right of members of the public to  
17          obtain information about the courts in  
18          the first place.

19 Now, I'm just going to take you down to the last  
20 sentence of paragraph 37, the next paragraph:  
21 (as read)

22          The fundamental question for a Court to  
23          consider in an application for a publication  
24          ban or a confidentiality order is whether, in  
25          the circumstances, the right to freedom of  
26          expression should be compromised.

1 I'll note since my learned friend brought this issue  
2 up, a tribunal does not have more discretion than a  
3 Court, and it is presumed to be effectively the same  
4 thing. In fact, I would say that in a disciplinary  
5 hearing for a professional, we are even closer to that  
6 of a Court insofar as they are akin to criminal  
7 proceedings. We have a prosecutor, that's the  
8 complaints director, and we have the accused. There  
9 will be no criminal sanctions, of course, if liability  
10 is found, but the seriousness is similar and the type  
11 of proceeding is similar.

12 This is not merely civil litigation in the sense  
13 that we have two private parties suing each other over  
14 a dispute, be it commercial or tort or otherwise.

15 I'll take you now just a couple of pages over to  
16 paragraph 62 of Sierra Club. Again, the Court is  
17 commenting on freedom of expression as it relates to  
18 the core principle. Starting at the beginning of the  
19 paragraph 52, the Court says: (as read)

20 In opposition to the confidentiality orders  
21 lies the fundamental principle of open and  
22 accessible court proceedings. This principle  
23 is inextricably tied to freedom of expression  
24 enshrined in Section 2(b) of the Charter.

25 The importance of public and media access to  
26 the courts cannot be understated, as this



1           access is the method by which the judicial  
2           process is scrutinized and criticized.  
3           Because it is essential to the administration  
4           of justice that justice is done and is seen  
5           to be done, such public scrutiny is  
6           fundamental. The open court principle has  
7           been described as "the very soul of justice",  
8           guaranteeing that justice is administered in  
9           a non-arbitrary manner.

10          Lastly, I'm going to take you to another couple of  
11          pages over to paragraphs 75 and 76 of Sierra Club. I'm  
12          now starting about two-thirds of the way through the  
13          paragraph 75. Supreme Court of Canada says: (as read)  
14               ... a discussion of the deleterious effects  
15               of the confidentiality order of freedom of  
16               expression should include an assessment of  
17               the effects such an order would have on the  
18               three core values.

19          Now, I will just stop there and say that the three core  
20          values being referred to are truth seeking, democratic  
21          discourse, and self-fulfillment.

22          Reading again from paragraph 75, the next  
23          sentence: (as read)  
24               The more detrimental the order would be to  
25               these values, the more difficult it will be  
26               to justify the confidentiality order.

1           Similarly, minor effects on -- of the order  
2           on the core values will make the  
3           confidentiality order easier to justify.

4   Moving down to paragraph 76:  (as read)

5           Seeking the truth is not only at the core of  
6           freedom of expression, but it has also been  
7           recognized as a fundamental purpose behind  
8           the open court rule, as the open examination  
9           of witnesses promotes an effective  
10          evidentiary process.  Clearly, the  
11          confidentiality order, by denying public and  
12          media access to documents relied on in the  
13          proceedings, would impede the search to truth  
14          to some extent.  Although the order would not  
15          exclude the public from the courtroom,  
16          [similar to the situation here, as my learned  
17          friend has alluded to] the public and the  
18          media would be denied access to documents  
19          relevant to the evidentiary process.

20   These comments here from the Supreme Court are very  
21   applicable because that's exactly what the complaints  
22   director is seeking.  He's not seeking, as I  
23   understand, to exclude anybody from the hearing from  
24   this point forward from attending.  He's -- what he's  
25   attempting to exclude is documents relevant to the  
26   evidentiary process.

1           Now, I'm going to talk a little bit now about the  
2 Charter Section 11(d) right to a fair trial. Again,  
3 Dr. Wall is submitting that it's -- it is not  
4 contestable that in this hearing before this tribunal  
5 he has Charter rights that this tribunal and the  
6 College of Chiropractors is bound to uphold, and if  
7 there are any infringements of those rights, they might  
8 be justified under Section 1 of the Charter. He,  
9 therefore, has a right to a fair trial before this  
10 tribunal, not merely in the common law sense, but also  
11 in the constitutional sense.

12           I'm going to take you to the Mentuck case at  
13 paragraphs 28 and 30. You're going to hear a reference  
14 to the Dagenais case that I haven't taken you to yet,  
15 but you will hear comments from that case.  
16 Paragraph 28. These comments are very apt to this case  
17 because often a publication ban is sought by the  
18 accused or, in this context, the member being  
19 prosecuted for all kinds of various reasons. You know,  
20 the obvious one is the sexual misconduct case. It  
21 might actually be in the interest of the complaints  
22 director of the College in those cases to have those  
23 proceedings be public for all kinds of legitimate  
24 reasons of deterrence and public accountability, et  
25 cetera, but the member may not want that to be public,  
26 considering the sensitive nature of the evidence. And

1 so often it would be the member seeking that type of  
2 order, and he would -- he or she would rely on the --  
3 his or her 11(d) rights to a fair trial in support of  
4 such an application.

5 I'm reading now from the second sentence of  
6 paragraph 28 in the Mentuck case: (as read)

7 While the Court in Dagenais was required to  
8 reconcile the accused's interest in a fair  
9 trial with society's interest in freedom of  
10 expression, the accused's right to a fair  
11 trial in this case was not, and never was, an  
12 issue. Indeed, the accused wishes to have  
13 the information disclosed, and views the  
14 publication of certain of the details of his  
15 arrest and trial as essential to the  
16 fulfillment of his fair trial interest.

17 Instead, it is the Crown that seeks the  
18 publication ban in order to protect the  
19 safety of police officers and preserve the  
20 efficacy of undercover police operations.

21 I will touch on this later as well, but I just want to  
22 note right at this point that the Crown in that case,  
23 you know, is similar to the position of the complaints  
24 director in this case, and insofar as the Crown sought  
25 a publication ban to protect the identity of officers  
26 successful in that case, but insofar as it sought

1    secrecy over substantive content, it was not  
2    successful. And that's very similar to the situation  
3    we have here insofar as the complaints director wants  
4    redactions at least until the end of these proceedings  
5    on the transcripts Dr. Wall wants to publish. Dr. Wall  
6    does not contest that. He wants to publish substantive  
7    content, and so that's what this -- what the Court  
8    decides in this case is exactly what Dr. Wall is  
9    seeking in his case.

10       I'm taking you now down to paragraph 29. Chief  
11    Justice Lamer -- I'm at the second sentence, sorry:  
12    (as read)

13       Chief Justice Lamer recognized in Dagenais  
14       that publication bans have a variety of  
15       purposes and effects. Significantly, he  
16       noted at page 882, that:

17             ... it is not the case that freedom of  
18             expression and the accused's right to a  
19             fair trial are always in conflict.  
20             Sometimes publicity serves important  
21             interests in the fair trial process.  
22             For example, in the context of  
23             publication bans connected to criminal  
24             proceedings, these interests include the  
25             accused's interest in public scrutiny of  
26             the court process, and all the

1 participants in the court process.

2 Going down to paragraph 30: (as read)

3 This appeal implicates precisely that  
4 interest. The accused has a Charter right to  
5 "a fair and public hearing" guaranteed by  
6 section 11(d), which he has invoked in  
7 opposition to the publication ban.

8 That's exactly the position of Dr. Wall, the -- his  
9 right to a fair and public hearing and society's  
10 interest in all hearings being done in a way that is  
11 proper and fair. Those interests are furthered and  
12 advanced and upheld by the publication of the redacted  
13 transcripts in this case.

14 And I'll go to my friend's comments about how  
15 nobody expected to become part of a public debate, but  
16 I'm sorry, anybody who is witness in this case and  
17 anybody who sits on the tribunal in this case, and,  
18 quite frankly, anybody who decides to be counsel  
19 involved in this case is presumed to be aware that what  
20 they are doing is, in fact, public and will be public,  
21 and if they're getting involved in a case of extreme  
22 public interests such as a case like this, then yes,  
23 what they have to say and how they say it and how they  
24 conduct themselves is likely to be public, should be  
25 public, and they should not be concerned about public  
26 scrutiny of their comments or their conduct. That is



1     how things are done.

2             I just read to you comments from the Supreme Court  
3     of Canada that justice is to be done and it is seen to  
4     be done, and if you've read that case, you will see  
5     actually that the word "seen" is italicized by the  
6     Supreme Court to emphasize just how important that  
7     principle is. That principle is a half of a millennium  
8     old, that justice must be seen to be done. And as  
9     lofty as that principle is, it does apply to something  
10    as seemingly unimportant as some disciplinary hearing  
11    such as this one. This is no less important than a  
12    court proceeding. It's no less important than a  
13    criminal proceeding. It's no less important than a  
14    proceeding at the Alberta Court of Appeal. In fact,  
15    this type of proceeding may end up at the Court of  
16    Appeal of Alberta, and that needs to be accounted for  
17    at this stage in the proceedings.

18            Now, I'm going to take -- this will be the last  
19    quote I take you to for the 11(d) interest. I'm going  
20    to take you to paragraph 52 of the Mentuck case, so  
21    just a couple of pages over. I'm going to start from  
22    the beginning of the paragraph: (as read)

23            Secondly, the right of the accused to a "fair  
24            and public hearing" would be deleteriously  
25            affected by the requested publication ban.

26            The Court has not previously had occasion to

1           elaborate at length on the content of the  
2           right to a "public hearing" protected by  
3           11(d) of the Charter. As it is not squarely  
4           before us, I do not wish to be in any way  
5           conclusive on the issue either. [But the  
6           Court says] It is clear, however, that 11(d)  
7           guarantees not only an open courtroom, but  
8           the right to have the media access that  
9           courtroom and report on the proceedings.

10       Take you down to the last sentence there: (as read)

11           The right to a public trial is meant to allow  
12           public scrutiny of the trial process. In  
13           light of that purpose, the observations of  
14           Justice Cory in discussing the right to  
15           freedom of expression are also apt when  
16           applied to the rights of a public trial.

17       Justice Cory said -- this is a quote from Edmonton  
18       Journal, that other case I gave you: (as read)

19           It is exceedingly difficult for many, if not  
20           most, people to attend a court trial.

21           Neither working couples nor mothers and  
22           fathers housebound with young children would  
23           find it possible to attend court. Those who  
24           cannot attend rely in large measure upon the  
25           press to inform them about court  
26           proceedings - the nature of the evidence that

1           was called, the arguments presented, the  
2           comments made by the trial judge - in order  
3           to know not only what rights they may have,  
4           but how their problems might be dealt with in  
5           court ... Discussion of court cases and  
6           constructive criticism of court proceedings  
7           is dependent upon the receipt by the public  
8           of information as to what transpired in  
9           court. Practically speaking, this  
10          information can only be obtained from the  
11          newspapers or other media.

12        I'll comment at this point about the fact that, of  
13        course, you know, this case is over 20 years old. The  
14        Edmonton Journal case is, I think, over 30 years old,  
15        and, you know, the media landscape in our nation looked  
16        quite a bit different back then. Nowadays we have  
17        what's called independent or -- or individual  
18        journalists or bodies that engage in some form of  
19        journalism even if they're not media organizations.

20           I would submit to you that the publication of  
21        these transcripts by Dr. Wall himself or by the  
22        organization Liberty Coalition of Canada or any other  
23        organization is akin to media as it's being referred to  
24        in these cases. The fact is these days, because of the  
25        way the media functions, you can usually only get  
26        certain information -- certain types of information

1 from certain media sources. So there are a large  
2 number of different media services that like to publish  
3 certain different things.

4 But the fact is -- the fact remains, the principle  
5 remains that it is through media sources, be they  
6 traditional or modern, that most people gain access to  
7 information about court proceedings, and that's at play  
8 here.

9 Was -- was the -- were the eight days of evidence  
10 in this hearing open to the public? Of course they  
11 were. Did anybody show up? No. Not exactly  
12 surprising. It's to be expected, as Justice Cory just  
13 alluded to. Notwithstanding the fact that these  
14 proceedings are virtual. Most people can't take a day  
15 off of work, paid work, to attend a hearing, but that  
16 doesn't mean they don't care about it. That doesn't  
17 mean they're not interested in it, and that doesn't  
18 mean that it doesn't matter that what happened in those  
19 proceedings, even though they were open to the public  
20 but nobody came, is not brought to light and accessible  
21 by the public.

22 I'm going to continue on to paragraph 53 now.  
23 Supreme Court says: (as read)

24 This public scrutiny is to the advantage of  
25 the accused in two senses: First, it ensures  
26 that the judicial system remains in the

1           business of conducting fair trials, not mere  
2           show trials or proceedings in which  
3           conviction is a foregone conclusion. The  
4           supervision of the public ensures that the  
5           state does not abuse the public's right to be  
6           presumed innocent, and does not institute  
7           unfair procedures.

8           [Paragraph 54] Second, it can vindicate an  
9           accused person who is acquitted, particularly  
10          when the acquittal is surprising and perhaps  
11          shocking to the public. In many cases, it is  
12          not clear to the public, without the  
13          advantage of a full explanation, why an  
14          accused person is acquitted despite what a  
15          reasonable person might consider compelling  
16          evidence. Where a publication ban is in  
17          place, the accused has little public answer.

18       THE CHAIR:                       Excuse me. Mr. Kitchen, we've  
19       been joined -- is that Dr. Wall?

20       MR. KITCHEN:                     Yes.

21       THE CHAIR:                       Just note for the record that  
22       Dr. Wall has joined the proceedings. Thank you.

23       MR. KITCHEN:                     Thank you.

24           I will just note that this paragraph is uniquely  
25          applicable to this case. This goes to the comments of  
26          my learned friend about division and strong opinions on

1     either side of this issue. I think many members of the  
2     public would be shocked if Dr. Wall was found liable  
3     for professional misconduct; I think some would be  
4     shocked if he wasn't. So I think that goes on both  
5     sides, just because of the presumptions many people  
6     have one way or the other about COVID and the  
7     restrictions and masks, et cetera.

8             And without the advantage of a full explanation  
9     and without the availability of the record,  
10    particularly the expert evidence, scientific evidence,  
11    the public would be confused and wouldn't know where to  
12    go and how to understand the ruling of the tribunal,  
13    and certainly, for Dr. Wall, he wouldn't have any  
14    answer for whether he was convicted or not -- sorry,  
15    found liable of professional misconduct or not; he  
16    wouldn't have an explanation.

17            Any members of the public -- and this will go to  
18    the submissions I'm going to make later as well. Any  
19    members of the public would be surprised, intrigued,  
20    dismayed to discover the evidence that came out in the  
21    four days of expert evidence that was discussed. A lot  
22    of the things discussed are things that don't get to be  
23    discussed, to put it lightly. Many people on both  
24    sides of the debate of the issue here would find the  
25    comments of these five expert witnesses of incredible  
26    interest and to be incredibly informing.



1           Now, I've given you a lot of comments on the  
2   rights and interests that are tied up with the test,  
3   tied up with the presumption against public bans, why  
4   that presumption is so important. Now I want to walk  
5   you through a little bit of how to apply this test and  
6   how the Court, the Supreme Court of Canada, has applied  
7   this test, which, of course, you are bound to follow as  
8   a tribunal subject to the binding decisions of the  
9   Supreme Court of Canada.

10           My learned friend walked you through the Health  
11   Profession Act. I will submit to you that the Act,  
12   these sections that he cited, they essentially codify  
13   in legislation the common law discretion that this  
14   tribunal has to order a publication ban in certain  
15   circumstances. In fact, I would submit to you that's  
16   exactly why the legislation says what it says and why  
17   you're not hearing from the EA constitutional challenge  
18   to the legislation because I would say it is perfectly  
19   constitutional. You know, that's why 75 -- Section 75  
20   says -- it starts out "A hearing is open to the public  
21   unless". Well, that's -- that's the open court  
22   principle. That's 500 years of legal jurisprudence  
23   right in those few words right there.

24           And why, when we go to Section 85, it says a  
25   member of the public can access the testimony, which is  
26   the transcripts. Of course, if the legislation did not

1 permit that, the legislation would be unconstitutional.

2 Now, my friend -- my learned friend said that you  
3 have very broad discretion. In fact, he said at one  
4 point you have absolute discretion. He indicated that  
5 you have more discretion than a court. I'm going to  
6 bring you to paragraph 71 of the Dagenais decision I  
7 have referred to but haven't taken you to yet. The  
8 citation for that is 1994 3 SCR 835. I'm at  
9 paragraph 71. I'll give you a chance to get there for  
10 anybody that's following along.

11 Supreme Court of Canada said at paragraph 71, I'm  
12 reading from the first sentence: (as read)

13 In the case at bar, we are dealing with a  
14 common law rule which provide judges with the  
15 discretion to order a publication ban in  
16 certain circumstances. The discretion cannot  
17 be open-ended. It cannot be exercised  
18 arbitrarily. More to the point, as I stated  
19 in Slight Communications, in the context of  
20 legislative conferrals of discretion [which  
21 is what we are dealing with here]:

22 As the constitution is the supreme law  
23 of Canada and any law that isn't  
24 consistent with its provisions is, to  
25 the extent of the inconsistency, of no  
26 force or effect, it is impossible to

1           interpret legislation conferring  
2           discretion as conferring of power to  
3           infringe the Charter, unless, of course,  
4           that power is expressly conferred or  
5           necessarily implied [which is, of  
6           course, not in this case]. Such an  
7           interpretation would require us to  
8           declare the legislation to be of no  
9           force or effect, unless it can be  
10          justified under section 1 [as I alluded  
11          to].

12   The Court continues: (as read)

13           I would extend this reasoning, and hold that  
14           a common law rule conferring discretion  
15           cannot confer the power to infringe the  
16           Charter. Discretion must be exercised within  
17           the bounds set by the principles of the  
18           Charter; exceeding these boundaries results  
19           in a reversible error of law.

20   I submit, again, that this tribunal is bound to respect  
21   principles and the rights and the interests in the  
22   Charter and that the only outcome possible if this  
23   tribunal is, in fact, going to do that is to not order  
24   a publication ban against the publication of the  
25   redacted transcripts as Dr. Wall has proposed.

26           Your discretion is not absolute. It is highly

1     fettered. It is not greater than Court, and it must be  
2     exercised in accordance with the supreme law of this  
3     nation, which is the Charter.

4             There must be a sufficient reason to exercise the  
5     discretion to order a publication ban. In this case,  
6     the only reason or interest being invoked by the  
7     complaints director is the administration of justice.  
8     Both the freedom of expression and Dr. Wall's  
9     constitutional right to a fair trial weigh against a  
10    publication ban of the transcripts.

11            By the way, when I say "freedom of expression",  
12    I'm referring both to Dr. Wall's right to express and  
13    also the public's right to receive, as the Supreme  
14    Court of Canada has mentioned a few times. In fact,  
15    it's mentioned in Edmonton Journal, although I won't  
16    take you there. The public has a right to hear; they  
17    have a right to listen; they have a right to read; they  
18    have a right to receive.

19            The public actually has a constitutionally  
20    protected right to read transcripts from this case.  
21    That's not a right merely conferred through the open  
22    court principle. It's actually a right that every  
23    individual of this nation has, protected by  
24    Section 2(b) of the Charter. That right can only be  
25    interfered with if doing so is justified, whereas it's  
26    likely to be in a proceeding of sensitive personal

1 nature, such as a sexual misconduct proceeding. This  
2 is -- this is a very public proceeding about a very  
3 public issue about a very scientific issue. It's not  
4 personal and sensitive. It is precisely the type of  
5 issue that is going to be of the utmost interest to  
6 every member of this nation.

7 The Supreme Court has provided guidance for the  
8 administration of justice as the only concern cited in  
9 support of a publication ban and the party seeking the  
10 publication ban claims that it is necessary, as the  
11 complaints director has done in this case.

12 I'm going to take you back to the Mentuck case.  
13 This is paragraphs 34 to 36 I'm going to be reading  
14 from. Starting at the first sentence of paragraph 34  
15 of the Mentuck case, the Supreme Court of Canada said:  
16 (as read)

17 I would add some general comments that should  
18 be kept in mind in applying the test. The  
19 first branch of the test contains several  
20 important elements that can be collapsed in  
21 the concept of "necessity", but that are  
22 worth pausing to enumerate. One required  
23 element is that the risk in question be a  
24 serious one, or, as Chief Justice Lamer put  
25 it at page 878 of Dagenais, a "real and  
26 substantial" risk. That is, it must be a

1 risk to the reality -- sorry. It must be a  
2 risk to the reality of which is well-grounded  
3 in the evidence. It must also be a risk that  
4 poses a serious threat to the proper  
5 administration of justice. In other words,  
6 it is a serious danger sought to be avoided  
7 that is required, not a substantial benefit  
8 or advantage to the administration of justice  
9 sought to be obtained.

10 Let me just stop to comment on that. I think the  
11 Court's saying two important things here: One, the  
12 risk has to be real, significant, substantial,  
13 evidenced, okay? It must be that whoever is seeking  
14 this is -- is trying to prevent this real harm, not  
15 trying to layer on some additional benefit, okay?

16 What's the risk in this case? There is no risk.  
17 The only risk, if there was one, could arise if names  
18 are not redacted. Theoretically -- although I'd say  
19 it's very speculative, and my friend has provided no  
20 evidence -- something bad could happen if people's  
21 names were included in the release of the transcripts  
22 at this point. Of course, Dr. Wall doesn't concede  
23 that. There's no evidence of that. There's no basis  
24 for that. It's purely speculative, and that is why the  
25 redaction of names beyond any decision made by this  
26 tribunal to the final outcome would be completely out

1 of order, is because there's no evidence that there's  
2 going to be any problem there.

3 Dr. Wall -- I would say if Dr. Wall wanted the  
4 released transcripts now with names on it, he would  
5 have a right to do so, and the complaints director  
6 would have to provide some serious credible evidence as  
7 to why those names should be redacted, but because  
8 that's not really the issue, out of courtesy, out of  
9 civility, Dr. Wall has agreed, as proposed, to redact  
10 the names because that's not what this is about. This  
11 is about getting the substantive scientific evidence  
12 into the hands of the public who deserve it, and a way  
13 to facilitate that and to keep the focus on the  
14 substantive evidence is to redact the names. That's  
15 why Dr. Wall proposed that.

16 So whatever risk there may be is completely  
17 answered by the fact that names will be redacted. What  
18 possible risk could there be to the administration of  
19 justice in this case if the scientific evidence that  
20 was presented in this case is released to the public?  
21 That question's not even begun to be answered by the  
22 complaints director.

23 And I would say this also: Dr. Wall proposes the  
24 publication of the scientific evidence and not of the  
25 lay evidence for the very reason that -- at this point  
26 in the proceedings, for the very reason that, again, he



1 wants the focus to be on the substantive scientific  
2 evidence, okay? Not on what his patient said or what  
3 Dr. [REDACTED] said or what [REDACTED] said.

4 But I would say this: If there's any -- you know,  
5 my learned friend commented on "piecemeal". If the  
6 tribunal has any concern about the -- the so-called  
7 piecemeal nature of releasing the scientific expert  
8 evidence and not the lay evidence, the answer to that  
9 is to order the release of all evidence with names  
10 redacted, of course, at least until the end of the  
11 proceedings. That would be -- that would be the proper  
12 way to address this. That would be the lawful way to  
13 address that issue, is to say, Okay. Well, the  
14 evidence should either -- for the purposes of  
15 administration of justice, the evidence should all go  
16 out or none of it should go out.

17 Of course, none of it -- we can't prohibit none of  
18 it from going out. That would be unlawful. It would  
19 be unconstitutional. There's no reason to do that. So  
20 we'll order the release of all of it. That's the only  
21 fair thing to do. Dr. Wall is fine with that. He's  
22 proposed the release of the scientific expert evidence.

23 But if the tribunal is concerned about the  
24 so-called piecemeal nature of only releasing the  
25 scientific evidence -- and by the way, when I say that,  
26 I mean both sides. I don't just mean his four experts,

1 but I mean the evidence of Dr. ■ because that's the  
2 only fair, proper thing to do is to release all the  
3 expert evidence.

4 The proper thing for this tribunal to do if that's  
5 a concern is to order that it all be released, all of  
6 it, every piece of it, but with names redacted. That's  
7 what's lawful. That's what's constitutional. If that  
8 is -- if the tribunal determines that there actually is  
9 a threat to the proper administration of justice by  
10 releasing only the expert evidence, and I would say  
11 there isn't, and I don't think my friend has brought  
12 you to any.

13 THE CHAIR: Mr. Kitchen, I'm cognizant of  
14 the time. We have about 30 minutes left. We have a  
15 hard deadline of 11:00 due to other commitments. So  
16 I'm wondering how much longer you thought you would be.  
17 We certainly want to leave time for questions.

18 MR. KITCHEN: I could speed things up a  
19 little bit. I am -- I am near the end.

20 THE CHAIR: Thank you.

21 MR. KITCHEN: If you can give me another 10  
22 or 15 minutes, I should be -- should be done.

23 I'm going to continue on, reading quickly from  
24 paragraph 35 of the Mentuck case. The Supreme Court of  
25 Canada said: (as read)

26 A second element is the meaning of "the

1 proper administration of justice".

2 [Take you to the second sentence] Judges

3 should be cautious in deciding what can be

4 regarded as part of the administration of

5 justice.

6 [Take you down to the next paragraph] The

7 third element I wish to mention was

8 recognized by Justice La Forest when he

9 formulated the three-part test discussed

10 above. Justice La Forest's second step is

11 clearly intended to reflect the minimal

12 impairment branch of the Oakes test, [that's

13 the section 1 justification test] and the

14 same component is present in the requirement

15 at common law that lesser alternative

16 measures not be able to prevent the risk.

17 This aspect of the test for common law

18 publication bans requires the judge [or the

19 tribunal] not only to consider whether

20 reasonable alternatives are available, but

21 also to restrict the order as far as possible

22 without sacrificing the prevention of the

23 risk.

24 In this case, that's easy. Because the alternative

25 measure to holding back the transcripts, to imposing

26 secrecy on this hearing, the alternative measure is

1) redact the names as Dr. Wall has proposed.

2 I'm going to take you back to the Dagenais case,  
3 paragraph 80. I'm halfway down the paragraph after the  
4 quote. The Court says: (as read)

5 It must be noted, however, that the Charter  
6 provides safeguards against both actual  
7 interests of bias and against situations that  
8 give rise to a serious risk of a jury's  
9 impartiality being tainted, it does not  
10 require that all conceivable steps be taken  
11 to remove even the most speculative risks.

12 Insofar as my learned friend has said that there might  
13 be some negative impact on the tribunal's ability to  
14 make a decision free of any influence, I didn't hear  
15 much on that, but in case that's an issue, the Court is  
16 addressing that here: (as read)

17 This must be borne in mind when the objective  
18 of a publication ban imposed under the common  
19 law is specified, since one of the primary  
20 purposes of the common law rule is the  
21 protection of the constitutional rights of  
22 the accused. As the rule itself states, the  
23 objective of a publication ban authorized  
24 under the rule is to prevent real and  
25 substantial risks of trial fairness -- or  
26 trial unfairness. Publication bans are not

1           available as a protection against remote and  
2           speculative dangers.

3       I submit that any -- any -- any issue is remote and  
4       speculative in this case if the names are redacted.  
5       There's no reason to think that this tribunal cannot  
6       issue a fair decision if their names are redacted prior  
7       to them making a decision.

8           The public scrutiny is to be welcomed. It's a  
9       good thing. Especially when that scrutiny is focused  
10      on the substantive issues and not the identity of the  
11      decision-makers, even though the identity of the  
12      decision-makers should be public, and it will be at  
13      some point -- it doesn't need to be at this point --  
14      but public scrutiny of the evidence at this point could  
15      only be welcomed as a good thing.

16          I'm not going to read the whole paragraph. I will  
17      just refer you to paragraph 82 of the Dagenais decision  
18      where the Court emphasizes the importance of the  
19      reasonable alternative measures, which I've hit on  
20      repeatedly. That's the redaction.

21          To summarize the test -- and I am nearing the end  
22      here -- to summarize the test, I will take you to  
23      paragraph 46 of Sierra Club. This is the test for  
24      issuing the confidentiality order of a publication ban  
25      that's being sought in this case. This is a summary of  
26      the test: (as read)

1           The Court emphasized that under the first  
2           branch of the test [that's necessity], three  
3           important elements were subsumed under the  
4           "necessity" branch. First, the risk in  
5           question must be a serious risk well-grounded  
6           in the evidence. Second, the phrase "proper  
7           administration of justice" must be carefully  
8           interpreted so as not to allow the  
9           concealment of an excessive amount of  
10          information. Third, the test requires the  
11          judge observing -- ordering the ban to  
12          consider not only whether reasonable  
13          alternatives are available, but also to  
14          restrict the ban as far as possible without  
15          sacrificing the prevention of the risk.

16         In other words, this is an open-and-shut case, to order  
17         the release of the redacted versions of the  
18         transcripts. If we're applying what the Supreme Court  
19         of Canada has just said, it's an open-and-shut case.

20           Again, I will remind you that in Mentuck, the  
21         Court ordered the release of the evidence in that case  
22         with the names of the police officers redacted. That  
23         was pretty sensitive information. It was information  
24         about undercover police operations in that case, and  
25         the Court ordered it released immediately, and the  
26         names of the police officers redacted for a period of



1 one year. That's what the Court ordered in that case.  
2 That's exactly what Dr. Wall is looking for in this  
3 case: the release of the information with the names  
4 redacted until the end of the proceedings.

5 It must be remembered that the subject matter of  
6 this case is not merely of the typical type of obvious  
7 interest to the public, rather it is of central,  
8 critical importance. This case goes to the core of one  
9 of the most pressing issues of our days, namely,  
10 whether the compelled covering of people's faces by  
11 their governments is needed, effective, and justified  
12 or, on the other hand, a gross, dangerous, unscientific  
13 overreach.

14 Further, the material contained in the transcripts  
15 in question is not only of extreme interest and  
16 importance, but its timely release to the public  
17 itself -- the timely release itself is highly in the  
18 public interest, given the urgency of the circumstances  
19 and the pace of developments regarding COVID and  
20 government restrictions on civil liberties.

21 I'm just going to take you briefly -- I think this  
22 will be the last time I take you anywhere -- briefly to  
23 paragraph 83 of Sierra Club: (as read)

24 Since cases involving public institutions  
25 will generally --

26 Public institutions, by the way, is the -- is the --

1 is, I think, important there because obviously a lot of  
2 the Court's comments have been about the court,  
3 although I submit that clearly covers tribunal in this  
4 case. You know, public institutions would include  
5 things like the College of Chiropractics. (as read)

6 Since cases involving public institutions  
7 will generally relate more closely to the  
8 core value of public participation in the  
9 political process, the public nature of a  
10 proceeding should be taken into consideration  
11 when assessing the merits of a  
12 confidentiality order. It is important to  
13 note that this core value will always be  
14 engaged where the open court principle is  
15 engaged owing to the importance of open  
16 justice to a democratic society. However,  
17 where the political process is also engaged  
18 by the substance of the proceedings, the  
19 connection between open court -- open  
20 proceedings and public participation in the  
21 political process will increase. As such, I  
22 agree with Appellate Justice Evans in the  
23 court below, where he stated, at  
24 paragraph 87:

25 While all litigation is important to the  
26 parties, and there's a public interest



1           in ensuring the fair and appropriate  
2           adjudication of all litigation that  
3           comes before the courts, some cases  
4           raise issues that transcend the  
5           immediate interests of the parties and  
6           the general public interest in the due  
7           administration of justice, and have a  
8           much wider public interest significance.

9       That's this case. This case is the archetype case for  
10      that.

11           There's nothing, I would submit, of more public  
12      interest right now than COVID restrictions on civil  
13      liberties than the restrictions by government bodies on  
14      professionals. Nothing is more important to the  
15      interest of this nation right now.

16           I don't think I need to remind everybody. We just  
17      had the Emergencies Act invoked by the Federal  
18      Government of this nation in response to a peaceful  
19      protest of a few thousand smiling Canadians, which, by  
20      the way, is exactly what Russia just did when it  
21      arrested 2,000 protestors.

22      THE CHAIR:                   Mr. Kitchen, in the interest  
23      of time, I think let's stick to the point, please,  
24      where --

25      MR. KITCHEN:                 I'm not going to belabour --  
26      I'm not going to belabour this point, but it has to be

1 mentioned, okay? The context of this case cannot be  
2 ignored. I say that the Supreme Court of Canada says  
3 it cannot be ignored. I'm not saying that simply  
4 because it's my wonderful idea. The Supreme Court of  
5 Canada says that you cannot ignore the substance of the  
6 case. The substance of this case is of paramount  
7 importance to the interest of this nation.

8         We just had five experts talk about this issue.  
9 Why? Because it is a very important issue. The  
10 covering of people's faces is an important issue. And  
11 this tribunal can lose sight of it. If it wasn't,  
12 there wouldn't have been four people willing to speak  
13 about why it's a bad idea.

14         As for the second part of the test, the balancing,  
15 it is clear any benefit obtained through holding back  
16 the transcripts is tenuous at best. Yet the  
17 deleterious effects to the rights of Dr. Wall and the  
18 public are enormous. Dr. Wall has a fundamental  
19 freedom of expression right to disseminate to the  
20 public the expert evidence he has called in his defence  
21 and that the complaints director has called in an  
22 effort to find him liable of professional misconduct.

23         Dr. Wall further has a fundamental right to a fair  
24 trial that is advanced by the realtime public scrutiny,  
25 realtime public scrutiny of the expert evidence called  
26 in this case. Further, organizations that fulfill a

1 media role as I mentioned such as Liberty Coalition  
2 have a Section 2(b) right to report on this evidence.  
3 Further still, the public has a 2(b) right, as I  
4 mentioned, manifested through the open court principle  
5 to receive this evidence without delay.

6 All these rights would be unjustifiably violated  
7 if the publication ban is ordered by the tribunal and  
8 the redacted transcripts are withheld. The benefits of  
9 the ban sought by the complaints director come nowhere  
10 close to outweighing the drawbacks, even if necessity  
11 could be established, which it cannot.

12 Those are my submissions, subject to any  
13 questions.

14 THE CHAIR: Thank you, Mr. Kitchen.

15 Mr. [REDACTED] any reply submission?

16 Submissions by Mr. [REDACTED] (Reply)

17 MR. [REDACTED] Very, very brief response.

18 I think we're asking you -- the complaints  
19 director is asking you to strike a balance. So I think  
20 I was fairly candid in my submissions to you that it's  
21 a pretty high hurdle to get an outright complete  
22 privacy order from you, and we're not looking for  
23 secrecy here. I think what we're really asking you is  
24 even if the open court principle applies -- and I  
25 think, you know, we've heard a lot of information from  
26 Mr. Kitchen about that -- the real issue here is timing

1 and the deliberate decision to release, again,  
2 piecemeal portions of evidence and doing that when the  
3 hearing is not completed. Doing that when it's out of  
4 context. Doing that when there are other larger issues  
5 that this tribunal has to consider. And doing that,  
6 allowing that when the section of the HPA speaks to  
7 access only occurring after the completion of a  
8 hearing. There's no prejudice to Dr. Wall at all to  
9 wait until the end of the proceedings to release,  
10 hopefully, redacted versions of transcripts, that's  
11 without names.

12 And I do want to mention that I think Mr. Kitchen  
13 stated that it would be highly unusual for a tribunal  
14 to have authority to restrict publication after a  
15 proceeding is concluded. I will just say that I think  
16 that can occur in certain circumstances, and we see  
17 that in, again, a professional conduct hearing relating  
18 to sexual touching allegations or where there's private  
19 confidential information about a person or patient  
20 that's disclosed. Your -- your restrictions can go  
21 beyond the end of your function as a hearing tribunal.  
22 So I think you do have some discretion in that regard.

23 Again, we're asking you to strike a balance.  
24 Should this happen, when should it happen, how should  
25 it happen, and I think Mr. Kitchen has been very clear  
26 and candid -- I'm not being critical -- of his client's

1 intention to publish transcripts with names without  
2 redaction after the conclusion of these proceedings.  
3 And that is a concern for the complaints director.

4 Those are my comments.

5 THE CHAIR: Thank you, Mr. [REDACTED]

6 I think we'll take a brief -- maybe five minutes.  
7 We will caucus just to review any questions that we may  
8 have of Mr. [REDACTED] or Mr. Kitchen. So if we can --  
9 just take us to our room for five minutes. We only  
10 have 20 minutes left. Hopefully we can utilize that  
11 time productively. Thank you.

12 (ADJOURNMENT)

13 Discussion

14 THE CHAIR: Thank you. We have three  
15 questions that we would like to put to counsel.  
16 Perhaps we could start with Dr. [REDACTED]

17 MR. KITCHEN: Dr. [REDACTED] you're muted.

18 DR. [REDACTED] Thank you. We are just  
19 wondering, will the redacted publication include expert  
20 witnesses' CVs and their reports as well as the  
21 references?

22 MR. [REDACTED] I will invite Mr. Kitchen's  
23 comments, but I suspect not. I think it's only the  
24 transcripts. You'll see from those sections in the HPA  
25 that talk about public access to transcripts, evidence,  
26 testimony. I don't think it includes their CVs and



1 expert reports.

2 Mr. Kitchen, I don't know if you have any thoughts  
3 on that, but ...

4 MR. KITCHEN: Those are exhibits. They form  
5 part of the record. I think they should be accessible  
6 by the public. I'll say this: Dr. Wall's intention  
7 was to release transcripts only, redacted, as I've  
8 mentioned. And my friend didn't say anything about,  
9 you know, whether or not we should throw CVs in or not.  
10 Dr. Wall wasn't intending to. He would be willing to  
11 if that was a fairness concern, but at this point the  
12 intention was transcripts only, redacted.

13 MR. [REDACTED] I will just mention --

14 THE CHAIR: Thank you.

15 MR. [REDACTED] -- very quickly. 85(3) and  
16 (4) talk about examining the decision and testimony,  
17 and that's fairly deliberate wording. It doesn't talk  
18 about getting access to exhibits. I'm not sure if  
19 there's some sort of an inherent right to exhibits, but  
20 the legislation doesn't really speak to that. It's  
21 kind of skeletal in some ways, and it's not maybe as  
22 fulsome as we might like. But it talks about examine  
23 the decision and the testimony and doesn't speak to the  
24 exhibits, so ...

25 MR. KITCHEN: Right. But the Supreme Court  
26 of Canada fills in the blanks on that and is -- is the

1     determinative law on this. So where the legislation is  
2     silent, the common law fills in, and the common law is  
3     clear. The Supreme Court of Canada says that it's all  
4     accessible. I don't really think that's -- I don't  
5     think that's contestable, although it's not a live  
6     issue here. We're not -- we're not arguing about  
7     whether or not CVs should be going out right now  
8     because that was not Dr. Wall's intention.

9             And I can tell you that Dr. Wall is not going to  
10    release anything that we're not talking about today.  
11    So if -- he's not going to release any other exhibits  
12    or anything like that. At the end, sure, yes, but now  
13    it's just transcripts.

14   THE CHAIR:                     Thank you.

15             Dr. [REDACTED]

16   DR. [REDACTED]                     Thank you. I guess this is a  
17   question for Mr. [REDACTED] As Mr. Kitchen was taking us  
18   through the three different court cases, he did refer  
19   or equate the Chiropractic College as a public  
20   institution, and he also spoke to the fact that he felt  
21   that the College was a governing body or a government,  
22   or he equated those two. I wanted to get your comment  
23   on that in respect to how we should feel about using  
24   these court cases in this incident.

25   MR. [REDACTED]                     I think there's pretty good  
26   case law, pretty clear case law that entities like the

1 College, because they're statutorily created, because  
2 they're administrative decision-makers, are created by  
3 government. They are government entities. I think  
4 there's -- having said that, though, I would take issue  
5 with, I think, some of the comments Mr. Kitchen made,  
6 that there's an absolute application between the court  
7 cases and discipline cases. I think you will see, for  
8 example, in Section 79 of the HPA, you're not bound by  
9 the formal Rules of Evidence.

10 So I think there are some broader principles that  
11 apply, but I think there still is some important  
12 discretion given to regulatory professional colleges  
13 that perhaps wouldn't apply in the court setting. I  
14 know Mr. Kitchen will disagree with that. Maybe I will  
15 steal his thunder and say that, but that's my client's  
16 view.

17 MR. KITCHEN: I generally agree. I guess I  
18 would emphasize different aspects. Of course, you  
19 know, we're on different sides of the coin here. You  
20 know, the reality is whether you -- whether the  
21 tribunal in this case recognizes it or not, it is bound  
22 by the decisions of the Supreme Court of Canada and it  
23 is bound by the common law. It is bound by the  
24 Charter. I mean, that's just -- that's trite law. I  
25 don't think my friend is really going to argue with me  
26 on that.



1           The College is a public institution. It is  
2 covered by Section 32 of the Charter. I mean, I'm  
3 going to take you through all this on April 11th and  
4 12th, but I don't think it's actually a live issue. I  
5 think it's trite law in this case. We would be wasting  
6 time really, you know, getting into it too far. So I  
7 think you need to read these cases as binding on any  
8 decision that you make.

9 DR. [REDACTED]                           Thank you.

10 THE CHAIR:                           Thank you.

11           Mr. [REDACTED]

12 MR. [REDACTED]                       Yes, thank you. My question  
13 is for Mr. Kitchen.

14           Mr. Kitchen, you just alluded to the dates that  
15 are set aside for closing argument. So my question has  
16 to do with really why -- please elaborate on the  
17 reasons why you're asking this tribunal to deal with  
18 this matter before we've even heard closing arguments.

19 MR. KITCHEN:                       It's a good question. I'm not  
20 asking you to deal with this. I'm responding to the  
21 complaints director asking you to deal with this. Like  
22 I said, out of courtesy, Dr. Wall gave notice to the  
23 complaints director of his intention and did not act on  
24 his intention until this was dealt with, again out of  
25 courtesy, out of an interest in keeping these  
26 proceedings as civil and amicable as possible.

1           But he submits he has a right -- prior right to  
2   release these, would have already if he wasn't going  
3   out of his way to be as courtesy [sic] as possible and,  
4   again, to provide notice. I actually -- to be  
5   perfectly honest, I didn't actually expect this to  
6   occur. Because I -- because Dr. Wall proposed these  
7   transcripts be published in a redacted form, I didn't  
8   actually expect that to be contested. I actually  
9   consider the complaints director bringing us here today  
10  to be rather unreasonable.

11           So I am not asking you to deal with this; the  
12  complaints director is. And I would say that it's  
13  quite easily dealt with based on my submissions.  
14  Redacted transcripts go out.

15  THE CHAIR:                   Okay. Any closing comments  
16  before we adjourn for today?

17           I will say to both parties that a lot of  
18  information has been presented. We appreciate you  
19  providing your submissions. We will be meeting to  
20  deliberate further on this. Just haven't had a chance  
21  today in the limited time available. So we will meet  
22  as soon as reasonably possible and certainly before  
23  closing arguments are scheduled on April 11th and 12th,  
24  and we will provide you with a decision with written  
25  reasons as soon as possible.

26  MR. KITCHEN:                I will just say one thing. I

1 know it should go without saying. My learned friend  
2 has said that the hearing isn't over with. The  
3 evidence part of the hearing is over with. There's a  
4 reason why Dr. Wall waited till now. He wasn't going  
5 to piecemeal published transcripts in the middle of the  
6 evidence part of the hearing. That would be  
7 unreasonable and inappropriate. He never intended to  
8 do that. He was never going to do that.

9 The evidence part of the hearing is over. We only  
10 have closing argument. That's why he wants to release  
11 it now because it makes sense to now, not before the  
12 evidence was done. That would be piecemeal. So if  
13 you're asking why are we dealing with this now, it's  
14 because the evidence portion is done. All the evidence  
15 is done, so only now can evidence appropriately go out,  
16 and that's why he's seeking to do so now.

17 MR. [REDACTED] Mr. Chair, just very, very  
18 quickly. There may be evidence at the -- if there's  
19 findings of unprofessional conduct at the sentencing  
20 phase. I won't say it's the same type of evidence  
21 necessarily, but you may well be hearing evidence at  
22 that phase.

23 And I will just make a comment as well. I think  
24 my friend said that he was surprised by this hearing  
25 having to occur today and that it was unreasonable. I  
26 don't think it was. I recognize everybody had to spend



1 some time and effort, but what Mr. Kitchen's client was  
2 proposing to do was, in my experience in working with  
3 regulatory bodies, unusual. And even if you agree with  
4 everything he says and issue orders entirely in his  
5 client's favour, we needed direction, and we needed  
6 someone to tell us what could and couldn't happen.  
7 We're hoping you'll help give some credence to the  
8 complaints director's position and adopt his reasoning,  
9 of course, but I don't think today's hearing was an  
10 unreasonable request. I think it was needed to give  
11 everybody certainty about what was going to happen,  
12 what wasn't going to happen, and to make sure people  
13 like Dr. [REDACTED] and others had their potential interests  
14 mentioned today.

15 So thank you for your time. I know we're running  
16 late here.

17 THE CHAIR: I appreciate that,  
18 Mr. [REDACTED]

19 And I will say from the hearing tribunal's  
20 perspective, nobody likes surprises. And I think  
21 there's also in the longer term, you know, perhaps --  
22 perhaps this is something that needs to be considered  
23 and maybe included when discussing the possibility of  
24 having expert witnesses testify, that this needs to be  
25 a part of the information they're provided with.

26 So in any event, thank you all very much. We're 5

1 after 11. We will close -- consider this hearing  
2 adjourned. As I said, we will have a decision out to  
3 you as soon as -- as soon as we can, and we will see  
4 everybody on April 11th and 12th. The hearing is now  
5 adjourned.

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7 PROCEEDINGS ADJOURNED

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1 CERTIFICATE OF TRANSCRIPT:

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3 I, [REDACTED] certify that the foregoing pages  
4 are a complete and accurate transcript of the  
5 Proceedings conducted in accordance with the Alberta  
6 Protocol for Remote Questioning, taken down by me in  
7 shorthand and transcribed from my shorthand notes to  
8 the best of my skill and ability.

9 Dated at the City of Calgary, Province of Alberta,  
10 this 4th day of March 2022.

11

12

[REDACTED]  
15 [REDACTED] CSR (A)  
16 Official Court Reporter

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