ORIGINAL

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 Professionals Act, R.S.A.2000, c. P-14

DISCIPLINARY HEARING

VOLUME 9

VIA VIDEOCONFERENCE

Edmonton, Alberta

June 16, 2022

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EXHIBITS

Proceedings taken via Videoconference for The College of Chiropractors of Alberta, Edmonton, Alberta

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June 16, 2022 Morning Session

HEARING TRIBUNAL

J. Lees	Tribunal Chair
W. Pavlic	Legal Counsel
Dr. L. Aldcorn	CCOA Registered Member
Dr. D. Martens	CCOA Registered Member
D. Dawson	Public Member
C. Barton	CCOA Hearings Director

COLLEGE OF CHIROPRACTORS OF ALBERTA

L. Fischer	Acting Complaints Director
B.E. Maxston, QC	Legal Counsel

FOR DR. CURTIS WALL

J.S.M. Kitchen	Legal Counsel

A. Vidal, CSR(A), RMR Official Court Reporter

(PROCEEDINGS COMMENCED AT 9:14 AM)

THE CHAIR: Good morning, everybody. I think we have everyone. I think we are prepared to start. I just would like to make a couple of comments before we -- before we open the hearing.

Opening Remarks

THE CHAIR: We do have some observers with us today, and these observers have registered and gone through the required College process in order to participate. And part of that is that they are identified as an observer and that their face appears on the screen at all times and that they remain on mute. They are not allowed to have input or participate in the hearing. So I just wanted to clarify that.

Some of the usual rules. We would appreciate if everybody would keep themselves on mute unless they are speaking. We would also ask that if you have cellphones with you, to please put them on mute as well.

And lastly, I think we will ask everybody to -- we'll go around the room and introduce ourselves. I do not ask -- I do not want the observers to identify or to introduce themselves; however, there have been some changes in -- in positions within the College. So I think it's worthwhile that the Hearing Tribunal

Members, the College representatives, and Dr. Wall and Mr. Kitchen identify themselves, as well as the court reporter.

So starting -- I'll start this off with the Tribunal Members. My name is Jim Lees. I'm chairing this hearing. I'm a public member in Edmonton.

Doug Dawson, who is also a public member. We have Dr. Diana Martens who is a regulated member of the College, and Leslie Aldcorn, who is also a regulated member of the College. Thank you, Leslie.

Our independent legal counsel is Walter Pavlic. And I'll ask him to speak to his role when I'm finished with the introductions so that everybody understands his responsibilities.

With the College, we have a new hearings director, Cathy Barton. We also have a new complaints director, Lloyd Fischer. And Mr. Kitchen, a familiar face. Nice to see you. And Dr. Wall as well. We have a court reporter, Andres Vidal, who will be taking -- making a transcript of all the proceedings today and tomorrow.

So before we ask -- I missed one party. Blair Maxston, who is counsel for the hearings director.

And before we -- before we ask -- before we open the hearing and start, I would -- or actually, we will open the hearing as of now. And I would ask that Mr. Pavlic just give a brief description of his role as

independent legal counsel.
MR. PAVLIC: Thank you, Mr. Lees. As independent legal counsel, I am not representing the complainant, and I'm not representing the College. I am counsel to the Tribunal, and my role is restricted to advising the Tribunal on questions of law as they arise or any other questions they may have with respect to process of the hearing. So that's my function.
THE CHAIR: And he's not a voting member of the -- of the Tribunal, just -- just to clarify that.

Okay. It's been a while since we -- since we met. I think it was back in April was the last time that we sat. And I believe today we are here to hear argument. We have finished with the evidence part of this hearing, and we will start today with -- with the College presenting its arguments. And I believe the floor was yours, Mr. Maxston.

MR. MAXSTON: Good morning, everyone.

Mr. Chair, I have one brief housekeeping comment to make, and then Mr. Kitchen has a request that I'll invite him to comment on, and then I'll begin my submissions. My housekeeping matter is I think we need to enter your June 12, 2022, hearing decision publication as an exhibit.

THE CHAIR: Mr. Kitchen, any objection to

that?
MR. KITCHEN: No.
MR. MAXSTON: Mr. Chair, I'll just let Mr. Kitchen make some comments to you on a matter he wants to address, and then I'll have some very quick comments in response.
THE CHAIR: Mr. Maxston, I have a very difficult question for you. What number would you propose would be attached to that as an exhibit?
MR. MAXSTON: I think -- I invite Mr. Kitchen's comments. I think we finished the 'H' -- the series of Exhibit H documents. I would think that it is Exhibit I-1. I don't have any exhibits today. It's not evidentiary -- there's no evidentiary stage. I've sent you some written statements that I'll get to in a moment. I'm assuming Mr. Kitchen doesn't have any exhibits in the true -- or evidence and exhibits in the true sense of those words and that we're going to stop, then, with Exhibit I-1 today, but I'll invite his comments too.
MR. KITCHEN: I-1 sounds fine to me. I don't anticipate having any exhibits during my submissions, but it's possible, but not likely.
THE CHAIR: Thank you, Mr. Kitchen and Mr. Maxston.
EXHIBIT I-1 - The June 12, 2022, hearing

decision publication

THE CHAIR: Mr. Kitchen, did you have a matter you wish to raise?

MR. KITCHEN: Well, two, actually. First -- we dealt with this before -- just a matter of individuals being able to attend the hearing. So what I've asked for is that in the course of the next two days, if there is anybody who attempts to enter and Ms. Barton does not permit them entry, I want a very brief record produced by Ms. Barton as to who she denied entry to, if she knows, roughly when, and then briefly what the reason is.

In addition to that, if there's anybody that is kicked out of the proceeding during the next two days, in other words, they can't -- they're no longer on the Zoom call, they can't hear it, they can't see it, et cetera. That would be done, of course, by Ms. Barton. And I'm talking about actions by Ms. Barton to not let somebody in or kick somebody out. I'm not talking about internet connections or technical difficulties.

So if Ms. Barton takes an action to not permit entry or to kick somebody out, I want a record produced by her of who, when, and the reason why. Very briefly, very simple. Basically just raw data of who, when, why for not letting in and kicked out.

That's -- that's been a problem so far with these hearings, and it's of concern to Dr. Wall. And so I ask for that record to be produced in the event that that happens.

THE CHAIR: And just before I respond to that, my understanding is that there were 17 -- last I heard, there were 17 people who inquired about attending as observers. All of them were sent the rules that the College has associated with being an observer, and the -- a description of the process that they need to follow and a form that they needed to complete. And I believe that 8 of these 17 have done that. So all of those who are here -- well, all of those who've inquired have certainly been made well aware of the rules. I touched briefly on a couple of them earlier, but there are -- there are a fulsome set of rules that -- regarding conduct, if you're an observer.

So I -- to be honest, I'm not sure that it's a matter for the Hearing Tribunal to determine regarding who is and is not being admitted or being refused admission. Your request has been noted, Mr. Kitchen. And rather than delay the actual merits of the hearing today, I'll discuss that with Mr. Pavlic and -- and Ms. Barton and -- and get back to you on that. But I wouldn't -- I would like to take our time, which has

been so precious in this matter, and use it wisely and -- and get started on argument. Your request has certainly been noted. Thank you.

MR. KITCHEN: Thank you. And just in response, I will say that the Tribunal as the trier of fact or the trier of law is the master of its proceedings and the master of its own courtroom, if I can call it that. So I do think they have common-law authority to say how they want things to be run. The other side of that coin is to simply say that, you know, the College should -- should positively respond to my request, as reasonable as it is, and it really should -- should not be -- they should not need to be told by the Tribunal to do as I have asked. So I think both of those points should be kept in mind.

I just have one other point I want to make sure is clear. There is, of course, a limited publication ban in this case that applies to Dr. Wall publishing on the internet the names of expert witnesses. But since we've had a lot of issues with this, I -- I feel that I must ask this.

We have observers here today, some of which are likely going to report publicly. And if this issue arises, my understanding -- and I want you to clarify if my understanding is correct -- is that anybody who is on the proceedings today who wants to then go and

report, whatever that looks like, Twitter, the media, a blog post, whatever that looks like, they can go and they can report the names of the experts that are discussed today. That's my understanding of the current state of your orders and decisions on that. If that's not the case, I ask that you clarify.

THE CHAIR: Mr. Maxston, any comment?

MR. MAXSTON: I'm going to leave it up to the Tribunal to address that. I think your recent order, the June 22 -- pardon me -- June 12 order is fairly clear in some respects, but I think Mr. Kitchen has asked a specific question. So I'm going to defer to you as the Hearing Tribunal to tell him what your order means and what its scope and application is. I'm not trying to be cagey. I just -- you'll have to speak to what your order does and doesn't cover.

THE CHAIR: Okay. I think at this point we'll take a brief break so that the Tribunal can caucus with counsel. So it's 25 after 9:00. We'll reconvene at 20 to 10. And if Ms. Barton will put the Tribunal and Mr. Pavlic into the breakout room, I would appreciate that.

(ADJOURNMENT)

THE CHAIR: So, Mr. Kitchen and Mr. Maxston, we've discussed the comments. And I just would like to make a couple of statements. First is a

reminder to observers that as per the agreement, the rules, they are not allowed to record or tape any portion of the hearings. And we would ask your -- expect your cooperation in that regard.

As far as publication goes, this was an issue that was discussed at length, argued, and an order, a decision was reached by the Hearing Tribunal. And in the decision, the Tribunal recognized that the -- there is a concept of the necessity for there to be an open court. And we noted that the member had made it clear that it is their intention to only release the transcripts of the expert witnesses, with those transcripts being fully redacted, with the exception of Dr. Hu's expert testimony, and that there would be no identification of the parties testifying, no identification of the panel members by name. And on that basis, we saw no reason why the -- why the members should be prevented from publishing the information.

So that was the spirit of the order, and that was the conclusion of the Hearing Tribunal. And that was done for specific reasons. And in -- it related to the transcripts. However, I think in the spirit of the agreement, was that that publication limitation -- it's a partial ban, to be honest -- would extend to -- to our discussions today.

So we agreed -- I won't say we agreed. The

conclusion drawn was that the names of the expert witnesses, the names of the Tribunal Members, and the names of -- of counsel would not be -- would not be published. And that was to avoid the potential for any harm to any of these individuals, particularly during the time that this hearing is proceeding.

The last thing we want would be a disruption to this hearing given the amount of time, resources, and effort that has gone into it by all parties.

So having said that, I would -- I -- I'm not sure I can make an order that -- that observers not publish certain things. I think that would result in another day or two of a dispute. So I'm asking that the observers -- observers recognize the spirit of the agreement, the spirit of the order that was determined by the panel, and that they respect that.

I'll say no more on that unless Mr. Pavlic has any comment.

MR. KITCHEN: Mr. Chair, with all due respect, that's entire unhelpful. The question I asked is whether or not observers today can report on the names of expert witnesses following this hearing. I --

THE CHAIR: The -- following the -- following the hearing today, Mr. Kitchen, or following the hearing?

MR. KITCHEN: Following the hearing today.

So, for example, if Mr. Hopkins wants to hop on Twitter today and talk about Dr. Hu or Dr. Bridle, I'm asking, you know -- right now, as your order stands, he is permitted to do that. Okay? But I'm -- I'm asking for clarity to help these people because they obviously don't want to get in hot water with the Tribunal. I'm asking for clarity that -- I'm asking for you to confirm that they are, in fact, permitted to do so.

THE CHAIR: Well, I'm not prepared to confirm that they are permitted to do so. What I said -- and I'll be perfectly honest with you, Mr. Kitchen. I'm not clear that the Hearing Tribunal or the Chair has the authority to tell observers what they can and cannot report. What I did say to them is what we agreed could be reported, and we would ask that they follow those same -- those same conclusions and guidelines if they wish to -- wish to report on the hearing. And that is that they not publish names.

MR. KITCHEN: Well, Chair, there's no asking. It's either -- it's either permission -- well, permission is not required because the presumptive default in the law is that they are permitted. So, you know, if -- if you're going to say that they're not, you have to issue an order. You cannot merely request. That's throwing confusion where there shouldn't be any. So if there's either an order which they can't, which

is a publication ban -- and you have the common-law authority to order that. I would argue that it's unlawful for you to do so insofar as it goes against the law in this matter. But as far as the jurisdiction or the authority, you of course have the common-law authority and jurisdiction to issue such an order. That's the same jurisdiction and authority you used to issue your first publication order.

So if -- if there's no order that observers today cannot publish the names of expert witnesses to discuss -- you discuss today, then they can, as a matter of law. And what I'm -- you know, if you're not prepared to confirm, then that's fine. That means that they can; right? But I just -- I want as much clarity as I can for my sake, for your sake, and for their sake. Because it is a serious matter of public interest that the names of these experts are able to be discussed.

THE CHAIR: Well, Mr. Kitchen, our view of this is that -- is that we do not want to facilitate a situation where the order of the Tribunal is bypassed by using observers to report information that other members, participants in the hearing, were -- were not allowed to. And that's the situation I see happening.

MR. KITCHEN: Well, I -- I would disagree with your characterization. I wouldn't say it's a

bypassing of your order. I would say your order was limited to Dr. Wall and his -- his internet publications. It didn't apply to anybody else.

THE CHAIR: Okay. I -- I hear what you're saying. I was hoping that we could, in the spirit of moving ahead, deal with it the way that I suggested. However, I think we need to go back into caucus and I need to speak with Mr. Pavlic. And so we will recess again for 15 minutes.

Please remove us to a breakout room --

MR. KITCHEN: Can I --

THE CHAIR: -- Ms. Barton.

MR. KITCHEN: Can I raise one another issue because I know you're going to want to discuss it. If you order that observers today cannot publish or publicly discuss the names of experts, the default presumption in the law is that they will be able to report that you made such a decision. Okay? And that very likely will happen. Okay? So that's something to consider.

I don't -- I'm not asking you or encouraging you to order that observers not be able to report that you ordered that they can't discuss experts. In fact, again, I would submit to you that that's patently unlawful. Okay? But I raise that as an issue for your consideration, that if you're going to order that

experts can't be discussed by -- by observers, those observers are likely going to go and then report, publicly discuss the fact that you did order that today.

THE CHAIR: Okay. Mr. Maxston, before we break, do you have any comment?

MR. MAXSTON: Again, this is an interpretation issue. You'll have to tell the participants what your order does and doesn't mean. I'm not trying to, again, be cagey or dodge an issue. It's -- I'm not sure what to say. I think we -- the complaints director's desire is to get going with the hearing. I know that. And I know you have an issue you need to consider.

THE CHAIR: Thank you. Okay.

MR. KITCHEN: For the record, I want to get going as well, but there's no point in getting going if we can't do so lawfully.

THE CHAIR: Ms. Barton -- thank you, Mr. Kitchen.

Ms. Barton, could you move us to a breakout room? We'll recess for 15 minutes.

(ADJOURNMENT)

THE CHAIR: The hearing is back in session. We will continue. Mr. Kitchen, you asked for a clarification on observers with respect to the order

that was recently issued. The Hearing Tribunal feels that the spirit of the order needs to be maintained. It was done for a reason. And while this hearing is still underway, we include observers in terms of the order as far as there is to be no identification of the witnesses, the Tribunal Members, or the counsel in any reporting that is done outside of this hearing through social media.

So we -- the order also stated that we directed any publication does not contain ancillary content or explanatory comments that could in any way bypass the decision of the Hearing Tribunal and identify the witnesses, Tribunal Members, or counsel.

We all recognize that once this hearing is concluded, there will be no limitations on the publication. And, obviously, the decision will be publicly available. So while this hearing is underway, we -- we include the observers for the purposes of the -- of the partial publication ban.

And with that, unless there are other matters, we are eager to move to argument this morning.

MR. KITCHEN: Will you be providing an amended order or a new order to that effect?

THE CHAIR: It certainly won't be provided at the moment.

MR. KITCHEN: No, I understand that.

THE CHAIR: Yes. Yes. We'll consider that, Mr. Kitchen. And either that, or an addendum to the order that reflects our decision today. I think we could do that.

MR. KITCHEN: That -- that will be required because the spirit of an order is not enforceable. So we either need an amended order or -- or a new order to clarify what you just -- because you've just -- you orally ordered something. So to have that in writing just to clarify would be good.

THE CHAIR: Thank you. We will do that.

And with that --

MR. KITCHEN: I just want to -- I just want to -- I'm sorry. I have to clarify. When you say "the end of the hearing", do you mean 5:00 tomorrow when we're done, or do you mean some other point in time?

THE CHAIR: The conclusion of this hearing, once a decision has been reached and published.

MR. KITCHEN: Okay. And that's a decision on liability?

THE CHAIR: That's a decision on the allegations. And -- yes.

MR. KITCHEN: Okay. Because of course once we have a decision on liability, you know, as Mr. Maxston has said, we're going to be moving into --

THE CHAIR: Into --
MR. KITCHEN: Basically a sentencing phase.
THE CHAIR: We may, yes.
MR. KITCHEN: Well, you may if you -- if you do find us in liability for my client.
THE CHAIR: Yes.
MR. KITCHEN: Okay. All right. Thank you.
THE CHAIR: Okay. Mr. Maxston, I would ask you to continue with your submissions.
Final Submissions by Mr. Maxston
MR. MAXSTON: Good morning, everyone. Just to be sure, this morning I had asked the hearings director to send you, Mr. Pavlic, and Mr. Kitchen a copy of my written submissions. I just want to be sure you have those. You'll see that they contain a list of authorities at the end. Those are hyperlinked so you can go to cases if you need to. There are also a series of appendices. I believe there are nine of them where I've taken some excerpts out of the transcript of various witnesses. Those you can use the bookmark function to go to quite easily and readily. I'm going to take you through those at some point. So unless I see a hand raised, I'm assuming that you all have those written submissions. Mr. Kitchen has advised me he has them.
THE CHAIR: Mr. Maxston, the Hearing

Tribunal did receive them. Thank you.

MR. MAXSTON: Thank you.

When we were going to be starting at 9:00, I -- I was going to be saying that I thought I would take a large chunk of the morning, or perhaps most of the morning. We're now -- it's now 10:30. I'm going to propose to go until the lunch hour, see how far I get. If we need to take a break at any time, halfway through or something like that, that's fine. I'm frankly not sure if I can complete my submissions before the lunch hour. And I want to be fulsome in those submissions, and I want to answer any questions you have as well. So I'll just begin.

THE CHAIR: Mr. Maxston, before you start, we appreciate your indulgence this morning while we dealt with some other issues, and we want you to know that you have all the time that you require to make your presentations. Please don't feel pressured in any way.

I will ask, do people want to take a break before lunch, or do we go through until 12:00? Is there anybody that wants a break? I mean, we could take a break now. We've had several.

Okay. I think we'll just plow through until noon, Mr. Maxston, and -- or at a logical point in your submissions if you feel there's a place close to noon

that we can do that, and -- and we can break for lunch and reconvene after lunch. We have two days booked.

MR. MAXSTON: Sure. If at any time someone needs a break, of course let me know. I'm in your hands.

I'm going to take you through the written submissions. I'm not going to read them to you, but I'm, frankly, going to spend a fair bit of time I guess amplifying them or highlighting them.

You'll see on page 1, I talk there about introductory matters. So just briefly, by way of background, we've had I think seven or eight days of hearings. We've heard from, I believe, eight or nine witnesses: three for the complaints director; five or six for -- pardon me -- six or seven for Dr. Wall, including four expert witnesses and three or four lay witnesses. We're in the liability phase of the hearing, and we're doing closing submissions. And if there are any findings of unprofessional conduct, then, as we were talking about, we would convene for a penalty hearing.

In Section B of the written submissions on page 1, I've reproduced the amended charges. You'll recall they were amended as a result of a preliminary application on Day 1, and the amendments were to the tail end of those charges by adding some bold-typed

phrases. I put those in in the written submissions.

So the five charges relate to, firstly, Dr. Wall failing to use masking, social distancing, and plexiglass barriers, and not requiring patients to be masked. The second charge essentially mirrors that, but is with respect to staff. The third charge relates to not advising patients of increased risk of transmission of COVID-19 due to masks not being worn, advising patients that masks were not required, or advising patients that wearing masks had no effect concerning the transmission of COVID-19. The fourth charge relates to failing to chart certain items of certain matters regarding COVID-19 masking, staff not masking, and his patients not masking. And the final charge is -- I'll call it an omnibus charge relating to failure to -- Dr. Wall's failure to and his staff's failure to follow the CMOH orders regarding COVID-19 and the College's pandemic directive.

Just a couple of housekeeping matters very quickly. The ACAC, and the Alberta College and Association of Chiropractors is now known as the College of Chiropractors of Alberta. I'm assuming that's not an issue for Mr. Kitchen. There's going to be a little bit of changing in verbiage from time to time on some of the documents.

I do want to mention one thing about the charges.

You'll see that at the beginning of each charge, it says "beginning on or about June of 2020". And I just want to -- I don't think this will be controversial, but I just want to say that that's a deliberate -- deliberate wording to give some flexibility to you.

When charges are created, the complaints director doesn't know exactly what the evidence is going to be. So we don't say on or about -- or more specifically, on June 7 this happened or didn't happen. There's some flexibility there for you to look at the appropriate time period now that you have heard all of the evidence.

So I think, generally speaking, those -- that phrase, "beginning June of 2020", is still accurate. I think some of the actions continue into December and perhaps some continue past that December of 2020, but you have some flexibility there.

The next couple of paragraphs in the written submissions, paragraphs 5, 6, 7, talk about the two onuses on the complaints director. First, to prove the facts which underlie the charges. I don't think there's a lot of controversy about the facts. It's about how they might apply in certain circumstances, and, from Mr. Kitchen's perspective, defences his client might have, but I've rarely seen a hearing where there's been such candour from a member in terms of his

actions and what he is doing.

The second onus that is on the complaints director is to prove that unprofessional conduct occurred. And I've reproduced the definition of unprofessional conduct that appears in Section 1(1)(pp) of the HPA. And we are arguing that (1) -- sorry, (i), (ii), (i) -- pardon me -- (i), (ii), (iii), and (xii) apply to this, so those are produced: (as read)

> Displaying a lack of knowledge of or lack of skill or judgement in the provision of professional services; [in] contravention of this act or code of ethics or standards of practice, a contravention of another enactment that applies to the profession; [something like the CMOH orders, those types of things, or the HS reopening order] conduct that harms the integrity of the profession.

And I noted this in my submissions to you initially when we opened the hearing, but the -- there is a definition of conduct in the HPA, and it says that conduct includes acts or omissions. So you have a lot of flexibility.

So that is the first tool available to you to assess whether unprofessional conduct has occurred. And, of course, it's a very important tool.

The second tool available to you are the College's

standards and practice and code of ethics which are mentioned in that closing paragraph of the charges. And any one or more of those references can apply. And, again, I've quoted those standards of practice where they're not too lengthy. A couple were too lengthy, but those are the second tool available to you to measure and assess Dr. Wall's conduct, taking a look at the standards and taking a look at the code of ethics.

The third tool available to assess whether -- and I'm at paragraph 10 on I think about page 5 of my submissions. The third tool available to you is to look at the CMOH orders which require masking and set out similar requirements. Those are things that are, of course, critical to this hearing. And you can also look at the -- what I will call the AHS documents, the AHS exhibits -- those are G-1 to D-3 -- because the charge has been modified to include, as you know, a reference to Dr. Wall not complying with Alberta Health Services directions and requirements. And I'll speak to that a little bit more in my -- my submissions later on.

So, again, third tool, look at those CMOH orders. Look at those AHS documents. And I think, also, I would urge you to look at the closure order, the AHS closure order for Dr. Wall's clinic, and the reopening

order. And I'll get to that later on in my submissions as well.

Fourth tool available to you is for the chiropractors on the Hearing Tribunal to use their knowledge as chiropractors to assess whether Dr. Wall's actions rise to the level of unprofessional conduct.

And very importantly, the final tool available is for all of the Hearing Tribunal Members to use common sense in looking at these issues and looking at the facts, and to decide whether unprofessional conduct occurred.

Quite obviously, for reasons I'm going to get into in a few minutes, the complaints director believes that both onuses have been satisfied. The facts are really not in dispute. They were admitted to and -- almost entirely by Dr. Wall in terms of the factual basis. And from the complaints director's basis, they certainly rise to the level of unprofessional conduct when you look at the definition in the HPA, and you look at the importance of the standards of practice, the code of ethics, those AHS requirements, and the privilege of self-regulation.

On page 5, I've got a heading, "The Role of the Hearing Tribunal". And I start off by saying there that the complaints director is strongly of the view that members of a profession are obligated to comply

with the requirements of their profession. There's nothing new here. We have continuing competence requirements; we have fees that are paid; we have practice visits that have to occur; there's standards of practice; there's, again, these codes of ethics. This is nothing new. There is to be compliance for self-regulation to occur; otherwise, we don't have self-regulation. And that includes, of course, the pandemic directive, a very important document that is mandatory for members.

In paragraph 14, I talk about the fact that the complaints director urges you to accept the scientific foundation for the CMOH orders, the required masking, and, of course, for the pandemic directive. But this case is really about other things. It's about whether a professional can selectively, independently, and, frankly, in secret, decide which requirements of a profession should or should not apply to him without any consultation with the College.

And the answer to that is no, professionals shouldn't be able to do that. Because if you allow that to happen, if there are no consequences for Dr. Wall, we really don't have self-regulation at all.

I have another comment at the top of page 6, paragraph 15. Again, practicing in a profession is a privilege, not a right. And an individual can't be

selective about which requirements apply to them. And Dr. Wall committed unprofessional conduct when he made a deliberate choice to not comply with the pandemic directive and to not the engage with his -- his College.

I've got another comment there in paragraphs 16 to 18 which I think are really, really important. Section 80 of the HPA sets out what your powers are today and tomorrow.

It says the Hearing Tribunal may decide that the conduct of an investigated person does or does not constitute unprofessional conduct. So that's your job today. But more than that, that is a limitation on what you can do. It sets out your role, your function. It's a pretty liberal role, a pretty broad function, but that's all you are legally allowed to do.

I think you are likely to hear an argument that you have the authority to strike down the pandemic directive. And I'm going to suggest to you very strongly that from the complaints director's perspective, Section 80 doesn't allow you to do that. You do not have that authority. You can certainly comment on the pandemic directive, its applicability, that type of thing, but issuing the pandemic directive is a matter of policy. It's a decision made by the Council of the College. And I'll get to Section 6 of

the HPA in a few minutes, but it's absolutely clear that striking down the pandemic directive would be beyond your authority.

Your authority is limited to assessing Dr. Wall's conduct. And if you find that he's committed unprofessional conduct, you issue penalty orders. There's no ability for you to, as a Court might, strike down legislation for being unconstitutional. That is not your role today. You cannot do that.

So I want to switch gears now. And you'll see in Section 2 of the written submissions, we begin with some background about the CMOH orders. Now, there's a lot of CMOH orders that are before you. You'll see them as Exhibits D-3 to D-9, and then Exhibit F-2. I think it's important to remember, and I talked about this in this part of the submissions, that the CMOH orders set out requirements for wearing masks in indoor places at times, and at times, they talked about exemptions. And there weren't exemptions that were enforced all the time.

So if we look at CMOH order 3820, which is Exhibit D-8, that's dated November 24, 2020. And it talks about the masking requirement applying specifically to Calgary, where Dr. Wall's clinic is, and it talks about, in Section 27-C, an exemption if a person is unable to wear a face mask due to mental or

physical concern or limitation. So that's on November 24, CMOH order.

We have another CMOH order which is in front of you, Exhibit D-9, Order 4220. And it mirrors that. It says, you know, there's a masking requirement, and then there are these exceptions.

I think what's really, really important is to understand that those CMOH orders came into force on November 24 and December 11 respectively. And that is well after Dr. Wall made a decision in June of 2020 to self-diagnose and then not mask. So the exemptions for masking, to the extent they're in those two CMOH orders, can't give him any protection. He can't rely on those at this point to say, Well, I -- I had an exemption. Because the exemptions didn't exist until December 11 and November 24.

The bottom of page 6, I mention the fact that CMOH Order 26-2020, which is Exhibit D-6, does talk about exempting a class of persons. It gives the medical officer of health the authority to do that, but it doesn't set out those specific exemptions that we were talking about a few minutes -- I was talking about a few minutes ago. So, again, there's really nothing Dr. Wall can point to to rely on for the June to December period to say, Even if I self-diagnosed and didn't get a medical letter, I somehow qualified for

exemption because those exemptions didn't exist.

The next section in my submissions is the City of Calgary bylaw. And that's Exhibit D-11. And it does have -- it was in place during the time the -- these events or the charges we're considering occurred. And it does create a face-covering requirement. And it also has an exemption for persons who have an underlying medical condition or disability. So masking, social distancing, and I think shield or barrier requirements in it, and then there's this exemption provision.

But the same as those CMOH orders I took you to, twenty -- subsection (2)(6) of the Calgary bylaw has a definition and interpretation section. It says: (as read)

> Nothing in this bylaw relieves person from complying with any provision of any federal, provincial, or municipal law or regulation, or requirement of any lawful permit, order, or licence.

Well, of course, there is a lawful permit order or licence that applies to Dr. Wall, and that's the pandemic directive and also CMOH Order 16-20, which we'll talk about in detail in a little while, that required reopening directions from the College that included the pandemic directive and required masking.

It talks about continuous masking.

So, again, the bylaw has some superseding paramountcy language, and it doesn't allow Dr. Wall to qualify for an exemption because he is, frankly, caught by the larger pandemic directive that the College has issued.

So I want to talk a little bit about -- now about the Alberta Health Services exhibits. And, you know, the complaints director acknowledges that those AHS documents can't apply directly to Dr. Wall because he wasn't an AHS employee. But we've got those entered. And you granted -- granted them as exhibits because they speak to some very, very important context factors that were alive at the time of -- of the charges and that certainly were reasonably considered by the College Council when they were issuing the pandemic directive. They consistently -- the AHS documents talk about continuous masking being a requirement, and they also speak to the efficacy of masking as well.

So just very briefly, I've reproduced some sections from Exhibit G-1. Again, the guidelines for continuous masking. This document outlines requirements for continuous masking. You skip to the bottom of the page, the Public Health Agency of Canada recommends that the healthcare workers should mask providing direct care to prevent transmission to

patients. Bottom of the page talks about this will minimize how healthcare workers -- exposures from each other and will conserve PPE.

If you go to the top of page 8, there are other comments there about the fact that the masking prevents the spread of COVID-19, and AHS has a continuous masking directive in place.

If we go to Exhibit G-2, it talks about PPE or masking being critical to the health and safety of all healthcare workers as well as patients.

Similarly, to prevent spread of COVID-19, AHS again has a continuing mask -- masking directive in place, as well as a requirement for staff who provide patient care that occurs within 2 metres wear eye protection. And, again, another reference to continuous masking. And when we go to Exhibit G-3, the final quote I have is: (as read)

> Continuous masking can function either as a source control, being worn to protect others, or part of personal protective equipment to protect the wearer to prevent or control the spread of COVID-19.

And I think this is a consistent theme that I would ask you to just keep in your mind at all times. There's a lot of information, a lot of good solid sources and science that say masking has a two-way function: It

protects the wearer; and it protects the people around him. And I think that, again, is very, very important.

You'll also see, as I say in paragraph 27, that none of the AHS exhibits set out an exemption for AHS healthcare workers, and no evidence to the contrary has been tendered by Dr. Wall.

So as far as we know, the evidentiary basis that we put before you is that there is a continuous masking requirement for the AHS. And I think that's very, very important and reinforces the contents of the pandemic directive the College created.

I now want to take you specifically to CMOH Order 16-20 and the College's pandemic directive. And as I say in paragraph 28: (as read)

> As part of the reopening of Alberta businesses on April 30th, 2020, the Government of Alberta issued a document entitled Alberta's Safely Staged COVID-19 Relaunch Document.

And that's Exhibit F-1 in the materials before you.

And you'll see the first quote I have from that, on the bottom of page 8, talks about the fact that healthcare workers will be allowed to resume services starting May 4, as long as they are following approved guidelines set by their professional colleges. And, of course, that applies to the -- the College of

Chiropractors.

You'll see at the top of page 9, that document goes on to say: (as read)

> Physical distancing requirements of 2 metres will remain in place through all stages of the relaunch.

And, again, that's consistent with the College's pandemic directive.

So in conjunction with the relaunch document, CMOH Order 16-20 comes out on May 3, 2020. And it has some real critical things in it. Dr. Halowski spoke to these at some length. Order Number 2, effective May 4, 2020, subject to subsection (6): (as read)

> A regulated member of a college established under the HPA practicing in the community must comply with the attached workplace guidance for community.

I'm going to speak about that in a moment, that "workplace guidance for community" document. But it speaks to continuous masking. And it's the default. That's what this CMOH order says. You've got to comply with that document unless you go to Number 6.

And if we skip down to Number 6, Section 2 of this order does not apply in respect of regulated members under the HPA whose College has published COVID-19 guidelines as required by Section 3.

And I'm just going to stop there. There's been some discussions, some submissions about the College having a choice in this matter and being able to do certain things. The College was required to create a pandemic directive. And, again, it was required as the result of CMOH Order 16-20 to have a directive which included mandatory masking, social distancing, plexiglass barriers, and those type of things. That's CMOH Order 16-20. That's the law that the College was required to follow.

So I'm just going to skip back to 16-20 itself. And Order Number 3 says: (as read)

> Subject to Section 5 of this order, each College established under the HPA must, as soon as possible, publish COVID-19 guidelines applicable to their regulated members that are substantially equivalent to the guidance and set out in that workplace guidance for community healthcare settings.

That's the CMOH telling colleges, not just this College, what to do.

Number 4: (as read)

> Every college must provide the CMOH with a copy of any COVID-19 guidelines published in accordance with Section 3.

There's an oversight mechanism here, a legal one.

And then, Number 5: (as read)

The CMOH may amend any COVID-19 guidelines created under Section 3 if the CMOH determines that they are insufficient for reducing the risk of transmission of COVID-19.

So as I mentioned in -- just at the end of paragraph 29, it was a requirement for all chiropractors to return to practice for the College to adopt the pandemic directive. Dr. Halowski spoke to that in his testimony, and Dr. Wall acknowledged that as well. And I've given you their transcript references for pages and lines.

This was the law, and there was no discretion for the College here.

And, again, as I say in paragraph 30, the workplace guidance for community healthcare settings, which was part of 16-20, was the default. And, again, I've quoted that at the bottom. All staff -- at the bottom of page 9: (as read)

All staff providing direct client patient care or working in client patient care areas must wear a surgical procedure mask continuously at all times and in all areas of the workplace where they can't maintain 2 metres of physical distancing.

If you skip to the next page, page 10, second bullet, this is again that default workplace guidance document. Any staff who do not -- this is the second bullet: (as read)

> Any staff who do not work in client patient care areas or have direct client patient contact are still required to wear a mask at all times in the workplace if a physical barrier, such as plexiglass, is not in place, or if physical distancing of 2 metres cannot be maintained.

Again, this is a requirement for the College to create, and very importantly, this default guidance document, which has to be substantially complied with by the College, doesn't contain any exemptions for face masking. It doesn't say healthcare practitioners or College guidelines can have exemptions for masking. And I think there was a good reason for doing that. Continuous masking was the position -- the requirement supported by a body of science that would help reduce COVID-19.

Carrying on in paragraph 31, in response to CMOH Order 16-20, and after a robust consultation with its members and with other outside sources -- I'll speak more of that -- more about that in a moment -- the Council created a pandemic directive dated May 5, 2020,

and that's Exhibit C-20.

And you'll see there's a footnote at the bottom of this page. There were three very -- or three iterations of the pandemic directive. A couple more came out May 25 and January 6th, but they stay fundamentally the same when it comes to masking and social distancing. And the changes -- or no changes to those provisions in the pandemic directive. So I'm just going to collectively refer to that as "the pandemic directive".

As I mentioned at paragraph 32, there was a rigorous, robust development process where regulated members were invited to provide comments where other sources of information were looked at. There were electronic town halls and something called a "ThoughtExchange platform" where members could provide input on the pandemic directive. And as paragraph 33 says, that: (as read)

> The pandemic directive was sent to the CMOH for review as was required pursuant to Order 5 of Order 16-2020.

And as paragraph 34 says, the -- the pandemic directive came back from the CMOH, and there were no amendments, no changes requested, nothing from the CMOH office saying there should be an exemption for masking. And I've given you references there to Dr. Halowski's

testimony, which clearly, clearly support that.

So as paragraph 35 says: (as read)

At all relevant times concerning the charges, the pandemic directive contained physical distancing and masking requirements and plexiglass barrier requirements for Dr. Wall and his staff.

And this applied to all chiropractors, not just Dr. Wall.

I -- I won't take you through these in any kind of detail because they're -- they're self-explanatory. But I would urge you to consider some of the sections in there carefully in your deliberations where it's -- I think it's not contentious at all here. There's a requirement to keep 2 metres of distancing. There's a requirement to have plexiglass barriers. There's a requirement to have masking for staff and chiropractors such as Dr. Wall when they're interacting with patients. And it's absolutely clear that Dr. Wall was responsible, by the very wording in this document, for his staff to comply with these orders as well as the requirements of the pandemic directive as well.

Again, the -- the pandemic directive is -- is quoted, and I would urge you to review it in detail in your deliberations.

If we skip to page 13, paragraph 36 of the

submissions is very important. Dr. Wall never asked the College for an exemption from the masking requirements of the pandemic directive, and I've given you a citation from Dr. Wall's own testimony. And I stand to be corrected, but I don't think he ever asked for an exemption as well from the social distancing or plexiglass barrier requirements. I don't know if he gave a direct answer to that, but I don't believe he ever said he requested any type of exemption for that as well.

And as I've said in paragraph 37 -- I reiterate this -- Dr. Wall is responsible, as any chiropractor is, for ensuring that all of his clinic staff comply with the pandemic directive. And Dr. Wall very candidly acknowledged that, and I've given you the citation from his testimony which sets that out. And Dr. Halowski was very clear on that point too. And there's a citation there for Dr. Halowski's testimony.

So I'm now -- and I'm kind of going in chronological order, Mr. Chair and Hearing Tribunal Members. I'm setting the factual stage here. I'm going to keep going in chronological order. Paragraph 38 and Section E deals with the CMOH closure and reopening of Dr. Wall's clinic. And I think it's more accurately an Alberta Health Services closure and reopening. They're relying on CMOH orders, among other

things. But paragraph 38 begins with: (as read)

> As a result of breaching Section 2(1) of the nuisance and general sanitation regulation of Section 26 of CMOH Order 38-2020, AHS closed Dr. Wall's clinic pursuant to a December 8, 2020, order of an executive office notice of public closure.

And I'm going to characterize that as what I would call the first breach by Dr. Wall of his professional obligations. So clearly, these are legal obligations pursuant to the laws of Alberta. But also for this hearing, it is a breach of -- and there's the wording in the charges -- AHS requirements, orders, directions, that type of thing. This is the first breach.

Paragraph 39 states: (as read)

> There's no evidence before the Tribunal that Dr. Wall sought to contest that closure order.

And if Dr. Wall had concerns with the CMOH or the AHS actions, well, it was his -- his purview to challenge them in court, but he chose not to do that. And I'm going to kind of pause here and make a point that I think Dr. Wall's larger fight, his bigger concern, frankly, is with government, not the College. The College is acting on directions, legally binding directions from AHS, CMOH, the government relaunch

program from the Alberta government.

The forum for challenging those is really the courts, not challenging them with the College of Chiropractors. But I just wanted to mention that.

Paragraph 40 is very important. Dr. Wall's clinic is reopened pursuant to a rescind notice order from AHS dated January 5, 2021. And it has four conditions -- four orders, more accurately, that he has to comply with: The first one is that he has to follow the College's pandemic directive; the second is he has to implement the relaunch plan requirements; the second [sic] order relates to booking of appointments and getting explicit patient consent to proceed with booking and undertaking services regarding not masking; and the fourth order is that he must ensure all patients he treats continually wear a mask that covers their mouth and nose for the duration of their time in the clinic, unless they're able to provide some type of exemption.

And I think it's absolutely clear -- this is paragraph 41 -- that Dr. Wall never complied with Reopening Order Number 1. I think he was very, very clear throughout the hearing that he did not comply with the pandemic directive, or at least, to be fair to Dr. Wall, the masking, social distancing, and plexiglass barrier provisions of -- barriers up in

December. For a long time he wasn't in compliance.

So order Number 1 of the reopening order was not complied with. That's absolutely clear.

And in paragraph 42, I want to mention that Dr. Wall himself said he was not in compliance with Reopening Order Number 4 when he reopened. He chose not to follow that. Independently, selectively, he chose not to follow that. So I'm going to characterize the failure to comply with Orders 1 and 4 of the rescind order, the reopening order, as the second breach by Dr. Wall of legal obligations for sure, but also his professional obligations as a chiropractor.

And I just want to stop and say, aside from Charter arguments and all those kind of things that we're going to hear about and talk about, these orders are legally binding. And you can't just pick and choose what you're going to comply with and what you're not going to comply with. That goes to the very foundation of the charges and the responsibilities, the larger, broader, ethical responsibilities of a professional, including those that are reflected or codified in the pandemic directive.

Section F on the top of page 14 gives little more context now moving forward, Dr. Wall and the complaint itself, complaint to the College. We'll talk about the fact that Dr. Wall has been a regulated member

since 1996. He practices at his clinic in Calgary.

Paragraph 45 -- and I think this is very significant -- Dr. Wall received all of the College communications and requests for comments about the development and implementation of the pandemic directive that are set out in Exhibit C-1 to C-22. All of those communications where the College was, as Dr. Halowski testified, asking for input, asking for views, asking for comments, being available at all times, Dr. Wall received all of those. He was aware of them.

Also, importantly, in paragraph 45, other than participating in one digital platform for the period from June to December of 2020, Dr. Wall had no communication with the College about the pandemic directive. And that's his own candid comments to you. And I've given you the citation there from the transcripts where he made that statement.

And then moving on. On December 1, 2020, the College received notification from Alberta Health Services, Exhibit A-2, that it had received a complaint from one of Dr. Wall's patients that he was in violation of the pandemic requirements, including failing to have plexiglass barriers, staff not masking, and Dr. Wall not masking. And, again, I want to emphasize -- we've talked about this earlier -- but

that's a complaint from a patient. It's not coming from the College. The College had no knowledge of any noncompliance at that point, but this is a concerned member of the public, a patient, saying, I think we've got an issue here.

At that point, the College's registrar wrote a letter -- that's Todd Halowski, wrote a letter to the complaints director advising him of this. Those are exhibits before you. And the complaints director, Mr. Lawrence at the time, treated that information, as he was allowed to under Section 56 of the HPA, as a complaint. And he then directed that an investigation occur. And as allowed by Section 55(2)(b) of the HPA, he conducted the investigation himself.

I just want to pause there as well and say there is absolutely nothing wrong or nothing improper with the complaints director choosing to conduct the investigation themselves. That's allowed for under the HPA, and the investigation report is before you as an exhibit as well.

We then have what I'll call an interim step that occurs, Section 65 order. So the investigation has occurred. There's a referral to hearing. At some point when all of this was going on, the complaints director makes a request to Dr. Linford under Section 65 for an interim suspension of Dr. Wall's

practice permit pending the outcome of the hearing.

And the rationale, as you know from the exhibits, is that Mr. Lawrence at the time -- the complaints director -- felt that there was a clear danger and risk to the public because of the noncompliance of Dr. Wall with the pandemic directive.

So I've reproduced Section 65. It talks about the authority to do that. In paragraph 50, I talk about the fact that Dr. Wall opposed that. And there's a series of letters from Mr. Kitchen opposing that. Those are exhibits before you.

And Dr. Wall ultimately -- pardon me. Dr. Linford ultimately receives communication -- this is in paragraph 51 -- from Mr. Kitchen dated December 10, 2020, where he says, Look, with respect to one aspect of this, plexiglass barriers have gone up.

So that's sometime in early December the plexiglass barriers go up, but they weren't in place before then.

So Dr. Linford denies the request for a suspension, and he orders instead some interim conditions. And those are set out in paragraph 52. There were four conditions. And there is, I will call it, in effect, something of an exemption from the pandemic masking requirements. And that's Dr. Linford's decision.

At the top of page 16 of the written submissions, I mention -- and this is very important, Section 65(2) says Dr. Wall, a person who is the subject to the -- of these interim orders or suspension, if it had been granted, has the right to appeal those orders to the courts. So that's a standard provision that applies to all chiropractors, all professions. If you don't like the interim orders or the suspension, you have the right to appeal to the court.

Very significantly, Section 5 does not allow the complaints director to appeal those orders to the court. And I can tell you that the complaints director was not satisfied with Dr. Linford's decision, disagreed with it fundamentally and would have -- if the HPA allowed him to, would have appealed those orders and sought suspension of practice. But he didn't have that ability.

What I'm going to say to you -- and I expect you'll hear about it from Mr. Kitchen that this, again, grants something of an interim exemption from the pandemic directive, is from the complaints director, Dr. Linford, from his perspective, Dr. Linford was wrong, that these orders, again, would have been appealed, that they were dis -- they were disproportionate to the very severe actions that were being carried out by Dr. Wall, and that they should

have been different.

I think it's very important to remember that these are interim orders and that Dr. Linford didn't have the benefit of all the facts and information before you, and they are not binding and determinative on you.

You, as I said, in Section 80 of the HPA, are given the authority to determine whether unprofessional conduct has occurred. And any of the statements Dr. Linford made, which again, the complaints director strongly disagrees with, those are not binding on you.

And, again, the complaints director would have appealed this, would've sought a full suspension if he could have. But he didn't have that ability.

So, again, switching gears a bit, as all this is happening, there's the question of the letters from Dr. Salem. And during the investigation, Dr. Wall provided a December 12, 2020, letter from Dr. Salem. That's Exhibit AA. And that comes up after the complaint process has been initiated. There's no medical information, no attendance at a doctor by Dr. Wall until then. And very importantly, in Section 55 of the written submissions, I mentioned the fact that the -- the complaints director felt that the letter from Dr. Salem was quite light. It was, I think, a couple lines long. And he said, Look, I need more than this. And he requested and received a second

letter from Dr. Salem dated January 8, 2021. And this was a somewhat more comprehensive letter, had -- I'll talk about this in a few -- a few minutes. It has a little bit more meat on the bone, but from the complaints director's, not much. There's no diagnosis formally, no prognosis, no treatment plan, nothing like that. And it also contains a series of what I'll call commentary or editorial comments by Dr. Salem about masking and exemptions and things like that that don't really have much to do with Dr. Wall's condition.

So, again, kind of proceeding in something of a chronological order, Section I of the submissions talks about Dr. Wall's actions regarding the reopening orders in the pandemic directive. And again, I think largely this is uncontradicted evidence and information. Section 56 says: (as read)

> Dr. Wall initially wore masks when treating patients, but sometime in June of 2020, he discontinued that practice on the basis of a self-diagnosed medical condition.

And I've given you some citations from Dr. Wall's testimony where he -- he confirmed that. He also confirmed, the balance of paragraph 56, that he had no training in anxiety disorders, but he self-diagnosed himself and determined that he had an anxiety order [sic] sufficient to qualify for an -- and I

believe I've quoted his words, "some type of exemption".

Carrying on, then, on June of 2020, Dr. Wall began treating patients without a mask and without distancing by 2 metres. Again, uncontroverted. I've given you a citation there.

The next paragraph also refers to the fact that Dr. Wall very candidly stated that his son, staff at the clinic, were not wearing masking, and that his son didn't have a medical exemption of any kind, and that the staff are not required to wear masks. And, again, I've given you the citations there for Dr. Wall's own words.

And I'm going to pause there, and I'm going to say to you that's what the complaints director says is the third breach. We have the first and second breaches I talked about, not complying with AHS Nuisance Act provisions, and those kind of things. That's the first breach. The second breach is not complying with the reopening orders for his clinic, at least two of them, maybe more, but at least two of them. And here, we have I think clear evidence before you of what I'll call the third breach of Dr. Wall's professional obligations.

And as I mentioned later in the -- or just after that in the submissions, Dr. Wall did not provide any

medical evidence to the College of his alleged medical inability to wear a mask until the Section 56 complaint was initiated.

Paragraph 60 is very, very important from the complaints director's perspective. And I think it's critical to the -- the hearing. After making the independent decision to not mask, Dr. Wall never contacted the College to advise them of his decision. He never contacted the College to ask for an exemption from the pandemic directive. And, again, Dr. Wall has been very candid about that, and I've given you the citations for that.

There's also no evidence before the Hearing Tribunal that Dr. Wall ever requested an exemption from the CMOH orders, such that they could apply to him. I think I've told you that chronologically, they couldn't apply. They weren't, in fact, in effect when the exemptions were in effect from December to June of 2020, but there's no evidence that he even tried to get an exemption from the CMOH.

Paragraph 63 is, again, something that the complaints director said -- says is fundamental to this hearing. When asked whether it was his obligation as a professional to notify the College of his concerns about the pandemic directive, Dr. Wall responded "I will say yes". And I've given you the cite for that.

That occurred during my cross-examination of Dr. Wall. And that was a very honest answer. And it's a very critical fact for the Hearing Tribunal.

Again, the complaints director strongly submits that Dr. Wall had an obligation as a healthcare professional to notify the College of any thought of not complying with the pandemic directive, and to engage in a dialogue with them.

I'll speak about this a little bit later on, but I think Dr. Wall's evidence, when he was being questioned by Mr. Kitchen, is that he was very apprehensive about contacting the College. And he really didn't think he'd have a chance to get an exemption.

And that may be understandable. And there's always apprehension for professionals when they're engaging with their regulator. But that's not -- not an answer to a professional obligation, particularly when we're talking about something so serious here as the pandemic directive.

You can't say, I'm uncomfortable about this. I don't think I'm going to be successful. I'm not even going to try.

I think there's a clear professional obligation on the part of Dr. Wall to do that. And this also ties into something I'm going to talk about in a little while, and that is with respect to the anticipated

human rights legislation argument that Dr. Wall will raise. The College couldn't ever accommodate his condition because he never asked them to accommodate his condition. They're in an impossible situation.

Paragraph 17, starting with -- pardon me -- page 17, starting with paragraph 64. Dr. Wall stated the following in terms of whether it was his obligation as a professional to notify the College of his intention to at least partly not comply with the pandemic directive. And there's a quote: (as read)

> Yeah, I -- with respect to masking, again, this was an issue that was affecting my health. I believe it was harmful to me, and so I didn't think it was necessary to respond to the College at that time.

I want to be respectful to Dr. Wall's concerns, or his position there, but, again, as a professional, you have higher, more significant onuses and obligations. And they can sometimes be very, very difficult obligations and onuses.

(UNREPORTABLE SOUND)

MR. MAXSTON: My apologies. My phone just went off. I set it to silent.

So, again, the comment here that he didn't think it was necessary to respond to the College at that time really misses the point. There is an overriding,

larger professional obligation to do that. All information given to the College by a member, when it's in a practice visit, when it's in a practice permit renewal, when there's an inquiry made by the member, that's kept confidential. There's been no evidence to the contrary that any kind of communication that Dr. Wall would've made would've been published. Everything would be confidential. And that's reflected in things like Section 118 of the HPA where we have incapacity assessments of members, where very delicate healthcare information sometimes becomes the subject of an incapacity order. And, again, it's all treated confidentially.

So very respectfully, this is not an answer that can be given to the charges. Dr. Wall had an obligation to respond to the College.

The next thing I want to speak to is Section J of the -- the submissions. And these are Dr. Wall's acknowledgements concerning the factual basis for the charges.

THE CHAIR: Mr. Maxston, I'm just wondering, for the benefit of those of us writing and taking notes, et cetera, perhaps we can take a five-minute break here just to stretch and a bio break. So I -- we'll -- we'll reconvene at 11:15. Five minutes from now. Okay?

MR. MAXSTON: Mr. Chair, why don't you take ten minutes? I don't want people to be rushing.
THE CHAIR: Okay.
MR. MAXSTON: Why don't we just take ten minutes?
THE CHAIR: Thank you, Mr. Maxston. That's -- that's fine with me. So 11:20. We'll take a ten-minute break now. The hearing is in recess.
(ADJOURNMENT)
THE CHAIR: The hearing is back in session. We will continue with Mr. Maxston's submissions.
MR. MAXSTON: Thank you, Mr. Chair. What I intend to do is to continue until noon. If I -- if I don't stop right at noon, someone can certainly remind me of that. I think we'll want to stop for a lunch break at 12:00, and then we can reconvene.

I was on page 17 of the written submissions and Section J, Dr. Wall's acknowledgements concerning the factual basis for the charges. And very significantly from the complaints director's perspective, there was an exchange that occurred between myself and Dr. Wall at pages 640 to 644 of the transcript where I asked Dr. Wall about each of the charges. And I literally read them to -- each of them. And he provided very honest and candid answers when I went through each of

the charges with him, and I've reproduced those here for you.

So with respect to Charge 1, I asked him "Do you dispute any of those facts?" And "No, I do not". And we had the same exchange for Charges 2(a), (b), and (c). Same exchange on Charges 3(a), (b), and (c): (as read)

Q Do you agree with that factually?

A Like "masks not being worn" I believe is --

Q Yeah.

A -- what you meant.

Q Yeah, sorry.

A That's correct.

Q And (b). Is that factually correct?

A Correct.

Q And (c). Is that factually correct?

A Correct.

And then we have the same or similar exchange on Charges 4(a), (b), and (c). Beginning on or about -- sorry -- I'm at the top page 18. (as read)

Q (as read)

Beginning on or about June of 2018, Dr. Wall failed to chart and/or failed to properly chart communications with his patients about him not wearing a mask.

[That's (a)]. Would you agree with that?
A Yes, I would.
Q (b): (as read)
[The] staff not wearing masks.
Would you agree with that?
A Yes, I would.
Q And (c): (as read)
His patients not wearing masks?
A Yes, I would.
And then I had another exchange with him, a final exchange, on Charges 5(a) and (b): (as read)
Q Do you accept that factually?
A Yes.
Q and (b): (as read)
Do you accept that failure to follow the pandemic directive? Do you agree with that factually?
A Partially, but, yes, with respect to masking; is that what (b) would be?
Q Yeah, I would. Yes, I think, in fairness to you, I'm thinking about masking, social distancing, and the plexiglass barrier.
A Correct, yeah.
I -- I can't overstate the importance of this exchange for the factual basis of the charges. There was some

discussion in redirect between Mr. Kitchen and Dr. Wall about some of his defences to these facts. But the clear statements he made very candidly, under oath, were acknowledgements by him of the facts that underlie the charges. And I really think those are -- are not in dispute. Mr. Kitchen will talk about defences to them, but those underlying facts are just not in dispute with respect to all five of the charges.

So I'm now going to take you to Section 3 of the written submissions and talk about the Health Professions Act and self-regulation. And as we comment in paragraph 66, the charges here focus on a professional's obligations to comply with his regulatory body. And this would include the pandemic directive. And that's founded on the College's overarching and paramount duty of public protection to ensure safe, competent, and ethical practice, and that there's no harm to patients.

And that is reflected in Section 3 of the HPA, which sets out the College's mandatory public protection duties. 3(1)(a): (as read)

> A College must carry out its activities and govern its regulated members that manner that protects and serves the public interest; [(b)] must provide direction to and regulate the practice of the regulated profession by

its regulating members; [(c) and (d)] must establish, maintain, and enforce standards for registration, continuing competence, standards of practice, and a code of ethics. And then we have some supplemental sections of Section 31 that aren't particularly relevant to what we're talking about today.

What I want to emphasize here, is that the word "must" appears in Section 3(1)(a), (b), and (c), and (d). So these, again, are mandatory legislated duties of the College. There's no discretion. The College gets the privilege of self-regulation, and its members do, but it's premised on these mandatory duties being complied with.

And Section 6 of the HPA states that the College's Council is responsible for carrying out those functions. I've quoted you that section here. I won't take you through it, but it gives the College Council the clear, legislated authority to carry out that public protection function. And one of those things would of course be the ability to create the pandemic directive, which was required by law, relaunch document and CMOH Order 16-2020.

Section 69 might seem like a minor thing, but I do want to emphasize it. The College's Council is made up of chiropractors and members of the public. And I'm

going to just kind of pause here. And I think there was, at times, a thread, T-H-R-E-A-D -- not threat -- a thread of submissions from Mr. Kitchen, and perhaps in Dr. Wall's responses, that the College Council was blindly following authority, that it was doing things that were somehow inappropriate, that they were, again, just following the CMOH without any kind of independence or decision-making. And I'll talking about the how the pandemic directive was created, and I think that will dispel that argument, all that happened in it.

But here it's important to remember that this is self-regulation. Self-regulation. Which means that there are chiropractors on the Council. These are fellow members of Dr. Wall's profession, his peers, who are deciding, among other things, to create the pandemic directive.

And equally important, there are members of the public on the College Council. They are there to provide the public's perspective and, where appropriate, to act as a check and balance if it becomes too profession-specific.

So I just want to emphasize there that the College Council is a multilayered body. It's Dr. Wall's peers. It has public representation. And there's no evidence whatsoever that the College Council did anything other

than properly carry out its Section 6 duties when it created the pandemic directive.

I've also got, in the following section of the submissions, some excerpts from some case law which expand on the meaning of Section 3 of the HPA, and this public protection legislated mandate that the College has. And I think these are important to reinforce the requirements for engagement and communication and candour and openness that Dr. Wall had with the College.

So we look at the Alberta Court of Appeal in Zuk v. Alberta Dental Association and College. The first quote there is from paragraph 94. And it says: (as read)

> Section 3 of the HPA has a purpose: to govern the profession in a manner that protects and serves the public interest.

There can be differing views on this, but that's the starting point, is it serves the public interest. And a couple of lines down, the fourth line down, there's a sentence right on the end: (as read)

> This statutory objective is pressing and substantial, and of great importance.

So this is serious stuff we're talking about here. It's not casual. It's pressing. And there's an obligation on the College to protect the public

interest, and I would say even err on the side of caution in protecting the public interest and avoiding harm before it happens.

And that takes me to Section 123 in the Zuk decision. And about four lines down, there's -- it begins with 31. It says: (as read)

> Section 31 of the HPA grants the ADAC the authority to not only protect the public from demonstrable harm, but also to ensure high ethical standards and professionalism and foster an environment in which the dentistry profession can most effectively serve the public.

If you skip to the bottom of the page, there's a quote from that decision where they're quoting another case, Brown v. Alberta Dental Association. Right at the bottom of the page: (as read)

> Furthermore, in order to meet the objective of public protection, it is essential to maintain the honour and dignity of the profession. To meet these objectives, the legislative scheme must allow for controls on a dentist's or chiropractor's business.

And then there are other cases that I've quoted you that emphasize the importance of self-regulation. Mussani v. College of Physicians and Surgeons

involved a case entirely different from this, where there was sexually inappropriate conduct with a patient, and there was an argument because the penalty was revocation of licence, that the Charter was violated. That was the -- the physician saying Section 7 and 12 of the Charter was violated.

And the Court said something very important in paragraph 41: (as read)

> The weight of authority is that there is no constitutional right to practice a profession unfettered by the applicable rules and the standards which regulate a profession.

And then Tanase, the next case I've quoted, is at paragraph 73. Again, totally unrelated facts, a sexual misconduct allegation. But the principles are important. Again, they quote Mussani. The Court -- this Court held that there was no constitutional right to practice a profession, nor is there a common law right to practice a profession free of regulation.

Third line down: (as read)

> The right to practice a profession (in that case, law) is a statutory right -- an important right, to be sure, but a right that is subject to adherence to the governing legislation and the rules made under it.

And I couldn't have said it better than that. And, you

know, we're not talking here about blind obedience and compliance without thinking and those types of things. Dr. Halowski took you through Exhibit C-1 to C-22, where the College wanted input from its members, made significant efforts to get input from its members about the nature and content of the directive: how it was going to be created; how it was going to be implemented.

When I write -- read these excerpts from the cases -- and I don't think the judge -- judges intended this either -- it's not about blind obedience to some crazy, highly irregular provisions that a profession might create. It's about the overall obligation to have adherence to professional regulation and the importance of that to, again, adhere to the governing legislation and the rules made under it.

The next section of the submissions talks about something called the "ungovernability principles", and I want to be very fair here that this is a situation where I want to mention to you some other case law which reinforces the importance of compliance with a professional regulator. But ungovernability, again, to be fair, arises in the context of the penalty phase of a hearing. And it's not really a charge. It's a finding that a Tribunal can make saying there's been such extensive noncompliance, a member is ungovernable.

So we are not at the penalty phase here. But I wanted to mention some of these cases because the principles they talk about are, broadly speaking, again, very important about this concept of self-regulation and the obligations that professionals have.

So if you go to page 21, there's a quote from an Ontario v. Savic decision. And it says: (as read)

> Ungovernability speaks to a pattern of conduct that demonstrates that the member is unprepared to recognize his or her professional obligations and the regulator's role. The privilege of professional regulation depends on members' willingness to be governed in the public interest, and to abide by the directions of the College.

And then the next case, Law Society v. Slocombe, very important quote: (as read)

> Without compliance, the Law Society is unable to fulfill its role of protecting the public.

Foundational requirement of self-regulation is member adherence to those rules, regulations, and requirements of the profession. And, obviously, why is that so important? Well, so the public has trust. This privilege of practicing in a profession means that whenever someone walks into an office of a

professional, a doctor, dentist, lawyer, architect, chiropractor, what have you, they know that there's an onus on that member to comply with their -- their profession's requirements and that they can trust their member in that regard. And it involves candour and openness and honesty, some of the things that I think Dr. Wall's choices were inconsistent with.

That kind of ties into paragraph 78, where I talk about the fact that, again, ungovernability arises in penalty phases, but those principles are applicable because we're looking at Dr. Wall's conduct and his deliberate decision to not engage with the College about the pandemic directive, to not come forward and engage in a discussion with them, to provide feedback, to request an exemption from his -- from the pandemic requirement, and his decision to independently self-diagnose and -- and rely on that.

So, again, the next paragraphs in this section talk about the fact of the -- the affirmative -- or the complaints director's submission that there's an affirmative obligation on Dr. Wall, again, to be open and honest and candid and engaged with his regulatory body. And instead of doing that, until the complaint notice was received from the AHS, Dr. Wall chose to maintain secrecy, frankly, about his medical condition and what he was doing at the clinic. And that's just

not consistent with self-regulation.

And Dr. Wall has acknowledged that obligation in the Q and A that I mentioned to you where he talked about it. It was his obligation to contact the College. It was his professional obligation.

Closing comments there, I talked about the fact that, again, it's untenable for a professional regulatory body to maintain professional regulation of privilege granted by government if there is selective noncompliance by regulated members.

So, again, from the complaints director's perspective, there's an affirmative obligation here, a clear professional obligation for Dr. Wall to engage, to communicate, to be open, to be candid, and to act, frankly, differently than he did.

The next section of the written submissions talks about analysis of the documents and testimony before the Hearing Tribunal. And I'll begin by saying that there are volumes, literally, of transcripts. I think we've got a thousand pages of testimony for you to look through, close to that anyhow. There's a lot of information for you to digest. And the complaints director would urge you to look at those transcripts as carefully as possible.

I've credited some appendices to the written submissions which set out selective portions of the

testimony which we think are very, very important for you to review. I'm going to take you through those. I'm going to try to be as brief as I can. But there are some important things to emphasize.

So, Mr. Chair, to avoid the -- the handwriting concern that you talked about before, I wonder if I can ask everyone to go to Appendix 1. Again, there should be a bookmark function on the right-hand side of the submissions, once you've -- you've opened them, that'll take you right to Appendix 1. And I'll just wait a minute or two to make sure that everybody has them. And this will be the summary of Dr. Hu's evidence.

THE CHAIR: Mr. Maxston, if I could interject for a moment. This is the first opportunity or occasion during your submissions where a witness's name has been mentioned. And in this case, it is Dr. Hu. His name was not covered by our previous order. But I just want to clarify for the observers -- I'll just reiterate what I said before -- that the -- that the partial publication ban included the identification of the witnesses, the Tribunal Members, and Counsel.

So those are the people whose names are not to be published prior to this matter having reached a final decision and that decision being published. So that was just -- just a reminder for the observers as we may

now be getting into mentioning names. Thank you.

MR. MAXSTON: Mr. Chair, I'll assume that everyone is at Appendix 1. And before I take you through again, very high level, the excerpts here that I've prepared, I just want to talk about something that I mentioned to you at the beginning of the hearing in my opening submissions. And that is why we called Dr. -- Dr. Hu when the complaints director's position is this really isn't about masking, it's about a larger self-governance question.

And as I said to you, we had not intended to call an expert witness on masking or social distancing and COVID, but Mr. Kitchen advised us, fairly, that his client was going to be calling expert witnesses, at least three, and then the Tribunal allowed a fourth expert witness. And we knew about at least the three well before the hearing. So we called an expert witness because we -- we didn't want to be faced with the argument that Mr. Kitchen might make that, Hey, we had four witnesses -- expert witnesses testify, and the College had none testify.

We wanted to be very clear that, you know, we called Dr. Hu for a reason, and it was to provide context to the other expert witnesses that were testifying.

And as I'm going to talk about in a little while,

there's conflicting expert evidence on masking and social distancing and COVID. And that's fine. There's all kinds of different views from stakeholders and government and policymakers and members of the public.

As I'm going to talk about to you later on, the test really here is whether there was a reasonable basis for the College to implement the pandemic directive and the masking requirements and social distancing of plexiglass barriers it contained. There doesn't have to be an absolute correct answer, which I think is what Dr. Wall wants to make this hearing about in terms of masking and social distancing, et cetera.

So that's Dr. Hu, why we called him. And, again, let's not lose site of the fact that this -- there's going to be diverging opinions about COVID-19, but that's not really the issue before you.

So if you look at Dr. Hu's excerpts here, you'll see on page 1 I talk with him about his CV, how he's worked with the AHS and the CMOH. He talks about the communication -- pardon me -- the work he did with AHS and his responsibilities for actually responding to COVID-19.

The bottom of that first page, he talks about working with the Public Health Agency of Canada and his consulting role that way.

If you go to page 2, the first highlight -- or the

first note is page 121. And there, he talks about the fact that he helped devise and implement AHS masking guidelines and -- for the infection prevention and control committees.

We skip down to the next set of quotes. He talks about being involved with the City of Calgary, providing them with advice about their masking bylaw.

Next section, beginning on page 127, I've quoted a few things about the fact that he's been a medical officer of health, and he's advised public health bodies in Calgary in that regard. You'll see towards the bottom of the page that he talks about Alberta Health Services and the fact that he was the initial chair of their scientific advisory group, or SAG. That's page 128. At the bottom of that page, he talks about working very closely with the City of Calgary providing recommendations about the pros and cons of masking, that type of thing.

Page 131. I'm on page 3. If you go to the top, there's a quote about the role of the CMOH, what that is, the fact that the CMOH sits within Alberta Health, and it sets overall health policy.

The excerpts from page 132 relate to the fact that the CMOH issues -- can issue legally binding orders and instruments that essentially limit people's activities to prevent the spread of infectious diseases or other

health hazards.

He talks about the fact that the CMOH orders are prepared in -- within the Ministry of Health. Two sections at the bottom, he talks about the CMOH masking orders and the fact that they were created. This is page 137 at lines 18 and 19: (as read)

Because we know that masking at indoor places reduces transmission of COVID.

And then he talks at the bottom of that page, when we were talking about Order 16-20, that all regulated health Colleges have to comply with it.

We go to the top of page 4, there's a continuing set of excerpts, lines 11 to 25, where he talks about the fact that Colleges were required to come up with the pandemic directive and that there was oversight from the CMOH in the fact that they could revise them.

The middle of that page, page 143, he talks again about CMOH Order 16-20 and the College creating, being required to create their own pandemic directive. He talks about the fact, in the page 144 excerpt, that there was a CMOH giving deference to the Colleges to create pandemic directives that really fit the particulars of each of their professions, close-body contact care providers like chiropractors being an example, and the fact that the CMOH had an oversight function as well on those.

The bottom of that page, he talks about the fact that there was mandatory masking when treating patients under CMOH Order 16-2020. If you go to the next page, page 5, beginning at page 151, he again talks about CMOH orders requiring masking. And when you have the time to read that excerpt, you'll also see a common theme here: Masking protects the user and the people around the user, patients.

Bottom of page 5, he talks about the AHS documents, those AHS exhibits that we had entered as exhibits and their importance and how they echo and support the benefits of masking.

If you go to page 6, you'll see beginning on page 158, the section on 158, and above that, again, there's dual protection for masking: The wearer and the persons around them.

He talks about, an excerpt on page 162, there's overwhelming evidence showing that masks reduce transmission of COVID, especially in a healthcare setting. Dr. Wall has presented experts who have their own studies and can rely on them. And, again, as I've said to you, this isn't a conclusive debate. There just has to be a reasonable basis for the College to adopt the pandemic directive.

He's very candid, at the bottom of page 6, that initially Public Health was saying -- Public Health

Canada was saying, You don't need to mask. But he said, You know what? I'm on page 7 here. As we became more aware of COVID-19, we knew that masking was the right thing to do, and we changed our direction based on the good information we had.

Page 7 in the middle, he talks about greater interactions: (as read)

The greater the interactions with people, the greater the risk of COVID.

He talks a little bit on page 7 about the need for an actual physician to make a diagnosis for a medical exemption, not self-diagnosis. And that I'll get to. This was also echoed by some of Dr. Wall's own expert witnesses.

So I'll invite you to look at Dr. Hu's testimony in greater detail, but these are some -- some excerpts we wanted to provide to you.

I'm going to take you next to Dr. Halowski's excerpts. And I'll take you through those. These are Appendix 2. So I'll just wait a minute until you're all there. I notice it's 13 minutes before 12. I might just go a little bit over 12 because I think -- I don't know if I can do this quite in 13 minutes, but I'll see, Mr. Chair.

So, again, we'll ask you to look at Dr. Halowski's entire testimony. I think it was very compelling. On

the first page of this excerpt, he talks about the fact that the Council is comprised of public members and chiropractors. In the middle of the page, 310 to 311 and 314, he talks about the fact that there is a lack of training for all chiropractors, substantive training, in pandemic matters and public health.

Beginning at the bottom of page 1, he talks about what began happening in March of 2020 when they started -- College Council started hearing about --

THE CHAIR: Mr. Maxston, you're freezing up.

MR. MAXSTON: Oh, I'm sorry. Can everyone hear me?

THE CHAIR: My entire screen is frozen.

MR. FISCHER: I'm having no problem --

MR. MAXSTON: Sir, I'm wondering if that might be your screen alone.

MR. KITCHEN: Yes. Chair, it's on your end, I think.

THE CHAIR: It's come back on. I'm sorry. Did anybody else encounter problems, or was it just me?

MR. FISCHER: We think it was just on your end, Mr. Chair.

THE CHAIR: Okay. I apologize. I'm not sure why. I usually have a very good connection.

Could I just ask you to go back one statement,

Mr. Maxston.

MR. MAXSTON: Yes. I was on the bottom of the first page, and it's Dr. Halowski's testimony about what started happening in March of 2020 when the College started hearing things from Dr. Hinshaw about COVID and public health initiatives and those types of things.

The next page is 2 to 3 and 4. I'll go through these in a little bit of detail when I talk about the development of the pandemic directive. But I'll just say for now, it's absolutely clear from Dr. Halowski's evidence that there was a significant amount of research and activity and consultation that occurred, including with the Federation of Chiropractic Colleges of Canada, with other Alberta Health Professions Act regulators, with a whole host of individuals in developing the pandemic directive. His testimony on page 3 talks about the member consultation that occurred, the town halls, the ThoughtExchange platform. And very importantly, in the middle of page 3 -- of the heading page 320 to 21, what is the purpose of having all this communication, those 22 exhibits I took you through at the hearing, he says, Well -- this is line 26. It's really important -- 25: (as read)

> Its really important for us. Like, we are a very transparent organization. Just like our

members, this was novel for us, and we were doing our absolute best to make sure we provided a safe environment for the public, but we also needed to make sure it's enforceable.

If you go to page 4, beginning with the heading page 324, he talks about the submission of the pandemic directive. He talks about the fact that there were no changes made to it by the CMOH. He talks about the fact that the -- there were no -- why there were no exemptions in the CMOH -- pardon me -- in the pandemic directive, because there was an expectation from Alberta Health Services and others that you wouldn't have any exemption for close-body contact healthcare providers.

And he does talk at the bottom of page 4 that there was discussion at the Council level about the thought of exemptions. And if you go to page 5 at the top -- again, I'm really jumping here, Mr. Chair; you can look at this in greater detail later on -- he talks about the implementation of Telehealth. Council is alive to these issues of how this is going to change chiropractic practice when they have the pandemic directive. And he talks about Telehealth being a new modality, brand new.

Page 5 talks about orders -- CMOH Order 16-2020

and, again, the guideline I took you through and the requirement in it for masking and how they created their own pandemic directive.

When you go to page 6 and you look through it, you'll see that he was very clear, and documents are clear on the face of it, the relaunch document on Order 16-20, that having that pandemic directive was a condition for reopening, that there was no doubt in anyone's mind the chiropractors couldn't return to work unless that pandemic directive was in place.

When you go to page 7 -- again, I invite you to look at this at your leisure. Again, he talks about the fact that there was consideration of exemptions, but the College Council decided that public safety outweighed the need for -- or the possible need for exemptions.

Page 8 talks about PPE requirements and the AHS' position on mandatory masking. He talks about the fact that surgical masks are the minimum required standard.

Again, some excerpts on page 9, beginning at page 343, where he talks about who is responsible in a chiropractic clinic for ensuring staff comply with the pandemic directive. Well, it's the chiropractor. We talked a little bit about that before. And he talks about the two-way protection as well, two thirds of the way down the page: protection for the wearer, and

protection for the patient.

Again, some comments at the bottom of page 9 that the College Council considered less restrictive measures, but if you go to page 10, ultimately felt that -- those were discussed, but that masking, or required masking at all times was the -- was the important factor to consider.

Page 10, he talks about the fact that there are other HPA colleges who created pandemic directives. And this is midway down on page 10 under the heading page 345 at line 23. Other HPA Colleges created pandemic directives, and, to his knowledge, they all had mandatory masking requirements.

Page -- pardon me -- page 11. Some more comments at the top about the AHS documents being considered and the reasons for AHS masking. Very importantly, at the bottom of that page, the bottom of page 11, I ask him -- this is line 21. (as read)

To your knowledge, has AHS ever granted an exemption for masking for the health workers they regulate?

And his answer is "no". And he says specifically, I spoke to AHS and -- about this, and even where they had latex allergies and things like that, there was no substitute for a procedural mask. That was on page 12.

Pages 12 and 13 talk again about the consultation.

All those notices that went out to the members, Exhibit C-1 to C-22. And all of them received them. He talks again about Telehealth being a new modality.

Page 13 talks about the -- again, the communication and the desire for feedback. That's going ahead to page 14 as well. Page 14 -- I think I mentioned this before, but midway through page 14 on -- it's line 10, Did you receive any emails from Dr. Wall, any feedback about the directive? And the answer to that is, No.

And then I take him through the -- in the balance of these pages, take him through the -- again, the development of the pandemic directive. You'll see quotes from him on page 16 about that, about the fact that -- maybe I'll let you get to that page, page 16. On line 15, he says: (as read)

So we -- again, we were always very open and communicative with members, especially when questions were coming up.

And a chunk down from that line 17: (as read)

Q So this is an opportunity [we're talking about these notices] for members to contact you again?

A Yes, it is.

Top of page 17, he says: (as read)

We're available to be communicated to at all

times.

The middle of that page, he talks about the fact that there were no emails or phone calls from Dr. Wall about the pandemic.

The balance of the document -- pardon me -- page 18, talks about the fact that the pandemic directive was fluid and that the College Council was always alive to issues that might require change.

Page 19 is very important. In the middle of that page, starting on the pages -- the quotes from pages 415 to 416, he talks about the fact -- and this was under cross-examination with Mr. Kitchen -- that the College Council did consider human rights and constitutional issues when they created the pandemic directive. But they decided that the -- the overall responsibility was to practice in as safe a way as possible and protect patients.

So he's -- again, that was a live issue for the College Council when it was going through -- going through the development of the pandemic directive.

Mr. Chair, I was a little faster than I thought. So the last five minutes maybe I'll try to take you through -- this will finish the complaints director's witness summaries -- Appendix 3 which is David Lawrence's testimony, excerpt from David Lawrence's testimony. And I'll just wait a minute and make sure

everybody is at Appendix 3.

Again, just very, very briefly.

THE CHAIR: Mr. Maxston, just for the -- just for the benefit of the observers, Mr. Lawrence was the former complaints director, I believe --

MR. MAXSTON: That is correct.

THE CHAIR: -- and who has since retired and has been replaced by Mr. Fischer.

MR. MAXSTON: So, Mr. Chair, page 1 talks about Mr. Lawrence's testimony that regulated health professionals have to comply with their professional obligations to protect the public.

There's some discussion at the bottom of page 1 and page 2, the top of page 2 that there was no exception or exemption from the pandemic directive.

He goes on to talk about the -- on page 2, the Section 56 complaint and how it came to the College's attention. Page 3 is important. In the middle he talks about -- again, I don't think this is controversial, but page 3, there was a quote from page 465, did Dr. Wall indicate whether or not he was masking. This was in the context of the investigation. He said he was not. We talked about the Section 65 orders on the next couple of pages there.

Page 4, there's some discussion. There's discussion there about the letter from Dr. Salem, the

first letter from December 12 of 2020. And if you go to the top of page 5, you'll see Mr. Lawrence expressing his concerns, that he thought that was a very general note, and that's why he asked for the -- for the second letter.

There's a very important exchange on page 5 from page 48 of the transcript, What was your -- this is me talking, me asking the question: (as read)

> What was your expectation if a member couldn't comply or was thinking of not complying with the pandemic directive?

And then the answer: (as read)

> So if there's questions about compliance, I would expect that they would -- usually what members do, is they reach out to the registrar and they talk about, you know, what the -- what options may be available or, you know, a question about, you know, if they're not sure about something. Usually the registrar fields those types of questions, and they reach out about that.

Bottom of the page, he echoes some of the comments that I made earlier to you about selective noncompliance or selective compliance, to put it differently, is a problem.

If you go to the next page, it talks about the

conversations that Dr. Wall -- the conversation that Dr. Wall and he had. And at the top of page 6 on December 3 -- and he indicates that there was some discussion about human rights accommodations and the -- this is line 3 here. I think he said something to the effect of, Isn't there a human rights part of this? I don't know the exact words, but something to that effect.

So that's in December. That's the first time any even broad discussion of accommodation or exemptions come up. And I'm not even sure it was -- I don't think it was, frankly, even a request for an exemption or some type of accommodation.

And if you go to the last page, page 7, there's a quote, page -- about page 530. Again, did Dr. Wall ever ask for an exemption, line 23 to line 24. No, he didn't.

And then we have some comments from page 532 about the fact that Order 16-2020 was mandatory and that there was required masking.

Mr. Chair, that is a very brief, high level summary of the complaints director's witness testimony.

I see it is 11:59, so Im going to, again, urge you to review the testimony in detail. But look through those. Those excerpts might be helpful with you. I'm assuming you're also going to want to take a break now

for lunch. And I'm available to answer any questions now too, I should say.

THE CHAIR: Thank you, Mr. Maxston. I think we will reserve on any questions until you finish with your submission. Just can you give us any idea of how long you would require after lunch?

MR. MAXSTON: I was thinking I would take about, you know, two to three hours in total. And I think I started at 10:30. Am I right? Because we came back at 10:20 or 10:30, so I'm thinking I'm going to need about another hour, hour and a half. What I'm going to do when I come back is I'm going to finish up with my review of, in this case, Dr. Wall's witnesses, and then I'm going to skip back to the written submissions and take you through the balance of them.

THE CHAIR: Okay. That's great. Then we will break for lunch. And I'm going to extend lunch a little bit until 1:15 when we reconvene. It's -- I need to pick up some ink, so I will do that during lunch. And we will -- we will recess for now and reconvene at 1:15.

PROCEEDINGS ADJOURNED UNTIL 1:15 PM

Proceedings taken via Videoconference for The College of Chiropractors of Alberta, Edmonton, Alberta

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June 16, 2022 Afternoon Session

HEARING TRIBUNAL

J. Lees	Tribunal Chair
W. Pavlic	Legal Counsel
Dr. L. Aldcorn	CCOA Registered Member
Dr. D. Martens	CCOA Registered Member
D. Dawson	Public Member
C. Barton	CCOA Hearings Director

COLLEGE OF CHIROPRACTORS OF ALBERTA

L. Fischer	Acting Complaints Director
B.E. Maxston, QC	Legal Counsel

FOR DR. CURTIS WALL

J.S.M. Kitchen	Legal Counsel

A. Vidal, CSR(A), RMR	Official Court Reporter

(PROCEEDINGS RECOMMENCED AT 1:18 PM)

THE CHAIR: Okay. We will continue. The hearing is in session once again. And I believe that Mr. Maxston is -- will continue with his submissions.

MR. MAXSTON: Thank you, Chair.

You may have recall before we broke for lunch, I was taking you through some transcript excerpts that appear as appendices to the complaints director's written submissions. I just ask everyone to go to Appendix 4, which is, again, some excerpts from Dr. Wall's testimony. And I'll take you through those, frankly, quite briefly. I'm going to be speaking to this in some respects in other parts of my submissions, and some things I've covered, but I wouldn't mind going through a few things with you.

THE CHAIR: If you could just give us a moment to get to Appendix 4. That's page 79? Page 80, I guess?

MR. MAXSTON: Sounds right.

THE CHAIR: Okay. Thank you. Everybody is okay? All right. Thanks.

MR. MAXSTON: So, Mr. Chair, again, these are excerpts. I'll just start on page 1 about halfway down the page. There's a confirmation, again, Dr. Wall candidly admitting that in June he stopped wearing a mask and stopped utilizing 2 metres of distancing. There's some comments on the balance of page 1 about the medical note and not receiving that until December 5. And at the bottom of that page, some comments, again, confirming that Dr. Wall's son was not

masking when he was working at the clinic.

If you go to page 2, beginning with the entry on page 606, you'll see an exchange where I start with a question saying: (as read)

Do you think the College is trying to protect the public?

And Dr. Wall answers "yes". And then he indicates that there is some type of collaboration between AHS and the College where the College wants to please authority, et cetera.

And I kind of touched on this a little bit before, but I would just, again, emphasize there's no evidence before you of any inappropriate collaboration or anything improper by the College Council in dealing with AHS or the CMOH.

The bottom of that page, the excerpts on page 612 talk about the fact that he can always contact the College. He doesn't need a standard of practice that says, Call us. Dr. Wall, like any member, is able to reach out at any time and contact the College. And then at the bottom of that page, again, a comment emphasizing that Dr. Wall acknowledges he didn't contact the College until December of 2020.

The next page of the transcript excerpts starts at page 619. At the top, again, confirming Dr. Wall's son isn't masking. He confirms at the middle of the page

on page 621 that he's not, again, complying with condition 4 of the reopening order.

At the bottom of that page is a -- an excerpt where I indicate or ask him about whether there was any -- he didn't ask whether there was any wiggle room in any of the College's documents, and he acknowledges that's the pandemic directive and the flexibility. And he acknowledges at the bottom that he believes the College was acting in what their view was good faith in terms of creating a pandemic directive.

On to the next page. Again, a comment about this argument that the College is trying to please the CMOH, but Dr. Wall acknowledging that there's no substantive evidence being tendered. He refers to some likely collaboration between the College and AHS or CMOH, which I think there was collaboration, but there's no evidence of any inappropriate collaboration.

Then there's a comment at page 640 about the fact that until the pandemic came -- came around, he had complied with all College requirements and directions in the past.

The next few pages, Mr. Chair, are something I've taken you through before, which is the exchange I had with Dr. Wall about the factual basis for the charges when I took him through each charge. So I won't take you through those.

If you skip ahead about three or four pages, there's an excerpt -- my apologies. These are not numbered. It starts off with line 2020 -- pardon me -- 22, that you are required to mask when treating patients. I'll just let everybody get there.

THE CHAIR: So just to be clear, Mr. Maxston, we're back in your presentation, or are we finished with the exhibits?

MR. MAXSTON: No. I'm still taking you through -- my apologies. I'm still taking you through Dr. Wall's -- the excerpt of Dr. Wall's evidence or transcript --

THE CHAIR: Okay.

MR. MAXSTON: -- pardon me -- and I'm asking you to go to about page 6 or 7 that starts off with line 22 at the top, with the line that you were required to mask when treating patients.

THE CHAIR: Does it start off "Order Number 4 says Dr. Curtis Wall must ensure"?

MR. MAXSTON: It literally starts off with line 22, that "you were required to mask when treating patients?" And a question mark.

THE CHAIR: Yes. I have it. I'm sorry.

MR. MAXSTON: No. My apologies. These were longer ones. I should've numbered the pages.

On this page, there's an exchange about the CMOH

orders and the fact that, again, there were certain exemptions. But they were not in place during June to December of 2020. Some comments about CMOH Order 16-20.

If you go to the next page, which starts off with line 21, "Q So I think you may have discussed this." There's some comments there about the pandemic directive and the AHS orders. We talk about the physical barrier requirement at the desk of the clinic and those types of things.

If you go to the very next page, beginning with line 12, "also not available". Again, just very briefly, there's some comments here where Dr. Wall confirms that he chose to comply with the AHS rescind order. I think if we look at subsequent parts of the transcript, it's clear that he didn't comply with all four of those orders, but I just want to point this out to you from the transcript.

If you go to the next page that begins with line 26, "Yes, I agree". Right on line 25, my question: (as read)

Q Did you take the position you had to get consent from a patient when you weren't masking?

A No, I did not.

And the next excerpts, from pages 671 to 672, are

Dr. Wall -- I'll just read this. It's a little easier. Line 15: (as read)

> Yeah, I was really asking that because you sort of objected, so my point, I think the answer was from June 2020 onwards, there isn't charting about Dr. Wall's masking or not being masked, and I think Dr. Wall said that is correct. [And the answer is] That is correct.

That go right to Charge Number 3 which says there was a failure to chart. So I just wanted to point that out to you.

> If you go to the next page, which begins with line 9, "Dr. Hu through them", there's a discussion there about the AHS exhibits and Dr. Wall acknowledging that there are other studies that are strongly in support of masking. In line 21, he says: (as read)
>
> I think there are probably multiple studies that would say they are in strong support of masking.

The point here is just, again, the diversity of studies and the differences of opinions that are out there.

> The balance of that page relates to self-diagnosis of his medical conditions, and the fact that he did not ask for an exemption.
>
> If you go to the very next page, the one that

starts off at the top of page 686, again, there's discussion there about staff compliance with the pandemic directive and Section 65 of the Section 65 orders.

I don't think, Mr. Chair, there's anything else I need to take you through on the balance of those excerpts. Some of the excerpts relate to the exchange I had with Dr. Wall when he acknowledged a professional obligation to contact the College and similar things, but I've already taken you through those.

So the remaining excerpts are quite brief, and I'm going to take you through those quite briefly.

The next Appendix is Appendix 5, and that's a lay witness, Charles Russell, that was called by Mr. Kitchen on behalf of Dr. Wall.

So again, that's exhibit -- pardon me -- Appendix 5, Charles Russell.

I'm going to take you through all four of the excerpts from the lay witness testimony. But I want to reinforce something I said to you before. I think it's very important. Lay-witnesses are not typically called in this context unless they have some direct -- direct knowledge of events, and they are not allowed, as I've mentioned before, to provide opinion evidence.

So the complaints director's strong position is, again, that these witnesses, their testimony, the

lay-witnesses, the patients, with all respect to their views, they are not relevant to the issues that you need to decide as a Hearing Tribunal about whether unprofessional conduct occurred.

This is not a popularity poll. We don't vote at public votes on whether unprofessional conduct occurred or didn't.

So, again, they may have very sincere views; however, this information, the evidence they gave, just isn't relevant to the question you are tasked with asking, which is guilt or innocence on the five charges.

You might, and I emphasize "might", expect to see this kind of testimony in the penalty phase of a hearing where a member might want to bring in good character witnesses to mitigate penalties, ask for lesser penalties, but that's -- that's really not what we're doing here at all.

So Mr. Russell -- again, my comments, the excerpts there are me asking him about the fact that he can only speak for himself, and he acknowledges that. And he also acknowledges that there may be other patients of Dr. Wall who don't share their -- his views, and who might, in fact, want Dr. Wall to comply with the College's pandemic masking directive.

If we go next to Appendix 6, that is the excerpt

from David Warren Hilsabeck's evidence. And if you look at the beginning of that, line 21 to 26, I'm just asking him about whether he has any knowledge of the process the College undertook to create the pandemic mandate. And he candidly acknowledges: (as read)

> No, that's correct, I don't know what the College has done.

And, again, there is a -- an exchange from me -- between me and him from seven -- pages 779 to 780, where he's acknowledging he can only speak for himself; there may be other patients who disagree with his views and may, in fact, want Dr. Wall to comply with the pandemic directive.

Appendix 7 is the next appendix. It's Jarvis Kosowan, another -- another lay witness. And, again, a similar exchange. He acknowledges he can only speak for himself about his views on the pandemic directive and what Dr. Wall was doing. And, again, there could be other patients who would want Dr. Wall to comply with the pandemic directive.

The next -- the next appendix is excerpts from Dr. Gauthier's testimony. You'll recall he was a chiropractor who was called as a lay witness. And there's just a few things I'll point out to you there. On the first page, lines 1 to 11, I ask him: (as read)

> Q And have you worn a mask while treating

patients when required to do so by the College?
A Yes.
Q Have you done so willingly?
A No, it's not been comfortable, but I've still done it.

And he's quite candid in that.

Now, I want to be fair to Dr. Wall and Mr. Kitchen, that Dr. Gauthier is not alleging a medical exemption or religious view exemption, but it is important to, I think, note that a fellow colleague of Dr. Wall's again here is recognizing the importance of complying with College pandemic directives, even if they're not something you might agree with.

The excerpt from page 819 is him confirming that things like code of ethics and standards of practice and compliance with them isn't coercion. It's just part of the responsibility of being a member of the profession. And he says, "Yes, yeah".

And at the bottom of the page, again, I explore with him the fact that he may have concerns about the science or medical underpinning of the pandemic directive, and yet he still chose to follow masking. And he acknowledges that.

And then, Mr. Chair and Tribunal Members, on page 2, again, this witness is acknowledging he has no

information about how the pandemic directive was created.

Mr. Chair, I'll ask you to, and Tribunal Members, I'll ask you to go to Appendix 9, which is a summary of the expert evidence given by Mr. Schaefer. I'm just going to emphasize, again, that there is a large volume of expert evidence, and you are not tasked with making a determination about whether there is absolutely a correct pandemic directive, whether there's an absolutely correct science which definitively supports one version of the pandemic directive or another. There has to be simply a reasonable basis for the College to adopt the pandemic directive that it did.

When we look at Mr. Schaefer's testimony, the quotes I've given you at the beginning, again, he acknowledges he was not -- this is 902, page 902 -- he was not involved in the development of the CMOH orders. He acknowledges that the pandemic directive is mandatory. That's the page 903 excerpt. Again, at page 904, he confirms that he hasn't been involved in the Alberta government's response to COVID-19.

Then 17 to 24, I ask him: (as read)

Q Would it be fair to say that your views about mandatory masking are inconsistent with most government public health agencies in Canada, I should say?

A In Canada, as far as the mandates that have come down provincially and nationally?
Q Yes, that would be correct.
A Yeah, I would say that we definitely have a difference of opinion.
So, again, a wide variation of opinion here.
At the bottom of the page, he indicates that he would comply with a paramedic equivalent of the College's of pandemic masking requirement. He says, however, he would not wear a breathing barrier. Again, an indication of the importance of compliance.
If you go to Appendix 10, this is Dr. Dang's testimony. And just a few things here. Make sure everybody has time to get to Appendix 10.
Line 25 in the first excerpt is a question to him from me: (as read)
Q Would you agree with me that Alberta Health Services and the CMOH and Health Canada and the College of Chiropractors in terms of the pandemic directive, which you've seen, they're erring on the side of potential benefits?
A Yes, I agree that is their intent.
Some comments at the bottom of that page and the page -- the page 973 excerpts about getting a physician diagnosis for a medical exemption, and again,

acknowledging that his views are different from -- the masking, et cetera, are different from those of AHS, the CMOH, and the Public Health Agency of Canada.

At the bottom of the page, he -- he talks about, again, him complying with AHS mandatory masking requirements and some similar comments on the next page of the excerpt.

If we go to Appendix 11, Dr. Bridle -- I'll just let everybody get there. Dr. Bridle confirming that to the extent there were masking policies implemented at his place of employment, the University of Guelph, he complied with those. He said, I -- this is line 25 and beyond: (as read)

> I did. I respect the law, and I respect rules. And so, even though, you know, what I've shared with you today, I respect those rules and adhere to them, yes.

The final appendix is Appendix 12. And that is a summary -- or some excerpts, rather, of Dr. Warren's testimony. And I'll just very briefly take you through those.

There's an exchange right near the top of that page, line 1. We're talking about the debate occurring about COVID-19. And my question is: (as read)

> While that debate is occurring -- and I'll be more specific, while that debate was

occurring in Canada when COVID-19 started and is still continuing, it's up to governments to make decisions through -- though, and orders, in terms of how we respond to the pandemic; is that fair? [And he says] Yes, that's the role of government.

And then, a few lines down on line 22 to line 26, we talk about the distinction between the scientific debate which has many sides, multiple sides of an issue, his words, versus decision-making, which is done by government.

And we talk about the difference between those and the -- the authority of government to make those kinds of decisions.

And then the final few comments, on the bottom of that page and going to the next page, are an exchange with him where he confirms to me that he would follow the CPSO, College of Physicians and Surgeons of Ontario, requirements for practice that apply to him.

In fairness, he says, "I don't have a choice". But he does indicate that he would comply with them.

So, again, the complaints director would urge you to take a look at all of these transcripts in detail. But those are some highlights from Dr. Wall, his testimony, and the testimony of his witnesses.

So, Mr. Chair and Tribunal Members, I'm going to

return to my written submission and page 22. And I'll wait a minute to make sure you're all at that page, and then I'll pick up again at paragraph 88.

So, Mr. Chair, I'm going to sound like a broken record here, but at paragraph 88, again, we're saying that despite the extensive scientific commentary you received, contradictory views on the science of masking and social distancing, this Hearing Tribunal does not need to make findings about whether masking and social distancing and the other relevant portions of the pandemic directive are or are not definitively supported by science. Instead, the question is whether the Council was acting reasonably when it created and established the pandemic directive.

So if there's a reasonable basis for them to do -- to do that, then it's lawful. It's legal.

And that's reflected in Section B, the reasonableness test section of the written submissions, where I take you to a Supreme Court of Canada case relating to Catalyst Paper Corp. And there was an issue where the Supreme Court was considering a municipal bylaw and whether it was something that could or could not be done. And I've quoted paragraph 18, and I'm going to read you the bold-type provisions. The Supreme Court is saying: (as read)

The fundamental question is the scope of

decision-making power conferred on the decision maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand.

The next highlighting: (as read)

This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes.

Please remember that: "A range of reasonable outcomes." Not the only outcome. Not one that everyone has to agree with, but a range of possible outcomes.

We'll go to the next page, page 23, paragraph 19: (as read)

The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation.

Just like the authority delegated to Colleges under the HPA.

And then there's another bold-type section talking about their decision-making: (as read)

Rather, they involve an array of social, economic, political, and other nonlegal

considerations.

Paragraph 20, a little bit into that line: (as read)

> Historically, Courts have refused to overturn municipal bylaws unless they were found to be abhorrent, overwhelming [again, fundamentally important] or if no reasonable body could have adopted them.

And if you skip down to paragraph 24, they expand on that test: (as read)

> The applicable test is this: Only if the bylaw is one no reasonably -- no reasonable body informed by these factors could have taken will the bylaw be set aside.

And very importantly, that Catalyst test was applied in the professional regulatory context. And it was applied in a Sobeys West Inc. decision in British Columbia -- arising out of British Columbia. And the Court of Appeal was considering a pharmacy inducement program. And they talked about the equivalent of Section 3 of the HPA and the public interest. And when they were looking at that inducement program -- and there's a quote there at paragraph 70, and the bold-typing says: (as read)

> At the end of the day, it cannot in my view be said that the Council's decision lay outside the range of possible acceptable

outcomes that are defensible in respect of the facts and law so as to require interference by a court of law.

Again, I would urge you to keep that in mind. The pandemic directive was one -- one decision that was clearly a possible acceptable outcome, and it is not abhorrent or based on a lack of scientific evidence.

So we also have -- in paragraph 93, the Court also stated that: (as read)

> With regard to enacting bylaws and policies, this must surely be correct. A body such as the College must be free to take preventative measures before actual harm occurs.

Again, reinforcing this broader public protection argument and prevention being a key.

If we go to paragraph 94, this Catalyst test was also applied in Alberta by the Alberta Court of Appeal involving the Alberta College of Pharmacists v. Sobeys. Again, an inducement program was in place and the College was trying to prohibit that. Quote at page -- paragraph 80 in bold-type: (as read)

> In that regard, he noted that the legislature [and this is referring to another judge's comments. He noted that] the legislature had given the Law Society a broad public interest mandate and broad regulatory

powers to accomplish this mandate.

And then at the end, he went on to hold that the meaning of: (as read)

> Public interest in the context of the Act is for the Law Society of Manitoba to determine.

And then the final paragraph, 83: (as read)

> The reviewing judge in this case did not ask if the policy was one no reasonable body informed by these factors could have been taken.

Again, Council acted reasonably. There was a reasonable basis for the pandemic directive. Not everyone has to agree with that. There doesn't have to be a definitive finding for it.

And I then have some comments at the beginning of Section C about the reasonableness test and the development of the pandemic directive. And if you go to the top of page 25, you'll see that even though the complaints director certainly acknowledges there are differing views amongst government policymakers and other stakeholders about COVID-19 measures, the College did engage in a very robust research and consultation process, reviewing documents that Alberta Health was publishing, consultation with the Federation of Chiropractic Colleges, consultation with other HPA regulators, consultation with other Canadian

Chiropractor Colleges, consultation with a microbiologist who happened to be a chiropractor, consultation with the College's competence committee, consultation with the Alberta Federation of Regulated Health Professionals, and considering AHS documents.

The next few paragraphs confirm Dr. Halowski's comments to you that the College engaged in consultation with its members, again, trying to ensure that they did the right thing and provided a safe environment.

Paragraphs 98 through 99 reflect what I took you through in Dr. Halowski's evidence, that a masking exception was considered by the Council but wasn't adopted because chiropractors couldn't maintain a physical distance of 2 metres, unless -- this is paragraph 99 -- less restrictive directives and masking were considered. But due to the fact that COVID-19 was novel, and given the risk of chiropractors being close-contact body workers, Council ultimately did not -- pardon me -- ultimately did adopt the position that masking is required.

And then we have, again, Dr. Halowski's testimony, that every HPA college had adopted a position of masking as a requirement. And that evidence, very importantly, is uncontradicted. There were no witnesses called from other colleges to contradict that

or talk about that.

Again, paragraph 102, very significantly, the pandemic directive, foundations of it -- they had masking, social distancing, and the plexiglass barriers -- are also consistent with views adopted by numerous other regulatory bodies and public agencies: the CMOH; Government of Alberta, see the relaunch plan; the Public Health Agency of Canada; and Alberta Health Services. And, again, remember the test. The test is, is this -- pandemic directive, is this something that's reasonably supported? Is it one of a range of possible defensible outcomes?

Paragraph 103, Dr. Wall very honestly acknowledges that his views on masking are not consistent with multiple studies. And as I took you through, two of his experts candidly acknowledged that their views are not shared by other healthcare stakeholders such as the CMOH or the Public Health Agency of Canada.

The balance of those -- if we go to page 26, the balance of that paragraph and paragraphs 104 and 105 talk again about Dr. Dang and his comments in terms of the pandemic directive and that in all of these circumstances, it was reasonable for the Council to adopt the pandemic directive as being based on a well-established and recognized body of evidence from diverse sources, even if Dr. Wall and his experts

disagreed with that. Again, there doesn't have to be one conclusion.

So, again, paragraph 105 -- this is one of a range of possible defensible outcomes. And you, again, do not have to -- have to make a decisive, conclusive, definitive finding about the pandemic directive.

I've also got a section here, "The Council Also Acted in Good Faith". There is absolutely no evidence before you that the Council acted improperly or in [sic] good faith. And in fairness to Dr. Wall, he acknowledged that. That's paragraph 107 of the submissions.

And as I said to you before, I think you're going to hear some type of -- types of argument that what the College Council did was really just an appeal to authority. They did what they did because everybody else was doing that. And I have to say there, I just don't think there's any basis for that. They engaged, again, in a robust consultation, fact-gathering exercise; they considered less restrictive measures; they considered an exemption to masking; and they came to the conclusion that they did. They weren't being a lackey. They weren't just following along. They were making their own decision-making based on their own analysis.

Mr. Chair, I'm going to now start on the Section 6

of the complaints director's submission regarding Charter of Rights matters, and I'll call this Charter Law 101, and Mr. Kitchen will take you to Charter Law 101 part 2 in his submissions. I see him smiling. This is a complex area of the law. It's one that is I think challenging for lawyers and Courts to come to grips with. I'm going to take you through some of the highlights here in the written submissions, and I'm going to leave you to read these in detail later on.

Paragraph 109 makes the statement that the masking orders and the pandemic directive have to comply with the Charter. And there are a number of -- and I'll wait for Mr. Kitchen's arguments. There are a number of potential Charter arguments that could be engaged here: Section 2(a), freedom of conscience and religion; Section 2(b), freedom of expression, Section 7, liberty and security of the person; and Section 15, equality of rights. The final paragraph in -- pardon me. The final sentence in paragraph 109 is very important, though. There is a provision in the Charter, Section 1, which is a limitation. And I'll get to this in greater detail. So, essentially, what it says is even if some of those rights are infringed, there can be reasonable limitations on them that still withstand a Charter challenge. That's the Section 1 reasonable limits test.

So the complaints director's position -- this is in paragraph 110 -- is that orders requiring masking will almost certainly be upheld as reasonable limits under Section 1. Cases currently before the Courts, and I'll discuss those below, support that argument and have found that the COVID-19 virus justified government and public health orders as reasonable infringements on any Charter rights.

I'll take you to page 27 and Section B, Heading B. Section 2(a) of the Charter provides: (as read)

> Everyone has the following fundamental freedoms: Freedom of conscience and religion.

And you'll see in paragraphs 113 and 114 that there's clear case law where the Charter prohibits certain infringements of religious beliefs and those types of things. In paragraph 114, there's a quote from a case called Syndicat Northcrest. And it says: (as read)

> Charter prohibits only burdens or impositions on religious practice that are non-trivial. The onus lies on the rights claimant to demonstrate that the impugned state action interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial.

Very importantly, though, the Supreme Court has said there are limits on this, that not every action will become, as they say in paragraph 115: (as read)

> Summarily unassailable and receive automatic protection under the banner of freedom of religion.

And there's a quote there that appears next, which essentially says that conduct which would essentially harm other people is not going to be covered by the protection of religious freedoms. So there's a context that has to be looked at and how this right is being exercised. And it -- it isn't an absolute right.

So on paragraph 116, Dr. Wall would have to demonstrate that his religious beliefs did not unduly cause harm or interfere with the rights of others. And the complaints director's position is that freedom of religion under the Charter cannot protect a right to a practice -- non-masking, not social distancing, or not having plexiglass barriers -- which can increase the risk of disease transmission to others in the context of the COVID-19 pandemic.

Again, I'll get to this later on. I'm at the top of page 28. Even if that is an infringement, it's saved by Section 1.

Section 2(b) of the Charter -- that's the Section 1 exemption. Section 2-B of the Charter deals

with everyone having the fundamental freedoms of freedom of thought, belief, opinion, and expression. And as we say at paragraph 121, it's possible that not wearing a mask in indoor places could be characterized as an action intended to convey a meaning for the purposes of Section 2(b) and freedom of expression. But as paragraph 122 says, the Supreme Court has said that, quote: (as read)

> Expressive activity may fall outside the scope of Section 2(b) protection because of how or where it is delivered.

So it's possible that the action taken which increases the risk of harm to others, in this case, masking, will be a limit on that freedom of expression, that right.

And Section 124 reflects that. Talking again about a Supreme Court of Canada decision coming from Saskatchewan: (as read)

> As in freedom of religion claims, the Supreme Court of Canada has consistently found that the right to freedom of expression is not absolute, and limitations of expression may be justified under Section 1.

And that, again, is the complaints director's perspective.

Going to page 29, Section 7 of the Charter: (as read)

Everyone has the right to life, liberty, and security of the person.

While there's some as we talk about in paragraph 125: (as read)

The pandemic directive can survive that type of Charter challenge if it is arbitrary, overbroad, or grossly disproportionate.

That's in paragraph 125.

In paragraph 126, I refer you to a case called Carter, which says: (as read)

The Supreme Court explained that an arbitrary law is one with no rational connection between the object of the law and the limit it imposes on life, liberty, or security of the person.

And if you skip all the way down to paragraph 130, the complaints -- there's some background I'll let you read through later on. But the complaints director says in paragraph 130: (as read)

It is abundantly clear that the pandemic directive for masking and other requirements are not arbitrary. There are reasonable scientific studies to support it.

And then, Section 131: (as read)

The mask requirements are not grossly disproportionate or overly broad. Any issues

of discomfort, anxiety, annoyance, or even distress that masks may provoke in certain individuals are proportional to the potentially lifesaving benefits and preservation of the public health system that such measures may promote.

Again, Dr. Wall could've stepped back and said, I'm not going to do close-contact treatment. There are some albeit more challenging modalities like Telehealth, but there's some options for him here.

Top of page 30. The pandemic directive is not overbroad. It's a directive that applies to all chiropractors. And it's -- it's valid and reasonable because it's there due to the transmission, high transmission, of COVID-19 through the emission of aerosols.

So now I'll turn to Section 1. If in your deliberations you decide that for any one of those Section 2 rights or the Section 7 rights that somehow Dr. Wall's Charter rights are infringed, well, I'll point you to Section 1 of the, again, exempting test that says: (as read)

The Canadian Charter of Rights and Freedoms [and I'm on paragraph 134] guarantees the rights and freedoms set out in it subject only to such reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society.

And the -- the seminal test on this comes from a case named Oaks. That's in paragraph 135: (as read)

> The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

So, again, if you look at the end of page 36 -- pardon me -- paragraph 136, there's a statement from the Supreme Court of Canada and some case law from the Supreme Court of Canada involving an Edmonton Journal case which finds that some reasonable measure of deference should be given to governments when the law mediates between the conflicting demands, interests, and rights of various societal groups.

Again, Section 130 -- or Section 137 of the submissions -- I'll let you read it in detail, but right at the tail end, there's a quote about the fourth-last line. Put another way, Chief Justice McLaughlin wrote: (as read)

> Section 1 of the Charter does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only

that it be reasonable and demonstrably justified.

And this is really important. Where a complex response to a social problem is challenged, Courts will generally take the more deferential posture through the Section 1 analysis.

So, again, there's some comment here about the Oaks test and how it applies. If we go to the top of page 31, Section 139 of the complaints director's submissions state that: (as read)

> The pandemic directive, including its mask requirements, were established as a requirement of the CMOH sixteen -- Order 16-20 to protect the public and certainly are a pressing and substantial objective for the purposes of the Section 1 test. And, again, given that the goal [this is paragraph 140] of the masking requirement and other elements of the pandemic directive was to reduce transmission of aerosols that can get -- carry the virus and lead to infection, it means, wearing masks, for example, are rationally connected to its objective.

Now, again, there may be differing opinions on this. That's fine. There just has to be a reasonable basis

here.

Bold-typed statement, a submission from the complaints director: (as read)

> Courts and this Hearing Tribunal are not asked to determine the effectiveness of masks in a constitutional analysis. That's a question of science. But rather, to enquire whether the government -- or the College in this case -- had a rational foundation for relying on reasonable scientific research that exists regarding masks. A question of law.

And obviously, the complaints director is saying there is a reasonable foundation.

Paragraph 141: (as read)

> It is equally the case that masking requirements and social distancing are likely to be found minimally impairing.

Then we have a quote from another Supreme Court of Canada case: (as read)

> The Oaks test recognizes that in certain types of decisions there may be no obviously correct or obviously wrong solution, but a range of options with its advantages and disadvantages.

I can't agree with that more strongly.

Paragraphs 142 and 143: (as read)

Any rights infringements occasioned by the Pandemic Directive are outweighed by the benefits of the pandemic directive, and they're a classic example of the reasonable limit Section 1 in the Oaks test was designed to allow.

The limited rights infringements on individuals may impose some limited rights infringements, but the benefit to the public health, the larger interest, is justified.

Section F. Canadian Pandemic Jurisprudence and Conclusions. While there's some recorded decisions on Charter challenges that are already circulating -- and this should give you comfort in terms of finding that there is no Charter breach. Or if there is, that Section 1 saves the pandemic directive.

Paragraph 145 refers to a case out of Newfoundland. And third line -- fourth line down, the submission is: (as read)

The opening line of the case conveys the context important for the judicial determination which follows.

And then there's a quote: (as read)

It is difficult to overstate the global impact of the SARS-CoV-2 virus, known more

commonly by the infectious and potentially fatal disease it causes, COVID-19.

So there's judicial recognition of the importance of that.

Top of page 32: (as read)

In conducting the Section 1 analysis, that same Court found that in the context of the pandemic [pardon me] found that the context of the global pandemic was critical to assessing the application of Section 1. The court accepted the government's scientific evidence that during much of the pandemic, the government was dealing with a "novel virus with no known cure, effective treatment, or vaccine." and that "infected, but asymptomatic, persons may unwittingly infect others".

And then paragraph 147 is very important: (as read)

In the context of such a public health emergency, with emergent and rapidly evolving developments, the time for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin for error may be narrow. In such a circumstance, the response does not admit of surgical precision. Rather, in public health

decision-making, the 'precautionary principle' supports the case for action before confirmatory evidence is available.

Well, there was confirmatory evidence, a reasonable body of confirmatory evidence. But clearly the College and the CMOH were being precautionary.

And then again in paragraph 148, there's a quote: (as read)

The collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease.

Another case, Beaudoin v. British Columbia, challenges to the BC chief medical officer of health's orders. And another quote at the end of that paragraph 149: (as read)

We are in the midst of a global pandemic that threatens the health and lives of people throughout the world, including our fellow citizens.

Paragraph 151: (as read)

The Court held that any interference with Section 2 Charter rights was justified under Section 1. The public health orders, the Court held, were premised upon "available" scientific evidence... including epidemiological data regarding the

transmission of the Virus.

And then if you skip down a few lines: (as read)

> Accordingly, the restrictions fell within a range of reasonable outcomes.

That's the Catalyst test I took you to before.

The Alberta courts have considered these types of Charter issues as well as. That's at paragraph 152, a case involving Alberta Health Services, and the Court is stating: (as read)

> The World Health Organization declared the Novel Coronavirus COVID-19 to be a pandemic in 2020.

And then, if you go to the top of the next page, there's -- the quote continues: (as read)

> By May of 20 -- [second line] by May 2021, Alberta was in what medical experts called the third wave of the pandemic.

So again, at paragraph 153, in summary -- and I know this is dry stuff and tough to go through. The summary is, even if the pandemic directive is found to you by -- to infringe some Charter rights, it's absolutely clear that the requirements of the pandemic directive have -- have to be upheld as a reasonable limit under Section 1 of the Charter, given their reasonable scientific foundation and the absolute need for protection in the face of the pandemic.

Chair, I'm going to continue on unless you want me to take a break. I don't think I'll be much longer.

So Alberta Human Rights Act matters, we anticipate that Dr. Wall is going to state that he has a claim under the Alberta Human Rights Act, that in some way, the College had a duty to accommodate him because of his diagnosed medical condition, his religious views, or both, in terms of the pandemic directive.

So I'm going to leave Section B of a bigger Section 7 for you to review. But I'll just say to you that there are some tests and criteria which are set out in terms of Human Rights Act cases and how they are valid and how they are accepted. And I'll let you go through those.

What I think is very important -- this begins on page 34 of the complaints director's written submissions -- is the fact that these very issues have been considered by the Alberta Human Rights Act delegate, the Alberta Human Rights Commission. And I've given you five cases, from pages 34 to 35, that all talk about a respondent -- a claimant, rather, saying that a masking prohibition in some way was an infringement of the Alberta Human Rights Act.

And if you look at the first case, the Sox v. Knott Insurance, you'll see -- this is in the second bullet -- that: (as read)

> The Chief of the Commission and Tribunals of the AHRC upheld the director's decision to dismiss the complaint. Applying both the tests to justify an adverse impact, and applying the Meiorin test [and that's something that's on the previous page] in the context of masking policies, they held the respondent's decision to implement a masking policy was justified.

We see the same thing in the Szeles v. Costco Wholesale case. Again, the second bullet, the respondent's implementation of mandatory masking was a bona fide occupational requirement, and, accordingly, justified the limitations of the complainant's rights under the Human Rights Act.

> Same thing in the Perfect v. Source case from Grande Prairie. Second bullet: (as read)
>
> The AHRC upheld the director's decision to dismiss the complaint. They applied the Meiorin test, found the masking policy was rationally connected to a legitimate business purpose, [in our case, it's a legitimate public protection purpose] was adopted in good faith, and that it was impossible to accommodate the complainant without undue hardship.

Page 35. The Pelletier case contains some very similar assertions by a claimant, indicating that he could not mask due to religious reasons. Again, in the second bullet, the Alberta Human Rights Commission said: (as read)

> In applying the Meiorin test they found that the respondent's masking policy was rationally connected to a legitimate business purpose, was adopted in good faith, and that was impossible to accommodate the complainant without incurring due hardship.

Same thing occurs in the Beaudoin case that we've quoted as well: (as read)

> Connected to a legitimate business purpose, and that it was impossible to accommodate the complainant without incurring undue hardship.

Section D of the written submissions again talks about the tests that are involved in the -- in the Alberta Human Rights Commission and Alberta Human Rights Act analysis. I'll let you read that on your own. I think it's quite straightforward. But I do want to mention -- comment fairly significantly about the third element of the Meiorin test. And that is that there is an obligation on an entity such as the College to accommodate a person such as Dr. Wall to the point of what's called "undue hardship". So paragraph 164 talks

about the fact that this duty to accommodate to the point of undue hardship of the other party may exist.

This is a very unique set of circumstances, though, and what -- what I've reproduced at paragraph 166 of the complaints director's written submissions are a portion of the Alberta Human Rights Commission website when it deals with masking claims. And I've bold-typed two parts of those, and this appears as Tab 31. But the second bullet says: (as read)

> When accommodating a relevant protected ground, consideration will be given to the need to balance accommodation obligations with other legal obligations to co-workers and/or customers.

And then, very importantly, the final bullet talks about a claimant advancing a human rights claim. And it says: (as read)

> They [the claimant, someone like Dr. Wall] should also be able to show a reasonable attempt to receive accommodation recognizing that accommodations, are not required to be perfect or ideal.

So as we say in paragraph 167: (as read)

> The duty to accommodate to the point of undue harshness or hardship is balanced against the

College's "other legal obligation", [that's the second highlighted bullet] the protection of the public, and the reopening requirements of CMOH Order 16-20.

That's just not a "might need to", "might want to". CMOH Order 16-20 was mandatory. And, of course, the pandemic directive and the College's HPA public protection mandate are also a factor that supports the College's position.

And as we say at the bottom of paragraph 167, those legal obligations and public protection mandate are: (as read)

An overriding and paramount consideration which are a complete defence to any Human Rights Act claim made by Dr. Wall.

And, again, on the top of page 37, I want to return to this theme of the -- the final bullet in that AHRC document that says: (as read)

A claimant [such as Dr. Wall] must show a reasonable attempt to receive accommodation.

And it's abundantly clear in these circumstances that other than a brief phone call between Dr. Wall and the complaints director in December of 2020, well after the June decision to not mask and not social distance, there was no request or attempt by Dr. Wall to receive accommodation.

And I'm just going to stop there and say: How can this College be found at fault for no accommodation when they didn't know what was happening? There was never a request for accommodation. And for those six, seven months, they had no idea that there was a breach in the pandemic directive.

So, again, this is an absolute defence to a Human Rights Act allegation by Dr. Wall.

At the end of that section as well, that section of the written submissions, paragraph 170, even if Dr. Wall was apprehensive and thought the request for an exemption would be denied, the College can't be found liable for failing to accommodate Dr. Wall when an accommodation request was never made. And I talked a little bit about that before.

And there's a final comment as well that shows good faith on the part of the College. They did try to accommodate members of the profession with Telehealth, a brand new modality that had never been introduced before. And, again, it's not a perfect solution, but it shows good faith. It shows that the College was alive to these kinds of issues.

I'm going to make some -- some -- I hope very brief closing comments to you. I've talked to you about the reasonableness test in terms of the pandemic directive, again, one of a range of possible legally

defensible outcomes, one that's supported by a measure of reasonable scientific evidence. It's clear that that is the case here, and that the pandemic directive survives on that basis alone.

In terms of the College's actions, it's hard to imagine a more engaged, open, and transparent regulator than the College. Exhibits C-1 to C-22 are the College reaching out numerous times to all of its members, including Dr. Wall, for input, advice, comments, those types of things. They are open for business. They're almost the 7-Eleven of regulatory bodies. Dr. Halowski says, We're available all the time for emails, phone calls, questions. We wanted participation from our members. And that's in his -- in his statement.

When we talk about Dr. Wall's actions, I think it comes down to him making a series of unfortunate decisions that began with the first breach and the second breach I told you about, the breach of the Nuisance Act resulting in the closure or the second breach of the reopening orders, and certainly the third breach of the pandemic directive where he doesn't communicate with the College at all. And in a sense, I think it's very fair to say that he was trying to fly under the radar, that he albeit was concerned about what the College might say, but he doesn't want to go to them. He doesn't want to approach them. And I said

to you before that's not an answer to this kind of very, very serious question. As Dr. Wall acknowledged, he did have an obligation to come forward and raise these issues with the College.

THE COURT REPORTER: Sorry. I missed the last few words you said. You said to come forward and raise these issues ...

MR. MAXSTON: And I think I said "engage with the College". I stand to be corrected --

THE COURT REPORTER: Yes, that's right.

MR. MAXSTON: -- but I think I said that.

THE COURT REPORTER: Thanks.

MR. MAXSTON: As mentioned before, this all leads to the fundamental issue of selective compliance by an individual, and the College being placed in the very, very difficult position if you uphold Dr. Wall's arguments, there will be no compliance conceivably, and self-regulation comes to an end. We can't have selective compliance from day to day by individuals who are members of a profession. They're called to a higher standard than that.

I want to take you really briefly through the charges. If you go to I think page 2 or 3 of the complaints director's submissions, the charges are reproduced there. And I'll just get everybody to go to those charges. I'll wait a minute until everybody is

there.

So, Mr. Chair and Tribunal Members, the first charge: (as read)

Beginning on or about June of 2020, at the clinic, Dr. Wall failed to use PPE; specifically, he failed to wear a mask.

I think there's absolutely clear evidence of that. (as read)

Failed to observe the required 2 metres of social distancing.

Again, clear evidence of that. (as read)

Until on or about December 2020, failed to have a plexiglass barrier at the clinic reception, and/or did not require patients to be masked.

Again, absolutely clear evidence of that.

And I want to stop and refer you to these two sub charges, c and d. I await Mr. Kitchen's submissions, but I cannot see how there is a Charter argument or a human rights argument to fail to have a plexiglass barrier up, or to not require patients to be masked when that was a requirement of CMOH orders that apply to third parties and patients. I can't see that there's any way you can argue some type of religious or medical exemption or something else that would justify those -- those charges not -- not standing.

Charge Number 2: (as read)
Beginning on or about June of 2020 and at the clinic, one or more of the staff members at the clinic failed to mask, failed to observe social distancing, and did not require patients to be masked.

Again, there's clear evidence of that. The CMOH orders require it. The pandemic directive requires it. Dr. Wall is responsible for his staff.

Charge Number 3: (as read)
On or about June of 2020, Dr. Wall treated patients while not wearing a mask and did not require patients to be masked and did not advise the patients of the increased risk of transmission of COVID, advised patients that masks were not required, and/or advised patients that wearing masks had no effect concerning transmission of COVID-19.

Dr. Wall, in his exchange with me, as he did with all these charges, did not dispute the factual basis for that. And, again, I just cannot see how there is any -- nothing with respect to this charge -- any type of Charter issue. It's not Dr. Wall's rights that are being infringed here. There's no human rights challenge. There's no religious grounds there. That's entirely separate from that.

Charge Number 4: (as read)

Beginning on or about June of 2020, Dr. Wall failed to chart and failed to properly chart communications with his patients.

Again, Dr. Wall in his exchange with me, candidly admitted there wasn't that kind of charge -- charting occurring. You can also go to pages 633 to 634 of the transcript where he reinforces that and confirms there wasn't that type of charting. And again, this is a charting charge. I can't see that there are any Charter arguments, any human rights arguments, any religious grounds for not charting. I think those are separate issues.

Charge Number 5: (as read)

Beginning on or about June of 2020, a, he failed to follow the CMOH orders regarding masking and COVID-19.

Well, again, there is clear evidence of that. I don't think I have to say anything more than that. (as read)

Failed to follow the pandemic directive.

And that would include 2-metre distancing, and for a time, not having the plexiglass barrier. Again, absolute clear evidence on that.

And, again, I want to be -- I want to be very clear that we added the wording to the closing comment, closing part of the charges, that there could've been

an infringement or breach of Alberta Health Services directions and requirements. And that is clearly the case with the AHS reopening orders. Dr. Wall has acknowledged he didn't comply with Order Number 4, and I think on its face, he did not comply with Order Number 1, which required him to implement the pandemic directive.

Again, not things that professionals can choose to do on their own, selectively not comply with orders like legal orders before you.

Final thoughts at paragraph 172 of the submissions before you, the case law supports the public protection mandate of the College, and there's a clear requirement for compliance on the part of regulated members like Dr. Wall.

Second bullet, the essential facts in this matter have been acknowledged by Dr. Wall. They've certainly been proven. They're not in dispute. And they rise to the level of unprofessional conduct. Council acted reasonably and in good faith when developing the pandemic directive. It doesn't violate the Charter, and if it does, it is saved by the exemption in Section 1, and there is no basis for a human rights claim here. Among other things, the pandemic directive was adopted for a purpose that is rationally connected to job performance and the College's legitimate purpose

of public protection, and it was impossible for the College to accommodate Dr. Wall when they didn't know what was happening, and he didn't tell them, and didn't ask for an exemption.

Mr. Chair and Tribunal Members, thank you very much for your patience. These are lengthy, complicated matters, and I appreciate your attention. I'm pleased to answer any questions, or you can reserve and ask some questions later on. Subject to taking a break, Mr. Kitchen would, I presume, begin his -- his submissions to you.

THE CHAIR: Thank you, Mr. Maxston. I note that it's 2:15. I think the Hearing Tribunal Members would like a few minutes to discuss and identify any possible questions, and it's probably a good time for a break. So let's take 20 minutes and come back at 2:40. And at that time, we'll inform regarding any potential questions and proceed from there. So we are in recess until 2:40.

(ADJOURNMENT)

THE CHAIR: Okay. At this point, the Tribunal Members do not have any questions of Mr. Maxston. So I will ask Mr. Kitchen to proceed with his submissions.

Just before I do, I have one -- just a short update. We are endeavouring to have the addendum to

our order prepared and circulated as quickly as possible. I can't commit to having it out today, but we will certainly have it out before the end of the day tomorrow, Mr. Kitchen. So you can expect to see that.

MR. KITCHEN: Thank you.

THE CHAIR: So, Mr. Kitchen, the floor is yours.

Final Submissions by Mr. Kitchen

MR. KITCHEN: Thank you.

As I'm -- as I'm sure you're expecting, I'm going to be much longer than the remaining of the day. You know, ideally we'll stop somewhere between 4:30 and 5:00, and then I'll be able to finish before the end of the day tomorrow and leave some time for my learned friend to have some rebuttal.

Just another administrative issue before I get going. I just -- I feel I have to note that Barbara Wall, which is Dr. Curtis -- Dr. Curtis Wall's spouse, she fell off the call due to an internet connection problem. She attempted to rejoin, and the hearings director, Cathy Barton, did not permit her entry.

Now, I need to highlight just how serious this is. I understand that the College has some sort of rule that authorized that ruling. I have not seen this rule. I have asked Ms. Barton to either send me a link or send me a copy of the rules. That has not been

done, and I have not seen them.

But whatever -- whatever rule was relied upon, both the rule and the decision to disallow the entry of Ms. Wall into the room was unlawful. It's a gross violation of the open court principle, and it's unacceptable that a spouse of a member was not able to get back into a hearing.

I'm sure I don't need to tell the Tribunal, but I will anyways, that in a court of law, members of the public are permitted freely to come and go from the gallery. Now, obviously there's some -- there's some restrictions currently, or there was, about capacity limits in a courtroom that are related to COVID. But aside from that, and even during that, as I've been to court during this, members of the public are permitted to come and go from the court, and the reason for that is the open court principle.

And if a judge was to disallow that, he'd probably face some pushback from the legal profession about the open court principle.

THE CHAIR: Mr. Kitchen, I can say that there are rules associated with observers. They are published on the website. A copy of the rules were sent to all observers who inquired and those who registered. And I can't quote them, but my recollection of the rules is that if somebody leaves

during a session, they won't be re-admitted until the next recess. And -- and I don't want to spend the afternoon debating the rules. The Hearing Tribunal didn't set the rules. The College -- I mean, that's a -- that's a side issue. But I understand what you're saying. And we are not trying to limit the open court principle. Everybody who signed on as an observer did so noting that they have read and agree with the rules as stated.

So --

MR. KITCHEN: They have no choice but to agree with those rules in order to attend.

THE CHAIR: Well, if you want to make a complaint or whatever to the College, I mean, I'm not sure that it's something we want to spend our time on this afternoon. Your concerns have been noted. And I hope Ms. Wall has been able to rejoin.

MR. KITCHEN: I'll just -- I'll just simply remind the Tribunal that the reality of the law in Canada is that any tribunal, which is synonymous to a court in many respects, has the common law authority to set the rules for its hearings that it is seized on. So it's not bound by the rules of the College. It is only bound by the common law. If it wants to intervene and overrule those rules so that these proceedings proceed in a manner that's consistent with the common

law and the constitutional law in this country, it can do so, and I am inviting it to do so. I'm not making an application because I don't want to take the time. I know you don't want to. I'm just -- I'm just reminding the Tribunal of the state of the law and inviting it to -- to take that step if it wants to resolve these issues.

THE CHAIR: We'll take that under consideration, Mr. Kitchen.

MS. BARTON: Okay. And, Mr. Kitchen, we have sent you a copy of the rules. And I was adhering to Item Number 10: (as read)

> If an observer needs to leave the hearing room for any reason while the hearing is in session, they will not be permitted to return to the room until the end of the next recess.

So that's what I was following.

MR. KITCHEN: Excellent. Yes. So did you send that to me by email?

MS. BARTON: Yes, we did.

MR. KITCHEN: Okay. Well, I haven't received it, so ...

MS. BARTON: It's coming to you soon.

MR. KITCHEN: All right. Well, with that, I'll jump in.

Tribunal Members, Chair, this case is pretty

extraordinary. I hope you realize that. I think you do. This case is about honesty, about honesty and truth. It's not about compliance, as you might think from encountering the word so many times in the transcript.

I say that because none of my legal arguments are going to matter unless you, the Members of this Tribunal, are honest with the evidence. I'm going to ask you to be honest: honest with the evidence, honest with yourselves, and then honest with Dr. Wall.

Another unique aspect of this case, unlike most triers of fact and triers of law, you have personal experience of the issues in this case. You've all worn a mask, so you've personally experienced this. And I hope that you will draw upon that personal experience to be honest with the evidence and honest with yourself and honest with Dr. Wall when you make a ruling in this case.

You're in an extraordinary position. Through this case, you will rule on one of the most pressing, ubiquitous, and controversial issues of the last two years. And you've been presented with more testimony and more information and more scientific material about this particular issue than any other decision maker that has yet had to wrestle with it in this country.

You have a unique opportunity to pronounce on this

issue from an informed position. Now, that's -- I recognize that's a whole lot more than most people who sit on a hearing tribunal are ever asked to do. And I'm sure that's not what you anticipated when you signed up for this. But that is what I'm going to ask you to do, and it is what Dr. Wall is going to ask you to do.

Now, let's be more specific about what I'm going to ask you to do. I could ask you to strike down the College's mask mandate as an unlawful violation of the Canadian constitution. The evidence is there to support that. And you have the authority pursuant to Section 24(1) of the Canadian Charter of Rights and Freedoms to do so. But I'm not going to ask you to go that far. For our purposes, you don't need to. I'm merely going ask you to find that the College's mask mandate and the pandemic directive is an unjustified violation of the Alberta Human Rights Act, and that the College unlawfully discriminated against Dr. Wall on the basis of his mental disability and his religious beliefs when it refused to accommodate him and, instead, attempted to discipline him.

Now, of course I'm going to ask more of you than just that, but that's -- that's the starting point. That's the central, key point. Everything else is going to flow from those findings that you make or

don't make.

Now, I want to remind you of the importance of asking questions as the trier of fact and the trier of law. I encourage you to ask questions of me. I encourage you to interrupt me to do so. Raise your hand or otherwise speak over me. And, in fact, I implore you to do so if there are questions in your mind, because I think it is incumbent upon you to indicate to Council, indicate to Mr. Maxston and I, or at least to me now that I'm giving submissions, where your mind is at on these issues, what you're wrestling with, what you're struggling with, what things you would like addressed. What things you would not like addressed because you've already resolved them in your mind. I submit that it is incumbent upon you to indicate to me in some fashion what your mind is on these matters, and if there are unresolved issues that matter to you as far as your decision, to raise them with me and to ask me questions and to press me on those things. I would submit to you that it is appropriate. And, in fact, it's the only appropriate thing to do as a decision maker because if you were going to make a decision about an issue and you have haven't heard submissions on it, that you demand to hear those submissions from counsel, and I will gladly give them to you.

Now, of course, much of this case turns on the expert evidence of which there is a large amount. I would also submit that its incumbent upon you, as the trier of fact and the trier of law, to make determinations about how much weight to accord to the expert evidence, and about what evidence to prefer when there is conflicting evidence, which there is in this case.

Weighing expert evidence, expert opinion evidence, and deciding what evidence to prefer when there's a conflict are findings of fact, which you are entitled to make and I would submit you must make as the trier of fact in this case.

Where the expert evidence is useful and helpful and reliable, the Tribunal should accord it significant weight insofar as the evidence, that type of evidence, is outside an average layperson's knowledge and, therefore, outside of your knowledge.

As for deciding which expert evidence to prefer when the opinions of experts conflict or oppose each other, the following factors should be considered. This is a non-exhaustive list, but these are some factors that should be considered.

For example, which expert is more informative? Which expert has more knowledge in the relevant fields? Who has the deeper knowledge? Which expert is more

credible and reliable? Did any of the experts retract statements or opinions or conclusions in cross-examination? Which expert was more professional? Which expert was more reasonable? Which expert was more balanced, neutral, objective, or impartial? Did any of the experts insult or excessively criticize the intelligence or abilities of other experts? And which expert was more mature?

And we should keep those in mind when I get into dealing with the expert evidence, which I'm going to at length.

First, I'm going to start with a large amount of case law. It is trite law that regulatory bodies such as the College -- I'm going to say "the College". I know it's the CCOA, the College of Chiropractors of Alberta, but I'm going to often refer to it as "the College". It is trite law that regulatory bodies such as the College are bound by the Alberta Human Rights Act. I don't think that's in contention, but nonetheless, I will take you to a quote from the Alberta Court of Appeal that clarifies this.

I'm going to read you from the case -- I believe it's actually been cited, but long before, when we were doing initial argument. It's the case of Wright v. The College and Association of Registered Nurses of Alberta. Two thousand --

MR. MAXSTON: Mr. Kitchen, I'm -- I'm really very sorry to interrupt as you're just beginning, but I think you've said this morning you were going to be sending me your cases, and I don't know if I've received them yet. So I see you're now starting to talk about cases. Is there -- are you going to be providing those to me and the Tribunal, or -- it's often hard for me to --

MR. KITCHEN: What -- what I said is -- and you can let me know if you object to this, but what I said is I was going to provide them at the end once I, you know, knew exactly what -- what cases I was going to be referring to.

MR. MAXSTON: I don't want to delay your submissions here, but I frankly would prefer to have the cases as soon as possible, not until the end, because it's going to be kind of hard for me to, maybe tonight even, take a look at what you said and the quotes you've mentioned. If you could endeavour to get them to me as soon as possible, I'd appreciate it. And I'm sorry to interrupt you so early on. I didn't know you'd be quoting cases just yet.

MR. KITCHEN: No, that's all right. Well, you know, we're probably going to have a break before I'm done today. So during the break, I'll just put them all together and email them to you, if that's all

right.

MR. MAXSTON: And I might suggest emailing them to the Tribunal or Mr. Pavlic so he can send them to the Tribunal. And again, my apologies for interrupting so early.

MR. KITCHEN: No. That's all right.

So, again, this is the case of Wright v. CARNA, 2012, ABCA 276. I'm going to read to you from paragraph 50. Court of Appeal of Alberta says: (as read)

> The law to be applied is well established. Human Rights Act prohibits discrimination by an occupational association like the College, against any member on various grounds, including physical disability or mental disability.

I didn't gather from my learned friend's submissions that there was any contention that the Alberta Human Rights Act doesn't apply to the College, but that makes it pretty clear.

> The College must not unlawfully discriminate against its members. The flip side of this is that the College must reasonably accommodate its members. This duty to accommodate and obligation to not discriminate applies to both the College's actions and its policies, which would include the pandemic directive as a policy.

Now, to be unlawful, discrimination must impact a protected characteristic. Mental disability is one of the protected characteristics in the Alberta Human Rights Act, also referred to often as a protected ground. Religious beliefs are another protected characteristic.

Discrimination on the basis of a protected characteristic is prima facie unlawful, which is to say it's presumptively unlawful. However, the discrimination can be justified if certain requirements are met. I think my -- Mr. Maxston took you through this.

There are legal tests for determining when discrimination has occurred and whether it's justified, and Mr. Maxston alluded to those. I'm going take you through them in a little more detail.

Now, the reason this is so relevant is because some charges against Dr. Wall are entirely contingent on a finding of whether or not the College unlawfully discriminated against Dr. Wall.

Those charges are 1(a), failed to wear a mask. I'm just summarizing. 1(b), which is failure to distance while not wearing a mask. These two charges against Dr. Wall are contingent on a finding that the pandemic directive does not unlawfully discriminate, that it lawfully discriminates. And I'm going to get

into the distinction between the two.

Just give me a second. I want to get this in front of me here. If you're wondering, I'm missing a page in my notes, that's why I pause.

I'm going to take you through these -- these charges just very briefly. 1(a) and 1(b) involve failure to mask and failure to distance while not masked. Similarly with 2, Charge 2, Charge 2(a) and 2(b) are essentially the same charge, but levied against Dr. Wall on the basis of his staff, which we know from the record is his son, and his son only. Failure of staff, son, to mask and to distance while not masked.

Let me look at Charge 4. Now, I know -- I know my learned friend said there could be no possible defence to this. Well, of course, with 4(a) and 4(b) -- well, with 4(a) we have -- 4(a) and 4(b) are the same charge, but related to charting. So in other words, there's a failure to chart this failure to do something. So there's a -- there's a direct connection. One follows the other.

And then, of course, there's the issue of 5(b), failed to follow the pandemic directive. And, of course, the only three things that were -- failed to be followed in the directive is masking, distancing, and the plexiglass barrier, so very much the same issues,

just reiterated in different ways.

Now, I'm going to submit to you that these charges are largely or wholly resolved if there's a finding that the pandemic directive is unjustified discrimination, or if there's a finding -- and/or there's a finding that the College acted in a way that constituted unjustified discrimination.

I just wanted to clarify that as far as case law, everything the Supreme Court of Canada says and the Alberta Court of Appeal says, of course, is binding upon you, which means that you must follow it whether you like it or not. Anything below that, that would be the Alberta Court of Queen's Bench, the Queen's Benches or Courts of Appeals of other provinces, like the British Colombia Court of Appeal, which both Mr. Maxston and I are referring to, anything from the Alberta Human Rights Tribunal or the Alberta Human Rights Commission, or any other Human Rights Commission or Tribunal. All those decisions are decisions you should consider, seriously consider, but they're not binding on you. You are free to disagree with them if you want to.

I'm going to be referring to a lot of cases. A lot of them are Supreme Court of Canada cases. Some of them are Court of Appeal cases. Those are binding on you. The other ones I refer to are not binding.

Now, human rights case law is clear that the onus is on the claimant, in this case, Dr. Wall, to establish on a balance of probabilities that they had been discriminated against. The test for that comes from the Supreme Court of Canada case of Moore, 2012 SCC 61. The reason the test comes from that case is Justice Abella gave an iteration of the case at paragraph 33 that was excellent. Every court since then has quoted her on this. And I'll read it to you. Justice Abella, as she then was, at the Supreme Court of Canada, said, in paragraph 33: (as read)

> To demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code, that they have experienced an adverse impact with respect to [in this case] the service, and that the protected characteristic was a factor in the inverse -- adverse impact.

Once a prima facie case has been established, the burden then shifts to the respondent, which I'll get into later. But this establishes three things that Dr. Wall has to show: He has to show that he has a protected characteristic, that he suffered an adverse impact, and that the adverse impact is connected to the protected characteristic. Or, in other words, that the

adverse impact, a factor in that was the protected characteristic.

I note that the College -- or the complaints director, I should say, contests whether Dr. Wall has any protected characteristics engaged. I submit that he has two, and I'll take you through each one.

First, I'll start with mental disability. Dr. Wall gave extensive testimony on this. I don't think I need to persuade you that he was, as my learned friend said, very candid. He was direct. He was open. He was consistent.

He never wavered in his positions or varied his statements, even when pressed by Mr. Maxston, who put it to him that his stance on the futility of masks was astonishing. He therefore is a highly credible and reliable witness. And this is important because when there are times that the only evidence we have on certain issues comes from Dr. Wall, I submit to you that it should be accepted and accorded great weight because of how credible Dr. Wall is as a witness. I didn't hear anything from my friend that undermined his credibility. If anything, I heard repeated references to how candid and truthful he was.

Now, I know you probably haven't read the whole record yet. I don't blame you, having read the whole record myself over the last week. Like my learned

friend, I do implore you to read the entire record. As time consuming and onerous as it will be, I think that has to be done for this case, and I encourage you to read the entire record. I'm going to read portions of it to you, like my learned friend has, to highlight certain things.

So no need to go there with me, but if you want to, you can. I'm going to start with pages 568 to 569 of the transcript. This is Dr. Wall's testimony.

Now, this is in regards to Dr. Wall's evidence of the effect of masking on him. On direct examination, I asked Dr. Wall: (as read)

> Now, did you start wearing a mask or treating patients once you became aware of the mandatory mask requirement in the pandemic directive? [Dr. Wall answers] Yes, I did, on and off. It was very apparent to me right from the start that when I put a mask on, that I did experience mental concerns.

Next line down: (as read)

> It was very quickly that I realized my mental concern.

And when we come to that again -- I'm now over on page 584. Dr. Wall says: (as read)

> When I put on a mask, I experience feelings of anxiety and a sense of claustrophobia like

somebody is cutting off my air supply. And so what that does, is it decreased my concentration level. And it makes it difficult for me, when I'm treating patients and note-taking, to maintain proper concentration and provide the best possible care to my patients. And so that specifically is what my mental concern was.

Again, everything -- everything Dr. Wall said right there was eminently reasonable. He's a credible witness. There's no reason to doubt that. There's no reason to think that Dr. Wall is overstating things or overexaggerating. And, in fact, I would put it to you that if we looked to the expert evidence from Dr. Dang and Chris Schaefer, that -- well, and even Dr. Gauthier, just in his anecdotal observational evidence, I put it to you that that's expected that Dr. Wall feels that way because it's expected that quite a few people would feel that way. That's exactly what we see with some people when they wear a mask. They experience exactly those types of mental concerns. Those types of mental disabilities present themselves when people wear a mask, for some people. So nothing there that's surprising.

And then, of course, we have Dr. Salem's letter. Now, there's two important things to note about

Dr. Salem. One, he decided, in his words, to grant a medical exemption to Dr. Wall. So in his clinical judgement, he decided that Dr. Wall had met that threshold. Of course, Dr. -- Dr. Dang, in his testimony, also testified that as far as he's concerned, medical exemptions to masks are legitimate and should be given sometimes, that he has given them out.

Dr. Salem specifically referred to -- this is in the first paragraph of his letter from January 8th: (as read)

> The primary driver for his inability [that's Dr. Wall's inability] to wear a mask is anxiety.

Couple lines down, Dr. Salem said: (as read)

> I feel I have gained a good grasp of the suffering Dr. Wall had endured on account of mandated mask wear.

And at the very end of Dr. Salem's January 8th letter, he says: (as read)

> Please understand that Dr. Wall's own mask exemption situation was not taken lightly.

Which means, that he, Dr. Salem, did not take it lightly.

Now, of course, Mr. Maxston noted that Dr. Salem made a lot of comments in this letter about the

ineffectiveness or questionable effectiveness of -- of masks and mask policies. I don't think anything turns on that insofar as that's consistent with what just about everybody else has said in this case, except for Dr. Hu, that I would say that Dr. Salem was perfectly reasonable and correct in what he said. But for the purposes of determining Dr. Wall's mental disability, nothing turns on that. The fact that Dr. Salem agrees with some of the best experts in this area about how masks don't work in no way undermines his clinical judgement that Dr. Wall has a sufficient mental and medical concern to exempt him from having to wear a mask.

I will also note that the College did not call a doctor to do a separate analysis on Dr. Wall. They did not get the opinion of a practicing physician to contest Dr. Salem's position. Dr. Salem's exemption went uncontested. In other words, the College did not bring in any evidence to contest what Dr. Salem had to say. Which is interesting as well, because it's often common in mental disability or physical disability cases, human rights cases, for the respondent to bring in a -- their own physician to do, you know, their own independent assessment, and then there's often a debate if it goes to litigation about, you know, which doctor's assessment is more reasonable and reliable

about whether or not the claimant actually has a mental or physical disability. That didn't happen here. Okay?

All we have on the record is Dr. Wall's evidence, which is credible, and Dr. Salem's evidence that Dr. Wall suffered mental disability that was triggered by mask wearing. I heard comments about how there's no other prognosis or there's no other way of dealing with this. Well, it's pretty simple. Dr. Salem said it. The solution to this, if putting on the mask causes anxiety, if it causes claustrophobia, don't put the mask on. That's the obvious solution; right?

It's not -- it's not appropriate to say, Well, you know, suffer through it, take some meds, you know? That's -- that's not appropriate. The appropriate thing is to simply take it off. And that's what he recommended, and that's why he granted the exemption.

Now, of course, as we know from the case law and common sense, anxiety and claustrophobia are serious and debilitating mental disabilities. And it's entirely expected that Dr. Wall would say, Look, it affected my concentration. I wasn't able to think straight. I wasn't able to do good patient care. Well, of course not. That's what happens when you have serious anxiety and claustrophobia. That's why they're called mental disabilities. Because they are a

disability.

A hundred years ago, the law wouldn't have recognized that. They would've scoffed at that and just said, You're weak-minded. Nowadays, the law recognizes how important that is. That's why we have it as a protected characteristic in the Alberta Human Rights Act.

I also want to point to the fact that Dr. Wall went out of his way to confirm that it was wearing a mask and then a face shield that caused these problems. He wore these things over and over and over again, and he documented them. And that's why he even went from trying a mask to trying a shield, to make sure that this is what was going on. So there's a direct connection between his mental disability and the wearing of the mask.

I'll note that human rights law doesn't necessarily require third-party physician verification, but often it does, and often a lot of weight is placed on that, that sort of objective third-party verification. But there are instances where that doesn't necessarily have to be in place. In this case, it's in place. But, of course, the timing is a problem, or at least the College says it is, because that third-party verification didn't come in until December 2020. And I'm going to get into that a little

later.

Now, the next step is adverse impact. If Dr. Wall establishes that he has a protected characteristic, well, the next question is: Did he actually suffer any kind of adverse impact? Well, I would say this much is obvious. The first adverse impact is the College's attempt to strip him of his licence, of his practice, and, of course, therefore his livelihood.

I do want to note that had the College's request for a suspension been granted in December of 2020, Dr. Wall would've lost his income for months or years, very likely resulting in the loss of his house and his family of eight children, which is entirely dependent on him, ending up at the food bank. I submit to you that would've been a scandalous outcome.

The second adverse impact is the College's ongoing prosecutions and the charges that it just brought against him that he is here today contesting. These adverse impacts are clearly a result of the College's actions, and, obviously, his mental disabilities are a factor in the adverse impact because the reason the College has taken these actions against Dr. Wall and levied most of the charges it has is because he has practiced without wearing the mask, which is directly connected to his mental disabilities that render him unable to wear a mask.

Emphasize "unable", by the way. I must have heard the word "selective" almost a hundred times from my learned friend. Dr. Wall was elected -- "selected" to do what he did. He was unable to wear a mask due to his mental disabilities. He went through a process to confirm that. He saw a doctor who confirmed it. And I don't think it's a coincidence that the word "unable" is specifically used by the CMOH when, in drafting her order, she says nobody has to wear a mask if they are unable to because of a mental concern or limitation.

So there's no mere choosing not to wear a mask as if Dr. Wall merely chooses not to wear pink shirts or not to wear an orange shirt on orange shirt day. He doesn't just choose not to. He's unable to.

Dr. Wall was treated exactly the same by the College as somebody who did not have mental disabilities and was not wearing a mask. But that's exactly what's at the core of discrimination, ignoring that somebody has a relevant protected characteristic and expecting them to do exactly as someone who doesn't have a disability or doesn't have a religious belief that prevents them from doing that thing.

A classic example from a 1980s case called Simpson Sears is you have somebody who cannot work on Saturday because they're Seventh Day Adventists, but the employer treated them like everybody else who can and

should work on weekends to keep their job, treated them the same. It's not that -- it's not that the employer treated them differently. It didn't discriminate in that sense. It discriminated in the sense that they treated them exactly the same, even though they have a protected characteristic that renders them unable to do something; right? It's like -- it's like expecting an Orthodox Jew or a Muslim to eat meat that they shouldn't. It's the same thing. See those classic examples from the '80s and '90s from the classic human rights case law.

It's same thing here. The College says, Look, we don't care if you have a mental disability, physical disability, religious, it doesn't matter. We are going to treat you exactly the same. You don't wear it, it's discipline. We're going to come after you. And that's -- that's exactly what discrimination is.

Now, let's talk about Dr. Wall's religious beliefs. This is the second ground or characteristic that he submits he was discriminated upon. I'll take you to 572 of the transcript record. Dr. Wall is giving testimony in direct examination. I asked him: (as read)

> Now, have you, since the spring of 2020, developed any other concerns or personal objections to wearing a mask?

Dr. Wall says at line 11 on page 572: (as read)

> Yes, I have. I would say that I do have religiously sincerely held religious beliefs that would preclude me from wearing a mask. Specifically, I'm a Christian. And that means that I'm a born again follower of Jesus Christ and, as such, I adhere to the teachings and requirements of the holy Bible. Dr. Wall proceeds to quote Genesis 1:27, which says "God created mankind in his own image. In the image of God, he created them. Male and female, he created them".

Dr. Wall then says: (as read)

> So I believe that, Number 1, my face is sacred. It's sacred to me. It's sacred to God. Because it is, it's a manifestation of his image. So for me to cover up my face, it essentially places a barrier between me and Jesus. And for someone to require me to wear a mask who is in a position of authority when there's no other reason to put that mask on other than the fact that they're telling me to when I don't exhibit any symptoms or any upper respiratory issue, to me, is essentially fearing man, and not God. And so that's one aspect of it.

Also, as a Christian, I believe that I am to live my faith, my life, in the fullest measure and expression of faith. Just to clarify that, I just want to read a couple passages from the Bible that support my religious conviction.

Dr. Wall reads Hebrews 11:6, which says: (as read)

Without faith, it is impossible to please God, for whoever comes to God must believe that he exists, and that he rewards those who diligently seek him.

And Dr. Wall reads Second Corinthians 5:7, which says: (as read)

For we walk by faith and not by sight.

And then he quotes Romans 14:23: (as read)

For whatever does not proceed from faith is sin.

And then Dr. Wall says: (as read)

So when I have to wear a mask, I'm living by faith. I am living because someone in a position of authority has told me, Put that mask on. Whether it's fear-based or whether it's for some other reason, it violates my life of faith.

Mr. Maxston brought you to the Amselem case, which is the controlling case on the test for establishing if a

claim of religious belief is, in fact, a protected belief. The test is, very briefly, is there a sincere belief? Is that belief -- does that belief have any nexus with religion? And would the impugned action or requirement or policy interfere with the claimant's ability to act in accordance with their religious beliefs in a manner that's more than trivial and insubstantial?

Now, the course -- the Court has struggled immensely with trying to figure out what is and isn't trivial and insubstantial. Obviously, there's -- that's somewhat subjective. But I put it to you that -- and I understand that perhaps none of you have any exposure to religion, and so this is difficult to comprehend. And, of course, the Court recognized that in Amselem. But I'll put it to you that if someone is compelled to commit a sin -- I don't care whether they're Jewish or Christian or Muslim or something else -- religiously, theologically speaking, to commit a sin is usually very severe. It's usually a big deal, to put it in plain English.

To commit a sin is more than a trivial and insubstantial interference. There may be aspects of religious belief that are merely optional, merely preferential, merely bonus. Of course, that's not most of religious beliefs, and it's unfortunate that the

test was drafted this way because it recognizes -- it doesn't really recognize religious belief. But the fact is, in this case, that's not really relevant. What's relevant is that for Dr. Wall, if he -- if he put on the mask, you know, once he had -- once he had determined that these are the beliefs that he has about masks, he puts that thing on, he's living in sin. And for a Christian like Dr. Wall, that's a big deal. That's a lot more than trivial and insubstantial.

And, of course, there's no question that his beliefs are sincere. There's no questions that his beliefs don't have a nexus to Christianity, and that's just one example of that. If he's able to quote that many passages of scripture and talk about them at length, clearly there's a nexus between his beliefs and the religion of Christianity.

So Dr. Wall's religious beliefs meet the Amselem test. They are protected beliefs.

Now, again, that doesn't mean that discriminating against Dr. Wall on the basis of his religious beliefs cannot be justified. Maybe it can. Okay? But there's a prima facie -- there's prima facie discrimination when Dr. Wall says, Look, I can't wear that mask because I'd be living in sin if I did. And the College says, Too bad, you can't practice. That's prima facie discrimination.

MS. BARTON: Mr. Kitchen, I need to interrupt. I've noticed that Dr. Wall is absent from his camera.

MR. KITCHEN: Yes, he did tell me he -- he's going to be having patients come in later this afternoon and that he would just try to come back on as much as he -- as much as he could.

THE CHAIR: Yes. I see he's back now.

MR. KITCHEN: So I would suggest how we approach this, is that we don't make this a concern that Dr. Wall leaves the screen. As we know, he -- he works alone in the office, and so no one else is there with him. I mean, he could tell us if that's untrue.

If he has a patient come in, I think it's -- there's couple different ways we can deal with that. He can -- if there's concerns about that, we can ask that he mute it so that his patient can't hear it. I have concerns about that because then he can't hear it. But I don't think there should be any concerns about him leaving the camera.

MR. FISCHER: Sorry, Mr. Kitchen. If I could just make a comment. Did you indicate that Dr. Wall has patients scheduled today during the time of the hearing and they'll be in the office? Did I hear that correctly?

MR. KITCHEN: Curtis, I'll invite you to

speak to that. Is it 4:00 you have a patient coming in?

DR. WALL: I have -- I have one patient coming in at 4. I'm able to mute everything and turn everything off so that it's unavailable to this patient. So it's completely up to your decision there.

MR. KITCHEN: Of course, the other way to approach this is that he -- he, you know, leaves and then comes back, but of course that requires Ms. Barton to let him in as soon as he comes back. So --

MR. FISCHER: Can we just have -- Ms. Barton, can you confirm how long the session was scheduled to go today on the notice for the hearing?

MS. BARTON: 5:00.

MR. FISCHER: So could I just ask why we weren't maybe made aware ahead of time that Dr. Wall would need to step out at 4:00 when the hearing was scheduled until 5:00 originally?

DR. WALL: Yeah.

MR. KITCHEN: There's no obligation on Dr. Wall to --

DR. WALL: Yeah. I can speak to that, actually. Yeah. I didn't have any patients scheduled today, but when I heard Mr. Maxston was going to be wrapping up fairly shortly in the afternoon, I didn't realize that James was going to be presenting after

that. And so I had a patient call in, and then I scheduled for 4:00, thinking that Mr. Maxston was going to be finished around 3:00.

MR. KITCHEN: So, Mr. Maxston, I invite your position on this. I think, you know --

MR. MAXSTON: Yes. You know, I think -- thank you, Mr. Kitchen, I appreciate that.

And I don't want to take up too much time here. Frankly, I think we just want to keep moving. But there's been a great deal of talk about the open court principle and Mr. Kitchen's concerns in that regard. I suppose it's up to his client whether he wants to be present or not. I think in most professional discipline hearings, the member wants to be present, wants to be seen, wants to be engaged, wants to hear. This isn't really the complaints director's issue, but we sure don't want to hear later on that there's been some prejudice to Dr. Wall, that he's in some way been adversely affected or Ms. Barton didn't let him back in, et cetera.

So I think it's -- it's a little frustrating when we keep having people, you know -- I recognize Dr. Wall is trying to a earn living here, but the hearing was scheduled for today. I think to the extent Mr. Kitchen is not going to raise that issue, well, I suppose Dr. Wall can leave as he wants to, but then he's going

to have to comply with Ms. Barton's stated rules as the hearings director. And I don't want to go --

MR. KITCHEN: Now that --

MR. MAXSTON: -- down that road. I don't want to debate it, but I --

MR. KITCHEN: That's the part that's unacceptable. Again, if he wants to leave, you're not going to hear anything from me that, like, Oh, hey, look, you know, Dr. Wall wasn't there for half an hour. Well, that's -- that's on him if he leaves; right? But what we have to have in place is that he's able to come back in. I think it's absurd, frankly, if he's not able to immediately come back in. The absurdity and the unlawfulness of this rule is now impeding on Dr. Wall's Charter rights.

THE CHAIR: But, Mr. Kitchen -- Mr. Kitchen, I would just reiterate, we had this time booked. And knowing the difficulty that we've had in coming to these -- these times -- I'm just going to say that. And I'm going to ask what about tomorrow, then?

DR. WALL: Again, just to clarify, I was under the impression with Mr. Maxston being done early that that was the end of -- of today. And that's why I scheduled this patient at 4:00. Had I known that James was going to continue afterwards, I wouldn't have made any appointments, but that's what happened. So ...

THE CHAIR: I think we discussed the process that we would follow at the beginning of the day. But I'm not going to get into that. There is another option. First of all, Mr. Kitchen, I'm not in favour of having -- having Dr. Wall just mute his screen and have people in. I don't -- that's not acceptable. The other option is that we can conclude at 4:00 for today, and we can either start at 8:30 or 9:00 tomorrow morning, and -- and go from there. And -- and that would eliminate this dispute or this discussion over whether Dr. Wall needs to be there or not. I'd prefer to have -- and you may have said yourself, this is a -- this is a significant hearing, and I -- I would prefer to have Dr. Wall present.

So that's one option.

MR. KITCHEN: Okay.

MR. FISCHER: I think Mr. Maxston had a comment.

MR. MAXSTON: I just want to say, Mr. Kitchen -- and I'm going to be careful in how I say this -- when you say Dr. Wall's constitutional rights or Charter rights are being impeded, Well, he's choosing to leave the proceedings. He's the one doing the impeding. And --

MR. KITCHEN: You misunderstand me. You misunderstand me. The problem is, when he's done with

the -- let's -- let's say we keep going after 4:00, it's 4:18, I'm still going, and he tries to come back in because he's done with his patient and Ms. Barton doesn't let him. It's then and only then that we have a problem.

MR. MAXSTON: I -- I think that, you know, the bottom line from the complaints director's perspective is we have a scheduled hearing. It was scheduled for a full day. I've been doing this a long time. I've rarely seen a member want to jump in and out of a hearing. It's that important for a member to be here. I can't make decisions for Dr. Wall.

MR. KITCHEN: I understand that.

MR. MAXSTON: The rules are the rules. I think we should try and press ahead, frankly, and try and get as much done as we can today. Maybe we cut off at 4:00, then, but tomorrow is a full day.

MR. KITCHEN: I think I'm okay with cutting off at 4:00. But -- but I have to ask, because this has come up before, does anybody have an obligation if they have to run to 5:00 tomorrow? And I say this partly for you, Mr. Maxston. Let's say I am still going until 4:00, and then you want to have a rebuttal, and the rebuttal gets really lengthy, and then all of a sudden, it's 5:00, and then you're -- you're cut off. That's my concern.

MR. MAXSTON: I'm anticipating you're not going to finish today, Mr. Kitchen, and I'll have my rebuttal tomorrow. So I -- I don't see any magic in that concern.

MR. KITCHEN: Look, to be perfectly frank, I don't expect me to still be going at 4:00 tomorrow. But if the Tribunal has a lot questions, it's possible. I have a lot of material yet to get through.

THE CHAIR: Well, let's -- let's do this: I'll make a decision, then, just so we can get going. We'll conclude at 4:00 today. Dr. Wall can deal with his patient, and we'll proceed at -- at -- tomorrow morning as scheduled. And if we need to shorten the lunch break, we will do so if that is what's required in order for us to complete this stage tomorrow.

DR. WALL: Yeah, and I'm good with that. And just for the record, just in reference to what Mr. Maxston said, a member bouncing in and out of -- of the hearing, it's not my intention. Again, I think I made clear why I scheduled this patient. And I'm -- I have no intention of bouncing in and out of this process. So ...

THE CHAIR: We've -- we've decided that we'll go until 4:00, which is half an hour from now.

So, Mr. Kitchen, back to you.

MR. KITCHEN: Thank you.

MS. BARTON: Can I -- can I just clarify that I am still going to adhere to the rules, that if anybody leaves the meeting, they will have to go in the waiting room.

MR. KITCHEN: I don't think we expected you to do otherwise, Ms. Barton.

THE CHAIR: Thank you.

And while we're -- while we're at it, Mr. Kitchen, I just wanted to ask the court reporter, are you okay with the pace of what you're hearing? Are you having any difficulties?

THE COURT REPORTER: No. It's -- it's okay. It is quite fast, but I understand there's a lot to go through.

THE CHAIR: Okay. If you just put your hand up, or interrupt if you've missed something or we're going too quickly.

THE COURT REPORTER: Okay. I will. Thank you.

THE CHAIR: Okay. All right.

Okay. Mr. Kitchen. Thanks.

MR. KITCHEN: I've given you my submissions on Dr. Wall's mental disability, with Dr. Wall's religious beliefs. I've argued that those protected characteristics are engaged. I've argued that he suffered an adverse impact through the College's actions in attempting to take away his licence and then

levying the charges and continuing the prosecution.

And then, of course, there is that remaining question of whether or not the protected grounds were a factor in the adverse impact.

What's important to understand about discrimination law or human rights law is that intention to discriminate is not required, and, in fact, rarely is that the case. We call it "adverse impact" or "adverse effect discrimination". Because what it is, is an ostensibly neutral rule without any intention to discriminate that results, nonetheless, in discrimination. And that's exactly what the pandemic directive is. So there was no intention to discriminate against Dr. Wall or any other member, I'm sure. But that's the effect. That's the impact nonetheless, notwithstanding the absence of that intention.

And I don't -- I don't have any evidence to give to you that the College was intentionally seeking to discriminate against Dr. Wall on these two protected grounds when they attempted to take his licence -- or I should say the complaints director -- when the complaints directed attempted to take his licence, or when he levied charges. But that's the impact; right? Because the charges are all about him not wearing a mask. Why can't he wear a mask? Because of these two

protected characteristics.

So when he suffered -- when he suffers the impact, the adverse impact of those actions, they are directly connected to these protected characteristics. So the protected characteristics are a factor in that adverse impact, in those actions.

So I submit to you that Dr. Wall has satisfied the tests pursuant to Moore to establish a prima facie case of discrimination on both mental disability and religious beliefs. Now, of course, I think you probably understand that he doesn't have to establish both. As long as you find that one or the other protected characteristics are engaged, that's enough. And if you find both, there's nothing in particular that turns on that or adds to that, but as long as one of them is engaged, he's met his onus. And then we move on to the next part of the analysis.

Now, as I'm going to talk to you, there is -- there is a distinction between the College's actions and the College's policies. But I'll just deal briefly with the repeated argument that I heard from my learned friend about the College's actions, and that relates to Dr. Wall not officially requesting accommodation in June of 2022 -- or -- sorry -- 2020.

Now, of course, we heard -- we heard in evidence from Dr. Wall that, well, he was apprehensive. He

rightly and reasonably anticipated that the College would react very similar to the way that it did, that it would not be supportive, that it would not want to dialog with him, that it would not look at options with him. And history bears out that his anticipation was entirely accurate.

When the College found out that he wasn't wearing a mask, it took the most extreme action it could. It sought to suspend his practice permit. There isn't anything more extreme that it could have done. In plain English, it pushed the nuclear button. No dialogue. We know from the evidence Dr. Wall had that conversation with both Mr. Lawrence and Dr. Halowski on the phone, and issues about accommodation and exemption were raised. Dr. Wall mentioned those concepts, at times, mentioned those words. Dr. Halowski's response was, Well, you're going to have to sit it out. You have to sit out practicing. And I put it to you, by the way, that if you find any conflict in the evidence about what was said in that phone call, that you need to favour Dr. Wall's evidence on that point, being a truthful and credible witness as he is. Dr. Halowski and Mr. Lawrence were repeatedly evasive and argumentative during cross-examination, particularly on the point about what was said on this phone call. Not much turns on this phone call, and yet it was very

difficult to get straight answers out of Dr. Halowski and Mr. Lawrence on the content of these phone calls.

I put it to you that Dr. Wall -- his recollection of the phone call is accurate and that it's credible and that there were brief discussions in those phone calls about accommodation and exemption.

So regarding the College's actions, their duty to accommodate was triggered at that point on December 3rd when those conversations occurred. This timing matters. Okay? Because the adverse impact that Dr. Wall suffered follows after that. The continued application to strip him of his practice permit, the continued prosecution of these charges, it all continued after that duty to accommodate was triggered.

If the College was acting in a procedurally fair manner, the College would've halted its application to suspend Dr. Wall's permit, and it would've assessed its duty to accommodate now that it's been triggered. And I'm going to take you to a case that talks about the importance of what's often referred to as procedural accommodation. Because, of course, there is substantive accommodation, which is actual regimes that are set up to accommodate someone, but then there's the procedure side of it, which is the respondent or employer or the College or whatever it is, stopping for the moment and saying, Okay, what can we do? How can

we sort this out? We'll look at some options, you look at some options, and we'll talk about this. Of course, that never happened.

I'm going to take you to the case of -- and of course I will provide these authorities -- of the University of British Columbia v. Kelly, 2016 BCCA 271. I'm going to read you from paragraphs -- the sum of paragraphs 42 and 43. The British Columbia Court of Appeal says: (as read)

> The settled law is that while there is no freestanding procedural duty, both procedural and substantive aspects of the impugned decision may be examined.

And now -- and then, of course, it -- the British Columbia Court of Appeal quotes the Supreme Court of Canada and the Meiorin case.

> The Supreme Court of Canada said: (as read)
> Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately first the procedure, if any was adopted to assess the issue of accommodation, and, second, the substantive content of either a more accommodating standard which was offered, or alternatively, employer's reasons for not offering any such standard.

So here, we have a procedural violation by the College because at no point did it consider accommodation options for Dr. Wall, realistic ones. Now, of course, I understand the complaints director wants to say, Well, there's Telehealth. Well, I'm going to get into how absurd that is, of course, because Telehealth is basically, you can talk on the phone to the very few, if any, patients that will be willing to do that with you. You can -- and then you can essentially lose your practice and make no money because nobody will do that more than a few days because they have to go and they have to get adjusted. We saw that repeatedly in the evidence from all four of Dr. Wall's patients -- all three -- sorry -- from Dr. Wall himself, and from Dr. Gauthier. There's really no -- I don't think there's anything contentious there, but Telehealth is not a realistic option for people to actually continue to practice and earn a living. Let's remember that these professionals, these chiropractors, they don't practice chiropractic as a hobby. They practice it is a means to earn a living. They practice it as a means to put food on the table for their families. In fact, I would submit to you that's what me and Mr. Maxston do. He might like practicing law, but it's not a hobby. This is the only way we earn income as professionals. That's how we put food on the table.

Same thing for chiropractors. Same thing for any regulated profession.

So an accommodation option that says: You're going to lose most of your practice, if not all of it; you're going to lose most, if not, all of your income; your patients are not going to get the care they need; your patients are going to have to go to some other practitioner, it doesn't even begin to come within the realm of realistic accommodation.

The College never considered a unique accommodation for Dr. Wall. It was Telehealth or nothing. And the duty to accommodate is the duty to try and figure out a reasonable accommodation with the individual. It's all context-dependent. Caselaw talks about that a lot. And that's to be expected. It's all about the unique facts of the particular situation. It's all about the context. What is the particular protected characteristic? How does it manifest itself? What's the particular situation the respondent is in? And how do we find what is a reasonable accommodation? Well, we don't -- we don't know in this case because it never happened. The College never entered that dialogue. The College never had that discussion. It was a big red button. Push it. And then no turning back. Even after Dr. Linford's decision, which should've given the College an idea of what reasonable

accommodation could look like -- because that's essentially what Dr. Linford decided -- the College never looked back.

So if Telehealth is not a realistic or reasonable accommodation, which it obviously it isn't, no other option was discussed.

Now, as the case law says, there's no freestanding procedural duty, but if we -- if we look at the College's actions and we look at the discrimination, that's a factor to consider, the fact that the College did not engage in any kind of dialogue, did not explore -- explore options.

We have 14 minutes left. I see a natural break in my submissions. I should be less than 14 minutes in getting through what I have to say next.

Now, the ultimate reality here is that this was all stemming from the pandemic directive. The pandemic directive was inherently discriminatory because it did not permit any human rights-based accommodation. The College has a duty to have policies that accommodate, and that -- that obligation is static. It doesn't need to be triggered. Nobody has to ask for the College to have policies that are consistent with the Alberta Human Rights Act. That obligation is always present.

I'm going to take you to another Court of Appeal -- Alberta Court of Appeal case, TWU v.

Telus 2014 ABCA 154, and I'm going to read to you from paragraph 29. The Court of Appeal said: (as read)

> Demonstrating an employer's knowledge of an employee's disability is unnecessary in a case alleging adverse-effect discrimination. By definition, adverse-effect discrimination is the uniform application of a seemingly neutral employment policy to all employees, regardless of whether some employees have protected characteristics. Impugned policy applies to a disabled employee whether or not the employer knows about the disability. The basic three-part test is sufficient to accommodate cases where an employer's knowledge is relevant to a prima facie case, and thus "knowledge" should not be added as a fourth element of the prima facie case test.

That's essentially what my learned friend has asked you to do, is to add knowledge as an additional part of the test that Dr. Wall has to show. That Dr. Wall has to show that the College knew in June about his disability. It doesn't. The pandemic directive is required to allow for human rights accommodations. Period.

> And if there's any doubt, I know that this case refers to, quote, "employers and employees", and it

applies equally to Colleges and their members as we know from some of the case law I brought you to earlier.

So it doesn't matter that Dr. Wall didn't have a conversation with the College about accommodation and exemptions and his mental disability until December. That is no defence for a discriminatory pandemic directive.

I'm going to submit to you, then, that Dr. Wall has established a prima facie case of discrimination on the basis of mental disability and religious belief. And, again, this is both regarding the pandemic directive itself as a policy, and the College's actions once the duty to accommodate, as far as their actions are concerned, was triggered in December.

Now, of course, the next question is whether or not the discrimination Dr. Wall experienced as a result of the College's policies and actions is justified. Bear with me. I'm looking through my notes. I have -- I have a lot to say on this point. And I think this is a -- this is a key point in this case because ultimately, all the scientific evidence is going to go to whether or not the College's actions and policy were justified. In other words, was it a bona fide occupational requirement that Dr. Wall wear a mask? And that if he can't, it doesn't matter that it is

protected characteristics. If he can't, too bad. That's -- that's what a bona fide occupational requirement means.

All of the evidence about the effectiveness or lack thereof of masks is -- as I'm going to get into, is speaking to that point. That's -- that's the -- probably the biggest consideration in this case. Everything else is going to flow from that.

And I'm going to be a lot more than nine minutes on that point, so I don't think I should get started on that. I think it's best to end now, subject to any questions you have about what I've already said, and then I'll pick up on this point first thing tomorrow morning.

THE CHAIR: I think the panel -- the Tribunal Members will reserve on -- on any questions for now, Mr. Kitchen. It's just about ten to 4:00. So, reluctantly, we'll conclude for today, and we'll convene at 9:00 tomorrow morning, and with the -- with the very firm intent that we conclude tomorrow afternoon with arguments and -- and questions, and any rebuttal that Mr. Maxston may have.

So I'll thank everybody for their efforts and attendance today. And I would ask Cathy if she could put the Tribunal and Mr. Pavlic into a breakout room. And for everybody else, we will see you tomorrow.

MR. FISCHER: Just before we do, can we confirm the start time again for tomorrow?

MS. BARTON: 9:00.

THE CHAIR: I believe it is 9:00, yes.

Mr. Kitchen, if you feel that there is any risk that we will not have enough time, we can adjust that to 8:30 or 8:00. That's -- I -- I don't know how much you -- you -- material you have.

Would anyone object to starting at 8:30, just to give us a little bit of a buffer? No? Okay. Let's do that. It'll make up for the time that we've given up this afternoon. We'll start at 8:30 tomorrow morning. And it's a good point. Thanks, Mr. Fischer, for bringing it up. And with that, I'll say good night.

And, Ms. Barton, if you could put us into our breakout room for a minute, I would appreciate that.

MS. BARTON: Yes.

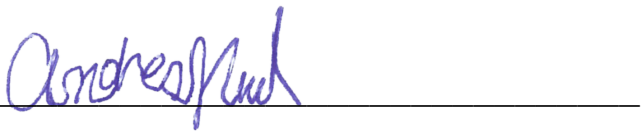
THE CHAIR: So the hearing -- the hearing is not in session as of now, and we'll reconvene tomorrow.

PROCEEDINGS ADJOURNED UNTIL 8:30 AM, JUNE 17, 2022

CERTIFICATE OF TRANSCRIPT:

I, Andres Vidal, certify that the foregoing pages are a complete and accurate transcript of the Proceedings conducted in accordance with the Alberta Protocol for Remote Questioning, taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of St. Albert, Province of Alberta, this 28th day of June 2022.



Andres Vidal, CSR(A), RMR
Official Court Reporter

ORIGINAL

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 Professionals Act, R.S.A.2000, c. P-14

DISCIPLINARY HEARING

VOLUME 10

VIA VIDEOCONFERENCE

Edmonton, Alberta

June 17, 2022

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W. Pavlic	Legal Counsel
Dr. L. Aldcorn	CCOA Registered Member
Dr. D. Martens	CCOA Registered Member
D. Dawson	Public Member
C. Barton	CCOA Hearings Director

COLLEGE OF CHIROPRACTORS OF ALBERTA

L. Fischer	Acting Complaints Director
B.E. Maxston, QC	Legal Counsel

FOR DR. CURTIS WALL

J.S.M. Kitchen	Legal Counsel

A. Vidal, CSR(A), RMR Official Court Reporter

(PROCEEDINGS COMMENCED AT 8:40 AM)

THE CHAIR: All right. Good morning, everybody. This Hearing Tribunal is back in session.

Today we have three objectives: One is for Mr. Kitchen to complete his closing submissions; the second is for any rebuttal submissions from Mr. Maxston; and the third objective is to allow the Tribunal Members to ask any questions they may deem necessary. So that is our plan for today, and we'd like to get going.

Before we do, Mr. Maxston, you indicated you had something you wished to say.

MR. MAXSTON: Thank you, Mr. Chair. I just wanted to mention for the record that Mr. Kitchen sent me about eight or nine cases yesterday afternoon, and indicated in an email that -- and I believe he sent those to Mr. Pavlic. He indicated in his email that there would likely be more cases today. And I just wanted to mention that, you know, I was fully prepared if I had received all of Mr. Kitchen's cases yesterday to look through them in the evening and, you know, be able to respond to them. That's what we do during hearings and trials, as Mr. Pavlic and Mr. Kitchen know; you sometimes have some late evenings as you get materials from the other side.

I know Mr. Kitchen is -- is going to be, I

believe, adding some additional cases today. And it's very challenging for myself and the hearings director to not have those cases, listen to the submissions, not be able to see the quotes that Mr. Kitchen is referring to. And it's just not -- we're not able to provide a proper and fulsome response in real time without having those cases in advance.

So just for the record, I'm going reserve my client's right to provide some supplemental written submissions regarding the case law and the -- the arguments that Mr. Kitchen is making in that regard. It's just not possible to get the cases throughout the day today, read them -- even getting them over the lunch hour doesn't work. There's not enough time.

So I just wanted to be clear that the complaints director is reserving his rights to provide some additional written submissions on the -- the case law and the issues that Mr. Kitchen is raising in conjunction with those cases.

THE CHAIR: Okay. Let's --

MR. KITCHEN: I'll need to respond to that.

THE CHAIR: Okay.

MR. KITCHEN: Mr. Maxston, I didn't receive your written submissions and cases until about 45 minutes before the hearing started yesterday, and I didn't even know they were coming. I had no

notice from you that I could expect to receive case law or written submissions. I mean, I wasn't terribly surprised. But, I mean, I only received them 45 minutes before with no notice.

As far as cases, I have three or four more today that I'm going to be drawing on. I -- we can stand down now and I can email them to you. I probably won't have more than just those three or four.

I -- you and I are both aware that you can immediately pull up the cases I'm going to be referring to. As is to be expected, they're well-known cases, appellant level cases and Supreme Court of Canada cases that -- you can pull them up in real time immediately. But if it's that big of a concern to you, I can send them to you right now anyways.

So I find it a little frustrating to make a big deal out of, you know -- we're kind of making a mountain out of a molehill here as far as --

THE CHAIR: Let's -- let's try to move --

MR. KITCHEN: If you want my cases, you know, we could have had a talk about that this morning.

THE CHAIR: We -- I don't want to spend the morning debating on how each other should be conducting their case.

Mr. Kitchen --

MR. KITCHEN: Well, neither do I.

THE CHAIR: All right. Then if you wouldn't mind taking a few minutes to send the cases to Mr. Maxston, or maybe that will preclude the need for any written submissions at the end of the day.

Mr. Maxston?

MR. MAXSTON: Yes. Just very briefly. I appreciate getting these cases now, but I would have appreciated them last night because I -- I really can't -- I mean, Mr. Kitchen says they're well-known cases; they're appellant level cases. I have no idea which cases he's going to provide. I haven't had the opportunity to review them. I won't be able to look at them in real time and look at maybe contradictory statements. He'll take you to certain paragraphs, and I may want to take you to other paragraphs.

I provided my written submissions and cases to Mr. Kitchen as soon as I could. I was working on them right up until the day before the hearing. He would've had the benefit of them last night. Again, I'm just -- I still am -- even if I get these cases now, I'm still, for the record, reserving my client's rights to provide supplemental written submissions.

THE CHAIR: I --

MR. MAXTON: I don't want to speak to it anymore, though, Mr. Chair.

THE CHAIR: Yes. I think -- I think what

we need to do, if Mr. Kitchen can send you those cases now, the ones that he believes he will use, then we will move forward. And at the end of the day, if there's still concerns, we'll -- we'll talk about the possibility of written rebuttal submissions then.

I think we really need to -- we really need to protect our hearing time so that Mr. Kitchen has full opportunity to -- to make his closing submissions and the other parties have the opportunity for rebuttal and questions.

So, Mr. Kitchen, if you could -- we'll take five -- is five minutes enough time?

MR. KITCHEN: Yes. That's more than enough, yes.

THE CHAIR: Okay. We'll take five minutes. Just stay on hold, please. And as soon as Mr. Kitchen indicates that he's prepared to start, we'll -- we will begin with the continuation of his closing submissions. Thank you.

(ADJOURNMENT)

THE CHAIR: Okay. Having said that, I will turn the floor over to Mr. Kitchen to continue.

I just ask, Mr. Maxston, you received the information from ...

MR. MAXSTON: I will just check my emails. Just a moment, Mr. Chair. Yes.

THE CHAIR: Good.
MR. MAXSTON: Thank you.
THE CHAIR: Thank you, Mr. Kitchen, Mr. Maxston. And the floor is yours, Mr. Kitchen.
MR. KITCHEN: Thank you.

Now, just one procedural matter before I go into my substantive matters. And I am loathe to raise this, but I'm compelled to as a matter of fairness. Yesterday during the hearing, there were two instances in which the complaints director left the screen. Once was for approximately three minutes. And I note that no one objected to that. That's a fairness concern because there seems to be quite an obsession with Dr. Wall leaving the screen and that being somehow a breach of a rule, of Rule 10. So I have to note that the conduct -- that same conduct was engaged in by the complaints director, but there were no objections.

So I hope -- and by the way, Dr. Wall and his counsel don't take concern with that, And we don't mind that the complaints director takes three minutes off the screen. He's human and that's natural, and that's going to happen sometimes.

I think -- I think all that's critical is that the court reporter and the Tribunal Members are on the screen at all times. So I'm not objecting for the purposes of objecting, because we are concerned. I'm

objecting for the purposes of pointing out the inconsistency and noting the fairness concern.

THE CHAIR: Duly noted. And I think the Hearing Tribunal is concerned that the member be present at -- at the hearing. And I don't want to get into an ongoing debate, but I think everybody here is -- is aware of the sensitivity of coming and going on the screen. And I will say I sometimes fade back, and I am just going to my other computer where I have documents on the screen that I need to access, so I'm not leaving the area.

But anyway, duly noted, Mr. Kitchen, and I will ask everybody to cooperate in following the rules regarding -- regarding attendance at the hearing.

So with that said, Mr. Kitchen, you can pick up where you left off yesterday afternoon.

Final Submissions by Mr. Kitchen

MR. KITCHEN: Excellent. Thank you.

So, Tribunal Members, yesterday I went through the Moore test for discrimination. And I submitted to you that Dr. Wall has established a prima facie case of discrimination on the basis of mental disability and religious beliefs regarding the College's actions towards him, and the pandemic directive, insofar as it does not allow exemptions, and insofar as the College made absolutely no attempt to accommodate Dr. Wall when

he was unable to wear a mask due to these two protected characteristics.

And I put it to you that there are several charges that are implicated by this analysis. And just briefly, those were 1(a), 1(b), and 1(c). 2(a), 2(b) has to do with staff. And then 5(b). I'm going to get into detail about those charges, but I just wanted to remind you those are the charges that we're dealing with, I would submit, when we're looking at this human rights analysis. And I know Mr. Maxston wants to say it's all about reasonableness. And yes, obviously, if you -- if you take the scientific evidence at face value, the pandemic directive is unreasonable.

But that's not the proper legal analysis. The proper legal analysis is whether or not the pandemic directive and the College's actions and zealously enforcing it against Dr. Wall are justified. Are they justified discrimination, or is it unlawful discrimination? And that's a slightly different analysis, as I'm going to get into.

So where I want to take you next is moving on -- and I'm going to remind of you of what -- of what Justice Abella said in Moore. At paragraph 33, she said: (as read)

> Once a prima facie case has been established, the burden shifts to the respondent to

justify the conduct or practice within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

Of course what she means by that is unlawful discrimination, which is to say discrimination that's not justified.

I cannot emphasize enough that you take note of the fact that the burden of justification is on the College. There can be no reverse onus here on Dr. Wall to prove that masks are completely ineffective. Now, I would submit he's done that. Okay? But the legal burden is -- is -- it's extremely important to understand where the burden lies.

The burden lies on Dr. Wall to establish a prima facie case. He's discharged that burden. I brought you through that yesterday. Now the burden is on the College. And my submissions are that -- I'm sorry. The complaints director. My submissions are that the complaints director cannot meet that burden. He cannot establish on a balance of probabilities that masks are meaningfully effective. It's not possible.

Now, of course I'm going to bring you to -- you know, I'm going to be spending probably a significant amount of time going through the expert evidence.

Okay? Which I know the complaints director doesn't want to do, and I can see why. The expert evidence does not favour him. The scientific evidence does not favour him. So that's why you heard a lot of submissions from Mr. Maxston about how this isn't about -- this isn't about science; this isn't about the scientific evidence. We're going to skirt around that; right? And it's just -- it's just an obvious way to point that. You can look at how cursory the cross-examinations of Dr. Wall's experts were. The actual scientific evidence was not engaged with at all.

And you see that also in my learned friend's submissions. The scientific evidence was not engaged with. Rather, he preferred to dance around it because it was an object in the room that he had to avoid.

But I will remind everyone that the scientific evidence was so important to the College, so important to the complaints director, that when we had a hearing scheduled for July of 2021 to do exactly what we're doing today, we had to adjourn because the complaints director didn't have an expert yet and did not want to proceed without one and demanded an adjournment. Clearly, it's pretty important.

And I do think it's relevant, even if tangentially. I think it's relevant that in this case,

Dr. Wall started with three experts. The College had to scramble to find one and had to apply to adjourn to find one. Then Dr. Wall induced a fourth. And here we are today with Dr. Wall with four experts and the College with one.

The College has never called any experts to rebut any of the information, material evidence, that Dr. Wall has put in that Dr. Hu was not able to deal with. I think that's very significant.

Now, there's a -- now, when we talk about justification for discrimination, there's a couple different ways we can look at it. We can just use the word "justification", or we can talk about bona fide occupational requirement, otherwise called a BFOR by those who practice human rights law. And I'm going to submit to you that that's probably the best way to look at this is is it a bona fide occupational requirement that chiropractors universally mask when treating patients, no exceptions? And, of course, this is theoretically possible. In does happen in the real world. There are bona fide occupational requirements that justify some level of discrimination. We see this all the time with people with mental disabilities, physical disabilities. There's certain jobs they can't do, and there's just no accommodation.

And that's what the College wants to establish.

That's what the complaints director wants to show, is that there's just no way. It's a bona fide occupational requirement, these masks.

There's a test that the complaints director has to meet in order to establish that legally, and that's what I'm going to bring you through. And that case, of course, comes from the Meiorin case. Now, you're going to have a copy of this case. And you'll notice that Meiorin, that's M-E-O-I-R-I-N [sic], is not in the name of the case itself. Sometimes cases gets names that actually aren't the real name of the case. We call it the Meiorin case. That's what the Supreme Court of Canada has called it for the last 20-some-odd years. But I just -- I'll note for you that the citation is [1999] 3 SCR 3.

It's a pretty simple test. The first step is to show that the standard adopted -- in this case, universal mandatory masking -- is rationally connected to practicing chiropractic at the material time. Second step is to show that the standard was adopted in a good faith belief, that it was necessary.

Now, Dr. Wall concedes these first two points. There is no doubt that the College honestly, even if mistakenly, believed that, no exceptions, masking was required. And although the College's mask mandate is itself irrational in light of the scientific evidence,

its purpose is, arguably, rationally connected to safety.

The third step is to show that the standard, universal mandatory masking, is reasonably necessary. This is where the majority of human rights cases are decided. This is the part of the test that is often referred to as "undue hardship". This is the part where Dr. Wall submits the complaints director fails.

Now, this part of the test is often difficult conceptually to apply because mere hardship is not enough. The hardship must be undue. But that begs the question, where is the line between mere hardship and undue hardship? Well, I'm going to take you to the case law to try and flesh that out for you.

Now, I'm going to go to the Meiorin case itself first. Again, this is -- the citation for this is [1999] 3 SCR 3. And I'm going to be at page -- sorry -- paragraph 68. Now, I understand you don't have that in front of you, but you will have it when you -- when you review my submissions and deliberate on your decision. I'm just going to read it for you. Of course, most of these cases are about workplaces. They're about employers and employees. As we've already looked at, all of that case law is equally applicable to regulatory bodies.

Reading now from the third sentence of

paragraph 68: (as read)

> By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society insofar as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that the standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation if reasonably possible.

The standard in this case is the pandemic directive. Okay? Universal, no exceptions, masking for chiropractors while treating patients. That's the standard. Okay? Case law says the standard itself is required to provide for individual accommodation if reasonably possible.

So we have a conundrum here because the College sets up this unreasonable, unlawful standard, and then

says, Well, we have to enforce it, so we can't accommodate you, Dr. Wall, because this is what the standard says, and this is what AHS says, this is what the CMOH says; right? But the law says, Well, look. Either you don't follow our standard and you accommodate because that's what the law requires, and by the way, human rights legislation is supreme over your standards and over what the public health guide says and over what the CMOH says. So this is a -- this is a higher obligation to the law. It's a quasi-constitutional obligation you're bound by. Okay?

Or, when -- when it comes to you that your standard isn't going to work, it's unlawful, well, you change it. And funny enough, we have an example of what that looks like. We have Dr. Linford's decision, which, you know, basically says, Look. Your standard isn't going to work because the implications of this standard is that when somebody has a human rights concern, you take away their licence, which is what we do to professionals that are stealing from their clients, or raping their patients, or other type of scandalous, egregious activity. So we can't do that. So we have a problem.

And this is why you get this inconsistency between Dr. Linford's decision and what the College wants and what the College is trying to do.

And, of course, my learned friend says, Well, the complaints director disagreed with that, and he would've appealed that if he could have.

I'll remind the Tribunal, since it may not know, the Queen's Bench of Alberta is a court of inherent jurisdiction. If the complaints director was that keen on stripping Dr. Wall of his licence, he has the option of making an application to the court. He's not limited only to the provisions under the Health Professions Act that allow him to, without going to the court, apply to strip Dr. Wall of his practice permit. Okay? He could've gone -- he could've gone to the Court of Queen's Bench. I mention that because I know my learned friend has a couple of times mentioned, Well, Dr. Wall could have gone to the Court of Queen's Bench. He could've -- he could've applied to vary this; he could've applied to overturn that.

Well, yes, both sides could've. But both sides didn't. And that's not surprising. This is the real issue here today with the Tribunal. This -- this is the place to resolve this, and so here we are.

So I'm going to take you back to paragraph 62 of Meiorin. So this is just a few paragraphs earlier from where I was. Supreme Court of Canada says: (As read)

> The employer must establish that it cannot accommodate the claimant and others adversely

affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship", it is important to recall the words of Justice Sopinka, who observed in the 1992 case that "the use of the term "undue" infers that some hardship is acceptable. It is only undue hardship that satisfies this test." It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

That's the law.

No doubt it is ideal for the College to have an absolute standard. Isn't that clean? They don't have to worry about any public pressure, any backlash, any issues with the chief medical officer of health. We don't have to deal with all these requests from chiropractors to be accommodated. We don't have to deal with any of that. Stringent standard. Public interest. Done. And if we didn't have human rights law in this country, that would've flown.

I'm going to take you to another Supreme Court of Canada case a little bit newer. The citation for this one is 2008 SCC 43, it's entirely French. I won't attempt to say it. But that's the citation for it. I'm going to read you from paragraphs 13 and 14. Paragraph 13, the Supreme Court of Canada says: (as read)

> In the employment context, the duty to accommodate implies that the employer must be flexible. Implying its standard of such flexibility enables the employee in question to work, and does not cause the employer undue hardship.

Going down to paragraph 14: (as read)

> As Justice L'Heureux-Dube stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

This case law was not put to Dr. Linford, but he

implicitly recognized that accommodation was possible in Dr. Wall's case. Of course, the nice thing about accommodation when employers or regulatory bodies actually do it is, a lot of times, you can come up with a solution based on the individual circumstances and scenarios of the people involved.

Dr. Wall's office is uniquely suited for accommodation. He works alone, or at least he can work alone. He sees patients one at a time. There's nobody else in his office besides him and his patient; right? This is unlike most chiropractic offices, as I'm sure the two chiropractors on the Tribunal can -- can attest to. A lot of times there's multiple chiropractors in an office, there's multiple patients at a time, there's all kinds of secretarial staff, there's all kinds of things going on. Dr. Wall's situation is uniquely suited. And I would say it's uniquely suited to this -- to the prescreening, which is fundamentally important to this case, that there was prescreening in place, and that Dr. Wall was not actually permitted and did not see patients while symptomatic, and he did not see patients that were symptomatic because of the prescreening to exclude symptomatic patients. It's particularly suitable to his situation.

Now, Dr. Linford didn't give much for reasons as to why he concluded the way he did, but I put it to you

that that's a relevant factor. That was probably considered by him.

So I need to reiterate, the College must show undue hardship, not mere hardship, because mere hardship can be anything. It has to be undue.

Now, I submit there are only two forms of hardship that the College can point to. One is obviously harm to patients, and, as I'll explain, the extensive scientific evidence induced by Dr. Wall closes the door on that. The other one is what I'm going to call a jurisdictional argument, the argument that the College had no choice because Dr. Hinshaw said so. Because if it didn't, it would suffer undue hardship because of the actions that the CMOH or AHS or the Cabinet might take against it.

But that's not how human rights works. As I've mentioned, the Alberta Human Rights Act is quasi-constitutional. It is above regular legislation such as the Public Health Act and the Health Professions Act. All provincial statutes are subject to the Alberta Human Rights Act. I'm going to read to you a little bit from that legislation. Section 1(1) of the Alberta Human Rights Act states: (as read)

> Unless it is expressly declared by an act of the legislature that it operates notwithstanding this Act, every law of

Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act.

That is a very all-encompassing statement that you will not see repeated in mere legislation. This is fairly similar to Section 52(1) of the Canadian Constitution Act, 1982, which says that every law in this nation that is inconsistent with the Charter is of no force and effect. This is similar language. It says, Look. This is supreme. If you're not in adherence with this, it doesn't matter what your statute says. It doesn't matter what your policy is. It doesn't matter what your sub-legislation says. It doesn't matter what your chiropractic regulation says. It doesn't matter what your Health Professions Act says.

And just so we don't leave any doubt on the matter, Section 12 of the Alberta Human Rights Act states: (as read)

The prohibitions contained in this Act apply to and bind the Crown in right of Alberta, and every agency and servant of the Crown in right of Alberta.

I know there's some fancy legal language in there, but I don't think my learned friend is going to disagree with me when I tell you that this covers the College. The College is a creature of statute. It has statutory

powers. It therefore falls under the broad umbrella of the Crown of Alberta or a servant or an agent of the Crown of Alberta. Okay? And, of course, that covers AHS and the CMOH as well. Those are part of the Crown. They're bound by this legislation.

And, of course, they have to be. If they weren't, this legislation wouldn't mean anything. If it didn't bind government, what would be the point of it?

Now, in case you're wondering, the Public Health Act does not include a statement that it operates notwithstanding the Human Rights Act, nor does the Health Professions Act. But for our purposes, it's the Public Health Act that matters, and that's because all the CMOH orders and all the AHS orders derive their jurisdictional lawful authority, insofar as they are lawful -- and I'm going to of course be contending a lot of them aren't, but insofar as they have their prima facie or presumptive authority or jurisdiction, it's all derived from the Public Health Act. Okay?

So if the Public Health Act does not include a statement that it operates notwithstanding the Human Rights Act, then none of the CMOH orders or the AHS orders can operate notwithstanding the Human Rights Act.

I'm going to take you back to the case of Wright, Wright v. CARNA. Now I'm going to take you to

paragraph 103. You will note in this case that there is a dissent. Justice Berger dissents, but not on this point that I'm going to read to you about. I'm actually going to read you paragraphs 102 and 103. Again, this is the -- this is the Court of Appeal. Justice Berger is an appellate justice. He's dissenting in this case, but not on these points. Paragraph 102: (as read)

> Importantly, the Alberta Human Rights Act also provides, and unless the legislature has expressly stated otherwise, every law of Alberta is inoperable to the extent that it authorizes or requires to do anything prohibited by this act. It follows that because the legislature has not expressly stated otherwise, Section 1(1) of the Alberta Human Rights Act trumps Section 1(1)(pp)(ii) of the HPA [that's the Health Professions Act]. And the respondent's argument based on the latter provision of Section 82 of the HPA fails.

Now, Justice Berger dissented on the outcome of this case, but this statement of the law is not inaccurate. Continuing on to paragraph 103: (as read)

> Human rights legislation is quasi-constitutional law. Its purpose is to

preserve the dignity of human beings, protect against discrimination, promote equality, and provide relief for the victims of discrimination. See O'Malley at paragraph 12.

I brought you to that case yesterday. That's, I believe, the Simpson Sears case from the '80s. (as read)

It must be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies.

Justice Berger cites an Ontario case. And he continues: (as read)

Human rights legislation is privacy over all other legislative enactments. Therefore, where provisions of human rights legislation conflict with the provisions of another provincial enactment, it is the former that apply.

Dealing with an argument that the Workers' Compensation Act encourages discrimination, the Court of Queen's Bench stated at paragraph 16 of the case with citation 2014 ABQB 712, that an employer can choose to discriminate, but cannot use the legislation as a defence when it chooses to do so. This case is

Challenger Geomatics and ...
MS. BARTON: Excuse me. I'm sorry to interrupt. I've just -- I've just been notified Mr. Dawson has -- he's lost his internet connection. He's trying to get back in.
THE CHAIR: Okay. Thank you, Ms. Barton. Let's take a -- let's take a quick five-minute break. I know Mr. Dawson was having problems earlier, and he has been trying to find a secure connection. We'll just take a short break while we have him rejoin. If you can -- and I apologize, Mr. Kitchen, for interrupting your chain of thought, but we really need --
MR. KITCHEN: It's good practice.
THE CHAIR: Okay. Stand by. Thank you.
(ADJOURNMENT)
THE CHAIR: Okay. Mr. Kitchen, we have Mr. Dawson back.
MR. KITCHEN: Excellent.
THE CHAIR: So if you can pick up where you left off, we'll continue. And I think it's 9:30 now. We'll look to take a short bio break, five or ten minutes, around 10:00 depending on what's convenient for you.
MR. KITCHEN: Sure.
THE CHAIR: Okay. Thank you.

MR. KITCHEN: All right. So I was discussing how the Alberta Human Rights Act and obligations to comply with it operate notwithstanding pretty much anything else.

And I brought you to a Court of Queen's Bench case that dealt with an argument that the Workers' Compensation Act authorized or required discrimination. The Court rejected that. I'll take to you an Alberta Human Rights Commission case. Or -- sorry -- I should say Tribunal case. This is the case of Horvath v. Rocky View School Division, 2016 AHRC 19. And same thing, at paragraph 164 and 165 of that decision, the Alberta Human Rights Commission -- this is a decision of William E. McFetridge. And he noted specifically that, as I've been saying, 1(1) of the Alberta Human Rights Act makes it clear that legislation is subject to the Alberta Human Rights Act. And it has no -- and he said it has no effect on the Human Rights Tribunal's ability to make findings and order remedies. It's just confirming what the Court has already said.

I submit to you it's the same for you, whether you're a Court, whether you're a disciplinary tribunal with the College of Chiropractors, or a human rights tribunal. The fact remains that the Human Rights Act is supreme over, in this case, the Public Health Act, and any discrimination that is authorized or required

ostensibly by the CMOH orders, which means by the Public Health Act -- no. That's not lawful. And you have the authority and jurisdiction to say it's not lawful. The way that Dr. Wall was treated, the way he was excluded, the way the pandemic directive caused him to face discipline, it's all discriminatory, and it can't fly.

Now, as I've already alluded to, and to put it very plainly, it's no defence for the College to say, Well, the CMOH and AHS said we had to discriminate against those would cannot wear a mask due to a protected characteristic. Of course, we have in evidence, look -- from Dr. Halowski and Mr. Lawrence, and we have some submissions from Mr. Maxston, you know, Look. The complaints director of the College, we thought about this. Okay? We considered all these things, but we just -- we just can't. We just couldn't. We asked -- we asked Dr. Hinshaw. We asked AHS. They said, No, we can't. That is no defence. You don't get to say, Yeah, we can breach the Alberta Human Rights Act because, you know, the public health officer said so. That's not how the law works. That's essentially what the College is trying to say. It's not how the law works.

If the College can show scientifically, factually, that its mandate is a bona fide occupational

requirement, yes, then it could say, Look, yes, we -- we discriminate, and it's justified. Okay? But it doesn't show that justification to the logical fallacy of appeal to authority. That's -- that's kind of what this is really all about. What the case law is saying, Look. If you're going to defend your discrimination as a bona fide occupational requirement, as a BFOR, you're going to have to -- you're going to have to show that on your own. You don't get to merely appeal to authority and say, Yeah, look, they said we could do it. That's not how the law works. That's what this is really getting at. So yes, the College can defend it, but not by pointing to other authorities, only by establishing on the record that its policy is justified.

Now, the fact that the CMOH and AHS are also bound by the Alberta Human Rights Act is implicitly acknowledged by these bodies. Okay? We see that in the CMOH orders. Okay? We -- and the relevant ones here of course are 38-2020 and 42-2020. We see this is in evidence. We discussed it at length. We saw in there the sections that would say, subject to Section XX, everybody must wear a mask in an indoor place. Okay. Well, that's legalese for, You have to do this, except for this. Okay?

So then we go to the next section. So if we're

talking 38-2020, its Section 26 says you've got to wear a mask, indoor place, no matter what. Unless -- except for Section 27. When we go to Section 27, we look at section -- (c), Section 27. And it says, If you are unable to wear a mask because of a mental concern or limitation, you don't have to wear one. Okay? So the requirement to wear a mask is subject to that exception. Okay? Well, that's a really good example of what legislation looks like when it actually is written or drafted or operated consistent with the Alberta Human Rights Act. It will have carve-outs. It will have exceptions. It will have accommodations built into it. Okay? That's what the CMOH order does. It's an implicit acknowledgement.

Now, the CMOH orders always failed when it comes to religious beliefs. They have allowed for accommodation of religious beliefs. So they were perfectly consistent with the Alberta Human Rights Act. But insofar as it recognized mental and physical disabilities, it was. And I would say that AHS implicitly acknowledges this because otherwise, Dr. Wall wouldn't be practicing right now. His clinic wouldn't be open. It wouldn't have been reopened on January 25th, 2021.

Now, what happened for why Dr. Wall's clinic is not in evidence? Okay. I can tell you that letters

were sent by myself to AHS. I can tell you that Dr. Salem's letter, the same one that's in this record, was provided to AHS. Okay? We didn't get into the evidence on that, but I think what you can do is you can infer that something must have happened because AHS closed his clinic, said, Dr. Wall, you must be breaching Section 26. And then they opened his clinic and said, Okay, you can practice without a mask. Obviously something happened there in the interim. I think you can infer that, well, if AHS is going to allow Dr. Wall to practice without a mask, it must have felt like he fell under Section 27(c) of CMOH Order 38-2020 because otherwise, we can't make any sense of what they did.

And, of course, you know, we've looked at the inconsistency here; right? Order Number 1 of the rescind notice, which is the -- I'll call it the reopening notice of January 5th, says: (as read)

> Dr. Wall must follow everything the College says, but he can practice without a mask.

Of course, we have a natural inconsistency there. I'm not going to blame AHS for that, though; I'm going to blame the College. I think what AHS is doing is doing its best, believe it or not, to actually act in accordance with the law, which is why it's saying to Dr. Wall, We're going to reopen your clinic because

you're exempt; right? We need to accommodate you. If we close your clinic, we're discriminating against you unlawfully. We're going to open your clinic, and we're going to tell you to follow the College even though, well, that isn't going to work because the College says you can't operate without a mask. But as far as we're concerned, we're going to follow the Alberta Human Rights Act, and we'll just leave that inconsistent mess up to you and the College.

So in conclusion, on the law -- and I'm going to take you to the evidence -- universal mandatory masking is either a BFOR because the science supports it, or it isn't. It is irrelevant if the requirement is ultimately coming from Public Health if the Public Health is telling the College it cannot accommodate members.

And by the way, if the -- if the science or the evidence or the facts or the reality says that masking isn't effective, then it doesn't matter if it's a chiropractor or if it's a chiropractor's staff or it's somebody who works in a department store. Okay? We don't have -- we don't have different standards for different people unless it scientifically makes sense; right? That's what the Human Rights Act says. You know, I understand that AHS apparently didn't accommodate its own employees for -- for masking, but,

well, insofar as that happened, I don't know that it's relevant, but, in any event, it was unlawful. And in any event, AHS did accommodate Dr. Wall.

Well, that brings us to the million-dollar question in this case: Is the College's no-exception mask mandate a bona fide occupational requirement because without it, undue hardship would accrue to the public interest the College must safeguard? And, of course, that harm to the public interest would be harm or risk of harm to the patients. That's -- that's the biggest question in this case. Do masks work?

Because if they do, the College didn't do anything wrong, didn't act unlawfully. Its discrimination is justified. It was lawful. If masks don't work, then what it did was unlawful. It was unlawful discrimination. Its policy is not justified. And that matters because you're going to have to decide, did Dr. Wall commit professional misconduct or unprofessional conduct? If he was unlawfully discriminated against, then, as a matter of law, he did not act unprofessionally. If there is no unlawful discrimination, then Dr. Wall didn't do what the College said, didn't follow the directive, and it's -- you know, at least it's theoretically possible to say, Well, that's unprofessional conduct. It makes sense. But you can't -- you can't possibly get to

unprofessional conduct if Dr. Wall is simply exercising his rights, and all the charges that the College is bringing against him is just another manifestation of unlawful discrimination. That's what you have to remember here.

Now, remember the onus is on the College to establish this, that their mask mandate is a BFOR on a balance of probabilities. It has to show through the evidence that it's undue hardship, not mere hardship. The College fails on this point. The complaints director cannot demonstrate that.

Now, just before I get you into the evidence, I'm going to give you my summary, high level, 40,000-foot view of the enormous amount of evidence in this case. That's the following: 1, since prescreening administrative controls were in place, chiropractors almost never saw patients while symptomatic, and patients almost never saw chiropractors while symptomatic.

2, the College's mask mandate is therefore, practically speaking, an asymptomatic mask mandate. It is a mandate that chiropractors, while asymptomatic, treating asymptomatic patients, always wear a mask.

3, asymptomatic transmission of the SARS-CoV-2 virus is very rare.

4, the majority, or at least a significant portion

of effective transmission of SARS-CoV-2 occurs through aerosols, and the rest occurs through droplets and contact.

5, masks prevent droplet transmission from symptomatic people.

6, masks do not prevent aerosol transmission from symptomatic people.

7, masks likely increase contact transmission from symptomatic people.

8, masks have no impact whatsoever when worn by asymptomatic people. This is for two reasons: First, because asymptomatic people effectively do not transmit the virus; second, if asymptomatic people ever did transmit virus, it would only be through aerosols, since droplets only result from symptoms, and masks do not stop aerosols in any event.

9, the College's mask mandate therefore had an entirely neutral impact on transmission. And Dr. Wall in no way increased the relative risk of transmission by not wearing a mask.

Masking chiropractors will not reduce the relative risk of transmission of SARS-CoV-2 in chiropractic offices. In other words, the risk of transmitting SARS-CoV-2 between chiropractors and patients remain the same with or without masks. There is a static underlying absolute risk, of course. Okay? The

question is whether or not does having an unmasked chiropractor, when he's asymptomatic, treating a patient, in any way increase that risk over and above a chiropractor who is wearing a mask? Is there a difference in risk and reduction? Okay? The College -- the complaints director has to show you, and what he can't show you, is that there is a relative reduction in risk from not wearing a mask to wearing a mask. Wearing a mask reduces the relative risk. Okay? It decreases that risk. He can't show that. That risk is the same when Dr. Wall sees a patient without a mask; if Dr. Wall sees a patient with a mask, the risk is unchanged. There has to be a difference in that risk or else we have a policy that has no impact.

And 10, transmission of SARS-CoV-2 is very high and has increased over time.

And lastly, 11. The disease caused by SARS-CoV-2, which is COVID, poses a risk on a similar level with influenza as far as risk of death but is much, much easier to catch regardless of any measures that are put in place to stop it. That is an overview of the evidence in this case.

Now, later today, I'm going to take you to all the evidence on how masks are harmful. But the harmfulness of them is not directly relevant to this question. Okay? This question is about effectiveness. To show

unlawful discrimination against Dr. Wall -- or to show that discrimination is justified, the College must show on the balance of probabilities that the College -- that the masks reduce risk. Okay? That they are effective. We'll put aside the hard question for now.

Now, let's start with Dr. Hu. In its attempt to meet its onus to show that masks are effective in preventing virus transmission, the complaints director induced expert opinion evidence from a public health physician. That's Dr. Hu. Now, I submit to you that Dr. Hu's evidence is poor, and I'll get into that. But there are problems with Dr. Hu himself as an ostensibly credible and reliable witness.

And I submit to you that for these reasons alone, the Tribunal should put very little weight on Dr. Hu's evidence and prefer the evidence of Dr. Wall's expert witnesses whenever Dr. Hu's evidence conflicts, which it often does.

The first issue regarding Dr. Hu as an expert is impartiality. During qualification, that is, during questions in which Dr. Wall's counsel asked Dr. Hu about his credentials, his qualifications, his research experience, et cetera, this revealed that Dr. Hu receives a substantial amount of research funding related to COVID and COVID vaccines. Dr. Hu acknowledged during questioning that he would receive a

lot less research dollars if everyone decided COVID was not really that big of a deal. You'll find that at page 120 of the record.

Dr. Hu has a financial interest, both in defending that COVID is serious enough to warrant massive efforts to prevent transmission, and in arguing that the measures intended to prevent transmission are effective. If the public realizes measures like masking and vaccines don't work, it will have a chill effect on available research dollars for Dr. Hu to consume.

Second is the issue of reliability as it pertains to maturity, professionalism, and reasonableness. In his report, and throughout cross-examination and I would say direct examination, Dr. Hu was flippant, careless with words, insulting, and accusatory of Dr. Wall's experts, and downright unprofessional.

For example, Dr. Hu included a section at the beginning of his report that he admitted on questioning was there for fun. Fun. He admitted that doing so was very casual and that he should not have. He then proceeded to retract that part of his report, admitting that it was not relevant. And, of course, it wasn't, as it talked about a bacterial infection from hundreds of years ago. You can see all this on pages 222 and 248 to 250 of the transcript.

And, of course, everybody acknowledged that bacteria are hundreds of times bigger than the viruses. That's one of the reasons why it's completely irrelevant to talk about masks in the context of a bacteria. Every grade 10 science student knows that.

Now, I submit to you it's rather extraordinary that an expert in a case of this magnitude would say things just for fun. I think it's pretty shocking. I think it exemplifies Dr. Hu's immaturity. Of course, there was a second instance of Dr. Hu retracting a portion of his expert report. During cross-examination, Dr. Hu retracted his insults and accusations directed at Dr. Thomas Warren. We see this on page 285. Remember that Dr. Warren provided a report with 98 citations of academic literature. He's been an expert witness many times. He teaches at McMaster. He's an infectious disease specialist. He's currently completing a masters in epidemiology at the University London, England. No slouch.

Dr. Hu says that Dr. Warren: (as read)

Lacks a basic understanding of disease patterns.

That accusation has no basis in reality. It's highly unprofessional to make. I submit to you it's the product of someone who resorts to insults when attempting to beat an academic opponent who outpowers

them on merit. When confronted with the accusation, Dr. Hu retracts, as would anyone caught issuing such an insult to someone as credentialed as Dr. Warren. It's juvenile, this type of behaviour.

And I also submit to you when experts retract portions of their evidence, it's significant. It strongly indicates a lack of credibility. It doesn't happen very often. You will note it didn't happen with Dr. Wall's experts. Four experts, and not one retraction.

Another example of carelessness on the part of Dr. Hu, he labelled you, as governments, as anti-mask in his testimony, and discussed so-called anti-mask protesters in his report. He seemed to think that the position of Dr. Wall and Dr. Wall's experts is that masks should not be used in healthcare settings. When it was put to him in questioning that Dr. Wall's experts were in opposition to mandatory masking, not masking itself, which obviously there's a difference there, he eventually agreed. But at one point, he arguably said, on page 232 of the record: (as read)

> Can I ask the ACAC for like -- like what is the actual argument here?

I submit to you that's also an impartiality concern, asking the College what the argument is supposed to be. But it also shows carelessness, that he doesn't

actually understand or isn't willing to understand the true position of those that he's arguing against.

Doctors Dang, Warren, and Bridle all commented on Dr. Hu's lack of reasonability in his statements, which were often outrageously absolute and arrogant, and his almost juvenile handling of causation and correlation, which are basic scientific concepts.

Dr. Bridle in particular commented on Dr. Hu's unprofessionalism in making the insults and accusations that Dr. Hu did. I'm going to take you to Dr. Bridle's transcript to show you what Dr. Bridle had to say about this. I'm going to be at page 1188 of the record.

And I'm going to start reading here at line 9 of page 888 -- 1188 of the record. Dr. Bridle says: (as read)

> Sorry to be blunt here, but this -- this report from Dr. Hu was -- and generally unprofessional, disrespectful in tone, very much highlighted here. That's why I have this actually underlined, because it's quite offensive. He uses language that is offensive, accusatory. He makes assumptions. He's hypocritical in areas of his report. And I can give you examples of all these so -- if I wish, and this is one of them. He makes demonstrable -- you know, many claims

of lack of evidence, lacked citations or whatever, only backed up by hearsay evidence, and then makes these kinds of statements, right, that as an expert in this area -- and I'm sorry, but looking at the expertise, I'm confident that I have deeper expertise in the area directly relevant to understanding asymptomatic transmission, or lack thereof. And he's actually arguing that I am provide -- I have no scientific evidence. That is a lie. That is a lie. I provided the scientific evidence today. I have all these citations. I'm looking at page 5 of -- and I see all kinds of citations listed here and a description of the science. And he says this proves -- somehow, this proves a lack of understanding. Like this means me, that I do not understand this.

This is unprofessional. I don't do -- write this way in any of my reports, So I'm sorry, this group needs to understand this. I have been involved in a lot of court proceedings. I've been involved in a lot of scientific proceedings. This is not a scientifically or medically acceptable document for interacting with other scientists or medical

professionals, and this highlights it. I encourage you to read that section soberly when you review and deliberate in your time to decide this case. It's pretty significant that Dr. Bridle would say this. You had a whole day with him. He's a fairly mild-mannered kind of guy. He's very, very, very academic, very professorial. He's not -- he's not given to exaggerations. He's not bombastic. To say this, I think, says a lot.

Dr. Bridle also expressed his shock at how poorly Dr. Hu dealt with the issue of randomized control trials through his parachute example. I'm going to take you to this as well. This is page 8 -- I'm sorry, 1182. It's just a couple of pages earlier.

Dr. Bridle said: (as read)

> Now, what I was honestly shocked by is in Dr. Hu's report, he acknowledged that but went on to proceed to argue that a randomized controlled trial could not be done because this is such cut-and-dry topic, because everybody is in such uniform agreement that masking works in the context of SARS-CoV-2. Well, clearly that is not the case. If nothing else, my expert opinion disagrees with his expert opinion. There's evidence of nonuniform agreement right there. And when

scientists disagree, you need further research to work it out.

I'm going to bring you back a lot to this parachute example, which exemplifies Dr. Hu's immaturity and inability to grasp basic concepts, and really wrestle with the evidence.

So let's get into Dr. Hu's evidence. Now, Dr. Hu makes much of the arbitrary distinction between what he calls a healthcare setting and a community setting, and between healthcare workers and non-healthcare workers. Of course, we saw in evidence that there really is no bright line between what is and isn't a healthcare setting and what is and isn't a healthcare worker.

In reality, this distinction is useless and meaningless. The distinction that matters is what Dr. Wall's experts refer to, which is a distinction between the absence or presence of symptomatic individuals.

And common sense tells us, some settings, we have a ton of symptomatic individuals: clinic, ER room, et cetera; right? Common sense and the evidence in this record tells us that we don't have asymptomatic people in Dr. Wall's office, or in just about any chiropractor's office. Or at least, it's extraordinarily rare, because we have prescreening. This is the difference. This is the distinction. We

don't need arbitrary distinctions between healthcare and non-healthcare. We need a distinction between healthcare settings where there's symptomatic people and healthcare settings where there's no symptomatic people. That's -- medically, scientifically, factually, that's the distinction that matters.

Relative risk of transmission increases when symptomatic people are present. Of course it does. That's why in some healthcare settings, in hospitals, the relative risk of transmission is higher than in settings where there's only asymptomatic people. It's common sense.

Now, the reason Dr. Hu fails to grasp this distinction is that he thinks asymptomatic transmission is higher, when on this point, he is repeatedly refuted by Doctors Bridle and Warren, who both demonstrated deeper knowledge of the subject, and both refer to a large amount of academic literature to support their opinions that asymptomatic transmission is very low, or negligible.

As I'm going get to when I get into Dr. Warren's evidence, he didn't just opine, he -- he sourced himself back to academic literature, scientific material to demonstrate it. Studies and articles have demonstrated that symptomatic transmission occurs at 25 times the rate of asymptomatic transmission.

Now, at this point, the Tribunal should prefer the opinions of Dr. Bridle and Dr. Warren over Dr. Hu. Why? For many reasons. Like I said, a deeper knowledge; they're more reliable; but, particularly, because they back up their opinions with citations to reliable academic literature at a much higher rate than Dr. Hu. I'll provide a few examples of this. When Dr. Hu referred to his Italian healthcare worker theory, he cited no study, no report, no literature whatsoever. He himself was his only authority. He did this again with his theory about the November, December 2020 lockdowns in Alberta. He did it when he criticized Dr. Dang's Sweden example. He referred to no authority beyond himself when he made the outrageous claim that every country that has implemented mandatory masking has experienced less cases or less transmission. He admitted citing no sources for these conclusions. In particular, you could see this at pages 270 to 280 in the record.

This Tribunal should be wary of an expert that usually uses himself as his own authority.

Comparing the testimony of Dr. Hu specifically to Dr. Bridle, it demonstrates it's Dr. Hu as the pupil, and Dr. Bridle is the teacher. We see this in how much deeper Dr. Bridle's knowledge is of key concepts, but it's also true from a literal perspective. Dr. Bridle

is a professor with a PhD in viral immunology, teaches and trains physicians like Dr. Hu on immunology and virology, which are critical components of this case.

Remember, the onus is on the College to establish that masks reduce the relative risk of transmission, and that that, therefore, constitutes BFOR. Even without turning to the enormous amount of evidence induced by Dr. Wall that demonstrates the futility of masking, we can see that the College fails to meets its onus with the evidence of Dr. Hu.

I submit to you that even if Dr. Wall did not call any experts, you would not be able to find, based on Dr. Hu's evidence, that the complaints director has demonstrated, on the balance of probabilities, that masks reduce relative risk transmission.

He's not credible, he's not professional, he's not reliable, and his evidence is very shallow. But, of course, Dr. Wall did induce experts. And I'm going to bring you there now.

Chair, it's 10:00. Did you want a break?

THE CHAIR: I think -- I think it would be wise if we took just ten minutes to stretch and recharge our coffee, if necessary. I know you're proceeding quickly, and I appreciate our -- Mr. Vidal's efforts to -- to capture everything you're saying, but I think, him included, it would be a good time for a

short break. So we'll convene for -- we'll recess for ten minutes. Come back at ten after 10:00. Thank you.
(ADJOURNMENT)
THE CHAIR: Mr. Kitchen, the floor is yours again. Thank you.
MR. KITCHEN: Thank you. Before the break I gave you submissions about Dr. Hu's evidence and why I submit you should -- can very well relate to it. And anytime it conflicts Dr. Wall's witnesses, you should prefer Dr. Wall's witness -- expert witnesses, I mean.

Now I'm going to take you to the evidence of Dr. Bao Dang. Dr. Dang is a practicing respirologist. He is categorically an expert on breathing and the lungs. Keep in mind that COVID is a respiratory illness. Further, Dr. Dang has actually worked in a hospital during COVID and has actually treated patients, both patients with COVID and patients that are unable to wear a mask for medical reasons, through his clinic and at the Medicine Hat Hospital.

He has clinical experience that Dr. Hu does not have. Some valuable knowledge that Dr. Dang provides us with is the reminder that widespread and mandatory masking in the face of a respiratory virus is novel. It was regarded as absurd in the past, such as during the viral outbreaks in 2003 and 2008. Dr. Dang was there. He was a medical student during the first one.

He was a practitioner during the second one. He had clinical experience during both of those respiratory viral outbreaks. It's pretty recent history.

Now, this doesn't necessarily mean that universal masking is now definitely unsupported, but -- but this history points to the fact that it's a new, novel idea that we don't know if it works from before. Maybe it works, maybe it doesn't. But we shouldn't be surprised that the evidence shows it doesn't work because it's a new idea. Some new ideas are great. Some are terrible.

And I submit to you that the -- there was a large amount of references to political influences in this case, so much so, that I don't think you can discount it as a coincidence that so many people observed that fact. And I'll remind you it was not just Dr. Wall's witnesses who observed that. The complaints directors, expert witness, Dr. Hu, confirmed that masking is a politicized issue. Okay? And we know this. You all know this from your experience the last two years. This is the reality. So when we look at a new idea, a new scientific theory, and then we look at the fact that it -- it is under political influence, it should make us highly skeptical.

There was also discussion on the record about how there's been a lack of debate. And I'll get into this

in detail with Dr. Warren, but he discusses the phenomenon of medical reversal and how once an idea gets entrenched through bad assumptions, it's difficult to replace, even when those bad exemptions are being exposed as bad exemption -- assumptions.

Dr. Dang agreed with Doctors Warren and Bridle that masks do not stop the diffusion and spread of aerosols. You'll see this at page 932. Weight needs to be given to what Dr. Dang has to say about aerosols. He's an expert in breathing and lungs. He knows what he's talking about. He runs his own pulmonary lab, which is a breathing laboratory. He knows a lot about people when they breathe, what they dispel and what they don't when they breathe.

Dr. Dang referred to the first randomized control trial conducted -- which conducted testing on the effectiveness of masks and preventative transmission of SARS-CoV-2. And that's called the DANMASK study. That study showed that masks had no impact on viral transmission. That's at page 933 of the record.

Dr. Dang opined that it is patently false for Dr. Hu to claim that viral transmission went down in every country that implemented mandatory masking, and he confirmed for us that Dr. Hu cited no authority in support of this contention. In fact, he confirmed that there is no study, article, or report that could

support Dr. Hu's claim. This is significant. Dr. Hu went out in left field, made an outrageous absolute claim, which is an inherently unscientific thing to do, and then cites himself as his authority for doing so. That's significant. You won't see Dr. Wall's experts doing that. In fact, Dr. Bridle repeatedly said, Look. In biology, nothing is absolute. Dr. Bridle always qualified his positions. He was eminently reasonable, the opposite of Dr. Hu, who was often absolute.

Now, look. If we're talking about physics, you can be absolute, but not in biology. As Dr. Bridle said, and as common sense would indicate, you can be absolute that 2 plus 2 is 4. You should never be absolute about how viruses spread.

Dr. Dang testified that he observed hundreds of COVID infections amongst healthcare workers just in Medicine Hat, demonstrating how absurd it was for Dr. Hu to claim that only a hundred events of viral transmission to healthcare workers have occurred province-wide. Province-wide. Dr. Hu says, Oh, and we've had hundreds of thousands of interactions amongst healthcare workers, and healthcare workers and patients only, you know, maybe a hundred or less transmission events. Dr. Dang says, Look. I was in a city of 100,000 in this province of 4.4 million, and we've had hundreds just here.

Remember, Dr. Dang has his own clinic. He works in the Medicine Hat Hospital. Okay? His observations in that regard should be given pretty good weight.

Dr. Dang opined that the mask mandates advocated for the -- advocated by the CMOH and AHS are politically influenced, as I mentioned, not based wholly on science. And, again, he's echoing what almost every witness has said in this case. In fact -- and I think this is what's interesting -- Dr. Dang opined that he wasn't surprised by the political nature of mask mandates and lockdown measures generally. Not surprised. You see this at pages 944 and 945 to 68 of the record where Dr. Dang gives his thoughts on this, eminently reasonable. He talks about why based on fear, psychology, and human nature, that he's not surprised.

Of course, Dr. Dang would know a little better than some people about this. He fled communism when he was young, and, as we all know, those who flee communism tend to know a little better about government overreach when they see it. And, obviously, several times Dr. Dang said that he disagreed with Dr. Hu about the effectiveness of masks, saying that he disagreed with Dr. Hu that there was a lot evidence in support of masking, and opined that masks had no impact on transmission. That's Dr. Dang. A respirologist.

Dr. Hu, of course, acknowledged that he's not a respirologist.

That only becomes relevant because we are talking about a respiratory illness, and we're talking about a device that purports to prevent respiratory transmission. So what a respirologist has to say is squarely on point, I would say more so than what a public health physician has to say. All this stuff is public health, but if you scratch the surface a little more, underneath it, it's immunology, it's virology, its infectious disease modelling. It's medical microbiology. It's respirology. It's these things underneath. Okay? These are the real science underneath the public health response. Okay?

So Dr. Hu is a public health physician, has familiarity with the responses, but whether or not they're actually rational, all the underlying reasoning, it's the specialists and the experts and the scientists that can speak to that at a much deeper level, as we've seen in this case.

We'll move on to Dr. Byram Bridle. Of course, he is a professor of viral immunology. He has a PhD in immunology. He did a six-year post-doctoral to become a viral immunologist. The core of his expertise lies at the core of the issues in this case.

Some of these core issues are how SARS-CoV-2 is

transmitted, how it causes COVID, and how masks can and cannot impact viral transmission. His expertise goes to the core of that. Dr. Bridle, I submit to you, is the most academic witness in this case, being the only witness with a relevant PhD, the only one that's a full-time professor and full-time researcher. As we saw from his CV and his testimony, he's highly published. 29 publications in just the last two years. That's at page 1013 of the record. He does a substantial amount of research in areas relevant to COVID. He's a peer reviewer, which is to say that he is one of those that reviews articles submitted by other scientists and academics for publication. He is one of those peer reviewers when we talk about peer reviewed articles. He's one of the ones doing that.

THE CHAIR: Mr. Kitchen?

MR. KITCHEN: Yes.

THE CHAIR: I -- I'm sorry to interrupt you, but I just want to make sure that our court reporter is able to get the spelling of these names. He may not be familiar with them.

MR. KITCHEN: You know what? I can provide that.

Mr. Vidal, you stop me if you don't need this, but Dr. Byram Bridle, his first name is B-Y-R-A-M.

THE COURT REPORTER: Yes, that's okay.

MR. KITCHEN: Last name is B-R-I-D-L-E.
THE COURT REPORTER: You don't have to do that at this moment. I was going to request maybe your speaking notes afterwards, if that's okay.
MR. KITCHEN: You know what? Yes, let's do that at the end, because that's -- it's -- we often do spellings of things at the very end. You probably have more.

So, you know, you and I, Mr. Maxston, can do that at the end.

THE CHAIR: Very good. Thank you.
MR. KITCHEN: So lastly, as far as Dr. Byram Bridle's qualifications and credentials are concerned, he teaches and trains physicians in immunology and virology, his areas of expertise. He teaches and trains physicians like Dr. Hu.

So obviously, he has a much deeper knowledge than physicians. He teaches and trains them. It's not surprising to see that Dr. Bridle has extensively deeper knowledge about virology and immunology than Dr. Hu.

Dr. Bridle gave extensive testimony on how SARS-CoV-2 is transmitted. He discussed that transmission occurs through droplets and contact, but also through aerosols. The issue of aerosol transmission is, of course, a key one in this case.

Dr. Bridle established that much viral transmission occurs via aerosols. This is key. Ever the reasonable academic, Dr. Bridle acknowledged that it is not clear precisely how much transmission is attributed to aerosols, but it is significance -- significant. And the prevalence of aerosol transmission partly explains why SARS-CoV-2 is so very transmissible and why it just continues to spread more and more regardless of what or how many measures are put in place. This is intuitive. This is common sense.

Dr. Hu and Dr. Bridle both noted something interesting. They agreed -- okay. Now, you'll find this in the record. I'll probably read it to you at some point. Dr. Hu actually agreed that the measures to stop COVID essentially haven't worked. COVID has just continued to spread. Okay? Now, of course he says, Well, we just need to keep doing more of them, and then they'll work, which is itself problematic. But he admits that they're not really working. Okay? So him -- him and Dr. Bridle are on the same page. And then they also alluded to something fascinating, that the measures are working to stop flu, influenza. We barely had it the last two years. Okay? They agreed on that. We're in a point of agreement.

Why is that? Flu is not spread very much by aerosols. It's mostly droplets and contact. That's

something you can potentially deal with. Dr. Bridle went into extensive evidence about this. Look, you keep people home, and if the virus is spread by droplets and contact, that would be really effective. That's what we saw; right? That right there. Common sense. Intuitive. That right there demonstrates that there's something different about SARS-CoV-2. So what is it? Well, I mean, we can -- we can on our own hypothesize it must spread some either way. But when we can also look at the evidence, it says, yes, it does spread another way. That's called aerosols. Okay? And that's how, no matter what you do, it's just going to spread. That's the difference.

Yes, we can go further into the evidence. I'm going to go there, but I want you to pause at that very basic moment and say, Okay. As a reasonable person, which I am called to be in making this decision, I look around me, and I see that COVID has spread like wildfire no mater what we've done, but flu hasn't.

Well, there's intuitive, common-sense reasons for that. No matter how much masking we've done, it just spreads; how many vaccines we put into people, it just keeps going. It doesn't matter.

Now, Dr. Bridle confirmed again the common-sense notion that masks, when worn by symptomatic people that are producing infectious droplets, are effective in

stopping those droplets. We all know this. No one's contending otherwise. Dr. Wall isn't saying, Look. Masks don't stop droplets. Of course they do. That's why they get soaked when you have symptoms. But he explained that masks do not prevent symptomatic individuals from spreading the virus through aerosols, which easily escape the mask, both through the mask itself, and due to the large -- due to large pore size, but also around the mask where it does not seal the face; right? We know this. We see it all the time.

Here, Dr. Bridle explained how it goes up the sides of the face, explained how it goes up here. He showed us with the fogging of glasses. Those of you with glasses know this. And he talked about elsewhere down here, especially if you have any kind of facial hair, like myself or Dr. Bridle. Common sense.

Now, this -- this isn't a problem if SARS-CoV-2 doesn't spread by aerosols. Who cares; right? When you cough and you sneeze and whatever, masks are going to catch the droplets. Now, provided that the masks don't increase contact transmission, which -- which they do when they're not handled right because they're contagious, then sure, yes, masks -- masks will work. You know, they'll potentially work to stop flu insofar as flu is spread by contact and -- and droplets. Not going to work on COVID. It's very simple.

This is a key point of departure between two -- one of two key points of departure between Dr. Bridle and Dr. Hu. Dr. Hu does not acknowledge the reality of aerosol transmission by symptomatic people. That's why he mistaken concludes that masks are effective even though the evidence shows that it just keeps going.

Now, on the issue of aerosol transmission, the evidence of Dr. Bridle should be preferred over that of Dr. Hu when the two conflict. We've seen the real world observations, and we've also seen what Dr. Bridle, who is an expert in this, has to say and the citations that he has referred to.

Now, that's the first issue, asymptomatic -- sorry -- aerosol transmission. Okay? The other -- the other big issue is this: Dr. Bridle gave testimony about the lack of viral transmission by healthy people, otherwise referred to as asymptomatic people. This is corroborated of course by Dr. Warren, and I'll take you into that. But this is the other key point of divergence between Dr. Bridle and Dr. Hu, asymptomatic transmission. Dr. Bridle opined that almost all transmission of SARS-CoV-2 only occurs in concurrence with symptoms, which is to say that symptomatic people transmit it; asymptomatic people essentially don't. Again, this is intuitive. We know this, but, scientifically, it also applies to COVID. Only when

there are symptoms.

And Dr. Bridle -- this is -- this is key; right? This is where the deep expertise in virology, immunology, which is to say the study of the immune system, the study of viruses -- this is where it really comes into play. Okay? This is where Dr. Hu can't keep up. Dr. Bridle spoke at length about how this works. It's about viral load. Okay? He described how that works. Only when there's enough virus being put out by an infected person can another person become infected by that. Okay? We only get that viral load when you have symptoms. Okay? The body is expelling a whole bunch of virus. Dr. Bridle explained this.

So this is why, going to Dr. Warren's evidence, you see in the real world symptomatic transmission is 25 times higher than asymptomatic transmission. Why? Because of that viral load issue. Because it's symptoms that are putting off tons of virus. It's when people have symptoms. They have so much virus buildup in their body now, that's why they have symptoms. Okay? And then they're expelling it. And, again, this goes on -- I'm going bring you through this, but this goes back to the evidence about the enormous amount of people that become infected with SARS-CoV-2 but don't develop the disease of COVID-19. It's only when you have the disease of COVID-19 and you have symptoms, and

then you're dispelling lots of virus. Otherwise, if you're merely infected but you have no symptoms, your body is dealing with it. That's why you don't have any symptoms. You don't even know you're infected. You carry on.

I urge the Tribunal to -- to acknowledge that Dr. Bridle is more informative. He's more reliable. He has the greater expertise in this relevant area, and I refer you to page 1187 of the record.

This matters for the legal analysis. This is dramatic. If almost all spread comes from symptomatic individuals only, this matters for our case because we are dealing with the mask mandate that applies to asymptomatic people, asymptomatic chiropractors, not symptomatic chiropractors, asymptomatic chiropractors. Chiropractors that are allowed into the office because they passed the prescreen. They don't have symptoms. They're healthy. They say, Now you've got to mask because of our theory that asymptomatic transmission is a thing, and because of our theory that it's not spread by aerosols. If those theories are not corroborated, there's no rational basis for the mask mandate, which then matters legally because Dr. Wall is saying, I can't wear it. Protected characteristic. Discrimination. I need to be accommodated. And the College is saying, No. And that's how we get this

discipline hearing.

I'm going to move on to Dr. Warren. Now, of course, I'm just giving you a brief overview. There's -- there's scores of pages for each one of these experts for the -- for the questioning that I brought them through. But I can't go through the whole thing. We don't have time for that. So I'm just highlighting what I think are the really salient points.

Now, Dr. Thomas Warren is a practicing physician. He's an instructor with McMaster. He's an infectious disease specialist, and he provides some valuable contextual information about the factors that impact how much a virus does and doesn't spread. He discussed three factors that cannot be altered. He called them "non-modifiable". He discussed how these three factors are what determined how SARS-CoV-2 spread and why no measures were able to contain it.

And just briefly -- I'm not going to go into great detail, but just briefly, those factors were the cyclical pattern of the virus, population density, and the age structure of a population. Which is to say, the rates of your transmission of your cases, et cetera, are going to be determined by how dense your population is. Again, common sense; right? Dr. Warren talked about all the interactions of people in New York

have as opposed to people in rural Alberta.

Well, age structure, Which we haven't got into this much. We don't necessarily need to get into it a whole lot. But everybody knows, of course, or at least they are familiar with the actual science on this. People above the age of 70 actually do have a decent risk of potentially dying from COVID, especially if they have comorbidities. It's a very -- it's -- the virus discriminates demographically quite extensively. We know this from the literature, but we also know it from the experts themselves. They talked about this. Not really contentious or controversial, but that's the reality. So Dr. Warren is saying, Look. The number of deaths are going to be a function of just what your proportion of people in those categories are, how many people that you have that are above the age of 70, obese, and have other comorbidities. That's going to determine your death rate.

And then, of course, he talks about peaks and the waves, the cyclical nature, how it goes up and down, up and down, up and down. He says, Look. You cannot alter these three things, no matter what you do. And that's what we saw. Nothing impacted those three things. Those are what drives the cases and the transmission. Okay? And you can't stop those drivers. That's what he gets at.

And the theory of masking, distancing, lockdowns -- the theory is that they're going to work notwithstanding these factors. That's the theory. Okay? Dr. Warren said that he was confident as early as spring 2020 that this theory was bunk and it wasn't going to work, and it didn't.

You can see all this on pages 233 to 36 of the record, and pages -- sorry -- 1233 and 1236, and 1250 to 1254.

Dr. Warren agreed with Dr. Bridle that the overall infection fatality ratio, IFR, for COVID was already down to .015 percent sometime in the spring of 2020 and has probably decreased since then, especially through Omicron he talked about, and so did Dr. Bridle, so it's probably lower now.

Regarding asymptomatic transmission, Dr. Warren stated several -- sorry -- stated several studies showed that asymptomatic transmission was rare or negligible. And he said at one study in particular, which demonstrated that symptomatic transmission occurred at 25 times the rate of asymptomatic transmission. I've already discussed that a couple times. That's at pages 1259 to 1260 of the record. And as Dr. Warren commented, this was a significant study because it was testing -- or it was looking at people in their homes, which is a good place to look at

if you're talking about transmission.

And it confirmed that asymptomatic transmission is very rare. It's very low compared to symptomatic, 25 times lower. In fact, Dr. Warren and I had a discussion about, you know, Do we call that substantial or significant? Dr. Warren said, Yes, we do, and I'm pretty confident to call it that. That's a big number.

I'll note again the difference here between Dr. Warren's evidence and Dr. Hu's evidence. Dr. Warren always referred back to scientific literature to support his points, including when it came to asymptomatic transmission.

That's why Dr. Warren has almost 100 citations in his report. Dr. Hu barely referred to scientific literature to support his opinions. He referred to none to support his opinion that asymptomatic transmission was common. Of course, I put it to you that explains why his report has only 22 citations. And I commend you to read Dr. Bridle's comments about those citations when he comments about how weak they are and how old they are.

This is very significant when it comes to weighing the evidence. When it comes to asymptomatic transmission, this Tribunal should prefer the opinions of Dr. Warren and Dr. Bridle over Dr. Hu, and it should give significant weight to Dr. Warren's opinion and

Dr. Bridle's, but specifically Dr. Warren's, on how well-grounded Dr. Warren is in the scientific evidence. He's steeped in it. That's why he's got 98 citations.

If something is likely to be true, if something is supported in the evidence, if something has the weight of science behind it, if something is accurate, you're going to find literature to back it up. You're going to find experts who can point to the literature to back it up. That's what you're going to see in the real world. And when someone is coming in with a novel theory that's being proven wrong over and over again, they're going to struggle the way Dr. Hu did. They're going to have less studies. They're going to refer to themselves as their authority more often. They're going to reveal themselves as having less knowledge, as being more shallow. And they might resort, like Dr. Hu did, to ad hominems when they can't keep up with their academic opponents. That's what you're going to see in the real world, and what you saw in this case.

Again, referring to scientific studies, Dr. Warren explained at pages 1265 to 1249 that there is no reliable evidence to support the theory that physical distancing has any effect on the transmission of SARS-CoV-2.

And again, for the Tribunal, physical distancing as an effective measure is theoretical. It's a new

theory. It hasn't been tried before. There's no literature on it. It hasn't been studied well before. It hasn't been tried before COVID. Dr. Warren went through that. Dr. Warren then discussed the available randomized control trial evidence on masking. He referred to the same Denmark study -- DANMASK study, as Dr. Dang. He demonstrated that masking asymptomatic people has no meaningful transmission. Now, but then he went on to discuss a recent study from Bangladesh. This is another randomized control trial. And, of course, we saw repeatedly in the evidence that randomized control trials are sort of the epitome of scientific evidence. They're sort of a golden egg. They're -- that's the best. That, and these, I think they called them meta-analysis of RTCs, if there's enough of them.

Unsurprisingly, this Bangladesh study conclusively showed that absolutely no impact is had from cloth masks. No surprise there. And, of course, chiropractors weren't asked to wear cloth masks. Okay? Now, here's where we get something interesting. The study did show a small impact from surgical masks. Let's look at that impact. Dr. Warren described this -- this impact that surgical masks had on transmission as an absolute risk reduction of 0.9 percent. This is page 1280 of the record.

Now, to make sense of that number, Dr. Warren explained what it would look like in the real world, which is what any good academic or scientist can do for you.

I'll remind you, this is uncontested evidence. Dr. Hu did not discuss the Bangladesh study. He did not contest Dr. Warren on this point. I'm going to take you to page 1281 and 1282 of the record. And I'm going to start at line 9. Dr. Warren and I had just had a discussion about this Bangladesh study, about the .9 percent. Actually, I'm going to start at line 3. So Dr. Warren says: (as read)

So if we take .09 percent and we do the inverse of it, it's approximately 1,100, just over 1,100. And so what you need to do is take 0.009 and then take the inverse.

So I divided 1 by the 0.09. You get 1,100. Okay?

And so what that said -- and the study went on for eight weeks. You can find that in the methods. So what that tells us is we need to -- in a general healthy population, in an asymptomatic population, we need to have 1,100 people a wear mask for eight weeks to prevent one infection. Not one death. Not one hospitalization, but one infection. So 1,100 people wearing a mask for eight weeks to prevent one infection. And that's a remarkably high number.

He continues: (as read)

Like, if there's any sort of intervention that we're studying in cardiology or infectious disease or, you know, in my -- like, with antibiotics or bacteria or, you know, cardiology, that number is remarkably high. Generally, something over between 50 to 100 is high. But anything over that, like, anything under 50 would be kind of low. And it's not a hard outcome. It's always important to say, what's the outcome? And maybe it is worth masking 1,100 people for eight weeks to prevent one death. But it's not. It's masking 1,100 people for eight weeks to prevent one infection.

Line 1 of 1282. So that's the best evidence we have in SARS-CoV-2. What Dr. Warren is saying, of course, is that the Bangladesh randomized control trial on masking is the best evidence we have on masking in the context of SARS-CoV-2.

This explanation is particularly fitting for our purposes because there are about 1,150 chiropractors in Alberta. So you would need almost all the chiropractors in Alberta to mask for eight weeks to prevent just one infection, statistically. Again, we do not have symptomatic chiropractors treating

patients. They're not allowed to. There's prescreening. We know all that. So that means that you have to have almost all chiropractors in Alberta -- asymptomatic, of course, as they are treating patients -- to mask for eight weeks to prevent one infection.

Remember, the IFR of COVID, even in the spring of 2020, was only around 0.15 percent, meaning that statistically -- and Dr. Bridle went through this -- statistically, only one person dies for every 667 infections. One person dies for every 667 infections, statistically. That means that all chiropractors in Alberta, almost all, 1,100 of the 1,150, would have to mask for over 102 years to prevent one death. 102 years. Of course, that's assuming that through the whole 102 years, we're in a static state of COVID, which we're not. It's -- you know, it's clearly becoming endemic.

Statistically, almost all the 1,150 chiropractors in Alberta would have to wear a mask for 102 years to prevent one death. That's how ineffective masks are, surgical masks. Okay? We're talking surgical masks, the masks that the College has mandated. That's how ineffective they are.

So we had almost all 1,150 chiropractors asymptomatic wearing masks for several months. During

that time period, the best that that could've produced was prevention of a few infections. Statistically, it came nowhere near preventing a death.

Scientifically, statistically, any claim that wearing masks -- chiropractors wearing masks save lives and prevented deaths is absurd.

I highlight that as probably the best scientific way to highlight how ineffective and absurd this mask mandate is.

Discussing the issue of healthcare worker versus non-healthcare worker and healthcare setting versus non-healthcare setting, Dr. Warren opined that, again, it is all about the context of symptomatic people interacting with other people. Page 1286. It's not that the setting, per se, matters; it's that the presence of symptomatic people matters. In some healthcare settings, symptomatic patients are always present, and others, they're very rare.

And, of course, this matters in the context of COVID. If you've got a symptomatic patient, it doesn't much matter what you're doing. You've got a good chance of catching it because the masks don't work, the distancing doesn't work, none of the measures work because it's spread by aerosols. With a symptomatic person present, they're spreading that by aerosols. You've got a good chance of catching it no matter

what's going on, unless you're in one of those hazmat suits that Dr. Bridle referred to. You got one of those full body suits on, you've got the tube coming around, you've got the negative pressure mask on, you've got the shield in front of you, you've got the gloves, you've got that full suit on, well, then you're okay. And again, this highlights the common sense notion that when you're dealing with a -- I think it was Class 3 pathogen or something like that that Bridle referred to. I mean, Dr. Bridle talked about, Look. If -- if I used a surgical mask in my laboratory, I'd lose my -- I wouldn't be able to use my laboratory. I'd be kicked out. I'd be accused of lacking basic understanding of PPE. I wouldn't be -- I wouldn't be able to run my experiments. Okay. He -- he showed what something that would actually work to stop transmission of a virus like SARS-CoV-2 -- he showed what that looks like. Okay? It is possible if you've got a full suit on and you've got a full mask and you've got the negative air pressure and all of that. Yes, you can. That works; right? He -- he said that if he -- just wearing a surgical mask that's supposed to stop the transmission of COVID, if he used that in the lab, he'd be in trouble.

To further explain the importance of context, Dr. Warren describes a scenario where a patient is

seeing a psychiatrist. A healthy patient, a healthy psychiatrist, prescreening administrative controls are in place. Yes. It's a healthcare setting, but the risk of transmission is very low because of the administrative controls; right?

This isn't -- this isn't hard. You go to the ER. You got a -- you got a symptomatic patient that walks in, and if you don't have a hazmat suit on, you might get infected. That's why we see outbreaks everywhere. That's why we see outbreaks in the nursing homes and in the hospitals and all the other places where we have the most intensive measures possible.

Of course, Dr. Bridle also referred to the fact that in the modern world, we have a lot of circulatory systems inside. So obviously outside there's the wind blowing around the aerosols, but inside, you have the circulation systems that are doing it. Again, common-sense explanation for why the outbreaks just keep happening.

I submit to you that the chiropractors scenario is very similar to the psychiatrist scenario. Now, I know my friend is going to say, Well, yes, but the psychiatrist and the -- the psychiatrist's patient are apart. Chiropractors get really close to their patients. Yes, they do. Yes, they do. And if you're dealing with symptomatic people, oh, yes, you're going

increase the risk of transmission the closer you get. Absolutely.

But if they're asymptomatic people and asymptomatic transmission is extremely rare, then that isn't going to matter. There's going to be no meaningful difference there, the fact that you are close when you treat because there's nothing to transmit. Neither one of you are transmitting. Neither one of you are symptomatic. This is why it's so important to accept the real scientific evidence that asymptomatic transmission is rare, that it's 25 times lower than symptomatic transmission. Of course, this -- this is corroborated with the evidence that masks don't have any impact on the transmission.

Now, Dr. Warren talks about a very important thing. He talks about the phenomena of medical reversal. I touched on this already, but Dr. Warren discussed how -- he used two examples too. I think he used a penicillin example. He used examples with -- with bacteria and older practitioners that had to use assumptions, and 25 years later, the assumptions have been debunked in the literature, but they're still practicing that way. That's how they started. That's how they do it; right? Difficult to change human nature.

This explains -- this phenomena explains a lot.

It explains -- it ties in with the whole political aspect as well. This phenomena explains why universal mandatory masking was not abandoned even in the face that it's futile. Now, of course, the evidence showed that masking probably wasn't going to work anyways, but then we try it. And we had faulty assumptions about it, but those assumptions really stuck. And so, of course, we knew pretty quickly -- I would submit we knew pretty quickly they weren't working, but those bad assumptions that they were going to work became entrenched, and they became political hot potatoes. And so admitting that they don't work, removing the mandates, having some humility about getting it wrong, that didn't happen. It is difficult. And Dr. Warren gave an explanation for how that happens. It's called medical reversal.

You see it elsewhere. When you get something that -- that wrong, something that that's important, it's difficult to admit it. It's difficult for the College to admit that their mandate doesn't work and that they need to accommodate.

Then, of course, Dr. Warren responded to Dr. Hu's allegation that Dr. Warren made a factual error when comparing motor vehicle deaths to COVID deaths. On page 1304 of the record, Dr. Warren explains how it was actually Dr. Hu that made an error by changing the

numerator without changing the denominator. It would've been grade 8 math, and I'm sure you know this, but if you've got a fraction and you have a number up top and a number down at the bottom, the numerator is the top number; the denominator is the bottom number. Of course, you know, if you're doing grade 8 math, one of the things you're going to learn is you can't change the numerator without changing the denominator; right? If we're going to have three-quarters, that's going to be different than three-eighths, but it's the same as sixth-eighths.

So we can see that this is a pretty -- it's a pretty elementary error on the part of Dr. Hu that he makes, but then in making this error, of course, then he -- he accuses Dr. Warren of having made an error. And instead of doing it in a professional, respectful, academic manner, he goes out of his way to insult Dr. Warren. So not only is he wrong on a very basic question of math, he then proceeds to insult the person that he thought was wrong based on the error that he made.

Dr. Warren shows that, Look. I'm talking about auto accident deaths in a 12-month period. And I'm talking about COVID deaths in a 12-month period. Okay? Well, actually 13 months, between March 2020 and April 2021, he's saying, Look. This is how many people

died of COVID. And in 2018, this is how many people died of car accidents, and more people died of car accidents than in the first 12 months of COVID. And the first months, of course, is when the deaths were the most severe.

So very basic comparison. And Dr. Warren's -- you know, he's not trying to play with people's emotions. He's just pointing out the raw facts, the raw data. And then, you know, Dr. Hu has a bit of a conniption about this. Forgets to change -- he changes some numbers. He says, Well, yes, by June, it's higher. But, of course, he forgets to add in 14 months of auto deaths. He just stays with 12 months of auto deaths and says, Dr. Warren is wrong.

Another example of why, as trier of fact, you need to prefer the evidence of Dr. Warren when it conflicts with the evidence of Dr. Hu. You need -- I submit that you ought to place greater weight on the evidence of Dr. Warren when it is uncontested and uncontradicted by Dr. Hu, as it often is. A lot of times, you will see that there -- that the experts that Dr. Wall has called have discussed things that Dr. Hu didn't discuss at all. So it's uncontested evidence. That's because their knowledge is deeper.

So to summarize Dr. Warren's evidence, his opinion is that the evidence base was never there to justify

masking asymptomatic people, which would include chiropractors in their offices during the material time because of the prescreening.

Now that I've discussed the evidence of Dr. Wall's experts and the effectiveness or ineffectiveness of masks, I'll note that very little cross-examination of Dr. Wall's experts occurred. In fact, there was essentially no substantive questionings from the counsel from the complaints director. The science was not engaged, not questioned, not challenged.

Essentially, the questions asked were, Look. Did you follow the law you were supposed to mask? And, you know, did you -- have you ever talked to government authorities about this? That's a summary of the questions of Mr. Maxston of Dr. Wall's experts.

The cross-examination on the substantive issues is very telling and it's very important. Much of the evidence from Dr. Wall's experts -- like I said, it was unchallenged and uncontested by the College through their expert.

You'll note that Dr. Wall's counsel did extensive cross-examination of Dr. Hu. And during that cross-examination, we saw two retractions by Dr. Hu, and we saw examples given that Dr. Wall's experts easily rebutted. I submit to you that that says something.

We constantly have heard from the complaints director that the science doesn't matter, but if it does matter, our science is better. That's what we've heard. So what we see is the complaints director is always trying to skirt around this enormous elephant in the room of Dr. Wall's experts saying, Look. Here's -- here's the real science. Okay? That's what this whole case is, skirting around that. Trying to say, We don't have to engage that. You don't have to do that. You can just ignore all that scientific evidence; it doesn't matter. He has -- of course the complaints director has to say that, because he's wrong. Because Dr. Wall is right. I don't just mean morally and ethically, I mean scientifically, factually. And, of course, if he is right scientific [sic] and factually, then he's right morally and ethically. And, of course, that's going to matter because one of the ways to determine if there's unprofessional conduct is to determined if there's unethical conduct, unprincipled conduct, unmoral conduct; right?

So what does all this mean? Technically, legally speaking, what does all this mean? The implication of the scientific evidence is that the no-exceptions mask mandate and distancing mandates contained in the College's pandemic directives are not justified. They're not bona fide occupational requirements. The

discriminatory impact the pandemic directive had on Dr. Wall is not justified.

The discriminatory treatment of Dr. Wall by the College in attempting to discipline him instead of accommodating him for not wearing a mask is not justified. The College has failed to demonstrate undue hardship. However one conceptualizes hardship or undue hardship, it is plain to a reasonable person that if one chiropractor doesn't wear a mask, or even if a few don't, no undue hardship to patients or the public interest will occur, not when it takes 1,100 chiropractors to wear a mask for eight weeks just to prevent one infection and you've got to have 667 infections needing to occur before there is statistically a death.

That might be hardship. Okay? That's -- that's more than nothing. That's not zero. Okay? So is it hardship? Maybe. Maybe not. Hardship is not a wishy-washy word. We think of hardship, we -- we -- when we talk about people going through hardship, we talk about, you know, they lost their job, their spouse died, they got really sick. Hardship. Okay?

Is this hardship? I don't know. But that doesn't really matter because it's certainly not undue hardship. If this is undue hardship, then any government body can point to anything and get away with

any rights infringement. So legally what this means is that the charges identified earlier -- okay. So that's -- I'm going to take you back to them. They have not been made out by the complaints director. Dr. Wall could not and did not, as a matter of law, commit unprofessional conduct in the areas where the College unlawfully discriminated against him contrary to the Alberta Human Rights Act.

So Charge 1(a), failure to wear a mask, that one's pretty straightforward. If the College unlawfully discriminated against him in saying he had to wear a mask and punishing him when he didn't, and when he -- when he said, No, I'm not going to, when he didn't, okay, he acted lawfully. The College acted unlawfully. Well, the party who acted lawfully obviously didn't act unprofessionally, as a matter of law.

I'm not trying to say the College acted unprofessionally. That's irrelevant and that's besides the point. Maybe that's true. Maybe that's not. But the point is, is that Dr. Wall acted professionally in saying, Look. You're acting unlawfully. I'm going to act lawful.

Charge 1(b), failure to distance. Now, how this works, factually and legally, is thus: The College says to -- or the complaints director says to Dr. Wall, Okay. Fine. You can't wear a mask, but you better not

go within 2 metres of people or else we're going to ding you. That's asinine. Okay? We know from the record, we know from Dr. Wall himself, and we know from his three patients, that if he doesn't come within 2 metres of people, he can't physically adjust them. He cannot physically manipulate them. He cannot treat them. He is a chiropractor. He is hands-on. Okay? That's what "chiropractor" itself means. Okay? This is -- this is clear in the evidence. This is not controversial. This is not problematic. It's pretty simple, basic facts. It's logic. You've got to come within 2 metres of someone to touch them. You've got to touch them in order to treat them, And if you don't, you're not providing chiropractic care. Your patients aren't getting the care they need. They're not paying you. You're no longer functionally a chiropractor at all. Okay?

So this requirement of distancing, it is engaged with the mental disability and the religious belief that precludes the masking; right? It's a discriminatory condition. It says, Okay. Fine. You can't mask, but you better stay 2 metres away. Well, that's -- that's ridiculous. So that's why that charge is implicated by this. That's why the College has to demonstrate that that's a justified condition because it is discriminatory; right? It treats Dr. Wall

differently than other chiropractors. Other chiropractors who are able to mask because they don't have a mental disability that prevents them, they can come within 2 metres and treat their patients. Dr. Wall can't, okay, because he can't wear a mask. So it's a discriminatory standard. It's not meant to be, but in effect, it is. Okay? So he cannot be found -- as a matter of law, Dr. Wall cannot be found to have committed professional misconduct by not distancing from his patients while not wearing a mask.

Now, this analysis applies equally to Dr. Wall's son. Remember that in the -- in all the documents, AHS documents and the charge documents from the College, we have staff. We don't have anything specified, but we know from evidence that the only staff working for Dr. Wall during this whole period, during the material time, June to December 2020, is his son. His 17-year-old son. That's it. Nobody else. We can just believe that. The College hasn't contested that. There's no evidence of any other staff. One staff, his son. Okay?

Dr. Wall gave testimony about what his religious beliefs are regarding masks. He was asked if those are the same beliefs as his son. He said, Yes, they are. Dr. Wall's son didn't wear a mask because of a protected characteristic, because of his religious

beliefs. Okay? So he therefore makes out a case of prima facie discrimination if someone says to him, You're going to be discriminated against or punished or penalized for not wearing mask.

Now, in this case, it wasn't directly from the College. The College wasn't trying to punish Dr. Wall's son. It's trying to punish Dr. Wall. Okay? The College has said Dr. Wall is responsible for his staff, for his son. Okay? So indirectly, the College is saying, We don't care if your son has a protected characteristic as the reason for why he's not wearing a mask. If he doesn't, you have violated the pandemic directive. Again, that's discrimination.

Now -- and I'll -- and I'll also note that, look, there's an employment relationship there between Dr. Wall and his son. Yes, they're family, but it's an employment relationship, which means Dr. Wall is actually obligated at law, the same as the College, to accommodate his staff, even if it is his son. He's required to accommodate his staff. So if his staff comes to him and says, I can't wear a mask because of a religious belief and, you know, my Christian beliefs, here they are, it's a protected characteristic in the Alberta Human Rights Act. Can you please accommodate me? Dr. Wall either has to say, Yes, I'll accommodate you because it's not undue hardship, or he has to say,

No, it's a hardship; I'm not going to accommodate. So Dr. Wall has that obligation, the same as anybody does, in this case. So he accommodates his son.

Now, my friend is going to say -- my friend -- learned friend is going to say, Wait a minute. Wait a minute. We don't hear from Dr. Wall's son. That's hearsay. Okay? Hearsay evidence is admissible when it's necessary and reliable. I submit to you that Dr. Wall's testimony in this regard is necessary. We don't have anything else to point to. And I would certainly say it's reliable. Okay? We know Dr. Wall is a candid witness. The counsel for the complaints director has acknowledged that. He's reliable.

It's only common sense to conclude that Dr. Wall knows very well what his religious beliefs are of his son. Okay? Especially since, you know, they live together, Dr. Wall's raised him, and they share these beliefs. And the case law on religious freedom acknowledges that parents and children presumptively share the same religious beliefs. And of course, at the relevant time, Dr. Wall's son is 17. He's still a minor. He's still an infant legally. He's not yet at the age of majority. He's not yet an adult. Working age, but not an adult.

There's no reason to disbelieve that Dr. Wall's son held the same beliefs as articulated by Dr. Wall,

and, therefore, couldn't and didn't wear a mask for that reason. And to penalize Dr. Wall for following the law and accommodating his son is itself unlawful discrimination, and, therefore, legally, Dr. Wall cannot be found to be in professional misconduct because of his son was wearing a mask.

And, again, back to the same question. Well, then, what if it's justified; right? What if it's a bona fide occupational requirement that chiropractic offices have their staff wear masks because, you know, masks are effective and if people don't wear masks, you know, we increase the risk of -- of COVID transmission and it's dangerous. So, you know, yes, it's discrimination, but it's justified. It's the same analysis I've just brought you through with Dr. Wall. It's the same thing. If it's not a BFOR for Dr. Wall, it's not BFOR for his staff.

The same thing with the distancing of his staff. Same thing. I've just brought you through that analysis. That's Charge 2(b).

Now I'll take you to Charges 4(a) and 4(b). These are the charting charges. Now, these charges must also fail because they are inextricably linked to masking itself. If masking is not a bona fide occupational requirement, if distancing is not, Dr. Wall cannot have committed unprofessional conduct

by not charting discussions that he's had about the lack of his masking. It's discriminatory to place this burden on Dr. Wall and compel him to discuss his mental disability with his patients. Dr. Wall's testimony is that he was reluctant, for obvious privacy reasons, to have this type of discussion with his patients, or anybody, which is eminently reasonable. The discussions and the charting would serve no legitimate purpose. It would only impose a condition for the sake of imposing a condition. You have to chart this when other people don't because you're not like other people. You don't wear a mask. Okay? So you've got to have this extra condition imposed on you. Well, maybe that makes sense if there's a reason for it. There's no reason for it. It's a condition for the sake of a condition.

Maybe the College says it's part of its accommodation. Look, one patient in the office at a time, please. Make sure -- make sure you're really extra vigilant about the prescreening. We're going to give you a couple extra questions for that. Okay. Now we're talking reasonable accommodation. Okay? Now we're talking some things that make sense. They aren't simply conditions for the sake of being conditions. Okay? Dr. Wall can say, Yes, well, they don't -- you know, this has no basis in science or whatever. Okay.

Well, sure, it doesn't. But at the same time, these aren't onerous. They're not -- they don't single him out. They don't expose him. They don't create this unequal distinction. It's just simply, Look. Just be extra careful. Okay? Dr. Wall would've said, Yes, that's fine. Look, I'll be extra careful. No problem. This is how my office works anyways. I ask people questions. It's just one patient at a time. No problem. Remember, it is -- it's reasonable accommodation. You heard from my learned friend about how, look -- hey, look, the claimant has to work with the respondent on what the reasonable accommodation is.

I'll tell you what. Dr. Wall's pretty reasonable. You heard him for quite a while. That conversation never happened. That dialogue never happened. The College never said, Hey, let's together on this. Okay. No dialogue. It was, No mask, you sit out. That's what they said. That's what they did.

The fact that he failed to out himself to his patients about his mental disability or -- and/or his religious beliefs, and he failed to chart it when there was no reason to, that's discrimination. And there's no BFOR. There's no bona fide occupational requirement to chart this. Or at least if there is, we haven't heard it.

So charting, him not wearing a mask, and his

patients not wearing a mask, he can't be found in unprofessional conduct for not doing that. There's nothing unprofessional about not doing that. It was a discriminatory and useless condition.

Now, Charge 5(b), because the distancing and masking requirements of the pandemic directive are discriminatory and therefore unlawful, Dr. Wall did not commit unprofessional conduct by not adhering to them, masking, and distancing. Okay? So Dr. Wall didn't fail to follow those parts of the pandemic directive because those parts of the pandemic directive are unlawful. Okay? At law, he can't be found for unprofessional conduct for failing to follow those two things.

Now, the remaining portion of Charge 5(b), failing to follow the pandemic directive, is that Dr. Wall engaged in a contravention by not erecting a plexiglass barrier. But I want to take you to the pandemic directive. And you have -- well, Chair, I'll put it to you that you might want to break at this point. I can pick up later. But if not, then you're going to have to give me a second to find the pandemic directive.

I found it. So you let me know if you want to take a break. It's 11:15. Do you want to keep going?

THE CHAIR: I think we should press on, Mr. Kitchen.

MR. KITCHEN: Good. Thank you.
MR. MAXSTON: Mr. Kitchen, can I make one quick comment? And this is for your benefit. I'm going to be turning around from time to time, and maybe getting up to go get some exhibit binders. I'm not leaving the hearing. So just so you know, that's what I'm doing if I'm looking at my computer behind me. Thank you.
MR. KITCHEN: And if I notice that you're doing that, I'll pause for your sake.
MR. MAXSTON: You know, that's fine. I can still hear you, Mr. Kitchen. I'm just -- I've got some exhibit binders up against the wall and things like that, so please proceed.
MR. KITCHEN: Well, yes, you and I have the same problem. I have my whole desk covered.
THE CHAIR: And to be honest, I'm doing the same because my screen is off to my right. But, anyway, let's carry on and see if we can get to lunch.
MR. KITCHEN: Okay. Now, I have two versions of the pandemic directive. But, as has been established, they are effectively the same. For our purposes, they are the same. Whether we're looking at the May 25th, 2020, or the January 6th, 2021, version, they are the same. So I'll just take you to the May 25th version, and I'll read to you. This is on

page 7 of that one. It's under that large heading, "Physical Distancing", and then the subheading, "Requirements For Managing Clinical Space".

And there's a bullet there a few bullets down that says: (as read)

> Reception and payment area - if 2 metres cannot be maintained in the reception area, either staff must be continually masked, or the installation of plexiglass or plastic barrier must occur to protect reception staff.

I just note that there's nothing there about patients. (as read)

> Installation of a plexiglass or plastic barrier must occur to protect reception staff.

It doesn't say anything about protecting patients. Reception staff. That's why it's a requirement.

Dr. Wall's son and himself were not masking due to a protected characteristic in the Alberta Human Rights Act. To erect a barrier in front of them is to impose a discriminatory burden on him and himself. It's to literally put up a physical barrier between him and other people who are different. They're not like him. They can wear a mask. He can't, for protected characteristics. So he has to put up this ugly,

obvious barrier that excludes him, that exposes him.

And why? Well, because it's going to stop the transmission of COVID. Clearly the plastic barriers don't stop the transmission of COVID because of aerosols. Okay? So it's not -- it's not justified. It makes no impact. Furthermore, it's not rational because there are no symptomatic patients or symptomatic chiropractors or symptomatic staff in the office. It's not an ER room. It's a chiropractor's office, and no one is allowed to be there if they have symptoms. We have prescreening administrative controls in place. What purpose does a plastic barrier serve except to place an additional burden on Dr. Wall? A financial burden, but also a social and emotional burden. You have up this plastic barrier. Why? Well, because we're different. We're not able to wear a mask. We have mental disabilities. We have religious beliefs. Awful. That shouldn't have to come up. They shouldn't be excluded and highlighted and outed that way, not unless there's a reason. If there's a reason, fine. It's justified, justified discrimination.

So if masking is not a BFOR, if distancing is not a BFOR, the plexiglass barriers for reception staff, not for patients, for reception staff, is not a BFOR, then Dr. Wall did not fail to follow lawful requirements of the pandemic directive. He only failed

to follow unlawful directives. And he cannot be found to have committed unprofessional conduct for failing to follow unlawful portions of the directive as a matter of law. Okay?

Dr. Wall admitted to the factual basis for this; right? And, you know, my learned friend commented on this, and I tend to agree with him that this is a very rare case insofar as we have a very candid member who is not hiding anything, not trying to confuse anything. He's just simply saying, Yes, I did this. I did this. I didn't do that. This is what happened. This is what happened. This is what happened; right? He's not -- he's not denying things. Like, you know, Hey, did you have a plastic barrier up? Oh, yes, yes. No, I did. That never happened. There was no discussion like that with Dr. Wall ever. It was always, No. Yeah, I didn't do this. No, this is when I took the mask off. Yeah. No, I didn't contact the College. Right? He was -- he was open and candid about that.

So the question, then, is what about the law? And so we're at a -- we're at a -- we're at a strange place in this case because of that. So I submit to you that disposes of Charge 5(b).

Now, that leaves -- and I'm going to get into this, that leaves a few other charges. As you will see, I haven't touched on Charge 5(a). I haven't

touched on the charges of Number 3. This is where Dr. Wall is being charged with saying something to his patients that the College didn't want him to say and then saying something -- not saying something to his patients that the College did want him to say to his patients. And then, of course, there's the repeated charges of not requiring patients to mask. He haven't dealt with those yet. Okay?

But all the other ones I have dealt with because I submit to you that they are caught by the human rights analysis. If Dr. Wall -- if you find that Dr. Wall established prima facie discrimination, and I submit you should, then the College has an obligation to justify all of these conditions as bona fide occupational requirements. I submit to you that they haven't, and if they haven't, then all these charges must fail. They all fall to that analysis.

Now, my learned friend gave you some submissions on human rights analysis. Bear with me. I will attempt to find this. Oh, here we go.

Mr. Maxston brought you to a total of five cases from the Alberta Human Rights Commission to say, Well, look, obviously -- obviously the Human Rights Tribunal would find these impositions to be justified. These five cases are either dismissals by the director of the Commission, or they are decisions upholding the

dismissal of a complaint by the director when that complaint -- dismissal of a complaint has been appealed. The equivalent of this before a Court is a summary dismissal. Okay? So these are not cases that have been decided on the merits, the full merits. There hasn't been a full case. There hasn't been full submissions and argument and evidence. It's simply the complaint comes into the Tribunal -- or -- sorry -- into the Commission, and I'm going to explain how the Commission and Tribunal are different. The complaint into the Commission. The Commission says, Okay. We've got the complaint. We'll send it to the respondent. And either the Commission or the respondent says, Look. This is a waste of time. Let's just summarily dismiss it. And then the director of the Commission decides to summarily dismiss it. That's what all these decisions are. They are not decisions of human rights tribunals making determinations on a fulsome case. They are summary dismissals.

Now, that doesn't mean they're worthless. That just means they lack precedential value because they're not full decisions. They're not from human rights tribunals. And remember, what happens at the Human Rights Commission is you have this body; it's called a Commission. They process complaints. Okay? And if the complaint is not resolved through reconciliation,

or if it's not dismissed, then it will continue on to a Tribunal where there will be a full hearing. And then there will be a decision from the Tribunal. Similar to what we're doing here today. There will be evidence, there will be facts, there will be testimony, there will be argument, there will be case law, there will be a full argued case. And the Tribunal will make a decision. Okay? That's not what these are. These are summary dismissals from the Commission side. They're not full decisions from the Tribunal.

Now, we don't know what evidence was put in in this case. It is possible, however, unlikely, that expert evidence similar to what Dr. Wall has put in was put in by the complainants in this case. I doubt it. Because it would be unreasonable to get a -- for a decision maker to issue summary dismissal if the (AUDIO FEED LOST). I'll let my learned friend object to this if he wants to.

THE COURT REPORTER: Sorry. I have to interrupt for a second. You just broke up for me for the last ten seconds or so.

MR. KITCHEN: Okay.

THE COURT REPORTER: So I didn't catch what you said. I apologize.

MR. KITCHEN: I don't precisely remember what I said before I said, I'll let my learned friend

potentially object to this.
THE COURT REPORTER: Okay.
MR. KITCHEN: I think it stands to reason that there are plenty of other human rights complaints on this basis before the Commission or the Tribunal. In fact, I can tell you as an officer of the court, I am counsel on several of them that have not been dismissed. So the fact that we have these five dismissals when we don't have any idea if there was expert evidence induced, it doesn't mean much.

Then my friend wants to refer to what the Commission itself has to say about some of these mask issues. Well, I'll simply say this: The Commission is not the legislation. The Commission does not own the legislation. A lot of the human rights cases I've referred you to are Supreme Court of Canada cases. Some of them are Court of Appeal cases. Some of them are cases involving regulatory bodies and regulated members claiming human rights. The Commission doesn't have a monopoly on the legislation. And its comments about the legislation as far as masks doesn't mean much if they're not pointing to scientific evidence, and they're not. Their comments are uninformed scientifically. They simply take at face value what Public Health as to say about it, and then they slap on a human rights analysis. And if what Public Health has

to say is scientifically accurate, then probably their analysis is pretty decent. They do know what they're talking about when it comes to human rights.

But there's no indication that these comments of the Human Rights Commission are coming from an informed position. Your position is going to be informed. As I said at the beginning of this hearing, I think you are more informed on this issue than any other decision maker has ever been in this country in the last two years.

The Human Rights Commission is not as informed as you. When it comes to masking, specifically and exclusively, which is what this case is about, masking and I suppose distancing, no Court in this country has ever been exposed to as much scientific material and expert opinion as you have. All the cases before the Courts are dealing with COVID lockdown restrictions generally speaking -- or globally speaking. On masking, you have been more informed, and I do urge you to use that information, that knowledge, that evidence, that scientific opinion to heavily inform your decision.

That's my submissions on the human rights issues and on the charges that are implicated by that. And, Chair, unless you have questions or unless the Tribunal Members have questions and unless you object, I'm going

to continue on to discuss the other charges.

THE CHAIR: I think we -- we decided we would reserve our questions until the end if we have any. So we have half an hour before lunch. We can do two -- one of two things: We did start early. We could take an early lunch or we could press on. Could people -- would people prefer to take lunch now and come back at 12:30? If so, put your hand up.

No indication of that, so we'll continue on, Mr. Kitchen. Thank you.

MR. KITCHEN: I'm going to deal with five -- sorry -- Charge 5(a), which is that Dr. Wall failed to follow the chief medical officer of health orders regarding masking.

Now, we have a problem here because what I hear my learned friend trying to say is that chief medical officer of health orders and the AHS orders should be regarded as one and the same. Legally, I think that's inaccurate. I think that's wrong. AHS orders are different. They're different legal instruments. They derive their authority from the Public Health Act, and, actually, usually they derive their authority directly from the CMOH orders. But they are different legal instruments, and they are decisions made by different people. The CMOH is the CMOH, Dr. Deena Hinshaw; right? And, obviously, she has staff and she has an

office. AHS health inspectors like Heidi Ho are different. They work through and with AHS, which is not the office of the chief medical officer of health. Obviously, AHS and the chief medical officer work together, but they're not exactly the same entities. These are different legal instruments. Rescind notices, closure orders, they're not the same as CMOH orders.

Now, as I'm going to show you, Dr. Wall has not breached any CMOH order. If we're following the law, that means that Charge 5(a) is not made out. But what I think the complaints director wants to say to you is that Charge 5(a) is made out because Dr. Wall breached an AHS order. He breached that rescind notice that opened his office.

This is a problem procedurally. Okay? As a matter -- as a matter of Dr. Wall's rights to know the case, he has to meet his right to a fair trial, his right to full answer and defence. If something is not in one of the charges, Dr. Wall cannot, as a matter of law, be found to have committed unprofessional conduct for something that's not in one of the charges. I'll give you an example of this. You cannot find Dr. Wall committed unprofessional conduct by not contacting the College between June and December about his mental disability and his religious beliefs and his inability

to wear a mask. Why can you not do that? Because it's not a charge. You cannot convict someone of something if they haven't been charged with it. Basic, basic principle of law, a thousand years old. Obviously, this isn't the criminal context, but these are nonetheless charges. And "conviction" is a fair word to describe what would happen if you find that Dr. Wall committed unprofessional conduct. We use the word "liability". It's same idea.

Dr. Wall cannot be found to have committed unprofessional conduct for breaching an AHS order because it's not in the charge.

Now, we have that "it is further alleged" underneath, and that's fine. Most of that makes a lot of sense. Because what it is, is that, Look. Dr. Wall, you failed to follow the pandemic directive. That's an actual charge. And in doing that, right, factually and legally doing that, you committed that charge. You didn't just fail to follow it factually, and then, of course, you had a legal defence that was unlawful. You legally failed to follow it because it was lawful; you should've followed it. Okay. So for 5(b) to be made out, there has to be factual and legal liability. Okay? So if it's made out, great, then we carry on. And the College says -- or the complaints director says, And this is why failing to do that is

unprofessional, because it's a breach of the Health Professions Act 1(1)(pp). It's a breach of your codes of ethics. It's a breach of the standards of practice. If the College says you've got to do something, you've got to do it, of course. If you don't, it's unprofessional. It breaches these things.

Okay. So that's fine. That's fine. There's no problem there. If the College can establish factual and legal liability for a charge, then it gets to say that this is how it's unprofessional. Okay?

But here's the problem. Of course, you'll note that this was an amendment, one that Dr. Wall objected to. If you go down to the "further alleged", okay, we're going to see something in here about AHS. At least I think we are. Well, I'm not seeing it. And I invite my learned friend to correct me if you see something about AHS in the "further alleged".

MR. MAXSTON: Mr. Kitchen, if you go to my written submissions, paragraph 4 reproduces the charges. And right at the end of paragraph 4, there's the bold highlighting which includes the -- the amendments to the charges that were granted at the preliminary application on Day 1. And there's a simple reference to Alberta Health Services directions and requirements.

MR. DAWSON: There it is.

MR. MAXSTON: There's one other change which isn't relevant to what you're speaking of right now, I don't think.

MR. KITCHEN: Well, this version I have is supposed to be the most recent version, but it's -- it's inconsistent with what you have.

MR. MAXSTON: Yes. I think, Mr. Kitchen -- I don't want to belabour --

MR. KITCHEN: I think that is correct. Because we went through a process to amend this.

MR. MAXSTON: Yes. And I think we agreed that there wouldn't be a necessity to issue a further notice of hearing because the Tribunal had granted this amendment. So I don't think that's contentious.

MR. KITCHEN: And perhaps that's why I have the wrong version.

So Dr. Wall is in agreement with the complaints director that the -- that the notice of hearing, as reproduced in Mr. Maxston's submissions, is the accurate one. And, of course -- actually, Mr. Maxston has highlighted in his submissions Alberta Health Services directions and requirements.

Okay. So here's the problem that -- that this poses, is without establishing a factual and legal basis, without making a charge against Dr. Wall, the commissioner is trying to say, You're going to be found

in professional misconduct for something we didn't charge you with. We didn't charge you with breaching Alberta Health Services directives, but we're going to find you in professional misconduct for it anyways. That's not lawful. It's not lawful to find Dr. Wall in breach of Alberta Health Services directions if he's not charged with it. When I say "charge", it needs to be specified as an actual charge. It can't just be lumped in with the "further alleged", which the only legitimate purpose of the further alleged is to -- is to show that, Look. If we establish factual and legal liability here, this is how it's unprofessional.

So on that basis, you cannot find Dr. Wall to have engaged in professional misconduct for not following the rescind notice, the AHS rescind notice, which is not a CMOH order. It violates Dr. Wall's right to know the case against him and to full answer in defence to be convicted of a charge that doesn't exist.

Now, in the event that you find that he has been properly charged with violating AHS orders, which he does not concede, I'm going to give you submissions on why, nonetheless, you shouldn't find him to have committed professional misconduct. But I need to point out that problem first.

Now, let's go back. I've said that Dr. Wall has not breached any CMOH orders. I understand the

submissions of the complaints director. The complaints director is saying he did. Now, it was established in evidence that Dr. Wall did not contravene any section of CMOH Order 16-2020. This is the one from early spring 2020. Okay? This is the one that says, Look. If the health practitioners are going to be allowed to work again, the regulatory body has got to have some sort of plan in place. That's how we get the pandemic directive. We saw that in the evidence. Okay?

That -- CMOH was very clear that if there is no regulatory body level plan, then each individual regulated professional has to follow the guidance that -- that the CMOH or AHS puts out. That's what Section 2 of CMOH Order 16-2020 says. But it says in this -- like I talked about earlier in the whole "subject to" thing, it says in there, "subject to Section 6". Okay? You have a Section 6. Section 6 says, Look. Section 2 doesn't apply if the regulatory body has a plan. Okay? The -- the regulated professional and the regulated -- the regulatory body, they'll work it out. They've got a plan. Section 2 doesn't apply.

So Dr. Wall did not breach Section 2 of the CMOH order, CMOH Order 16-2020. There's no section in that order he could've breached. Unless you want to say that, Well, he must have indirectly breached Section 6

because he wasn't following the pandemic directive. We've already went through that. Okay? Insofar as the pandemic directive is unlawful -- most of it is lawful -- insofar as it's unlawful, okay, and Dr. Wall did not follow the unlawful parts, he cannot be found, as a matter of law, to have not followed Section 6 of the CMOH order. All that is predicated on the regulatory body's plan being lawful.

So the only other CMOH order Dr. Wall could have possibly contravened is CMOH Order 38-2020 or 42-2020, which is identical. Those are the only two CMOH orders that are relevant during the material time, okay, June to December 2020.

And the only section there, of course, that he could've breached is Section 26, which is the requirement to wear a mask. But as I've already explained, Section 26 is subject to Section 27. 27(c) of CMOH Order 38-2020 states that Section 26 does not apply to individuals who are unable to wear a mask due to a mental concern or limitation. That's Dr. Wall. If Dr. Wall is covered by Section 27(c) of CMOH Order 38-2020, then he did not, as a matter of law, breach Section 26.

AHS assumed he did. That's why they closed his office. They didn't ask any questions or, you know, enquire about whether or not he fell under 27(c) or had

an exemption. They just closed his office. Fine. Well, that's how we get his office reopened. That's how we get the rescind notice. That's how we get that interesting and contradictory order from the AHS officer saying, you know, Look. You can open. You can not wear a mask. You just, you know, you've got to follow the directive that says you've got to wear a mask.

That's how we get that rescind notice, is because -- now, of course AHS doesn't say, We acknowledge that you fall under Section 27(c). And you don't need to. If he didn't, they couldn't have and wouldn't have issued a rescind notice. It's because he fell under 27(c) that the rescind notice was issued, and he was able to practice now not in violation of a CMOH order. If he was in violation of a CMOH order, the rescind notice wouldn't have been issued. So at no time was Dr. Wall ever in violation of 38-2020. Because remember, CMOH Order 38-2020 is based on self-diagnosis. And my learned friend made a big deal about how Dr. Wall self-diagnosed. And, yes, he did up until about December 5th or so. And he got the doctor's note to confirm that diagnosis. Okay? But the CMOH order is predicated on self-diagnosis, on self-identification. It's based on saying, Look. If you identify yourself in these categories, you're

exempt. You do not have to provide proof. You do not have to have it authorized by a third party. Okay? There's nothing in there about that.

So if Dr. Wall reasonably fell within that category -- he obviously reasonably did. You've heard the testimony from him. It's been verified by Dr. Salem during -- you know, we know from June onwards, when Dr. Wall determined, self-diagnosed, that for -- because of his mental disabilities, he can't wear a mask, he reasonably fell within that category. He's permitted by law to fall in that category if he has reasonable basis for doing so because there's nothing in the CMOH order that says you've got to back that up with some sort of medical documentation. That doesn't come in until May 13th or 14th, 2021. We have a CMOH order that brings in that requirement. It's not relevant for this case. Prior to that, if you self-identified on a reasonable basis, you're saved by that section. So Dr. Wall did not breach any section of CMOH Order 2020 or 42-2020. There's no other relevant CMOH orders to this case. During the material time, June to December 2020, no other CMOH orders that apply to Dr. Wall that he could've possibly breached.

So as a matter of fact, Dr. Wall -- well, as a matter of fact and law, Dr. Wall did not breach the CMOH order. If he didn't breach the CMOH order about

masking and COVID-19, which is what the charge says, then the charge fails on a factual basis.

Now, Mr. Maxston is going to say to you -- just bear with me. I apologize. Mr. Maxston is going to say to you that, Look. Dr. Wall admitted to this charge. I questioned him on it. He admitted it. He said, Yeah, that's right. Yeah. I did. I failed to follow the CMOH orders. In fact, Mr. Maxston has already told you that. He brought you to that in the record.

What he failed to bring you to is my redirect. I'm going to take you to page 72 of the record. This is Dr. Wall's testimony. I say to Dr. Wall: (as read)

Dr. Wall, let me just ask you this: We discussed that there was -- there's an exemption clause in CMOH Order 38-2020. Well, okay. Is there a general requirement to wear a mask in CMOH Order 38-2020? [Dr. Wall answers] Yes, there is. [and I say] Q There's an exemption; correct? [He says] Yeah, that's correct. [And I ask him] Do you think you fell under that exemption? [He answers] Yes, I do. [And I ask him] So do you think you breached the general requirement to wear a mask? [He says] No, I don't. [And then I question

with] Now, while I'm on this point, this is important because -- so you just said now, and you said earlier, that you never breached any CMOH orders. But when my learned friend asked you if you agreed factually to the statement at 5(a) of the hearing notice that you failed to follow chief medical officer of health orders regarding masking and COVID-19, you said yes. And you agreed to that. So let me ask you, do you think that you failed to follow any chief medical officer of health orders? [Dr. Wall answers] No, I don't.

Mr. Maxston's questioning of Dr. Wall was very general. It was very quick. It was very unspecified. And, yes, Dr. Wall agreed factually to it. But then on redirect, when I brought him to it more specifically, he said, No.

And I think -- I think you need to accept his retraction of that admission because he's candid, he's honest, he makes honest mistakes sometimes, but he's honest about them. And he made an honest mistake. When I gave a detailed question about that, he realized what he had said earlier. And he said, No, I didn't, actually. I think you need to accept that.

And I think, of course, the facts, the record bears that out. If we look at the actual CMOH orders

and we look at what happened to Dr. Wall and we say, Okay. So he mistakenly admitted to this and then retracted it, and then we look at what the CMOH orders actually say and what actually happened and how he was actually exempt, he actually fell under 27(c), well, then we can see as a matter of fact and a matter of law, he did not breach the CMOH orders, and the fact that he accidentally admitted it doesn't mean anything.

Now, again, just to make it clear, what Dr. Wall is submitting is that as a matter of fact and law, he did not breach any CMOH orders. And, therefore, as a matter of fact and law, he did not commit the charge of 5(a), failure to follow chief medical officer of health orders. Okay? And there's nowhere else, by the way, in the notice of hearing, which is basically the charge document, that you're going to find a charge that Dr. Wall breached AHS directions. The only place you could possibly fit it in by implication is in 5(a), where it says chief medical officer of health orders. Because, of course, if you go down to "further alleged", when you see Alberta Health Services directions and requirements, that comes in as an amendment right after chief medical officer of health orders and ACAC pandemic directive. It's lumped in together. So I think what the complaints director wants to say, and of course what he has to say if he's

going to have any way of charging Dr. Wall with this, is he's going to say, Well, it's implied. It's implied in Charge 5(a) that, you know, Alberta Health Services documents are included in the CMOH orders. Well, as a matter of fact and law, it's not included. And I don't think you can include it just because it's in the further alleged. Okay? So I'm going to submit to you that it's clear Dr. Wall did not commit the charge under 5(a).

If, however, you find somehow that Dr. Wall has been lawfully charged with breaching Alberta Health Services directions and requirements, and you find that it is incorporated in 5(a), then I'm going to say to you that Dr. Wall only breached paragraph 4 of the rescind notice. Paragraph 1 says, Follow the ACAC pandemic directive. Well, obviously we've been through that. Okay? Dr. Wall can't be found in professional misconduct for not following the ACAC pandemic directive the way he did because the three requirements that he's alleged to have breached were all themselves unlawful. Okay? So Section 1 or paragraph 1 of the rescind notice doesn't matter. Okay?

So then there's that critical question about paragraph 4, which says you gotta make sure your patients mask. So what that is is basically a -- yet another indirect way of charging Dr. Wall for the same

thing, not masking his patients. We see this charge over and over again, which of course is itself a problem. That charge shouldn't appear multiple times. But that's -- that's what that charge means in reality. Okay? Because there's no other health services or directions or requirements that he didn't follow. Okay? It's the AHS rescind notice. It's the only lawful instrument, AHS instrument that can be said that he didn't follow. And he didn't. He did not follow Number 4 of that rescind notice. He didn't make his patients mask. Okay?

So if you find that he's been properly charged with not following paragraph 4 of the rescind notice, his defence to that is going to be the same as it is to the other charges in the charge document in the notice of hearing, which say you committed unprofessional conduct by not making your patients mask.

And that's where I'll be going this afternoon. I'll be talking about all the scientific evidence from the harms of masking.

Chair, I would submit that this is a pretty natural break in my submissions, and if I was to jump into the next section I have, I would take us past 12:00.

THE CHAIR: Okay. I think it is a good time. It's been a -- a long morning. I just want to

touch base on where we're at, Mr. Kitchen. In terms of after lunch, how much longer do you feel you will need?

MR. KITCHEN: I'm going to say no more than two hours.

THE CHAIR: So if we're back at, let's say 12:45, that would take us at 3:00.

Mr. Maxston, I know this leaves your rebuttal submissions as well as questions from the panel as outstanding, but let's press on and see where we're at. And I know you've raised the point of a potential for a written rebuttal submission. I think that's still something we -- we may need to discuss as we get towards the end of the day.

So let's take a 45-minute lunch break now.

PROCEEDINGS ADJOURNED UNTIL 12:45 PM

Proceedings taken via Videoconference for The College of Chiropractors of Alberta, Edmonton, Alberta

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June 17, 2022 Afternoon Session

HEARING TRIBUNAL

J. Lees	Tribunal Chair
W. Pavlic	Legal Counsel
Dr. L. Aldcorn	CCOA Registered Member
Dr. D. Martens	CCOA Registered Member
D. Dawson	Public Member
C. Barton	CCOA Hearings Director

COLLEGE OF CHIROPRACTORS OF ALBERTA

L. Fischer	Acting Complaints Director
B.E. Maxston, QC	Legal Counsel

FOR DR. CURTIS WALL

J.S.M. Kitchen	Legal Counsel

A. Vidal, CSR(A), RMR	Official Court Reporter

(PROCEEDINGS RECOMMENCED AT 12:46 PM)

THE CHAIR: Okay. Mr. Kitchen, you can resume your -- your closing submissions.

MR. KITCHEN: Thank you.

All right. Where I left you before the lunch break were my submissions on the justification, or lack thereof, for the complaints director's actions and the pandemic directive insofar as it discriminated against Dr. Wall, and that deals with a number of charges, as I said. And then, of course, I went into Charge 5(a) and gave you my submissions on that and the problems there.

I'm going to end with my submissions on what I would call patient masking charges. Before I get to that, I'm going to give you brief submissions on Charges 3(a) and 3(c).

3(a) and 3(c) relate to Dr. Wall telling his patients the truth regarding the ineffectiveness of masks. Charge 3(a) is that Dr. Wall did not tell his patients about the increased risk of transmission of COVID from not wearing masks.

In other words, the College's -- or the complaints director is looking to discipline him for not uttering the expression of the complaints director, for not uttering what Dr. Wall believes to be false. I understand the complaints director has an honest belief that these things are true, but they're not. And the complaints director cannot, at law, discipline Dr. Wall for declining to say what the complaints director wants him to say.

Charge 3(c) is that Dr. Wall did tell his patients

that wearing masks have no effect on the transmission of COVID. Now, Dr. Wall submits that these charges cannot be made out, first, because quite obviously, it is not unprofessional conduct to tell your patients the truth. It does not contravene the code of ethics. In fact, it upholds it.

I have in front of me the code of ethics for the College. And I think my version is the most recent version. Three pages in, we get the principles. Well, Principle 5 is veracity. I'll read it for you: (as read)

> Chiropractors must be truthful and forthright in all professional matters by fully disclosing and not misrepresenting information in dealing with patients, public at large, other professionals, and the ACAC.

Dr. Wall -- as we've seen from the expert evidence, if you accept Dr. Wall's expert evidence, if you agree with his experts, if you find that his experts are correct that masks are ineffective, that they do not prevent the transmission of COVID, if you find that, then, necessarily, you will find that Dr. Wall told the truth. Because what he said to his patients and what he's accused of saying that he shouldn't have said is exactly what his experts are saying.

So far from contravening some sort of principle or

ethic he must abide by, he upheld it. He told the truth when nobody else was. He told the truth when everybody else wanted to skirt around it. He told the truth when it was painful to do so. He told the truth when it was inconvenient to do so. He told the truth when almost nobody else would.

I wouldn't say he just upheld this principle of ethics, I would say he is the archetype for it. He is the one standing up and telling the truth when nobody else will. That is the epitome of professionalism, that even when it's inconvenient to tell the truth, he does it anyways. Even when it's inconvenient to let his patients choose, he let's them choose. And by the way, that's Principle Number 1, patient autonomy and informed choice.

So, obviously, he didn't contravene the ethics. Not only that, he didn't contravene the standards of practice or the Health Professions Act either. There's nothing in there that would permit the complaints director to penalize Dr. Wall for telling the truth and nothing in there that would label telling the truth as somehow unprofessional. In fact, it's the other way around.

Dr. Wall submits that you can reject these charges without resorting to anything other than the expert evidence, the code of ethics, and your authority

pursuant to Section 80(1) of the HPA. You can find, as a matter of law, Dr. Wall did not commit unprofessional conduct when he told his patients that masks don't prevent the transmission of COVID, and that there's no increased risk if they don't wear a mask.

However, in addition to this, both of these charges are unreasonable limitations of Dr. Wall's freedom of expression as guaranteed by Section 2 of the Canadian Charter of Rights and Freedoms. The Charter protects professionals as against the regulatory bodies. Conversely, the Charter obligates regulatory bodies, like the College, to refrain from censoring their members or compelling their members to utter an expression they disagree with, unless doing so can be demonstrated to be justified.

As far as freedom of expression is concerned, Charge 3(a) is an attempt to penalize Dr. Wall for not saying something the College or the complaints director wants him to say. In other words, he's using professional discipline to compel Dr. Wall to say something against his will. This is called compelled speech. It's presumptively unlawful.

I'm going to take you to -- and I've provided this, by the way, to my friend Mr. Maxston and to Mr. Pavlic, so the Tribunal will have access to it. This is a Supreme Court of Canada case from 1989. It's

called Slate Communications v. Davidson. Now, the citation for it is [1989] 1 SCR 1038.

Now, this is one of those cases where the Supreme Court of Canada is all over the place on all of its differing minority opinions and majority opinions. Ultimately, in this case, everybody agreed that -- agreed on what compelled speech is and that compelled speech occurred in this case and that that is a violation of freedom of expression. Where they disagreed is on whether or not it was justified.

I'm going to take you to the comments of Justice Beetz at paragraph 39 of this case and what he had to say about compelled expression. He said: (as read)

> There may be a distinction, somewhat difficult to apply, between being forced to express opinions or viewed which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of freedom of opinion and expression, or, at the very least, the freedom of expression.

Just moving down a little bit: (as read)

> It is one thing to prohibit the disclosure of certain facts. It is quite another to order

the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them.

We go down little more: (as read)

... to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedom of -- freedoms of opinion and expression, as was held in the case of National Bank of Canada. In my view, such a violation is totalitarian in nature.

I'll provide you some comments from the Supreme Court of Canada justice on how to understand compelled speech and how to regard it for the serious totalitarian thing that it is.

Now, I'll take you to paragraph 95. These are the comments, I think, of Justice Lamer, as he then was. And he said: (as read)

There is no doubt in this case that the -- part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation of freedom of expression. There's no denying that freedom of expression necessarily entails the right to say nothing, or the right not to say

certain things.

There's a more mild-mannered way of agreeing with Justice Beetz. Freedom of expression includes the right to not speak the words of other people that you disagree with. Obviously, Dr. Wall disagrees with the complaints director on the effectiveness of masks.

In this case, he didn't say something that the College wanted him to say, and because of that, it's turning around and attempting to discipline him for it, which is -- legally speaking, is compelled speech. When you are punished for not saying something that somebody else wants you to say, it's compelled speech. It's a violation of your freedom of expression. It's a violation of your right to be left alone if you want to not say something you don't believe in.

Now, Charge 3(c) is an attempt to penalize Dr. Wall for saying something the College doesn't want him to say. Now, this is sort of the inverse. Okay? It's -- now we're talking censorship. That's also presumptively unlawful. That's a little more obvious as to why. You say something, you're penalized for saying it. It's a violation of freedom of expression, which is a right to say things without being penalized for saying them. Of course, I mean, that does beg the question for those of us who aren't familiar with all the 2(b) -- or the freedom of expression jurisprudence

on this. Well, are these things actually caught by Section 2(b)? My learned friend brought you through some of that. I brought you through a lot of that back when we had the publication ban application. Essentially, the test is, Look. Does this -- does this speech in question, does it convey a meaning? Does the content actually have -- is there actually content to the expression? That's Step 1. Obviously, you know, the two things here that are being said or not said, they have content. They have meaning. That's obvious. The next question is: Does the method or location remove protection? No. That's for things like violence or being -- you know, being able to enter the inaccessible judge's chambers of the Supreme Court of Canada so you can protest the pipeline project. And that's not a protected location; right? So those -- those are very simple examples. Obviously, Dr. Wall's office is a protected location for freedom of expression. If the government tries to censor either the practitioner or patient in Dr. Wall's office, they're not permitted to do so. It's a protected location. The method is peaceful. There's no issue there. And then of course -- so the third step is: Does the -- does the standard or the action or the penalization of whatever it is, does it -- does it have a negative effect? Does it somehow practically limit

the freedom? Well, I just walked you through that. And, of course, you know, there's always this question of, well, does the expression go to one of the three core values of freedom of expression? Truth -- and those three values are truth-seeking, democratic discourse, and self-fulfillment. Well, in this case, everything Dr. Wall has to say or not say is about truth-seeking. It's about seeking the truth of masks, or it's about stating the truth of masks, or it's about not stating a lie about masks. So obviously, we're at the core of one of the underlying values of freedom of expression.

So clearly, what Dr. Wall is saying or declining to say are caught by freedom of expression, and his right under Section 2(b) of the Charter is limited by these charges.

So if that limitation is not justified, then as a matter of law, these charges must fail because they are unlawful insofar as they violate his rights, his Charter rights. They can be justified under Section 1, of course. My learned friend brought you through that.

Section 1 is -- well, it's what governments in this country use to justify violating freedoms. Maybe that sounds a little strange that governments can justify violating freedoms, but that's how it works in Canada, which is how you get a lot of what you got the

last two years.

So how does that work? Well, it's very simple. If the College is correct, if they're right, on a balance of probabilities -- if they show on a balance of probabilities that masks are effective, it's -- it's a justified requirement, it's a -- safety, it's dangerous if you don't wear them, if they can show those things on a balance of probabilities -- which they haven't, but if they could, well, then they would begin to have a Section 1 justification. Okay? That Section 1 justification can't even get off the ground unless they can first establish that what they're saying is actually, factually, scientifically true. Okay?

Now, even then we have a problem because you still have to go through the Section 1 analysis to determine if Dr. Wall should be penalized for not saying what the College wanted him to say, or he should be penalized for saying something that the College would rather him shut up about, which still wouldn't -- we'd have to go through that analysis. And it's not clear that the complaints director would meet that analysis, meet that test even if he was right about the factual scientific evidence, but he's not. So we don't need to go there. This de facto -- these freedom of expression violations are unjustified because Dr. Wall is right, because he's

correct, because he's accurate, because he's scientific, because he's true in what he said.

And the truth is highly relevant in this analysis, as it should be. I've provided Mr. Pavlic and Mr. Maxston with the case of Strom v. Saskatchewan Nurses Association, 2020 SKCA 112. That is a recent professional discipline case from Saskatchewan involving a nurse, and it's not entirely, but largely, a free expression case.

And the Court of Appeal -- Saskatchewan Court of Appeal in that case found that it was a relevant factor in the legal analysis whether or not Ms. Strom was telling the truth in the comments that she made that she was punished for. And interestingly, the position of the regulatory body in that case was, Well, look, she can't prove that what she said was true. Therefore, you know, we get to censor her through professional discipline. But the Court said, No. No. It's the other way around. It's -- the onus is on the regulatory body to show that what she said was untrue. If it's going to censor her through professional discipline, the onus is on the regulatory body to show that what she said was untrue. If they can't do that, then they don't get to censor her over it. Same thing here. You don't get to arrive, you know -- wherever you go with -- with the freedom of expression analysis,

right, whether you do it through a Charter lens or you do it through a professional lens, and I commend you to read the Saskatchewan Court of Appeal case with Ms. Strom because the Court walks through that. You could look at it from both angles. So whether you look at it from the professional discipline angle or the rights and freedoms angle, the truth of the matter is important, and the onus is on the regulatory body to show that what Dr. Wall said is untrue. Okay? On the balance of probabilities, that's the onus. Obviously, the complaints director cannot discharge that onus. We've been through the evidence on the efficacy, or lack thereof, of masks. So these charges must also fail, 3(a) and 3(c). No unprofessional conduct committed for telling the truth.

That brings us to the last set of charges. I say set, but they're scattered throughout this. I have -- I have given you my submissions based on what I think is a proper categorization of these charges.

So these are the patient masking charges. 1(d), that Dr. Wall did not require a patient to be masked. 2(c), that his staff did not require patients to be masked. 3(b), he advised patients that they were not required to mask. And 4(c), his patients not wearing masks.

These charges are very redundant. I think they

ultimately all boil down to the same thing: He didn't make his patients wear masks. Now, as we heard in evidence, there was never a requirement from the College for patients to mask. The pandemic directive does not include that. And that's not surprising. I think at one point we heard evidence that, Well, it's not really the chiropractor's -- the College of Chiropractors' place to tell patients to mask. So Dr. Wall cannot and did not breach any requirement from the College to compel his patients to mask.

Well, where else could that be directed? Well, what about the CMOH order? No. There's no CMOH order that applies to Dr. Wall that compels him to make -- or that causes him to have to make his patients mask. There's nothing that says, you know, These certain people have to make these certain people mask. That doesn't exist. It would be unlawful if it did.

So where else do we go for that? Where else can we ground this charge? If he didn't breach anything from the College and he didn't breach anything from the CMOH, where do we go? One of the only places we can go to find that is the rescind notice, is the order from the AHS that opens up Dr. Wall's office on January 5th, 2021. That's the only place we can go to that. Now, as I've already told you, Dr. Wall has not been properly charged with breaching an AHS directive,

which means all these charges of not making his patients mask must fail. They're not based on anything he's actually been charged with breaching. As a matter of law and fact, they fail.

Now, maybe -- maybe what we say, and maybe what the complaints director says as well, it doesn't matter if there's no instrument, if there's no document that commands him do this, that requires him to do this. The fact is, he didn't do it, and he should have. And it's unprofessional that he -- that he didn't make his patients wear masks. I submit to you that that can't be the case. There has to be a basis for it. It's arbitrary otherwise.

And I submit to you, again, as I've said, you cannot find Dr. Wall to have breached AHS directives when he hasn't been charged with it, and to have it included in the further alleged is not a charge.

But in the event you find these charges are properly constituted, you find that because Dr. Wall did, in fact, not follow paragraph 4 of the rescind notice and that he has been charged properly for not doing that, in the event you decide that way, well, then -- then we have to answer the other million-dollar question in this case: Is it unprofessional for Dr. Wall to let his patients choose whether or not they mask in his office?

Well, for that, I'm going to take you, again, back to the code of ethics. Principle Number 1, patient autonomy and informed choice: (as read)

> Chiropractors have a duty to inform the patients of their treatment options, including the benefits, advantages, and disadvantages, significant risks, and cost.

I'm going to the next sentence: (as read)

> The patient makes the final decision to proceed with treatment.

Well, of course the complaints director is going to say putting on a mask isn't a treatment. If masks are harmful, then it is categorically a treatment. It's a medical intervention. It has medical harms. Maybe medical benefits. Dr. Wall is saying there are no medical benefits. Somebody else is saying there is, though, so that makes it an intervention. That makes it a medical treatment. These masks were called devices by Dr. Hu, by Chris Schaefer. They are devices that are intended to produce a medical benefit, and they are -- they are a medical intervention device that causes medical harms. They're therefore a treatment, and therefore, informed consent is required.

Now, my learned friend wanted to limit informed consent to practitioner and patient. Okay? And we're talking Dr. Wall and his patients. We have that

anyways. But I'm going to submit to you it's a little broader than that. Because whenever there's a treatment involved that has supposedly medical benefits, potentially medical risks, and one entity is telling another entity they have to do it, informed consent is relevant as soon as that scenario arises, regardless of who those two entities are.

But sticking to just Dr. Wall and his patients, obviously, informed consent is relevant to the treatment of masks where there are potential benefits and definitely risks. Patients should choose.

Let's go into standards of practice. We see informed consent again in 3.1 of the standards of practice. The purpose and objective of this section: (as read)

> To make clear the responsibilities of a chiropractor regarding information that is required to be given to or received from a patient to ensure patients are informed of all aspects of their care.

Going down: (as read)

> As part of the informed consent process, chiropractors are responsible for disclosing to each patient.

And Number 3 is: (as read)

> The potential risks, including those that may

be of a special or unusual nature.

Dr. Wall believes, reasonably, I submit, that he's ethically and professionally obligated to let patients decide for themselves if they're going to mask, to let patients decide for themselves whether or not the benefits of masks outweigh the harms of wearing them.

Further, because masks are harmful, as I'm going to get into, Dr. Wall is ethically and professionally obligated to refrain from imposing that harm on his patients merely to appease authority, or to safeguard his own reputation, or to insulate himself from the wrath of AHS and the College. He's ethically bound to stand in the gap between his patients and the oppression of government authorities that care nothing for informed consent.

Now, of course, this begs the question: Are masks harmful? If they're not, if they're merely useless but not harmful, Dr. Wall may be arguably professionally obligated to follow the directions of AHS, provided you find he's properly charged with that, to compel his patients to mask. Those directions are asinine if masks are useless, which we've established they are. But if masks are merely useless and not harmful, maybe he should follow them. There are all kinds of rules that we all follow that are useless, but not necessarily harmful.

Going back to Mr. Maxston's reasonableness analysis, all kinds of bylaws are useless, but not harmful. So we have to grin and bear it and follow them because the Court is not going to overturn them. But that's not this case, because masks are harmful.

Dr. Wall has induced extensive expert evidence that masks are indeed harmful, very much so. Now, to start, the Tribunal must keep in mind that the evidence of the harms of masks induced by Dr. Wall is almost entirely uncontested by the complaints director. Dr. Hu barely addressed the issue on the harms of masking. This is important to keep in mind. Almost all the evidence I'm going to bring you through was uncontested.

I'll start with the report and the testimony of Chris Schaefer. Now, as we know from Mr. Schaefer's CV and the qualification questions, he has over 25 years of experience as an occupational health and safety consultant. He teaches courses on proper mask use. He's certified regarding certain airborne toxins, and he's experienced with dealing with oxygen and carbon dioxide in the workplace. His report is very brief. I'm going to read you just a few portions of it. Speaking of the devices that are imposed, in this case, the surgical masks on chiropractors and the cloth masks that are imposed on patients by the CMOH orders, he

says: (as read)

> It is arrogance to call these devices masks, as they are simply breathing barriers to interfere with normal healthy inflow of atmospheric oxygen and outflow of toxic carbon dioxide.

Next paragraph: (as read)

> Wearing any of these barriers creates a lower oxygen and a higher carbon dioxide breathing environment that is hazardous to the wearer, regardless of contaminant filtration efficiency.

In other words, regardless of whether they actually work with COVID, the fact is they create a lower oxygen and a higher carbon dioxide breathing environment. (as read)

> Simply put, all closed barriers or covers worn over the mouth and nose are hazardous to the wearer, regardless of whether there is an atmospheric contaminant.

Common sense. Cover your face, you cover you mouth, put a blanket over your head, you are not getting the oxygen you need. We all know that. We all knew that before COVID, but we especially know it now because we've had to wear these things, so we know from experience, for Tribunal Members, I think I'm safe to

say, have worn masks. You have experienced this. You know what this feels like, and like I said at the beginning of this, that places you in a particularly unusual, interesting, and useful position. Because as trier of facts, you have personal experience. You don't have expertise about viral immunology. You don't have expertise like Chris Schaefer does, but you do have experience of what it's like to wear these things.

Page 2 of his report, Chris Schaefer said: (as read)

> Readings showed oxygen levels below 19.5 percent.

He's talking about the testing he conducted on people wearing these masks. The Occupational Health and Safety Code of Alberta describes oxygen levels below 19.5 percent as hazardous in emergency and respiratory danger. And, of course, included in his report at Tab 5 is a copy of the relevant portions of the Alberta Occupational Health and Safety Act. Sorry. It's Tab 4 of his report. So you have that in front of you. Of course, you can look up this legislation, but the relevant excerpts have been provided to you attached to his report, so you can see when the Occupational Health and Safety Code of Alberta calls the oxygen level below 19.5 percent.

Now, in his testimony, Chris Schaefer commented on

the need for fit testing for a mask to provide any protection, and for screening to be done to determine if it is safe for any one person to wear a mask, sub-pages 857 and 58. This was required and standard prior to COVID, but it's been abandoned now.

Schaefer's structural explanation of how these masks worked corroborates Dr. Bridle's evidence with the same problem with unsealed masks. They're not sealed. You get air coming out of them. They're really not working in any sense that they were designed to work, unless their only purpose is to catch droplets from symptomatic people. But that's something different because we don't have a symptomatic mask mandate here. We have an asymptomatic mask mandate that we're dealing with.

Chris Schaefer discussed how real respirators work. Okay? And this is by using engineered breathing openings for inhaling filtered air and expelling exhaled air. He brought you through this. You have a lot of testimony on it. In fact, he even showed you visually by showing you what these filters and these masks with these filters look like. Okay? And he referred to them as respirators or masks. Things with engineered breathing openings, designed holes for breathing through. Now, in real respirator masks, these holes are filtered; right? So that the air that

comes through the hole to breathe in filters out whatever the contaminants designed to filter out. And then the exhalation hole has a valve for expelling the exhaled air. We've all seen pictures of gas masks. And Chris Schaefer referred to this. We all -- we all know what that looks like. They have a thing that covers your face with two things poking out at the bottom.

That's why he repeatedly says, Look. The things, the devices that have been mandated to be worn by people by the pandemic directive, CMOH, these things are not masks. They're not respirator masks. They are breathing barriers. They're simply a device with no engineered breathing openings designed to impede airflow. Barriers to breathing. So of course, this is -- structurally, this is important. Because what happens if you cover your mouth with a barrier? Well, common sense suggests, and Chris Schaefer confirms, that you get trapped exhaled air -- air between that barrier that you placed on your face, and your face. What happens? You end up rebreathing your own air. What does your own air contain? Increasingly higher amounts of carbon dioxide. What do you end up breathing? Increasingly higher amounts of carbon dioxide.

Chris Schaefer discussed at pages 867 to 68 how

the proper practice is to screen people even for wearing a proper respirator, which only minimally increases breathing air. The so-called mask for breathing barriers that we have used ostensibly to protect against COVID significantly increase breathing efforts. Again, because there are no engineered breathing openings, they're simply barriers.

So if we can imagine that people who breathe -- who use respirator masks that only slightly increase breathing effort, if they have to be screened, well, then, you can imagine how much more important it would be to screen everybody who's asked to wear a surgical mask. And yet, nobody is.

Chris Schaefer says it's unsafe to compel someone with a pre-existing condition to wear a device such as a breathing barrier without being medically screened. It's -- technically it's even unsafe to get them to do this to wear a real respirator mask. Chris Schaefer, again, confirmed common sense when Dr. Dang and other witnesses have discussed about how some people, depending on the preexisting conditions, will tolerate and not tolerate masks differently or better or worse than others. And again, on page 869, Mr. Schaefer confirmed common sense in the observations and opinions of other witnesses in this case, that blocking normal breathing will result in the predictable symptoms of

headache, dizziness, lack of coordination, feeling faint, et cetera.

We all know somebody, perhaps ourselves, that have encountered these symptoms when wearing surgical masks or cloth masks.

Getting more specific, Mr. Schaefer discussed the precise level of oxygen that is acceptably safe, and the level of oxygen inside the mask while it's being worn. 19.5 percent is the minimum, as I've mentioned. Anything below that is unsafe and dangerous to life and health. We see that from what the OHS legislation says. We see that from what -- in OSHA authorities said in the United States. And, of course, this is called medically -- the medical term for this is hypoxia. Okay? This is page 871 of the record. Of course, Dr. Bridle referred to this medical situation of hypoxia, a lack of oxygen.

Now, of course, these are from test results that Mr. Schaefer performed. Mr. Maxston noted that the actual data from the test results are not in evidence. However, there is no reason to doubt the accuracy of the tests done by Mr. Schaefer. He told you the device that he used. He's trained in using that device. And the evidence he gave is uncontradicted. There is no other expert induced by the complaints director that has come in and said, Look. Mr. Schaefer is not

correct. I have done testing, and I can confirm that the levels are fine. Here's my test results. I used the same device as he did. Here you go. That didn't happen. The complaints director hinted that he might do that. He never did.

So Mr. Schaefer's evidence is uncontested. You have no reason to not accept it. You have no reason to doubt the accuracy of those tests or his representation of those results, especially since his results are consistent with common sense and observations that you all have experienced. The exact levels require testing, but that oxygen goes down and carbon dioxide goes up inside of a mask is irrefutably true. The question is: How much? And for that, Mr. Schaefer gave his results, and those results are uncontested.

Now, as for carbon dioxide, Mr. Schaefer gave evidence about that as well. I'm actually going to take you to page 784 of the record. Sorry. 874. Mr. Schaefer says, starting at line 5: (as read)

> Okay. So let's say a couple minutes of wearing either a non-medical, medical, or procedural mask, you're looking at a couple of minutes of wearing 20,000 parts per million carbon dioxide, oxygen levels as low as 18 percent, 18 to 18-and-a-half percent. The lowest oxygen can go legally is 19.5

before it becomes immediately dangerous to life and health.

Next paragraph: (as read)

So in occupational health and safety standards, when we talk about IDLH [which is an acronym for immediately dangerous to life and health] which stands for immediately dangerous to life and health, we're looking at device -- we're looking at levels that might not necessarily cause you to drop dead once they're reached, but certainly they're -- they're considered levels that now become -- those exposures become harmful without protection from those exposures.

Of course, Mr. Schaefer explained to us how the upper limit of what people should be exposed to for carbon dioxide over a 24-hour period is a thousand parts per million. And, of course, attached to his report is a Health Canada document which verifies that. A thousand parts per million carbon dioxide, which you should be exposed to no more. According to Mr. Schaefer, you're exposed to 20,000 parts per million. 20,000. 20 times the limit -- the safe limit of carbon dioxide after a couple minutes of wearing a mask.

So, of course, those are toxic levels, and it's no surprise that symptoms result from toxic levels of

carbon dioxide.

Mr. Schaefer commented on how serious of a problem he thinks it is that governments and bodies have mandated the wearing of devices that cause oxygen levels for people to drop below safe levels. That's at page 88. Mr. Schaefer was asked if he was surprised that most people don't pass out from wearing masks for prolonged periods. Well, he said that he wasn't surprised. You'll recall that Dr. Hu's flippant remark that if masks were so bad, his colleagues would be passing out.

Let me read to you pages 892 to 93. I'm on line 7, and I ask Mr. Schaefer: (as read)

> Does it surprise you, then, that most people, when they wear these breathing barriers, even for hours on end, they don't pass out from wearing them? [He says] Well, it doesn't surprise me. But just because they're not physically passing out doesn't mean that harm is not being done. [Skipping a paragraph] If you subject yourself to IDLH levels of low oxygen, it will negatively impact your health whether you're aware of it or not. That's why all the government bodies that govern the rules of health and safety legislation legislate what the minimum oxygen

concentration and air that you can be exposed to, because you might not necessarily feel harm right away. You might not necessarily have a headache right away or dizziness. You might not necessarily feel nausea right away. Any of these are other minor -- more minor types of symptoms of low oxygen. [And then on line 8] It might not necessarily be something that the wearer or user is aware of, at least not immediately.

So, again, common sense. Real world evidence. No, people aren't passing out left, right, and centre when they wear these things, but -- and this is consistent with Chris Schaefer's readings. He's taking readings of oxygen at 18 to 18-and-a-half percent. Obviously, that's below 19.5 percent. But you're going to struggle. You're going to have symptoms. You're going to have enough oxygen to not die, which is why people don't die from wearing masks. If you're exposed to 5 percent, you'll probably die. You're not going to get enough to live. Your tissues are going to malfunction. That's not what's happening here; right? And we all know this. And this is what Chris Schaefer is getting at; right? This is what Dr. Hu was trying to flippantly disregard. Well, if they're so harmful, why aren't people just dropping out? Why aren't they

just dropping dead? Well, that's because they're not reducing oxygen levels to immediately deathly amounts. They're reducing them below what's safe.

So when we say -- when Dr. Wall says harms are -- or masks are harmful, he's not saying that this is going to kill you. It's theoretically possible. But what he's saying is they're harmful to your health. There are other things that are more harmful, of course. But it can't be ignored that if you put something on and it causes symptoms like dizziness and headaches, that's harmful to your health. It won't kill you, at least not quickly, but that's harmful to your health. It doesn't have to kill you to be harmful. That's what Dr. Wall is saying. That's what everybody else has said in this case. That's what the experts have said. You know, Look. Wearing a mask, no, it's not going to kill you, but yeah, it iis going to impact your health.

And anything that impacts health in any negative way has to be a matter of choice for the patients before they need it. They cannot be forced to do it by practitioners. This is basic. Basic. It's the kind of stuff you learn in the first week of med school or chiropractic school or any other school that has any kind of medical training or background to it.

On page 898, Mr. Schaefer stated that he disagreed

with Dr. Hu's assertion that there are no known harms associated with masking. Mr. Schaefer noted that Dr. Hu cited no studies in support of this assertion. Mr. Schaefer also opined that just because masks are mandated, doesn't mean they're safe, obviously. This much is obvious. But it has to be said these days that just because an authority says so, doesn't make it right. Mr. Schaefer also stated that the mandated masks are not safe for anyone because of their lack of breathing valves.

Now, lastly, I want to read to you the full exchange regarding whether Mr. Schaefer would wear a cloth or surgical mask to keep his professional licence. Mr. Maxston, quite disingenuously, I would submit, only provided you with a truncated quote yesterday that appeared to show that Mr. Schaefer would wear a mask if his regular [sic] body told him he had to. Let me take you to page 908. I'm at line 13. This is Mr. Maxston asking a question. He says: (as read)

> I'm going to ask you a fairly specific question here. Would you comply with the paramedic equivalent of the College's pandemic requirement about mandatory masking if you were in the field?

We had evidence early in the questioning of Chris

Schaefer that for one year, he was a regulated member of the Paramedic College. That's why Mr. Maxston was asking this question. Mr. Maxston: (as read)

> Would you comply with the paramedic equivalent about mandatory masking if you were in the field? [Chris Schaefer says, line 17] I would comply with wearing a mask, but I would not wear a breathing barrier. I have not worn a breathing barrier, and I won't. So, remember, there's a big difference between what's currently being mandated, and what an engineered mask is. A mask is safe to wear. A mask is engineered. It has engineered breathing openings. A mask has an engineered exhalation opening. That's safe. It's established as safe. It's proven as safe for many decades. So a closed cover is not something that I would wear. No. But I would wear an actual mask. I don't think I need to explain this to you. What Mr. Schaefer is saying to Mr. Maxston is, No, I wouldn't wear what you would call a mask. I wouldn't wear a surgical mask. I wouldn't wear what I call a breathing barrier. I would only wear a real respirator mask.

Continuing on line 7 of page 909, this is Mr. Schaefer speaking in answer to Mr. Maxston. He says: (as read)

> I'm not going to jeopardize my health and safety through low oxygen and accumulations of carbon dioxide for any occupation, because that's my health, and my health is important to me. It's more important than anything else.

Going over to the next page on my redirect, I ask Mr. Schaefer -- this is at line 16: (as read)

> If all you had access to was a breathing barrier that they said you had to wear, would you wear it keep your licence?

Line 19, Mr. Schaefer's answer: (as read)

> No. I would not wear it to keep my licence because my health is more important than my job.

That's how harmful Mr. Schaefer regards these masks. And he's someone who would know better than most. That's how harmful he regards them. He wouldn't wear it to keep his licence, to keep his occupation, to keep his job. I think that says a lot.

That was a common feature in Mr. Maxston's questioning. He questioned I think every expert witness that Dr. Wall put in. Do you wear a mask even though you disagree with it? Do you follow the law?

And everybody except for Chris Schaefer said, Yes, I do. I disagree with it. I think it's stupid. But yeah, I do. And I suppose the complaints director's point there is that even when laws are stupid and violate your rights, you should just do what you're told. Well, if that's the point, I don't see how that helps the complaints director.

But in any event, there are some people in society who say, No. I'm going to do what's right both for me and everybody else, and I'm not going to do what the government says just because they say so, when I know darn well it's wrong, harmful, and stupid.

Now I'm going move on to Dr. Dang and Dr. Bridle and what they had to say about the harms of masking, which of course is quite a bit less, but there's some significant things there. Dr. Dang provided evidence through his own testing on those wearing masks. He found through his testing that while wearing a mask, lung function drops by 15 to 20 percent. You can find this on pages 957 to 58 of the record. Remember, Dr. Dang is a respirologist. He runs a pulmonary laboratory, which is a breathing lab, essentially. Okay? So he has done testing at his breathing lab on people breathing while they're wearing these masks, and their lung function drops 15 to 20 percent.

Of course, again, I would say these findings are

uncontested. Dr. Dang is a credible, reliable witness. There's no reason not to accept his testimony as accurate and to put a lot of weight on it. But, again, I will submit to you that this is consistent. This corroborates everything in this case. It corroborates what Mr. Schaefer just said. It corroborates common sense. Common sense is that when you put these masks on, you don't breathe as well. You're not dying; right? And so, you know, probably lung function of 75 percent might mean you're about to die. But 15 to 20 percent, well, that's pretty consistent with, you know, oxygen levels a percent below what they should be and carbon dioxide 20 times what it should be. So I submit that for a lot of reasons, but because it's consistent with everybody else's evidence and common sense, you should accept what Dr. Dang has to say about his testing and that lung function decreases by 15 to 20 percent when they're worn.

Of course, no reasonable person is going to say that decreased lung function is not harmful. It is harmful to some degree. Categorically, logically, medically, it has to be, and it is.

Dr. Dang also stated -- he opined as a respirologist that he was not surprised that some people tolerate masks better than others. And Dr. Dang opined that mandatory masking violated both informed

consent and the principle of "first do no harm" because of the potential harms of masking to each person who wears one. You'll find this at pages 954 to 55 of the record.

Let's move on to Dr. Bridle. Dr. Bridle noted three harms from wearing masks and mandating them. The first one is that masking actually increases the spread of COVID through contributing to contact transmission. Dr. Bridle observed and opined what we all have seen and what we all know to be true, that people wear masks over and over and over again. They touch them all the time. They let them lie around. And, of course, if they are symptomatic and droplets get on the mask, you're going to have contact transmission problems. Again, this is intuitive. This is common sense. And Dr. Bridle is an authority to explain how this works, given his understandings of virology.

Two, or second, Dr. Bridle noted the harms resulting from the issue of muffled speech and hindered communication, especially for those with special needs or hearing issues. Again, common sense, intuitive. We all know this to be true. We've all spoken with masks on. We've all had to listen to people who have them on. Communication is hindered to a degree. There is muffling. You have a hard time hearing.

Now, sort of like a lot other things when it comes

to masking, for some people it's not that big of a deal. Their hearing is good, and, you know, they can get by, but then it's a serious harm -- a minor harm for everybody and a serious harm for some. It's not merely hypothetical. Dave Hilsabeck provided testimony about how much he benefits from both himself and Dr. Wall not wearing a mask while he receives treatment because he is able to communicate effectively with Dr. Wall. Mr. Hilsabeck has had a hard time hearing, so he has a hard time elsewhere. He has a hard time around all the other people that do wear masks because of the muffled voices and his loss of hearing and his loss of lip reading. He can't read lips of people wearing masks. It makes it hard for him to understand people. He testified about this on pages 770, 71. So that's a real harm that some people have to deal with. That's a harm that Mr. Hilsabeck, as a patient of Dr. Wall, didn't have to deal with when he was being treated by Dr. Wall.

Third, Dr. Bridle opined that -- the harms of carbon dioxide toxicity and hypoxia, which is again, low oxygen.

I'm going to read it for you, some sections of pages 1160 to 1162 of his testimony. I'm at line 24 of page 1160. Dr. Bridle speaking when he says: (as read)

And then I guess another one that I would mention is this idea of carbon dioxide, because this is just intuitive, So, you know, firefighters have equipment to do this. At my university, we have the ability to do this, look at CO2 levels, and we often do that when looking at how we adjust the air change rate in our rooms, especially the workrooms we work in a lot, like the laboratory space that we're in, the animal research rooms that we're in. So if you monitor the carbon dioxide level in front of your mouth without a mask, and then with a mask on, it goes up. And this makes intuitive sense because what you're doing by putting the mask on your face is you are restricting, you know, the free flow of oxygen. What you're doing is you're creating additional dead space. When we exhale -- when we exhale, there's always dead air. We cannot get all of the air out of our lungs, and we can't get all of the air out of our mouth. That's dead air. When we inhale that dead air, when there's not been fresh air exchanged, it gets inhaled back into the end of our lungs. By -- so by putting on a mask,

we're extending that dead-air space a bit. And so it does increase the carbon dioxide level a little. Not a lot, a little. And this creates a condition of very mild hypoxia. It's not severe hypoxia. But if you have high carbon dioxide, then the net result is that you have slightly higher [and then he says] lower oxygen levels. But, again, slight changes in oxygen concentration, we know, can have a profound physiological consequence.

I think Dr. Bridle just said it there, corroborated what Chris Schaefer said, what Chris Schaefer observed, what Chris Schaefer tested. It corroborates Dr. Dang, and it's consistent with common sense, and it's consistent with what you have experienced, all four of you.

And, again, I cannot say enough how important it is that you are honest about this evidence, that you are honest with yourselves, that you are honest in this decision about the harms of masks, about the decreased oxygen, about the increased carbon dioxide, about the effects that that has on the human body, about the headaches, about the anxiety and claustrophobia it causes in some people like Dr. Wall, about how much it decreases the quality of life, people like Dr. Gauthier

who have to suffer with asthma and can't get an accommodation because he knows the College won't give it to him, and so he just suffers.

I'll give you just one example from Dr. Wall's testimony where he talks about these same harms. He is informed on this. These exactly are the harms he's aware of and he wants to protect his patients from. Page 572, just one example.

What's the thrust of all this? It's that what Dr. Wall did was right. He did what was ethical. He did what was moral. He did what was professional. He allowed his patients to choose whether or not to incur those risks of carbon dioxide, toxicity, of low oxygen. He adhered to the principle of informed consent. He upheld the principle of "first do no harm". Three of his patients testified that they appreciate this. They're thankful Dr. Wall gives them the choice.

Let me take you to the testimony of Charles Russell, a patient of Dr. Wall. I'm going to be reading from page 753 of the record. At line 121, I ask Mr. Russell: (as read)

> Are you grateful that Dr. Wall does not require you to wear a mask when you come in for treatment? [Charles Russell says] Absolutely. I probably wouldn't come otherwise.

Dave Hilsabeck also testified how much he appreciates Dr. Wall giving him a choice. So when it comes to Dave, he's grateful that both Dr. Wall doesn't wear one, because he can hear Dr. Wall and read his lips, and because he doesn't have to.

I'll take you to page 775. Dave Hilsabeck says, starting at line 16, page 775: (as read)

> And so to come in here not wearing a mask, I appreciate that we don't have to. He's not requiring it. If he said I had to wear a mask to be treated, I wouldn't be happy about it. But would I do it? Yes, because I need the treatment. So if he's forced into it, it's not because of his doings. It's because of something else, you know, forcing him to go down this path.

Very interesting comments from Mr. Hilsabeck here. He said, if Dr. Wall said I had to wear a mask to be treated, I wouldn't be happy about it, but I would do it. But would I do it? Yes. Because I need the treatment. There's a name for that. There's a word for that. Coercion. I need the treatment. Yeah. I'll take it. Put it on. I need the treatment. Give it to me. I'll suffer the harm. I need the treatment.

You heard Dr. Gauthier said that too. For two of you, he's a colleague. He said, Yeah, I'd wear the

mask. I gotta put food on the table. Chiropractic is how I do it. If I don't wear the mask and I go down to Telehealth, I don't have an income. I don't have a practice. I'm not feeding my family. Coercion. That's what Dr. Wall experienced. You wear that thing, Dr. Wall, or you sit out. That's what Mr. Lawrence -- sorry. What's what Dr. Halowski said to him. That's coercion.

That's what this is all about. Dr. Wall is not going to coerce his clients to wear a mask because it's harmful, because they don't want it, because they know the harms of it. It's the most eminently professional thing he could've done in the face of all this tyranny and oppression.

Now, of course, where does all this lead us? It leads us to an outrageous and extraordinary conclusion, that by disobeying the government, by disobeying the government when it told him to make his patients mask, that he acted professionally in doing so. That's the conclusion. That's outrageous. It is. It's outrageous that I'm asking you to make that conclusion. This isn't the 1920s. We're not dealing with eugenics; right? It's not this -- it's not this crazy emotional thing. That's just so obviously wrong in historical hindsight. You know, we're not dealing with the Sixties Scoop or something that just is so

repugnantly immoral.

And yet, maybe we are because -- maybe because we're in the middle of it still. We're just coming out of it. Sobriety is just returning. We're only just now starting to realize that maybe what we did was wrong for two years.

It's still outrageous to think that somebody can act professionally with disobeying the government to protect their patients, but that's what I'm going to ask you to do. If you find that Dr. Wall has been properly charged with disobeying AHS, I'm going to ask you to find that in doing so, he did not act unprofessionally. In fact, he did the opposite. He upheld the highest of the ethics and principles that we are all called to live by, protecting others. After all, this is what this is supposed to be all about, protecting patients. It's exactly what Dr. Wall did. He protected them from being harmed by low oxygen and high carbon dioxide, and by doing something that they don't want to do, that in and of itself is a harm. To be coerced into doing something that you don't want to do is harmful psychologically. That's why we recognize it, and informed consent, and first do no harm. He protected his patients from that. The complaints director is going to say, No, he didn't. He didn't protect anybody. Harms aren't -- masks aren't harmful.

In fact -- in fact, he did the opposite. He -- he exposed people to harm because, you know, masks are effective and they reduce the relative risk, and if he doesn't wear one, he's increasing the relative risk of COVID transmission.

I'm going to put it to you that none of that is true. We have the scientific evidence to show none of it is true. So the one protecting patients here, the one protecting the public interest is not the College, it's not the complaints director, it's Dr. Wall choosing to do what's right, choosing to look at the evidence and follow the evidence where it leads, even when it leads to him getting in trouble because he doesn't have the political power.

Compliance. That's what the complaints director says this is about. Compliance. What that's really saying is this is about power. We have it, and he doesn't. The CMOH has it, and he doesn't. AHS has it, and he doesn't. If he doesn't do what he says -- what we say, if he doesn't comply, then the hammer is going to come. That's what the complaints director wants to tell you this case is about. It's about power. It's about who has it, and who doesn't. And what I'm telling you about is it's about the truth. It's about the facts. It's about the science. And it's about the law. Because that's what the law is. It's about

taking us away from living in a society that's based on power into a society that's based on order and truth and reason. That's what the law does. And the law says, Yeah, the science matters. Because if we don't adhere to the scientific truth, then we end up in this situation where truth doesn't matter, only power does, and people have to do what other people say just because they have the power, not because of whether or not they're right.

I will bring you back to the medical reversal phenomenon that Dr. Warren talked about. Everybody talked about the politicization of masks in this issue -- in this case. Dr. Warren explained why that is. Look, we had bad assumptions. Those assumptions stuck, and nobody wants to let go of them. So here we are, doing this over and over and over and over again. It doesn't matter that it's wrong. What matters is that the people who don't want to give up their bad assumptions have the power to make somebody else submit to them. That's what this is about.

I want to take you -- I'm almost done. I want to take you to page 756 of the record. This is Mr. Russell's testimony. I asked Mr. Russell: (as read)

> Do you think your interests should be considered as part of any decision to

restrict or not restrict Dr. Wall's ability to practice? [The answer is] I would hope it would have some bearing. [I asked] If Dr. Wall is ordered to stop practicing or stop treating you, except by calling him on the phone, would you be upset with that order or that decision and the person or body that made it? [Charles answers] Absolutely. [I asked] Could you explain why? [He says] It's not fair. It's not reasonable. It goes against the Hippocratic oath. It goes against a lot of things. [I asked] Do you think the chiropractic profession has important core principles? [He answers] Absolutely. [I asked] What do you think some of those are? [He says] Promote natural health to give people an alternative to the pharmaceutical, medical establishment, to mainly promote natural health.

And then I ask at line 5: (as read)

Do you think those principles are currently being adhered to? [He answers] Well, I think they are by most of the practitioners. I'm not sure about the administrative side of it. [And I ask] Why do you say that? [He said, line 10] Because we're having this hearing

right now. I think it's a travesty that we're even having this hearing. [I asked at line 17] How do you think the chiropractic profession should be acting in response to the government COVID restrictions? [He answers] I think they should be pushing back. I think they have plenty of evidence that the government's mandates are unreasonable and not in the interests of good health.

A lot of this is about the public interest. Well, that's a member of the public right there. That's a patient of Dr. Wall's. That's what he thinks about this. His opinion on COVID does not matter. It's not admissible. It's not relevant. That wasn't an opinion about COVID. He was speaking about the public interest. He's a member of the public. He's a patient of the regulated member that is being prosecuted today.

If you're going to make public interest part of your decision, which I think you have to, which I think the complaints director is going to ask you to, you need to consider his interests. You need to consider what he has to say. I won't take you to it, but what Mr. Hilsabeck says, Look. I'll be in a world of hurt if I lose Dr. Wall as my chiropractor. These three patients that testified for Dr. Wall, they have been with Dr. Wall for over 20 years. How do you think

they're going to feel if they lose their chiropractor over something like this?

Violations of informed consent are not in the public interest. Violations of first do no harm are not in the public interest. This has to be said in this day and age. Protecting the public is in the public interest, no contention there. But that's exactly what Dr. Wall did. He protected his patients from harm by letting them choose whether or not to mask, even though the government told him he was supposed to make them mask.

The totality of my submissions, therefore, are that Dr. Wall did not commit professional misconduct in any way. All of the charges fail. He acted professionally and ethically throughout the material time, and in the way that he protected his patients, and in the way that he asserted his rights to be accommodated under the Alberta Human Rights Act, and in the way that he stuck to the truth, even when it was painful to do so.

Subject to your questions, those are my submissions.

THE CHAIR: Thank you, Mr. Kitchen.

Perhaps we will take a short five-minute break and caucus so we can determine if there are questions. And we will allow -- this would allow Mr. Maxston to --

actually, let's make it ten minutes. This would also allow Mr. Maxston to -- to prepare his -- his rebuttal submission. So --

MR. FISCHER: Mr. Chair, may I suggest we take 15 minutes so I have a few minutes to confer with Mr. Maxston and then take a quick bio break before we jump back?

THE CHAIR: Yes. I think that's okay. We're a little -- we're a little ahead of the time that we thought we would be. Mr. Kitchen was great on keeping on schedule. So 2:15 is fine. So we'll recess until 2:15. And please put the parties in their breakout rooms. Thank you.

(ADJOURNMENT)

THE CHAIR: The Hearing Tribunal has -- requires a few more minutes in order to complete our -- our discussions. So I would like to extend this until 2:20 -- the recess until 2:20. So another five minutes, everybody. Thank you.

(ADJOURNMENT)

THE CHAIR: Okay. We are back in session. Before I -- before I turn the floor over to Mr. Maxston for his rebuttal submissions, Mr. Kitchen, the Hearing Tribunal members were discussing during the break how beneficial it would be if it would -- if we could receive a summary of your closing submissions. And not

a detailed word-by-word reconstruction of them, but just a general summary that would assist us in working through the information that you've presented. Is -- would -- we anticipate having the transcription by June 27th. Would such a summary be possible by the end of the month?

MR. KITCHEN: Yes, it would. I guess what I'll provide you, then, is, you know, truncated written submissions.

THE CHAIR: That would be -- that would be very helpful to us, and we would appreciate that, and it balances nicely with Mr. Maxston's closing submissions.

MR. KITCHEN: I just will say that, you know, if I was to write a full factum, I probably would've written something 50 pages long or something. So you might still receive something from me that's, you know, 20, 25 pages, but rest assured, that's actually a brief brief.

THE CHAIR: That's fine. We will work with that.

Okay. Mr. Maxston, you're muted. Are you prepared to proceed with rebuttal submissions?

MR. MAXSTON: Yes, I am. Thank you, Mr. Chair.

THE CHAIR: Okay.

Rebuttal Submissions by Mr. Maxston

MR. MAXSTON: So, Mr. Chair, I'm going to begin with just going through a few comments I have in response to some of the submissions my friend Mr. Kitchen made over the last day or so now. And then I'm going to turn to some comments about the human rights cases and issues that are before you. I've got just a couple of quick comments after that.

So I -- I want to go back to I think very early in Mr. Kitchen's comments to you yesterday, where he made a comment about having heard the word "selective" a great deal on behalf of the complaints director. And really, this wasn't a selective decision by Dr. Wall because he couldn't mask. And I think that misses the point. It's the flip side of the same coin, but it misses the point. There certainly was selective decision-making by Dr. Wall to not contact the College, to not engage with them, and to not -- from the complaints director's perspective, fulfill a professional obligation to come forward and talk about these things.

So there -- there is a selective element here. I don't think it's fair to say this was simply a matter of Dr. Wall not being able to mask or social distance.

The other thing that I want to talk about that I think was at the very beginning of Mr. Kitchen's

comments yesterday was a discussion or submission he made to the effect that Dr. Wall was apprehensive about coming forward to the College to make a request for accommodation. He didn't do that. And guess what? History proved him right. Because eight months later or seven months later or whatever it was in December, the College said, Hey, we're going to treat this as a complaint, and we're going to investigate you. And, again, I think that mischaracterizes what happened because I'm -- we don't know because Dr. Wall didn't take this step, but if he had participated, as he was invited to on numerous occasions by the College to provide input and feedback about the pandemic directive when it was created -- you heard extensive evidence about that, he would've been doing that back in April and May. And instead, what happens is when this comes to the College's attention many, many months later, they find out, Wait, there's been a patient complaint. His clinic has been shut down, and he hasn't been talking to us for eight months, or seven months, whatever it is. You can do the math. So I think that's -- again, kind of misses the point here. The College is confronted with a totally different set of facts six, seven months later. And this idea that Dr. Wall was very prescient or knew what was going to happen, it was going to be a terrible thing -- well,

again, this happens many months later when the CMOH, AHS has shut down his clinic. There's a patient complaint. And now AHS -- or, rather, the CMOH officer, Heidi Ho, is coming to the College. So their response is bound to be different many months later than it would've been if Dr. Wall had been more open, been more candid, again, as the complaints director submits he should've been very early in the process. I wanted to talk to you about that.

There was a discussion at one point -- or -- pardon me -- comments at one point from Mr. Kitchen about the fact that the telephone discussion between the then complaints director and his client in early December mentioned accommodation, and I think, again, there's -- there's a bit of conflicting or different evidence, I would say, about what was said during that discussion. But it's absolutely clear when I talked with Dr. Wall that he didn't formally ask or even casually ask for an exemption. He didn't do that. And he said that. So this idea that, Wait a minute, accommodation was raised, you know, in December, and the College had some, you know, duty because of that to accommodate. Well, I don't think it was that formal or that direct at any time by Dr. Wall. And very importantly, around that time as well, Dr. Wall is represented by Mr. Kitchen. He's engaged in the

Section 65 process, and, of course, he could've jumped in at any time and said, Hey, slow down the train here. We need a formal request for an exemption. Now, I'm not sure a lot turns on that, frankly. But I think it -- I just wanted to make sure that there wasn't a mischaracterization of the evidence before you because it's -- it's clear there wasn't, during this conversation between the complaints director and Dr. Wall, a lightning bolt accommodation issue that just burst onto the scene and everybody had to deal with that. That really wasn't the case.

I think my friend Mr. Kitchen several times in his submissions -- I think mostly today, but yesterday as well -- talked about the College skirting the science behind the masking issue, and I couldn't disagree with that more. The College has maintained -- the complaints director has maintained that this really isn't about science because you're not going to -- you don't have the authority or the jurisdiction, the ability, perhaps, to make a final and binding decision about whether masks do or don't work and whether social distancing is or isn't supported by science.

But we've put a whole bunch of information before you. It's not just the expert witnesses. And Mr. Kitchen said, Well, look, we heard from four witness, and we only heard from one from the College.

Well, in addition to Dr. Hu's testimony, which I'll talk about in a few minutes and which I think was pretty solid testimony, very solid, you heard all kinds of information from Dr. Halowski, and you saw all kinds of documents about science supporting masking and social distancing. And by that I mean look at the AHS documents. Mandatory continuous masking for their patients. Look at the CMOH documents. Look at the government's relaunch document that requires masking in those guidelines. And then look at 1620, order 1620. There's got to be a basis, a scientific basis for those documents, those pronouncements, those positions. And we heard from Dr. Wall, and we heard from his experts, that there are studies and other institutions that do support masking, and there's a wealth of information there. And I think, again, Dr. Wall's expert witnesses were very candid in admitting that, and so was Dr. Wall. So this idea that, again, we're skirting the scientific evidence, no. We think there's a robust, fulsome body of evidence that supports the pandemic directive. And I would take you, again, to the submissions I made yesterday about that reasonableness test that just winds through all those Charter cases, and the other cases, the Catalyst test that says you only strike down something like the pandemic directive if it's entirely undefensible. It's an outcome that

can't be supported as a possible outcome from a range of outcomes.

Well, it's clear there is science here that supports the pandemic directive and the College's views on it. So I think, again, this idea that we are skirting the science is just not true. There's ample science here, but we're not prepared to say, for the Hearing Tribunal, you've got to get into a debate and figure out what's entirely right and definitively right. The College has a standard to meet, and that is this reasonableness standard. Again, I take you back to that Catalyst case in my written submissions.

I want to turn next to some comments about Dr. Hu's testimony that I found, frankly, inappropriate on the part of Mr. Kitchen. He called Dr. Hu not credible, not reliable, immature, insulting, and accusatory. Those are very strong words. And I'm going to suggest to you that when you heard Dr. Hu testify, he engaged in a to-and-fro with Mr. Kitchen. He was never rude. He was, I think, steadfast in his positions. He wasn't flippant. He's a CMOH medical officer of health of Calgary. He understands the seriousness of this. He was on the scientific advisory group for the CMOH. He worked with them. So I think that's really an unfair characterization of how he presented his evidence. Often in cross-examination --

I experienced some of this with the experts called by Dr. Wall -- there's going to be to-and-fro, and there's going to be back-and-forth, and that's fine. But to say he was insulting or accusatory, I think -- I think that's just wrong. And I think Dr. Hu was quite candid, and I think quite gracefully candid when he was cross-examined in saying, you know, I probably could've chosen better language at some points in these -- in my expert's report, and he said, you know, I would take that back. There was a few things that I think are probably personal in nature, and I regret that. He was very clear about that, but the substance of his opinion never changed. He never wavered. He always said he was in favour of masking, and the science was there to report -- to support it. So again, I think we have to be careful about that kind of characterization.

You'll sit down when you go through the expert evidence and you'll decide who is credible and who isn't and what weight to put on it, and you'll also look at the AHS documents and the relaunch document and the CMOH orders and all those things and you'll decide where the scientific basis is. But Dr. Hu was a good expert witness who had to-and-fro with Mr. Kitchen. But I think characterizing his testimony as something inappropriate was just not correct.

Mr. Kitchen commented that there was very little

cross-examination of Dr. Wall's expert witnesses and that somehow that must mean it's a default by the complaints director that we're -- we're accepting their positions, and, again, that couldn't be farther from the truth. I told you a few minutes ago about the College's -- pardon me, the complaints director's view that there's a lot of scientific evidence before you. Not just Dr. Hu, but other documents, other information, Dr. Halowski's testimony about what the College engaged in when they were developing the -- the pandemic directive.

And, again, I didn't need to go through a lengthy cross-examination with each of those expert witnesses. They very candidly, again, admitted that their views weren't held, shared by AHS, the CMOH, Public Health Agency of Canada, the Alberta Government, all those things. It wasn't necessary to go through line by line because there's a difference of opinion here, and I'm sure as heck not going to presuppose that Dr. Wall's expert witnesses would've crumbled under harsh cross-examination. They have their views. They -- they obviously believe them. I didn't need to take them through chapter and verse on what their -- what their scientific views were.

I'm skipping around a little bit here, but I want to talk about the bona fide -- the BFOR test, bona fide

occupational requirement. And I think Mr. Kitchen said to you, and I'm going paraphrase here, but, Look. We have these difference tests and these different criteria, but now it all comes down to, at the end of the day, can the College prove that this is a bona fide occupational requirement? Can they prove that to not have exceptions is an undue hardship? And I would invite you to look through the numerous cases we presented, Charter cases from the Supreme Court of Canada, where they talked about the serious, deadly nature of the COVID pandemic, the fact that it was unknown and novel, the fact that great latitude had to be given to decision-makers to implement precautionary measures. I can't think of a more compelling situation for a BFOR, which would -- bona fide occupational requirement -- than COVID. The Courts -- the Supreme Court of Canada said this is serious business, and I'd invite you to look back at those judicial findings from the Supreme Court of Canada that really support why the College took the position that universal masking was required.

So I think that's an important point to talk about.

MR. KITCHEN: Mr. Maxston, I don't like to interrupt, but I do owe you a couple. I just think it's important that we know what cases we're referring

to. There's no Supreme Court of Canada cases on COVID. There's some --

MR. MAXSTON: I'm talking -- Mr. Kitchen, I'm talking about the cases --

MR. KITCHEN: Of Section 1, yes, Supreme Court of Canada.

MR. MAXSTON: Pardon me. You're quite right. My apologies. But there are extensive cases beginning on pages 31 to 32, Court of Appeal for British Columbia.

MR. KITCHEN: That's right.

MR. MAXSTON: So my apologies, Mr. Kitchen. You're correct, but there are at least seven -- six or seven cases we've cited here that really set out a judicial foundation for the significance of COVID and the risks to the public.

MR. KITCHEN: Just none are from the Supreme Court. That's --

MR. MAXSTON: Yes, that's -- that's fair.

MR. KITCHEN: -- what I wanted to clarify.

MR. MAXTON: Yes.

There was a discussion about the plexiglass barrier, and that somehow it was singling out doctor -- Dr. Kitchen -- Dr. Wall. Pardon me. I don't mean to elevate you, Mr. Kitchen, to that.

I'll just say this: I think this is another one

of those common-sense areas, common-sense questions you're going to have to talk about. The plexiglass barrier requirement applied to all chiropractors, and I can't think that in this day and age when we walk into Best Buy or Costco or your 7-Eleven and there's plexiglass up, that has any negative connotation whatsoever, or that Dr. Wall is in any way stigmatized in that respect. So I think that's something -- again, it's a proportionality, a reasonableness question. And I just don't see argument here that there is some, again, terrible consequence here to Dr. Wall being singled out on some basis for having the plexiglass barriers.

I'd like to next talk about Mr. Kitchen's comments in terms of -- I'm going to call it the factual admissions exchange I had with Dr. Wall during the hearing, and then Mr. Kitchen taking you to his redirect and saying, Look. He -- he really didn't make those admission, and I -- I think I've got to really, really, really ask you to look at those transcripts carefully. Because I took my time going through those five charges with Dr. Wall, and I was very clear at the beginning of my questions that I wasn't asking him to make admissions of unprofessional conduct. I was asking him about the factual underpinning. That's all through the exchange I had with him, the factual

underpinning for these charges. And he said yes each time.

Now, Mr. Kitchen, when he did his redirect, was certainly entitled to explore that with him, and I think Dr. Wall made some comments about the reasons why he was doing that or why he felt he had to do it or couldn't act in certain ways or whatever. But the fact of the matter is when I had my first exchange with him, those were pretty candid statements, and there wasn't a retraction of them. There was a massaging of them in terms of defences to them and mitigating factors or exceptions. But again, I invite you to read that exchange with Dr. Wall and I, and I think it was very telling and, again, dealt with the facts underpinning those -- those charges.

Mr. Kitchen spoke to Section 2(b) of the Charter and the freedom of expression breach. I think that was it with respect to Charges 3(a) and 3(c). It might be with respect to other ones. I can't recall exactly. But I would just take you to or ask you to go to those -- again, those Charter cases that we put in the written brief where they talk about Section 2(b) and the -- the exemption, the saving test under the Oaks test for Section 1 under a reasonable, demonstrable limit on some of those rights. And I think you'll find that compelling to support Charges 3(a) and (c), or the

other charges Mr. Kitchen was referring to.

Mr. Kitchen took you to a pretty well-known case called Strom v. Nurses College of Saskatchewan. I'm going to get the name wrong, but it related to -- perhaps get the name wrong. But it related to a nurse who made comments on social media about the care that her grandfather received in a healthcare setting. And I'm just going to say that, you know, the Court in that case, a very significant judgement, said, Hey, you know, there's some free speech issues here and regulators have to be careful. But that case is categorically different than the one we're dealing with here. That was a nurse making comments in essentially a private capacity on social media about her grandfather's care. The nurse wasn't making comments about the nursing profession. The nurse wasn't making comments about what she would or wouldn't do with patients. The nurse wasn't making comments about, you know, not complying with her regulatory body. A very important case, but a very different one, that I submit to you doesn't give you any type of a legal basis for, you know, excusing Dr. Wall's conduct. That case in and of itself is very, very different than what we're dealing with here, a professional who is directly engaged in a -- not complying with the requirements of his regulatory body and doing so without telling them.

The facts are just too different to make that case applicable in any way.

Mr. Kitchen made a comment, I think towards the end of his submissions today, that the harm of masking is uncontested. And again, I would just -- I was troubled to hear that because I think it -- it misses all the evidence that was put before you by the complaints director. Alberta Health Services -- again, I hate to sound like a broken record -- the CMOH, the Alberta Government relaunch plan, Public Health Agency of Canada, all those things, the harm of masking is contested, or the complaints director says there is evidence to support that masking does cause harm. That's set out in all of these different documents, all of the different pronouncements, orders, what have you from different government agencies and healthcare stakeholders. There's a difference of opinion on that. That's fine. But again, the harm of masking is something that the complaints director takes very seriously here, and the College did in creating the pandemic directive.

Mr. Kitchen made a comment I think at -- near the very end of his submissions, that this was about compliance and power or authority or some sort of -- I think the implication is some sort of egregious power imbalance that Dr. Wall was faced with when he's

confronted by his College, and, again, I really strongly disagree with that on the part of the complaints director. I'll remind you that this is self-regulation. This is not an amorphous third-party entity that is far off in Ottawa even or what have you. This is the College of Chiropractors of Alberta, which is made up of chiropractors, and the Council has chiropractors on it and has members of the public on it. So again, this -- this argument that in some way Dr. Wall is confronted -- he's powerless and he's confronted with this entity that is doing these terrible things, well, again, it's self-regulation. These are chiropractors coming up with rules, requirements for the profession. And the other thing is, Dr. Wall wasn't without power, without the ability to contact the College. We heard Dr. Halowski say again and again, We sent all these notices. We wanted feedback. We were available by phone. I think I called them the 7-Eleven of regulatory bodies. They were open 24/7. So to say that he's sitting there and this massive monolith is crushing him is -- is just not fair. He didn't come forward for six, seven, eight months when he was invited to many times by the College, when the phone was always there, when he could pick up the phone or dash an email. So I think those are things that are important to keep in mind as well.

I want to talk a little bit now about the human rights arguments that my friend has put forward, and I'll invite you in your deliberations to go through our written submissions where I talk about the Human Rights Act and different things that relate to it. But I want to begin with Mr. Kitchen's comments about the five Human Rights Commission decisions that we've cited in the written brief and I think asking you to really dismiss those and say they're of no value. They are -- the Courts would call, or judges, lawyers would call a summary dismissal. Sort of saying, Look. They didn't have witness, they didn't have fulsome hearings and those types of things.

But I think they are still very, very important because when you read them -- and I'd encourage you to them -- when you go the hyperlinks, they talk about the Meiorin test. They talk about the Moore test. They talk about all the things that are engaged here, and they uniformly come to the same conclusion that, Wait, this masking requirement is something that is permitted under a human rights legislation. So yes, they're not Supreme Court cases, but they're very compelling cases as well.

And I think it's also worth noting that Dr. Wall hasn't been able to find any cases which would -- that directly, expressly come out and say, No, these do

contravene -- the specific COVID Alberta requirements, for example, contravene human rights legislation in Alberta. So what we have is, currently, I think those five or six cases which are out there, and they're pretty darn powerful cases when you look at the analysis. They're not snap decisions. They're fulsome. There's good reasoning in them, and I'd encourage you to read those -- those carefully.

I'll just make a couple of comments about the Human Rights Commission -- Human Rights Act cases that my friend Mr. Kitchen referred you to, and I think it's really important to remember that none of those expressly deal with COVID. We don't have any of those cases yet, and that's a huge caveat on those cases. All the urgency, all the public health issues, all the things that are getting quoted in some of those cases we put before you in different circumstances, all those things are at play here. And the cases Dr. Wall is relying on, they're -- I'll call them historical; not to diminish them, they're not applicable in the same way. They're employer and employee cases largely, and I note that in many of them, the employer was aware of the employee's disability or need for accommodation when they filled out a job application or things like that. Very, very different than what we have here.

The Meiorin test, the Moore test, those kinds of

things I think are difficult to -- it's a square peg, round hole in some ways. We don't have guidance from the Courts yet, real guidance, about what happens when a regulator tries to implement these things. And you'll also -- when you look at those cases, you'll see that one of the options available to the Human Rights Commissioner Ward, is to look at actual adverse impact, a loss of income, those kinds of things. I don't want to go too far down this road, but Mr. Kitchen made a comment yesterday that Dr. Wall could've lost his house and those types of things. I want to be very fair or respectful when I say this, but we heard no evidence from Dr. Wall about that. There's just no evidence of any financial impact on him, and despite the fact that the complaints director disagrees with Dr. Linford's Section 65 decision, Dr. Wall has been able to continue to practice. And I note that from June to December of 2020 he did continue to practice without telling the College and didn't suffer any financial impact.

So I think when you're looking at that, you know, the elements of the various cases for the human rights legislation, that adverse impact becomes pretty darn significant here, an interesting question for you to look at. Just as I said, it's the written briefs submissions here that you've got to look at the medical exemption and how that came about and Dr. Wall's views

on that. And I'm going to suggest to you that, again, when it comes to a -- a professional dealing with patients in the healthcare setting, there's a higher obligation to do more than just a self-diagnosis, to reach out. Dr. Wall may well have gotten a letter from Dr. Salem or someone else in June of 2020 which said exactly, you know, what the letters were that he got, you know, six or seven months later. But he didn't do that, so that's a -- I think a question for you to look at.

And I want to reiterate the complaints director's position that there's -- you know, this is one of the most compelling situations that you could have for undue hardship, patient death, patient illness, not being able to accommodate. Again, there's lots of information there for you to talk -- or to think about there.

The other thing I want to take you to, and we didn't really get into this, is Section 11 of the Alberta Human Rights Act. And it has a saving provision similar to Section 1 of the Charter. And you can look this up with Mr. Pavlic. It's quite brief, so I'll just read it to you. It says -- the heading is "Reasonable and justifiable contravention", Section 11: (as read)

A contravention of this Act shall be deemed

not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

Well, not surprisingly, I'm going to tell you that the complaints director's strong view is that the pandemic directive and the various requirements it set out are justifiable, are reasonable in the circumstances. Again, you can go back and look at all the body of reasonable science that the College relied on in reaching the pandemic directive, and certainly Section 11 would apply to the complaints director's position in these circumstances.

So, Mr. Chair, just as Mr. Kitchen said, I would encourage you to look through all the transcripts, go through all of the evidence, But I think you'll come to the conclusion acting reasonably, bearing in mind the obligations a professional has to engage, to engage promptly, to engage candidly and to comply, yes, not in the powerful coercive way, but comply with your professional obligations, continuing competence, practice permit renewal, charting, infection prevention and control, you'll come to the conclusion that the charges are made out.

Those are all my submissions to you, Mr. Chair. I'm pleased to answer any questions, and I'm sure

Mr. Kitchen is available to answer questions as well.
THE CHAIR: Thank you, Mr. Maxston. I think we will take a short break so that the panel members can determine if we do have questions for either counsel. It's 2:50. So let's reconvene at 3:05, a 15-minute period, and we will -- we will let counsel know if there are questions. Thank you.
(ADJOURNMENT)
THE CHAIR: Okay. I can advise counsel that at this time the Hearing Tribunal does not have any specific questions for either party. However, we would reserve on the possibility of any -- if a question should arise, we would be in direct contact with both parties requesting information or clarification in writing. I'm not sure that will happen. But as everybody has noted, there is a lot of information here, and we appreciate very much the efforts by both Mr. Maxston and Mr. Kitchen to organize and present a large volume of information, and there is certainly lots of us -- lots for us to go through.
So having said that, I think we are finished with the hearing for today. A couple of points I would note. The addendum, which basically states that the partial publication ban does cover observers, has been sent out, and, Mr. Kitchen and Mr. Maxston, you should have copies of that. And for the court reporter, there

was a copy emailed to the general email address that we have. So if you want to access it, it should be at that email address. If you have any difficulty accessing it, please contact Ms. Barton, and she'll send you a copy directly.

MR. MAXSTON: Mr. Chair, it's Blair Maxston. I assume Mr. Kitchen wouldn't have a problem if we -- while we're here -- we all agree to this -- marking that decision as I think Exhibit I-2 now, if I'm right.

THE CHAIR: Yes. That's fine.

So letter 'I', Number 2.

EXHIBIT I-2 - A partial publication ban

MR. KITCHEN: Mr. Vidal, do you want to have a moment with Mr. Maxston and I to go over any spelling issues?

THE COURT REPORTER: The only one is -- I think it was Dr. Gauthier in case I can't find that one.

MR. KITCHEN: I can give that to you really quick. I have to find the place where it hasn't been me that's spelled it. G-A-U-T-H-I-E-R. And, in fact, it's spelled wrong in the record I have.

THE COURT REPORTER: Okay. Yes, I noticed.

MR. KITCHEN: There's an 'I' between that 'H' and 'E'. Yes.

THE COURT REPORTER: Okay.

MR. KITCHEN: It's -- I think it ...

THE CHAIR: So it's Gauthier?
MR. KITCHEN: Gauthier, that's why. It's 'I', yes. I'm English. He says his name is Gauthier, but that's not how it's spelled.
THE CHAIR: Well, we'll take him at his word on that. I don't think there's anything further at this point. I -- I do want to thank everybody. We have been through -- pardon me. There's one other comment. Mr. Maxston, on your submissions, your written submissions, the very first page, you noted liability phase of the hearing and you provided some dates. I wondered, did you mean to include April 12th?
MR. MAXSTON: If there's a missing date, yes, that's simply a typo. I think on -- Mr. Chair, on paragraph 1 or 2, I do talk about the actual dates, and hopefully I got it right there. But, yes --
THE CHAIR: Yes, but the last date you mentioned is February 25th, and I believe we also met April 12th. Yes. Okay. That's a minor thing.

Thank you, everybody. It's been a -- it's been a productive two days. I know we've been challenged on time, but we will do our best to -- to continue with our deliberations and produce a decision for the parties. I can't guarantee you when, but please understand we wish to deal with this in a timely manner, so we have information coming by the end of the

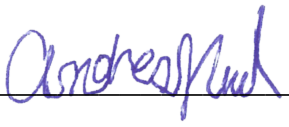
month, and then we will -- we will proceed from there.

PROCEEDINGS CONCLUDED

CERTIFICATE OF TRANSCRIPT:

I, Andres Vidal, certify that the foregoing pages are a complete and accurate transcript of the Proceedings conducted in accordance with the Alberta Protocol for Remote Questioning, taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of St. Albert, Province of Alberta, this 28th day of June 2022.



Andres Vidal, CSR(A), RMR
Official Court Reporter