



— COLLEGE OF —  
**CHIROPRACTORS**  
— OF ALBERTA —

## Hearing Tribunal Written Decision on Findings for the Hearing of:

Dr. Curtis Wall

Date of Decision: January 27, 2023

Date Posted: July 17, 2024

## Posting expiration date:

July 16, 2034

**IN THE MATTER OF A HEARING OF THE HEARING TRIBUNAL  
OF THE COLLEGE OF CHIROPRACTORS OF ALBERTA (FORMERLY KNOWN AS  
THE ALBERTA COLLEGE AND ASSOCIATION OF CHIROPRACTORS) ("THE  
COLLEGE") INTO THE CONDUCT OF DR. CURTIS WALL, A REGULATED  
MEMBER OF THE COLLEGE**

**Pursuant to THE HEALTH PROFESSIONS ACT,  
R.S.A. 2000 c.P-14 being Chapter H-7 of the  
Revised Statutes of Alberta  
Regarding the conduct of Dr. Curtis Wall ("Dr. Wall")**

**DECISION OF THE HEARING TRIBUNAL**

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**Hearing:**

The Hearing was conducted virtually using the Zoom application on the following dates:

September 1, 2, 7 & 8, 2021

November 16 & 20, 2021

January 28 & 29, 2022

February 25, 2022

April 12, 2022

June 16 & 17, 2022

Members of the Hearing Tribunal included:

James Lees, Public Member, Chair

Doug Dawson, Public Member

Dianna Martens, Regulated member

Dr. Leslie Aldcorn, Regulated Member

Other participants included:

Walter Pavlic, Independent Counsel to the Hearing Tribunal

David Lawrence, Complaints Director, CCOA

Lloyd Fisher, Complaints Director, CCOA

Blair Maxton, Counsel for the CCOA

Curtis Wall, Investigated Member

James Kitchen, Counsel for Dr. Wall

Karoline Schurman, Court Reporter

Preliminary Matters:

Dr. Wall and the College are represented by counsel. At the commencement of the Hearing, they were asked if they had any objections to either the composition or jurisdiction of the Tribunal. Both counsel confirmed that they had no objections. They further confirmed that they did not object to having the Hearing heard virtually via video conference.

The parties then advised that there were a number of preliminary applications to be addressed.

The first preliminary application related to the College's Complaints Director's request to amend the Notice of Hearing to include the phrase "Alberta Health Services directions and requirements". In support of that amendment the College made reference to Section 66 (Subsection 3) of the *Health Professions Act*<sup>1</sup> ("**HPA**") which states that:

*"If on reviewing a report prepared under this section the Complaints Directors determines that the investigation is concluded, the Complaints Director must refer the matter to the Hearings Director for a Hearing".*

<sup>1</sup> *Health Professions Act, RSA 2000*

The College also made reference to Paragraph 47 of the *Wright Decision*<sup>2</sup>, which states that a professional organization has the ability to invoke and manage its professional disciplinary regime, which power is analogous to prosecutorial discretion. The grounds of review of that discretion are to be very narrow. They next referred to the decision in *MacLeod v. College of Social Workers*<sup>3</sup>, which states that the particulars enable the professional to identify the event that amounts to misconduct, and that the particulars can also have the effect of limiting the scope of the charges. The requirement of particulars is that they be specific enough in order that the professional knows the case that he or she has to meet. The College indicated that the proposed amended Notice of Hearing was originally provided to Dr. Wall in March 2021, and that there have been no requests made by Dr. Wall for any further particulars. The College stated that the particulars of the charge are very well-known to Dr. Wall, and that the addition of the phrase “Alberta Health Services directions and requirements” does not result in any prejudice to Dr. Wall.

Dr. Wall objected to the amendment on the basis that the reference to “Alberta Health Services direction and requirements” is very vague, and that those directions and requirements are not relevant. Rather, what is relevant in this matter is the Office of the Chief Medical Officer of Health’s orders.

After hearing arguments on the matter, the Tribunal concluded that Dr. Wall had received sufficient particulars in advance, and had not demonstrated any prejudice. Dr. Wall had ample

<sup>2</sup> *Wright v. College and Association of Registered Nurses (Alta.)*, (2012) 536 A.R. 349

<sup>3</sup> *MacLeod v Alberta College of Social Workers*, 2018 ABCA 13

opportunity to raise any questions or concerns regarding the proposed amendments in advance of the Hearing. He did not do so. The amendment was allowed.

The College's second Preliminary Application was to admit three Alberta Health Services ("**AHS**") documents as additional exhibits. The College briefly reviewed the contents of the documents that the College was asking to be admitted. They then made reference to Section 79(5) of the *Health Professions Act*, which states that:

*"Evidence may be given before the hearing tribunal in any manner that it considers appropriate, and it is not bound by the rules of law respecting evidence applicable to judicial hearings. (pg. 70)"*

The College made reference to the *Mohan Decision*<sup>4</sup>, and identified that when entering new documents the Tribunal ought to consider three elements:

*(1) are the documents relevant;*

*(2) are the documents relevant to the facts and issues that are before the decision maker;  
and*

*(3) will the documents provide the decision maker with some assistance?*

They argued that the documents sought to be entered contained important information with respect to issues in the Hearing. They maintained that the documents would provide guidance and were relevant.

<sup>4</sup> *R. v. Mohan, 1994 CanLII 80 (SCC), [1994] 2 SCR 9*

Dr. Wall responded by saying that the documents failed to add any scientific value, and were nothing more than an appeal to authority. The documents were also independent from the CMOH's orders, and as a result they fail to add any value. The effect of the documents is only to prejudice Dr. Wall. He stated that the documents' probative value is outweighed by their prejudicial impact.

Following consideration of the arguments, the Tribunal concluded that the documents are relevant and are material. There is no exclusionary rule that would support ignoring them. As a result, the three Alberta Health Services documents were admitted as Exhibits H-2, H-3, and H-4.

Dr. Wall also had a Preliminary Application. He wanted Mr. Schaefer's CV and his report admitted as evidence before the Tribunal. He argued that the principals of the *Mohan* case were satisfied. Specifically, he argued that the report is relevant, necessary in assisting the trier of fact, does not violate any exclusionary rule, and is prepared by a properly qualified expert. Dr. Wall argued that the report addressed the central issue in the case, was relevant and probative, and that any possible prejudice could be rectified by providing an adjournment to the College. He further stated that the *Alberta Rules of Court*, which limit opinion evidence to one expert on any one subject, is not strictly applicable, and should not preclude the admission of Mr. Schaefer's evidence.

The College objected and argued that, although not binding on the Tribunal, the Rules of Court ought to be adhered to, and that Dr. Wall already had three other experts providing evidence. The College stated that the late provision of the report, being three weeks prior to Hearing, created a prejudicial effect.

After considering the submissions of counsel, the panel determined that both Mr. Schaefer's report and his CV meet the requirements for admissibility, and admitted them into evidence. The panel then advised the College to make best efforts to obtain any Expert Report they intended to produce in response, in order to avoid any potential adjournment.

The Allegations:

At the commencement of the hearing, the charges against Dr. Wall were amended. As a result, the allegations for consideration by this Tribunal are as follows:

1. *Beginning on or about June of 2020 and at the "Wall Chiropractic Clinic" (the "Clinic") Dr. Wall:*

- a. Failed to use Personal Protective Equipment, specifically he failed to wear a mask;*
- b. Failed to observe the required two metres of social distancing when unmasked;*
- c. Until on or about December of 2020, failed to have a plexiglass barrier at the Clinic reception; and/or*
- d. Did not require patients to be masked;*

*when interacting with patients, members of the public or both.*

2. *Beginning on or about June of 2020 and at the Clinic, one or more staff members of the Clinic (the "Staff"):*

- a. Failed to use Personal Protective Equipment, specifically Staff failed to wear masks;*
- b. Failed to observe the required two metres of social distancing when unmasked; and;*
- c. Did not require patients to be masked*

*when they interacted with patients, members of the public or both.*

3. *Beginning on or about June of 2020, Dr. Wall treated patients while not wearing a mask and/or did not require patients to be masked and:*
  - a. *He did not advise patients of the increased risk of transmission of COVID-19 due to masks not being worn;*
  - b. *He advised patients that masks were not required; and/or*
  - c. *He advised patients that wearing masks had no effect concerning transmission of COVID-19.*
4. *Beginning on or about June of 2020, Dr. Wall failed to chart and/or failed to properly chart communications with his patients about:*
  - a. *Him not wearing a mask;*
  - b. *His Staff not wearing masks; and/or*
  - c. *His patients not wearing masks.*
5. *Beginning on or about June of 2020, Dr. Wall and/or the Staff:*
  - a. *Failed to follow the Chief Medical Officer of Health Orders regarding masking and COVID-19; and/or*
  - b. *Failed to follow the ACAC "Pandemic Practice Directive".*

*IT IS FURTHER ALLEGED that the conduct described above constitutes unprofessional conduct as defined in s. 1(1)(pp) of the Health Professions Act, and/or constitutes a contravention of one or more of the following (in force at the relevant time): Chief Medical Officer of Health Orders, ACAC "Pandemic Practice Directive", Alberta Health Services directions and requirements, ACAC Standards of Practice 1.2(a), (i), (j), and/or (k), 4.3, 5.1, and ACAC Code of Ethics Principle #2, Principle #4, A-1, B-1, C-1, and D-1.*

During the hearing each of the above five charges were read to him. Dr. Wall did not dispute any of the facts set out in the charges and acknowledged that each of the five charges was factually correct.



### Background Facts:

In the Fall of 2019, the world became impacted by the spread of the SARS-CoV-2 virus. That virus led to a disease known as COVID-19. A pandemic ensued which resulted in Governments around the world reacting with various lockdowns, travel restrictions and quarantine requirements. In March of 2020 the Alberta Government directed that health professionals stop practicing unless there was an emergency. Chiropractors were among the health professionals impacted. Dr. Wall, along with all of the chiropractors in Alberta, was required to close his office.

On April 30, 2020 The Government of Alberta published the *“Safely Staged COVID-19 Relaunch”*. It provided that health professionals would be allowed to resume providing services effective May 4, 2020, if they followed guidelines approved by their professional colleges. The Government of Alberta also issued CMOH Order 16-2020, which provided that each college was required to publish COVID-19 guidelines applicable to its regulated members, and to provide a copy of those guidelines to the Chief Medical Officer of Health. The above Orders and Directives required the Colleges to create and publish mandatory distancing and masking guidelines. Regulated members of a college were required to comply with the Workplace Guidance for Community Healthcare Settings when providing a professional service. None of the Orders or Directives provided any exceptions to the masking requirement.

In response to CMOH Order 16-2020, the CCOA issued a Pandemic Practice Directive (**“Pandemic Directive”**) on May 5, 2020. In developing the Pandemic Directive, the College sought input from its members by providing notices via email, by holding virtual town hall meetings, and usage of an online communication tool known as the *“ThoughtExchange Platform”*. Dr. Wall

acknowledged that he received numerous documents from the College inviting members to provide input, and asking members to contact the College with respect to the Pandemic Directive.

The Pandemic Directive that was subsequently developed by the College was submitted, to and approved by, the CMOH. It contained physical distancing and masking requirements and required that all chiropractors and clinical staff were to be masked at all times while providing patient care. It also stated that non-clinical staff must be masked in circumstances where a physical distance of two metres could not be maintained. The Pandemic Directive provided detailed information with respect to the applicable masks, and the process for “donning and doffing” the mask.

As a result of the issuance of the Pandemic Directive Dr. Wall was able to reopen his office. He initially wore a mask as required. In June of 2020 Dr. Wall self-diagnosed as having an anxiety disorder. He believed that his self-diagnosis qualified him for a medical exemption from wearing a mask. As a result, he stopped wearing a mask when treating patients. Additionally, Dr. Wall’s son, who also worked at the clinic, did not wear a mask. Dr. Wall never contacted the College to let them know he would not be wearing a mask, nor did he ever request any medical or other exemption from the Pandemic Directive that required he wear a mask. He also failed to tell his patients about the risks of not masking, and did not provide any consent from any patient he treated while unmasked.

On December 1, 2020, The College was notified by Alberta Health Services (“**AHS**”) that a patient of Dr. Wall’s had filed a complaint. The complaint stated that Dr. Wall was not masking during patient treatment, his staff was not masking or observing social-distancing measures, and there were no plexiglass barriers in the clinic’s reception area.

On December 3, 2020, the Complaint Director sought a suspension of Dr. Wall's practice permit. This was to be an interim suspension, subject to the outcome of any hearing. Dr. Wall opposed the interim suspension. On December 10, 2020, Dr. Wall's legal counsel advised that Dr. Wall had installed the required plexiglass barriers, and also indicated that Dr. Wall would be relying upon a religious exemption.

Dr. Wall did not provide the College with any medical information supporting his claimed medical exemption until after the commencement of the investigation. On December 12, 2020 Dr. Wall provided a letter from his physician Dr. Salem. The College viewed that letter as unsatisfactory, and requested additional information. Dr. Salem was not Dr. Wall's regular family doctor, and did not provide any prognosis, any treatment plans, or recommend any steps to address Dr. Wall's anxiety disorder. Dr. Wall further acknowledged that in the subsequent letter provided by Dr. Salem dated January 8, 2021, Dr. Salem at no time mentioned the existence of any medical disability. The subsequent letter also did not provide any prognosis or any treatment options. Dr. Wall acknowledged that despite the fact that he had no training in anxiety disorders, he self-diagnosed an anxiety disorder that he believed was sufficient enough to qualify for a medical exemption.

In response to the College's application for suspension, Dr. Wall stated that he was of the view that any risk to patients by not wearing a mask was speculative, and that the COVID-19 virus was not a real and imminent public health threat. Dr. Wall disagreed that the Complaints Director had

a legitimate concern of risk to the public by Dr. Wall's failure to wear a face mask when treating patients.

The College ultimately did not suspend Dr. Wall's practice permit. Instead, they placed conditions upon it. The conditions were as follows:

- (1) Dr. Wall shall inform each client he sees that Dr. Wall has a medical exemption from the public health order that all persons in a public place must wear a face mask, and Dr. Wall shall obtain the written confirmation signed by each patient that the patient agrees to be seen and treated by Dr. Wall without him wearing a face mask or face shield. Dr. Wall shall provide copies of the written confirmation from each to the Complaints Director by 5 p.m. on Friday of each week in which Dr. Wall sees any patients. This requirement will remain in effect as long as the public health order for physical barriers, social distancing and face masks are in effect.*
- (2) Dr. Wall shall direct any staff person assisting in his office, whether that person is paid or unpaid, to comply with the current public health order requiring use of physical barriers, social distancing and face masks. If any staff person claims an exemption from the wearing of a face mask, Dr. Wall shall consult with Alberta Health Services as to whether the claim of an exemption is supported by objective proof.*
- (3) Dr. Wall shall maintain a log of screening questions asked and answered by all patients and daily screening of his staff and himself, regarding any symptoms or events that would require isolation and/or testing for Covid 19. The list of screening questions is set out on page 10 of the ACAC Pandemic Practice Directive issued May 3 and revised May 25, 2020. Dr. Wall shall provide a copy of the log to the Complaints Director by 5 p.m. on Friday of each week that the public health orders for physical barriers, social distancing and face masks are in effect.*
- (4) In the event that Dr. wall shows any symptoms or answers positively to the screening questions, he shall not see or treat any patients until he has been tested for Covid 19 by Alberta Services and received confirmation of a negative test result. Dr. Wall shall provide proof, satisfactory to the Complaints Director, of the negative test result on the same date that Dr. Wall receives the test result. Dr. Wall shall not see any patient until he has received confirmation from the Complaints Director that he can return to seeing and treating patients.*

At no time did Dr. Wall appeal these conditions, nor did he make any complaint to the *Alberta Human Rights Commission*.

As a result of Dr. Wall's failure to wear a mask, *Alberta Health Services* took action. On December 8, 2020 they issued an "Order of an Executive Office Notice of Public Access Closure". As a result, Dr. Wall's office was closed. Alberta Health Services subsequently issued a rescind of closure notice on January 5, 2021. The rescind notice provided that Dr. Wall must observe the following conditions:

- (1.) Dr. Curtis Wall must follow the current reopening practice guidelines set out by the Alberta College and Association of Chiropractors, as well as all future iterations of this guidance.*
- (2.) Dr. Wall must implement his revised COVID-19 relaunch plan that was submitted on December 24, 2020 into practice to reduce the transmission of COVID-19 among the attendees of the Wall Chiropractic and Wellness.*
- (3.) Prior to booking an appointment, Dr. Curtis Wall must inform the patient he will be unmasked while providing services, and obtain the patient's explicit consent to proceed with booking an undertaking of said services.*
- (4.) Dr. Curtis Wall must ensure that all patients he treats continuously wear a mask that covers their mouth and nose for the duration of their time in the clinic, unless they are able to provide evidence that they have been granted a mask exemption.*

Dr. Wall did not challenge or contest either the *Alberta Health Services* closure order or the terms of the rescind notice.

Dr. Wall believed that he was not endangering the public by not wearing a mask. He did not require his son to be masked, and did not think it necessary to install any plexiglass barriers. He

did not advise any patients as to the dangers of not being masked, as he believed people were aware of them.

Dr. Wall was aware that refusing to wear a face mask and refusing to social distance as required by the Pandemic Directive, was a choice he made in June of 2020. Dr. Wall believed that it was both professionally and ethically acceptable, with respect to masking and social distancing, for him to decide, without consulting his College, how and when the Pandemic Directive applied to him. He stated that if he personally decides that a requirement of the College causes harm, then he does not have to follow it. Dr Wall also acknowledged that as a professional he had an obligation to notify the College about his concerns involving the Pandemic Directive. When asked whether it was an obligation as a professional to notify the College of his intention to not comply with the masking and social distance requirements outlined in the Pandemic Directive, his response was that masking was harmful to his health and he did not think it necessary to respond to the College.

#### The College's Submission:

The College alleges that Dr. Wall unilaterally determined that he would opt out of the Pandemic Directive, and has ignored its requirements for masking, plexiglass barriers, and physical distancing.

The College (by virtue of Section 3 of the *Health Professions Act*) has an obligation to discharge their duties in the public interest, and must maintain and enforce standards for the profession. The College stated that the focus of the hearing ought to be the mandatory obligations and

responsibilities of professionals. The Pandemic Directive initiated by the College is a mandatory requirement for all members of the profession arising from an express requirement of the Government of Alberta. The College had no discretion to deviate from that mandatory requirement. The College further stated that the issue for this hearing was compliance, and that Dr. Wall did not have the ability to pick and choose which requirements he would and would not follow. The College emphasized that what is to be considered is not the efficacy of masking or the reasonableness of the mandatory Pandemic Directive, but rather whether or not Dr. Wall's actions were contrary to the regulated and mandatory requirements imposed upon him by the College.

Dr. Wall's Submission:

Dr. Wall maintains that the key issue to be determined at hearing is whether the College's Pandemic Directive violates Dr. Wall's statutory Human Rights and Charter Rights. Dr. Wall challenges whether the Directive itself was lawful and reasonable. He further states that should the evidence establish that the Directive was not beneficial, it cannot possibly be unprofessional to refuse to comply with it. He states that the mask mandate of the College is unlawful, as it unjustifiably limits Dr. Wall's Charter rights and breaches the *Alberta Human Rights Act*. Dr. Wall made it clear that the only portion of the Directive being challenged is the portion that mandates masking. He argues that if the masking requirements are unlawful, then failure to follow those requirements cannot be considered unprofessional conduct.

## The College's Evidence:

### Evidence of Dr. Hu - Direct Examination:

Dr. Hu was a Medical Officer of Health with *Alberta Health Services* in the Calgary zone. Dr. Hu was tendered as an expert in the area of Public Health, in particular COVID-19 and the efficacy of masking and related COVID-19 prevention measures. Dr. Wall objected to having Dr. Hu qualified as an expert in the efficacy of masking or any other preventative measures. The Panel then caucused and subsequently determined that they would qualify Dr. Hu as an expert witness as submitted by the College.

Dr. Hu identified CMOH 38-2020 as an Order, effective November 24, 2020, that applied to the Calgary Metropolitan Region. It made face coverings in indoor public places mandatory. The only exception was for individuals who were unable to wear a face mask due to a mental or physical concern or limitation. CMOH Order 42-20, Exhibit D-9 was next reviewed. Dr. Hu stated that CMOH 42-20 was the most restrictive order produced by AHS. It provided that a person must wear a face mask at all times while attending at an indoor place. Dr. Hu explained that the rationale for that order was as a result of masking in indoor public spaces reducing the transmission of COVID-19. He explained that the Government of Alberta had initially been opposed to any Provincial masking bylaws. However, once Alberta was encountering a large number of COVID-19 cases the masking order was issued. Dr. Hu further stated that even prior to the CMOH order, *Alberta Health Services* had recommended continued masking in all healthcare settings, and that there were masking mandates by every health care organization and College in the Province that provided health care services.



Dr. Hu next reviewed Exhibit F-2, being CMOH Order 16-2020. Dr. Hu explained that during the first wave of the pandemic, health care service offices were shut down. CMOH Order 16-2020 directed that all regulated health care professionals had to comply with, and every College was directed to publish, guidelines to all members of their college and/or provide their own guidelines to ensure a safe return to clinical services. The Order stated that where Colleges were not able to provide suitable guidelines, the CMOH would revise them as necessary. He further confirmed that CMOH Order 16-2020 required that any staff providing direct client or patient care, or working in a client and/or patient care area, must wear a surgical/procedural mask continually at all times unless they are able to maintain adequate physical distancing. The Order further stated that the rationale for masking was to reduce the risk of transmitting COVID-19 from individuals in the asymptomatic phase.

CMOH Order 16-2020 required that each College was to provide the CMOH with a copy of the published guidelines. This was to ensure that the CMOH knew what the Colleges were doing, and what they were recommending to their members. A College would be required to amend any guidelines if the CMOH determined that those guidelines were insufficient or inadequate.

Dr. Hu then reviewed the Pandemic Directive that was issued by the Alberta College of Chiropractors in response to CMOH Order 16-2020. The Pandemic Directive required masking, social-distancing, and plexiglass barriers. Dr. Hu testified that the use of such measures is scientifically supported. He indicated that there was a significant amount of evidence establishing that wearing a mask reduces transmission of COVID-19. He stated that a mask protects both the

person wearing the mask, as well as any people that are in proximity to the person wearing the mask.

Dr. Hu next reviewed *“AHS Guidelines for Continuous Masking”* (Exhibit H-2). That document makes reference to evidence that asymptomatic, pre-symptomatic or minimally symptomatic patients are capable of transmitting COVID-19. As a result, the Public Health Agency of Canada made a recommendation to health care workers that masks were required when providing any care to patients. He then reviewed the AHS document titled *“Personal Protective Equipment”*. He confirmed that PPE is critical to the health and safety of all health care workers. He stated there was significant evidence that masking is very effective at preventing the transmission of COVID-19, and that it protects both health care workers and the patients. Dr. Hu also stated that he was directly involved in the original continuous masking policy. He indicated that in other jurisdictions many healthcare workers contracted and died from COVID-19 because of a lack of masking. He also stated that proof that masks were effective could be found in the fact that in Alberta, health care professionals had contact with hundreds of thousands of COVID-19 positive individuals, yet there were less than 100 transmission events identified by AHS that occurred from contact between a masked health care worker and a COVID-19-positive individual.

Dr. Hu next reviewed Alberta Health Services’ directive *“Use of Masks During COVID-19”*. He identified that masks have a dual purpose. The first purpose is to prevent a person who has COVID-19 from transmitting it to others. The second purpose is to prevent individuals who do not have COVID-19 from contracting COVID-19. He confirmed that the expert report’s comments with respect to the benefits of masking and social distancing are consistent with those of both

the Alberta Health Services and the Public Health Agency of Canada, as well as the Chief Medical Officer of Health's office. He stated that there is an overwhelming body of evidence that supports the wearing of masks, particularly in a health care setting. Dr. Hu then reviewed his written report, and indicated that he relied primarily on recent publications, given that COVID-19 is a recent phenomenon. He also stated that as the pandemic progressed, peer-reviewed studies demonstrated that masking was effective in reducing COVID-19 transmissions. He stated that COVID-19 is transmitted through contact and respiratory droplets and, to a lesser extent, aerosols. He stated that it is quite infectious, and masking and physical distancing reduce the possibility of droplet spread. He stated that there were many studies that supported the efficacy of masking, and included 27 studies in his report. He also stated that a highly rated systematic review concluded that wearing masks reduced the risk of contracting and transmitting COVID-19.

Dr. Hu further stated that health care workers, including chiropractors, are at a high-risk of contracting COVID-19. The evidence of the importance of masking among health care workers is very robust, and that there is an overwhelming body of evidence supporting the use of masking in health care settings. Dr. Hu commented upon the reports prepared by the Defendant's witnesses Dr. Warren, Dr. Dang, and Dr. Bridal and stated that those reports were not specifically about masking in a health care setting, and not directly salient to the issues at hand.

Dr. Hu cited a report published in the LANCET, which he identified as a highly reputable medical journal. That report stated that after review of 200+ studies, it was determined that there was an approximate 85% in reduced transmission when people wear masks. He stated that the Canadian Thoracic Society has stated that mask-wearing is not known to exacerbate any lung-

disease. The only problem with mask-wearing is that people with extreme anxiety may have issues. He stated that a health care worker who is in direct contact with patients should not be allowed to have an exemption from wearing a mask.

Dr. Hu also commented on Mr. Schaefer's report. He stated that the Canadian Thoracic Society has determined that mask wearing is not dangerous. He further provided his own observations, stating that the health care professionals that wear masks in hospitals every day have no apparent difficulties. Finally, he stated that he was not aware of any epidemiologically valid studies that establish that masks should not be worn by health care providers.

#### Cross-examination of Dr. Hu

At the commencement of the cross-examination, Dr. Wall made an application to introduce two documents. These two documents were described as randomized clinical trials. Dr. Wall maintained that his intention was to present them to Dr. Hu and have Dr. Hu comment upon them. The College objected on the basis of the late production of the documents, unfairness to Dr. Hu, and the fact that Dr. Wall had already tendered four expert reports. Following the submissions of the Parties, the Tribunal determined that the two documents would be admitted. It was noted that the documents were either in progress or recently published, and neither of the documents contained any actual results. Dr. Wall was advised by the Tribunal that if the intention was to simply establish that the randomized trials exist the Tribunal was prepared to enter them on that basis. Dr. Wall then accepted entry of those documents as exhibits on those conditions.

During his cross-examination, Dr. Hu maintained that chiropractors provide healthcare in a community setting. He stated that there is a risk of asymptomatic transmission in chiropractic offices, and he also stated that it is difficult for people to accurately determine whether or not they are presenting with symptoms prior to attending a chiropractic office. He agreed that if an individual has overt symptoms and self-identifies as being symptomatic, they could avoid contact, however, he stated that there are many low grade symptoms or chronic symptoms that are difficult to differentiate between COVID-19 and other ailments. He agreed that most people who attend chiropractic offices are asymptomatic; however, a chiropractor would see and be exposed to more people in a closed indoor setting than usual, and this increases the risk of transmission and infection. He also stated that any pre-COVID-19 studies that were prepared in relation to masks are not as salient as COVID-19 masking studies; COVID-19 is a unique and novel virus with its own transmission dynamics. Dr. Hu stated that no one in the healthcare setting should be exempt from wearing a mask except those with severe mental health issues. He stated that the riskier the setting the more important it is to wear a mask. In particular, he stated that in a healthcare setting, the COVID-19 risk is much higher, and that there should be almost no exemption to mask wearing. He also stated that patients in healthcare settings should wear masks. Dr. Hu acknowledged that he had no peer-reviewed studies or scientific reports in support of his statement that a “ton” of health care workers died in the Spring of 2020 as a result of their failure to wear masks. He also stated that he did not have any peer-reviewed studies or scientific reports to verify that statement. He made reference to the number of infections between infectious patients and healthcare workers in Alberta, but he did not have the information in relation to his comments on the number of transmission events. Dr. Hu said the information and

statements he made were based upon discussions with Workplace Health and Safety, Alberta Health Services and hospital management leadership. Dr. Hu maintained throughout that the evidence in support of masking in a healthcare setting is overwhelming.

Redirect examination - Dr. Hu:

In his redirect examination Dr. Hu confirmed that chiropractic offices are healthcare settings, and that the more patients that are seen the higher the risk of COVID-19 transmission.

Rebuttal:

In his rebuttal Dr. Hu stated that while there was no criteria in the CMOH orders as to where a person was to get an exemption, or who was to provide that exemption, it was broadly assumed that people seeking exemptions would go to their family doctors.

Evidence of Dr. Halowski - Direct Examination:

Dr. Todd Halowski, is the Registrar of the College, and a practicing chiropractor. He stated that the responsibility of a regulatory College is to protect the public and ensure professional competence. He stated that the College has created Bylaws, a Standard of Practice and a Code of Ethics as required by the *Health Professions Act*. He confirmed that all Standards of Practice are meant to be mandatory.

Dr. Halowski stated that shortly after the pandemic began, the CMOH effectively ordered all healthcare services to be closed with the exception of urgent care. It became rapidly apparent that the members of the College did not have any experience or exposure to practicing in a

pandemic. It was a novel and difficult time. As a result, the College immediately worked on preparing a directive to assist chiropractors in safely returning to work. During that time the College referenced Alberta Health information, as well as other regulators inside and outside the province, including the *Alberta Federation of Regulated Health Professionals*, the *Federation of Chiropractic Colleges*, as well as the College's *Competence Committee*. Once the information was compiled, the College then initiated member consultation, where all members had an opportunity to review and provide comments on what had been developed. There were town halls conducted to obtain input from members as well as a digital consultation, which allowed members to provide their input. The digital platform was called ThoughtExchange. Approximately 25% of the membership actively provided feedback on that platform. Once all that information was obtained, the member consultation was deemed complete. The information collected was then used to develop the Pandemic Directive.

Dr. Halowski stated that during these consultations masking was identified as reducing the risk of transmission of COVID-19.

The proposed Pandemic Directive was then forwarded to the government for review. The government approved it without amendments, and, once approved and circulated, chiropractors were able to return to practice. The College also developed and adopted Telehealth as a practice. Telehealth did not permit hands-on care, but did allow chiropractors to consult with patients via the telephone to instruct them on neuromuscular exercises that might assist them.

Dr. Halowski stated that CMOH Order 16-2020 specifically required all regulated members of the College, as established by the *Health Professions Act*, to comply with the attached Workplace

Guidance for Community Healthcare Settings. That document expressly provided that all staff providing direct patient care, or those working in patient care areas, must wear a surgical/procedural mask continuously at all times and in all areas of the workplace if they were either involved in direct client/patient contact or could not maintain adequate physical distancing of two metres from clients/patients and coworkers. It went on to state that those requirements need not be met if a regulated members college had published COVID-19 guidelines that are substantially equivalent to the guidelines developed by Alberta Health. Essentially, the College was able to use the documents created by Alberta Health Services, or they could create their own, which had to be substantially equivalent.

The Pandemic Directive was subsequently amended to require the use of a face shield or eye protection. This was in response to published information that eye protection could prevent the spread of the COVID-19 virus. The College also mandated that patients were required to be masked when they attended at a chiropractor's clinic. The Directive further stated that non-clinical employees who were unable to maintain a two-meter distance must be continually masked, or a plexiglass or plastic barrier was to be installed. All these requirements were mandatory.

The standard required by AHS and adopted by the College required that all chiropractors wear a surgical procedural mask continuously at all times in all areas of their workplace when involved in direct patient contact or where they cannot maintain adequate physical distancing from patients and coworkers. The minimal acceptable standard was surgical or procedural masks, and the masks were to be worn at all times. Non-clinical staff were also to be masked whenever a



physical distance of two metres could not be maintained. An exemption was not considered because chiropractors work face-to-face with their patients, and the mask was meant to be protection for both the patient and the chiropractor. The Pandemic Directive also provided that given the fluidity of the virus, if a discrepancy developed between the Pandemic Directive and the Provincial Public Health Recommendations, the latter was to take precedence. Given that various local authorities, including the City of Calgary, were introducing their own masking mandates, the Pandemic Directive also stated that the chiropractors had a fiduciary responsibility to follow all civil orders that originate from any level of government.

Dr. Halowski testified that from the start of the pandemic, the College was very communicative with its members. It sent notices to members, sometimes twice a day, to make sure they had all necessary information. He testified that the College is an electronic communicator, and one of its requirements is that its members must have the capability to receive communications electronically. Dr. Halowski indicated that he was confident that Dr. Wall would have received the notices, as when Dr. Halowski did make contact with Dr. Wall, he did so using Dr. Wall's email address. In the process of developing the Pandemic Directive, Dr. Halowski stated that he received upwards of 100 emails from members providing their input and comments. He stated that he reviewed the comments provided. He noted that Dr. Wall did not provide any feedback. He also confirmed that mandatory compliance was necessary in order for a chiropractor to practice. The notice to members stated that if members had any questions they were to contact the College's office. He stated that the College was always very open and communicative with members as questions came up. He reiterated that masking was mandatory, and that this was made clear in the subsequent notice to members dated December 9, 2020. He also made it clear

that the College was there to support the members, and that the College was available to be contacted by email or telephone.

When developing the Pandemic Directive, the College considered a masking exemption; however, that exemption was never adopted, as chiropractors were unable to maintain a physical distance of two metres with patients. As COVID-19 was a new, novel and risky virus, and given that chiropractors are close-contact-body-workers, the College ultimately determined that masking would be mandatory. Dr. Halowski further stated that every Health Professions Act College adopted mandatory masking. Further, the additional social distancing and plexiglass barrier requirements were consistent with the approach adopted by numerous other public agencies and regulatory bodies.

Dr. Halowski testified that on December 1, 2020 he received an email from AHS stating that they had received a complaint that Dr. Wall and his administrative staff were not masked, and had been within two metres of a patient. When Dr. Halowski received the complaint, he was concerned that Dr. Wall was not following the Pandemic Directive. He then spoke to Dr. Wall, who stated that he was mask-exempted as per CMOH 30-2020. Dr. Wall was then asked to provide information as to which exemption he was claiming. Dr. Wall then confirmed that he was not masking and did not intend to mask. Dr. Wall stated that he did not think COVID-19 was serious, and that the College was overreacting by instituting the Pandemic Directive. Dr. Wall stated that he had briefly worn a mask, but then decided he did not want to wear it, as he did not feel comfortable when he did. Dr. Wall also commented that COVID-19 was not real, and that he was not comfortable wearing a mask. Dr. Halowski did not recall Dr. Wall making any

comments with respect to any religious exemptions. There was no request for any accommodation made. Dr. Wall also told Dr. Halowski that as the City of Calgary bylaws allowed him to be exempt, he was no longer required to wear a mask. Dr. Halowski then advised Dr. Wall that the Pandemic Directive required masking. Dr. Halowski also stated that since the onset of COVID-19, two members of the College had passed away as a result of COVID-19, and many of the College's members had contracted COVID-19.

Cross-examination - Dr. Halowski:

In cross-examination Dr. Halowski acknowledged that adjustments and manipulations cannot be conducted over the phone, or when a chiropractor is more than two metres away from their patient. Dr. Halowski confirmed that when the mandatory masking was included in the Pandemic Directive in May, 2020, and when the College revised the Pandemic Directive in January, 2021, it did not consult with any scientist independent of the Alberta government. Dr. Halowski also acknowledged that Dr. Wall did not contravene Section 2 of the CMOH Order 16-2020, as the College had developed its own COVID-19 guidelines as required by the CMOH Order 16-2020. He also acknowledged that none of the Pandemic Directives required chiropractors to enforce mask-wearing by their patients. The December 2, 2020 conversation between Dr. Halowski and Dr. Wall was next reviewed. Dr. Halowski disagreed that he told Dr. Wall to either wear a mask or sit out from practicing.

Redirect Examination - Dr. Halowski:

In redirect, Dr. Halowski stated that the College had no jurisdiction over patients, and that patients may be asymptomatic when they attend at a chiropractor's clinic.

The Tribunal Panel then questioned Dr. Halowski. He confirmed that the ThoughtExchange forum was anonymous. He also stated that he had contacted AHS with respect to the many potential mask exemptions that commenced in August, 2020 and continued through December of 2020.

Mr. Lawrence (Complaints Director) - Direct Examination:

Mr. Lawrence explained that the College's regulatory function, and its obligation under the *Health Professions Act*, was to establish Codes of Ethics, Standards of Practice, Policies and Directives for members to follow. He stated that in his role as a Complaints Director he is responsible for holding members accountable if they fail to comply. He stated that all regulated health professionals have a mandatory obligation to comply with Section 3 of the *Health Professions Act*.

In the Spring of 2020, a precondition to the reopening of chiropractic clinics was the implementation of a Pandemic Directive approved by AHS. The Pandemic Directive that was developed by the College required chiropractors and clinic staff to be masked at all times while providing patient care. They were also required to social distance, and to install plexiglass barriers. The Pandemic Directive did not provide any exemption for masking when a chiropractor was within two metres of their patient. He stated that as subsequently set out in CMOH Order 38-2020 and CMOH Order 42-2020, there were exemptions provided for individuals who had

medical conditions that prevented them from wearing a mask, which were, in his view, not applicable to Dr. Wall. He stated that Dr. Wall never asked the College for either a masking exemption or any accommodations.

Mr. Lawrence stated that on December 2, 2020, he received a letter from Dr. Halowski relating to a complaint made against Dr. Wall. Mr. Lawrence then forwarded a letter to Dr. Wall stating that the College had received a complaint. The basis of that complaint was that Dr. Wall was in breach of CMOH Orders, Standards of Practice, as well as the Pandemic Directive. As Dr. Wall was not prepared to comply with those requirements. Mr. Lawrence proceeded with the complaint. Dr. Wall then inquired if there were any alternatives. Mr. Lawrence advised Dr. Wall that he could comply with the Pandemic Directive and wear a mask. Dr. Wall stated that he had an exemption to masking, and that he would not mask. Dr. Wall then stated that he had attempted to mask, but had feelings of anxiety and claustrophobia, and took the position that he was exempt. As a result of Dr. Wall's conduct, Mr. Lawrence made a request for an interim suspension to the College's Council. He did so as he believed there was a danger in having Dr. Wall treat members of the public without a mask. In addition, there was no plexiglass barrier as required, the staff were not masking as required, and Dr. Wall was not following the Pandemic Protocols of the College and AHS when treating patients.

The College's Council refused the interim suspension request. Instead, they placed conditions on Dr. Wall's practice permit. Those conditions were:

- (1.) Dr. Wall was required to inform each patient that he has a medical exemption from the public health order;

(2) Dr. Wall would obtain signed written confirmation from each patient agreeing to be seen and treated by Dr. Wall without his wearing a mask or face shield;

(3) Copies of these written confirmations were to be sent to the Complaints Director by 5pm on Friday each week;

(4) Dr. Wall was to direct any staff assisting in his office that they are to comply with the current orders including masking, physical barriers and social distancing; and

(5) Dr. Wall must maintain a log of screening questions asked and answered by all patients, as well as daily screening of staff and himself.

Mr. Lawrence also testified that AHS had issued a closure order to Dr. Wall's clinic. In order to reopen, AHS required Dr. Wall to immediately mask when treating patients, required patients to be masked, required staff to be masked, and required that Dr. Wall install a plexiglass barrier in his office.

Mr. Lawrence advised that in discussing the complaint with Dr. Wall, Dr. Wall stated that the masking requirement was a human rights violation, and that he was exempt from wearing a mask. Dr. Wall told him that COVID-19 had a high recovery rate, and he did not believe he would be endangering anyone. Dr. Wall told Mr. Lawrence that he initially wore a mask, but in June of 2020 he decided to discontinue wearing one, as he believed that the facemask was causing him anxiety and symptoms of claustrophobia. He attempted wearing a face shield, and found that the same symptoms continued, and that it interfered with his discussions with his patients. He stated that his patients were understanding of his position. He stated that he had not received any

diagnosis of his medical condition, and the decision not to mask was made by himself. He also stated that his son, the only other person working at the clinic, was not required to mask either, and Dr. Wall did not think it necessary to install any barriers. He stated that his son is young and healthy, and did not believe he was at risk for COVID-19. Dr. Wall further stated that CMOH Order 38-2020 provided for an exemption to mask wearing. Dr. Wall stated that while he stopped wearing a mask in June there was no need to talk to his patients about the dangers involved when masks are not worn, as he believed that his patients were aware of these dangers. He advised that he received no treatment for his claimed medical condition, and provided no communication to the College. He made no mention of any religious beliefs or religious exemptions.

Mr. Lawrence then reviewed the two medical notes produced by Dr. Wall and authored by Dr. Salem. Those notes stated that Dr. Wall had anxiety about masking, and was concerned about his inability to breath. The notes also stated that Dr. Salem conducted no tests, and had no diagnostic information.

Mr. Lawrence next discussed the concept of ungovernability, and stated that members of the College are 'ungovernable', where they purposefully fail to comply with the requirements to practice.

#### Mr. Lawrence - Cross-examination

In cross-examination, Mr. Lawrence acknowledged that when he spoke to Dr. Wall in early December, 2020 there was a discussion as to the effect of the applicability of human rights. Mr. Lawrence also stated that while Dr. Wall could choose not to wear a mask in his personal life, if

Dr. Wall refused to comply with the College's requirements then the College would take action. In response to being questioned on Dr. Wall's comments with respect to the efficacy of masking, Mr. Lawrence stated that neither patient safety nor compliance was up for debate, and that if Dr. Wall refused to comply, further action would be taken. Mr. Lawrence acknowledged that in response to the request for an interim suspension, the College identified that Dr. Wall had a medical condition that prevented him from wearing a mask or face shield, and as a result Dr. Wall has practiced since that time in a manner that does not comply with the Pandemic Directive. He also acknowledged that following the rescind notice issued by AHS, Dr. Wall was permitted to see his patients without masking.

Mr. Lawrence confirmed that the conditions placed on Dr. Wall's practice by the College did not require his patients to be masked. He also acknowledged that he had no evidence that any of Dr. Wall's patients were harmed. He acknowledged that the complaint made against Dr. Wall was made to Alberta Health Services, not to the College. He also confirmed that there has never been any complaint made to the College about Dr. Wall's conduct. Mr. Lawrence stated that Dr. Wall never asked him about any process with respect to addressing any human rights concerns and that Dr. Wall also never asked for an exemption or accommodation.

#### Evidence of Dr. Wall - Direct Examination:

Dr. Wall has been a practicing chiropractor in Alberta since early 1987. Since that time, he estimates that he has treated thousands of patients. In March of 2020, the Alberta government ordered chiropractors to stop practicing unless there was an emergency. Chiropractors were permitted to resume practice in May of 2020, provided that they follow the requirements set out



in the Pandemic Directive issued by the College. Dr. Wall testified that he understood that the Pandemic Directive required that Chiropractors wear a surgical style mask when treating patients. He stated that he did not view the Pandemic Directive as being optional.

Dr. Wall stated that he initially wore a mask, but in June of 2020 he decided that, based upon his mental concerns, it was no longer productive for him to do so. He stopped wearing a mask at the end of June, 2020. He then attempted to wear a face shield, but experienced symptoms similar to those he experienced while he was wearing a mask. He did not obtain a doctor's note that would provide him with any medical exemption, nor did he believe that one was necessary. He stated that he did not understand the Pandemic Directive to require him to contact the College if he could not wear a mask. He was of the view that it was a private concern between him and his physician. He also stated that since the Spring of 2020, he felt an additional concern, mainly that his religious beliefs precluded him from wearing a mask. He stated that the *Canadian Charter of Rights and Freedoms* and the *Alberta Human Rights Act* protected the expression of his religiously-held beliefs, and guards anyone from discriminating against him based on those beliefs. He stated that his face is sacred, and sacred to God, and for him to cover his face would put a barrier between him and Jesus. Being required to wear a mask by someone who is in a position of authority when he didn't exhibit any symptoms or have any upper respiratory issue, results in him fearing man and not God. He also stated that when he has to wear a mask it violates his life of faith. He stated that he believed that wearing a mask harmed him and his patients, and that it was his obligation to educate his patients to advise them of the specific harm of mandatory masking. If he did not advise his patients of the harms of masking he would not be obtaining informed consent from them.

Dr. Wall stated that when he stopped wearing a mask most of his patients made no comment. Those that did ask about masking were told by him that he had an exemption. He stated that 99% of those patients were understanding and not concerned.

Dr. Wall confirmed that his chiropractic office was closed by AHS in December of 2020. He further confirmed that AHS rescinded the closure order in January of 2021. He stated that AHS permitted him to continue treating patients without the need to wear a mask. Dr. Wall referred to CMOH Order 38-2020, which provided for a medical exemption to masking.

When he was approached by the College in December 2020, Dr. Wall advised them of his mental concerns, and that he believed he was exempt from masking. He stated that he mentioned accommodation and human rights. He also stated that Mr. Lawrence told him that while he cannot be compelled to wear a mask, his refusal to wear a mask would result in the College issuing a request for the suspension of his practice. Dr. Wall subsequently obtained a doctor's note that stated that when he wore a mask he experienced feelings of anxiety that mirrored claustrophobia. He said his concentration level had decreased, thereby preventing him from providing the best possible care to his patients. Dr. Wall stated that the College subsequently permitted him to continue to practice without wearing a mask, although there were further conditions and restrictions placed upon him. Dr. Wall confirmed that when he spoke to Mr. Lawrence in January of 2021, he did not mention his religious beliefs, but rather focused on his mental concerns relating to anxiety.

Dr. Wall indicated that his son worked in his office from the Spring of 2020 up until December of 2020. While his son was working at his office he did not wear a mask, as his son had religious concerns and beliefs that were similar to his own.

Dr. Wall then explained the nature of his work, and confirmed that it involves physical manipulation that cannot be provided from a distance or over the phone or by the patients themselves. He stated that he did not believe that Telehealth was effective in his practice, and that he could not properly care for his patients using Telehealth. He stated that his ability to practice and earn an income would be severely impacted if he could only provide Telehealth. He also stated that he does not require that his patients wear a mask in his office, because he believes that each of them has a responsibility to make their own health choices. He stated that requiring patients to wear a mask would cause harm, as it would decrease oxygen levels, increase carbon dioxide levels, and result in imminent physical harm and danger. He also stated that he is not aware of any circumstance where COVID-19 was transmitted in his office. He stated that his practice is to treat patients one-by-one, so that no other person is in the office other than him and his patient at any given time. He further stated that he pre-screens his patients, and if they exhibit any symptoms, they are not treated and are required to reschedule. It is his belief that AHS has generally gotten it wrong with respect to masking and other COVID-19 restrictions. He said that wearing masks does not in any way protect the public, that the College has collaborated with Alberta Health Services, and that the College wants to please authority.

Cross-examination - Dr. Wall:

In cross-examination, Dr. Wall stated that he was in agreement that practicing chiropractic is a privilege and not a right. Dr. Wall then acknowledged that Section 3 of the *Health Professions Act* enabled the College to establish numerous mandatory requirements, and that until he decided not to follow the Pandemic Directive he had followed all prior College requirements. Each of the five charges were then reviewed with Dr. Wall. He did not dispute any of the facts and agreed with those facts that formed the basis of each of the charges. He acknowledged that in June, 2020 there was no CMOH Order in force that allowed for any masking exemptions, and that those exemptions only came into effect in November of 2020. He indicated that he was aware that the Government of Alberta's staged COVID-19 relaunch created an obligation of the College to establish a Pandemic Directive, and that it was mandatory that he comply with that Pandemic Directive. He further acknowledged that he received the Pandemic Directive from the College in early May, 2020, and understood that the Pandemic Directive was a binding direction by the College. He also acknowledged that he did not follow that Directive when it came to having his staff continuously mask, or installing a plexiglass barrier, and that he was not wearing surgical procedure masks when involved in direct patient contact. He also acknowledged that, as he was not wearing a mask, he was not following the donning and doffing requirements for PPE set out in the Pandemic Directive. He then stated that notwithstanding that he very strongly disagreed with the AHS Closure Order, he did comply with it and proceeded to close his clinic. He stated that he took issue with the science that the CMOH order relied upon when ordering masking and social distancing. He further confirmed that he was prepared to respect the authority of the AHS

Order. He also confirmed that when he reopened his office he failed to comply with the conditions set out in the AHS Order by failing to ensure that all patients continuously wore a mask.

Dr. Wall next stated that he did not need to obtain any diagnosis from a healthcare provider in order to claim a medical exemption. He stated that his symptoms of anxiety and claustrophobia were very apparent to him. He also acknowledged that the CMOH Orders that allowed for exemptions from masking did not take place until November of 2020, and that he first stopped wearing a mask in June of 2020. He stated that in January of 2021 he advised the College that he was of the view that any policy of the College that did not permit exceptions to mask wearing were unreasonable. He confirmed that he never asked the College for an exemption. He then stated that he was of the view that the Pandemic Directive implicitly permitted an exception for legitimate mental health conditions. He acknowledged that he came to that conclusion on his own. He stated that he was absolutely confident that his failure to mask posed absolutely no risk to his patients. He also verified that his son did not have a doctor's note providing any medical exemption. Dr. Wall also confirmed that he was not in compliance with reopening requirement number 4, which stated that all patients treated by him must continuously wear a mask, unless they are able to provide evidence that they have been provided an exemption.

Patient Witnesses - Jarvis Kosowan, Charles Russell, David Warren Hilsabeck:

Three of Dr. Wall's patients were called as witnesses. They each stated that they did not feel threatened by Dr. Wall not wearing a mask, and that the treatments he provided could only be provided in person. They also provided their opinions on masking, and on whether or not Dr. Wall had acted appropriately or inappropriately. These witnesses also provided their views on the

efficacy of masking, survival rates of COVID-19 infections, and the legitimacy of the masking mandates.

Evidence of Dr. Gauthier:

Dr. Gauthier is a chiropractor who practices in Alberta. He testified that he provides hands-on treatments, and that Telehealth would not be effective for him. He confirmed that he thought of his chiropractic office as a healthcare setting, and stated that there are different types of healthcare settings. Dr. Gauthier indicated that he was aware that the College had mandated that all chiropractors must wear masks when treating patients, and that he had complied with that mandatory requirement.

Direct Examination - Chris Schafer:

Mr. Schafer is an Occupational Health Consultant, and has been working in this field since 1994. He stated that his primary specialty is respirator fit testing and training, and that he was familiar with occupational health and safety legislation and atmospheric hazards. He has also performed tests on non-medical masks, as well as medical and procedural/surgical masks that had commonly been in use since the beginning of COVID-19. Mr. Schafer was subsequently qualified to give evidence regarding any harm associated with medical masking.

Mr. Schafer testified that prior to COVID-19 there was a requirement that masks be fit tested. Following COVID-19 there is no fit testing. He stated that if there is an insufficient air supply while wearing a mask a build-up of excess carbon dioxide will occur. He then described the common forms of masks, being tighter fitting N-95 and looser fitting blue surgical masks. He stated that it

is important to be able to breathe freely, and if there is a restriction on breathing, exhaled carbon dioxide levels will build-up. He indicated that common symptoms of excess carbon dioxide levels are headaches, nausea, dizziness, lack of coordination and sometimes impaired hearing and vision. A person can also feel as if they are faint and/or overheating. He stated that the Alberta standards for the maximum exposure to indoor carbon dioxide is one-thousand parts per million over a twenty-four hour period. He stated that wearing a mask resulted in levels of carbon dioxide exceeding five-thousand to ten-thousand parts per million within a minute. He testified that the normal oxygen level in the air is 19.5 to 20.9%, and that when it drops below 19.5% it becomes dangerous to health. He stated that wearing a mask resulted in an oxygen drop between the mouth and the person's mask or nose to below 19.5% within the first twenty seconds. He stated that if anyone breathes air under any circumstances that is less than 19.5% oxygen, a person's health will be harmed. Anyone working in an environment of 19.5% or lower oxygen must be equipped with a source of clean air.

Mr. Schafer stated that anyone wearing a procedural mask will create a hazardous environment for their body. If they were working in a space with less than 19.5% oxygen they would have to be evacuated from that space. He indicated that people wearing masks will have their oxygen drop below 19.5% in two minutes. He noted that while people do wear masks for hours on end without passing out, that does not mean that harm is not being done. He stated that he found it strange that Alberta Health Services would mandate masks without consulting with respiratory professionals. He stated that medical doctors are not certified in respiratory protection because they do not regularly deal with respirators. He stated that he disagreed with Dr. Hu's comment that there were no known harmful side effects to masking.

Cross-examination - Chris Schafer:

During cross-examination Mr. Schafer acknowledged that individuals having a pre-existing medical condition that impacted their ability to wear a respirator should first attend upon a doctor. Mr. Schafer then confirmed that he had not been involved in developing the government's response to COVID-19, and that he was not qualified to provide an opinion with respect to the possible benefits that could arise from masking. He also confirmed that his views on mandatory masking were inconsistent with the Canadian public health agencies. He further confirmed that the testing that he conducted and reviewed was not included in his Expert's Report.

When asked if he would wear a mask if the regulatory body he belonged to required it, Mr. Schafer stated that he would not, as he viewed them as breathing barriers. However, Mr. Schafer stated he would wear an actual respirator, which is something that is far and beyond a mask.

Direct Examination - Dr. Dang:

Dr. Dang was qualified as an expert in the area of respirology, and the efficacy of masking and related measures. He testified that he has an outpatient respirology practice in Medicine Hat, and manages a pulmonary function lab. This lab conducts various breathing tests. Dr. Dang reviewed the SARS pandemic in 2003 and compared it to the COVID-19 pandemic. He stated that there was no masking mandated for SARS, and that the masking that is recommended for COVID-19 is based on socio-political reasons and not scientific reasons. He disagreed with Dr. Hu's assessment that masks are highly effective in preventing the transmission of COVID-19 in



healthcare settings. Dr. Dang stated that the only randomized controlled trial that considered COVID-19 and masking determined that there was no effectiveness in wearing a mask. He also stated that jurisdictions that required masking, compared to jurisdictions that did not require masking, had no noticeable differences in the transmission of COVID-19. He also stated that, from his observations, there is no difference between his patients that did wear masks and his patients that did not wear masks and their contracting COVID-19. He stated that he did not believe that masking made any impact on transmission of the COVID-19 virus. He disagreed with Dr. Hu's statement that the efficacy of masking on disease transmission is beyond doubt. He stated that masks have the potential to cause harm to individuals, depending on a number of factors including how the mask is worn, how often it is changed, and the physical condition of the individual wearing the mask. Masks also cause a reduction in pulmonary function by 15-20%. He stated that this reduction would not be noticeable unless you were physically exerting yourself or had some other lung or health issue. He also disagreed with the Thoracic Society's statement that there is no evidence for masking impacting underlying lung conditions. He stated that a lack of evidence does not mean that an issue is not there. He also stated that there are medically valid reasons for not wearing a mask.

Dr. Dang - Cross-examination:

In cross-examination, Dr. Dang agreed that if an individual intends to seek a medical exemption, the best course of action would be to obtain an exemption from their physician. He also stated that it would generally be the case that someone claiming a medical exemption would attend

upon their physician, and that it would not be appropriate for someone to self-diagnose their own exemption for masking.

Dr. Dang also confirmed that he had complied with the CPSA's masking requirements, as well as Alberta Health Services' mandatory masking requirements. He indicated that he obeys the law, even though he may not agree with it.

Direct Examination - Dr. Bridal:

Dr. Bridal testified that he obtained a Bachelor of Science Degree in Biomedical Sciences, a Master of Science Degree in Immunology, and a PhD in Immunology. He then completed a six year, post-doctoral fellowship to become certified as a Viral Immunologist. He is now an Associate Professor of Viral Immunology at the University of Guelph. He indicated that he teaches veterinary students in the field of General Immunology. Dr. Bridal is not a medical doctor, and he is also not a member of any regulatory college. He also confirmed that he has not worked with the Ontario Chief Medical Officer of Health.

Dr. Bridal testified that the COVID-19 virus has mutated over time, and while the Omicron Variant is more contagious, the infection fatality rate has diminished. He estimated that the infection fatality rate at the time he gave his testimony in January, 2022 was below 0.15%. He stated that masks are helpful at stopping large droplets, but are not useful where the wearer is asymptomatic. He stated that the surgical masks worn to prevent the spread of the COVID-19 virus are very good at trapping large particles, but are not very effective at stopping aerosols. The reason for this is that there are gaps in the masks where exhaled air escapes without being

filtered. He also stated that early indications suggested a 10% fatality rate from COVID-19. That supported the declaring of a pandemic however, with subsequent variants and further data, and an infection fatality rate of 0.15%, COVID-19 is not an issue of pandemic proportions. He states that he agreed 100% with Dr. Hu that there is efficacy of masking with symptomatic individuals however, masking of asymptomatic individuals does not stop the spread of aerosols. He cited a study in China which indicated that there was no substantial evidence of asymptomatic transmission of COVID-19. He stated that asymptomatic transmission was not the driver of the pandemic. He testified that healthy people do not transmit the virus, and that almost all transmission of COVID-19 occurs when people are symptomatic, as without symptoms there is an insufficient quantity of virus to cause infection. He stated that it does not make logical sense to require an asymptomatic health care worker and an asymptomatic patient to wear masks. In addition to the ineffectiveness of stopping aerosols, masking also has the potential to create harm, as failure to follow proper protocols when putting on, taking off, or touching the mask while being worn, will contribute to the spread of the virus. There is also the harm caused by inhibiting communication between individuals. An additional harm is that failing to expose individuals, particularly children, to the microbial world risks harming their immune system development. Additionally, mask wearing increases carbon dioxide levels, which creates a condition of very mild hypoxia.

Cross-Examination - Dr. Bridal:

During cross-examination, Dr. Bridal acknowledged that his position at the University of Guelph is in the Patho-Biology Department at the Ontario Veterinary College. He stated that much of his teaching work is to the students enrolled in the Veterinary Medicine Program.

Dr. Bridal acknowledged that the University of Guelph had implemented masking policies, and he confirmed that he did respect the masking policies and adhered to them.

When asked by a panel member when Dr. Bridal became aware that the infection fatality rate was below 1%, he indicated that by January, 2022 it was apparent that the virus was not as fatal as originally anticipated.

Direct Examination - Dr. Warren

Dr. Warren graduated from the University of Western Ontario in 2005, and completed two fellowships in Infectious Diseases and Medical Microbiology. He then completed three years of residence at the University of Ottawa in Internal Medicine. As an infectious disease specialist he treats patients with diseases caused by viruses, bacteria, parasites and fungus. As a Medical Microbiologist he manages the Microbiology Laboratory in his hospital. He also is enrolled in a Master's of Science and Epidemiology Program at the London School of Hygiene and Tropical Medicine. He has an adjunct appointment at McMaster University as a Clinical Assistant Professor. He is also a member of the College of Physicians and Surgeons of Ontario.

Dr. Warren stated that the infection fatality rate varies by age, but as of January of 2022 it was approaching that of influenza. He stated that the Omicron Variant is less severe, but is more

infectious. Dr. Warren testified that in early April, 2020 he was of the view that COVID-19 was going to become endemic, and that attempts to completely stop the virus were futile. He indicated that symptomatic transmission is twenty-five times greater than asymptomatic transmission.

Dr. Warren acknowledged that his workplace requires him to wear a mask even when he is asymptomatic, and that he understands that the College of Physicians and Surgeons of Ontario requires him to wear a mask even when he is asymptomatic. He indicated that he does wear a mask, even though there is no evidence that would support constant mask wearing. He stated that masking has no effect on transmission, and that he is not aware of any literature that supports Dr. Hu's conclusion that every country that has imposed masking has experienced a decrease in transmission of COVID-19. He stated that the best predictor of COVID-19 is population weighted density, meaning that areas that have a higher population will have a greater number of cases per capita than those areas that have a low population density.

Dr. Warren testified that asymptomatic transmission was rare or negligible, and that symptomatic transmission occurred at a rate twenty times higher than asymptomatic transmission. He then stated that the virus spreads as a result of population density, the cyclical pattern of the virus, and the age-structure of the population. There is no evidence that physical distancing reduces transmission of COVID-19. He referenced a study from Bangladesh, which showed that cloth masks had no impact on the spread of COVID-19. Surgical masks used in that study showed a small impact, which Dr. Warren identified as a-risk reduction of 0.9%. He then extrapolated that in the general population, which showed that 1100 people would have to wear

masks for eight weeks to prevent one infection. Dr. Warren also testified that there is no relevance as to whether or not an individual works in a healthcare or non-healthcare setting, what is relevant is symptomatic people interacting with others. He also commented on the concept of “medical reversal” being a phenomenon where assumptions become entrenched and, once so entrenched, the practices based upon those assumptions do not change. Dr. Warren stated that this explains why universal masking has not been abandoned, even in the face of evidence that it is futile. Dr. Warren also alluded to political influence on mask policies.

#### Dr. Warren - Cross-Examination

During cross-examination Dr. Warren indicated that in April and May of 2020, during the first wave of COVID-19, the infection fatality rate was its highest. He also confirmed that COVID-19 is definitely a pandemic. He agreed that it was up to the government to make decisions and orders in response to the pandemic. He also indicated that even though he would disagree with the requirement of masking, if his regulator or a hospital required it he would mask.

#### Submissions of the College:

The College accepts that they have the onus of establishing the facts that underlie in the charges, and to prove that unprofessional conduct occurred. The College states that the facts are not in dispute; there is no question that Dr. Wall was acting contrary to the conditions of the Pandemic Directive. In determining whether or not the Complaints Director has established that unprofessional conduct occurred, reference is to be made to the *Health Professions Act*, the College’s Standard of Practice and Code of Ethics, and the CMOH Orders requiring masking. The

College maintains that practicing is a privilege not a right, and that Dr. Wall committed unprofessional conduct when he decided not to comply with the Pandemic Directive. The College also emphasized that Section 80 of the *Health Profession Act* establishes the powers of the Tribunal, specifically that the Tribunal is to decide whether or not Dr. Wall's conduct is unprofessional.

The College maintains that the issue to be determined is whether a regulated professional is allowed to decide which professional responsibilities are applicable to him. They argue this hearing deals with the issue of compliance, and that, pursuant to Section 80(1) of the HPA, the Tribunal only has authority to make a determination as to whether or not Dr. Wall has committed unprofessional conduct. The Hearing Tribunal has no authority to strike down the Pandemic Directive, or to create and/or set any policy for the College.

The College noted that the various applicable CMOH orders did not provide any exemptions for masking until November 24, 2020. This was subsequent to Dr. Wall's decision in June of 2020 to self-diagnose and unilaterally determine that he ought to be exempt from masking on the basis of a medical condition.

The College stated that the City of Calgary Bylaw 26M2020, dated August 1, 2020 (Exhibit D-11) states that a masking requirement does not apply where the person has an underlying medical condition or disability which inhibits their ability to wear a face covering. That same Bylaw goes on to state that nothing in the Bylaw relieves a person from complying with any Federal or Provincial applicable law and/or regulation, or any requirement of any lawful permit order or license. The College argues that the CMOH Order 16-10, and the College's Pandemic Directive

supersede the Calgary bylaw, and the masking exemption contained within it. The College also made reference to the various Alberta Health Services' exhibits, and maintained that these do not set out an exemption for Alberta Health Services health care workers, and further note that no contrary evidence in this regard has been tendered by Dr. Wall.

The various Alberta Health Services exhibits repeatedly and consistently reference the requirement for continued masking, as well as the efficacy of that masking. The consistent theme throughout is that masking protects others and the wearer from the spread of COVID-19.

The AHS documents assist in establishing the context and contents of the Pandemic Directive issued by the College. CMOH Order 16-20 directed that the College's Pandemic Directive include mandatory masking, social-distancing and plexiglass barriers, CMOH Order 16-20 also required that every college was to provide the CMOH with a copy of their COVID-19 guidelines, and that those guidelines were to be substantially equivalent to the guidelines set out in the Workplace Guide for Community Healthcare Settings. The College maintains that they had a legal requirement to create a Pandemic Directive and this, among other things, required the wearing of a mask. The CMOH Order 16-20 contained no exemption for the face-masking requirement.

The College states that Dr. Wall had a responsibility to ensure that his clinic and staff complied with the Pandemic Directive. Dr. Wall expressly acknowledged that obligation in his testimony. It is very clear that Dr. Wall did not follow the College's Pandemic Directive. It is also very clear that Dr. Wall never asked the College for an exemption of any type when he stopped masking. Dr. Wall expressly acknowledged that he had an obligation to notify the College of his concerns in the Pandemic Directive. Dr. Wall indicated that he did not think it necessary to advise the College



of his failure to wear a mask and his self-diagnosed medical condition. As a result of his failure to communicate with the College, the College was unable to accommodate his claimed medical condition. The College maintains that Dr. Wall, as a member of a regulated professional organization, had an overriding obligation to advise them that he was no longer complying with the CMOH Directive.

On December 8, 2020, AHS closed Dr. Wall's clinic. There is no evidence that Dr. Wall made any effort to contest or appeal that closure order. A reopen notice was subsequently issued by AHS on January 5, 2021. As a result of the reopen notice, Dr. Wall's clinic was reopened on the following conditions:

*(1.) the College's Pandemic Directive must be followed;*

*(2.) the relaunch plan requirements must be implemented;*

*(3.) explicit patient consent must be obtained to proceed with booking and services and patients must be advised that he would not be masked; and*

*(4.) all patients being treated must continually wear a mask that covers their mouth and nose during their visits to his clinic (absent any legitimate exemptions).*

Dr. Wall's failure to comply with the terms of the reopening notice are not only a breach of Dr. Wall's legal obligations, but also his professional obligations. Dr. Wall's decision to ignore this legally binding requirement indicates his failure to satisfy his broader ethical responsibilities as a professional.

Dr. Wall also expressly acknowledged the factual basis for each of the charges as indicated by the following extracts of evidence:

*MR. MAXSTON: Okay. I'm going to take you through each of the charges, and I want to be very clear. I'm not asking you to make admissions of unprofessional conduct; I'm more interested in the facts in the charges are the factual foundation. So Charge 1 says: (as read) Beginning on or about June of 2020 and at the Wall Chiropractic Clinic: (a), [you] failed to use PPE, specifically failed to wear a mask; (b), failed to observe the required 2 metres of social distancing when unmasked; (c), until on or about December 2020, failed to have a plexiglass barrier at the clinic reception and/or did not require patients to mask; [and then] when he interacted with patients, members of the public, or both. Do you dispute any of those facts?*

*DR. WALL: No, I do not.*

*MR. MAXSTON: And if we go to Charge Number 2: (as read) Beginning on or about June of 2020 in the clinic, one or more staff members of the clinic, the staff, failed to use PPE, specifically staff failed to wear masks; (b), failed to observe the required 2 metres of social distancing when unmasked and/or, (c), did not require patients to be masked when they interacted with patients, members of the public, or both. Again, I'm not asking you to make an admission of unprofessional conduct, but do you accept those facts?*

*MR. KITCHEN: Mr. Maxston, I don't mind the question, but, in general, I'm going to ask that you break it up for each one of these pieces.*

*MR. MAXSTON: Sure, I'm happy to do that.*

*MR. KITCHEN: Okay, thank you.*

*MR. MAXSTON: Yeah.*

*MR. MAXSTON: Let's go to 2(a), do you dispute those facts, Dr. Wall?*

*DR. WALL: No, I do not.*

*MR. MAXSTON: And similarly for 2(b)?*

*DR. WALL: No, I do not.*

*MR. MAXSTON: And similarly for 2(c)?*

DR. WALL: No, I do not.

MR. MAXSTON: Okay, we go to Charge Number 3: (as read) Beginning on or about June 2020, Dr. Wall treated patients while not wearing a mask and/or did not require patients to be masked, and, (a), he did not advise patients of the increased risk of transmission of COVID-19 due to masks being worn. Do you agree with that factually?

DR. WALL: Like "masks not being worn" I believe is --

MR. MAXSTON: Yeah.

DR. WALL: what you meant?

MR. MAXSTON: Yeah, sorry, yeah.

DR. WALL: That's correct.

MR. MAXSTON: And (b): (as read) He advised patients that masks were not required. Is that factually accurate?

DR. WALL: Correct.

MR. MAXSTON: And (c): (as read) He advised patients that wearing masks had no effect concerning transmission of COVID-19. Is that accurate factually?

DR. WALL: Correct.

MR. MAXSTON: So if we go to Charge Number 4: (as read) Beginning on or about June of 2020, Dr. Wall failed to chart and/or failed to properly chart communications with his patients about, (a), him not wearing a mask. Would you agree with that?

DR. WALL: Yes, I would.

MR. MAXSTON: (b): (as read) His staff not wearing masks. Would you agree with that?

DR. WALL: Yes, I would.

MR. MAXSTON: And (c): (as read) His patients not wearing masks?

DR. WALL: Yes, I would.

*MR. MAXSTON: And then, finally, Charge Number 5: (as read) Beginning on or about June of 2020, Dr. Wall and/or the staff, (a), failed to follow CMOH orders regarding masking and COVID-19. Do you accept that factually?*

*DR. WALL: Yes.*

*MR. MAXSTON: And (b): (as read) Failed to follow the ACAC Pandemic Practice Directive. Do you agree with that factually?*

*DR. WALL: Partially, but, yes, with respect to masking; is that what that (b) would be?*

*MR. MAXSTON: Yeah, I would -- yes, I think, in fairness to you, I'm thinking of masking, social distancing, and the plexiglass barrier.*

*DR. WALL: Correct, yeah.*

The College maintained that the evidence of the three lay witnesses' testimony was not relevant and that despite whatever beliefs or opinions the lay witnesses may hold, their evidence bears no relevance to the question of whether or not Dr. Wall should be found guilty of the five charges before the Tribunal.

The College then reviewed the evidence of the experts called by Dr. Wall. Each of Mr. Schafer, Dr. Bridal, and Dr. Dang, agreed that there were differences of opinion with respect to their views and those of AHS, CMOH and the *Public Health Agency of Canada*. Each of them also indicated they either have complied or would have complied with their professional organization's masking requirements.

Following Alberta Health Services' closure of Dr. Wall's clinic on December 8, 2020 (Exhibit D-1), there is no evidence that Dr. Wall at any time contested the closure order in court. The clinic was reopened on January 5, 2021. The reopening was subject to the following Alberta Health Services requirements:

- (1) Dr. Curtis Wall must follow the current reopening practice guidance as set out by the Alberta College and Association of Chiropractors, as well as all future iterations of this guidance.*
- (2) Dr. Curtis Wall must implement his revised COVID-19 Relaunch Plan that was submitted on December 24, 2020 into practice to reduce the risk of transmission of COVID-19 among the attendees of the Wall Chiropractic & Wellness.*
- (3) Prior to booking an appointment, Dr. Curtis Wall must inform the patient he will be unmasked while providing services and obtain the patient's explicit consent to proceed with booking and undertaking said services.*
- (4) Dr. Curtis Wall must ensure that all patients he treats continuously wear a mask that covers their mouth and nose for the duration of their time in the clinic, unless they are able to provide evidence that they have been granted a mask exemption.*

Dr. Wall admitted that he is not complying with the College's masking and social-distancing requirements and was, for a period of time, not complying with the plexiglass barrier requirements, all three of which were set out in the Pandemic Directive issued by the College. In addition, Dr. Wall acknowledged that he was not in compliance with the January 5, 2021 AHS Rescind Notice.

Counsel for the College then reviewed Section 3 of the *Health Professions Act*, and maintained that Section 3, which references a college's public protection role, is mandatory. Section 3 states:

*"3(1) A College*

- (a.) must carry out its activities and govern its regulated members in a manner that protects and serves the public interest,*
- (b.) must provide direction to and regulate the practice of the regulated profession by its regulated members,*
- (c.) must establish, maintain and enforce standards for registration and of continuing competence and standards of practice of the regulated profession,*
- (d.) must establish, maintain and enforce a code of ethics,*
- (e.) carry on the activities of the college and perform other duties and functions by the exercise of the powers conferred by this Act, and*

*(f.) may approve programs of study and education courses for the purposes of registration requirements.”*

Importantly, use of the term “must” establishes that these are mandatory duties to be carried out by the College.

They also referenced Section 6, which provides that:

*“(6) A council manages and conducts the activities of the college, exercises the rights, powers and privileges and carries out the duties of the college in the name of and on behalf of the college and carries out the powers and duties of the council under this Act and the bylaws.”*

In support of their interpretation of Section 3, counsel for the College cited the decision in *Michael Yar Zuk v. Alberta Dental Association and College*<sup>5</sup>. In Zuk, the Alberta Court of Appeal found that Section 3 of the *Health Professions Act* creates a statutory mandate to govern a profession in a manner that protects and serves the public interest. The Court also adopted the ruling of an earlier Alberta Court of Appeal Decision, *Brown v. Alberta Dental Association*<sup>6</sup>, which identified that the paramount objective is the protection of the public. The Court went on to state that, in order to protect the public, the honor and dignity of the profession must be maintained, and the legislative scheme must allow for controls on the businesses of professionals.

The College next referenced the Ontario Court of Appeal decision in *Mussani v. College of Physicians and Surgeons on Ontario*<sup>7</sup>, where it was held that there was no constitutional right to practice in a profession unfettered by the applicable rules and standards which regulate that

<sup>5</sup> *Michael Yar Zuk v. Alberta Dental Association and College, et al* 2018 ABCA 270

<sup>6</sup> *Brown v. Alberta Dental Assn.*, 2002 ABCA 24

<sup>7</sup> *Mussani v. College of Physicians and Surgeons on Ontario* (2004) Can 48654 (ON CA)

profession. Further case law was cited in support of the proposition that there is no common law, proprietary or constitutional right to practice a profession free of regulation.

The College also reviewed the concept of ungovernability. They argued that while ungovernability typically is dealt with at the penalty stage, it is also relevant to this matter at the liability stage of the hearing. Reference was made to the *Ontario College of Physicians and Surgeons of Ontario v. Savic*<sup>8</sup> decision, where the Court commented on ungovernability, and stated that a pattern of conduct that demonstrates that the member is unprepared to recognize his or her professional obligations in their regulated role gives rise to ungovernability. The Court further stated that the privilege of professional regulation is dependent upon the profession's members willingness to be governed in the public interest, and to abide by the governing body's directions. It was argued that Dr. Wall's conduct demonstrated ungovernability, as he failed to engage with the College following the issuance of the Pandemic Directive, he self-diagnosed a medical condition, and he made a conscious decision to ignore the masking and social distance requirements that were required of his clinic without notifying the College. Particularly egregious is the fact that Dr. Wall made no effort whatsoever to contact the College, and the College was unaware of his conduct until a complaint was forwarded to the College by AHS in December, 2020, six months after Dr. Wall stopped masking. The College argues that Dr. Wall's conduct speaks to selective compliance, acting in secrecy, and failure to communicate with the College all of which is indicative of his ungovernability.

<sup>8</sup> *College of Physicians and Surgeons of Ontario v. Savic* 2019 ONCPS D-40

The College emphasized that the question to be considered by the Tribunal is whether or not the College acted reasonably when it issued the Pandemic Directive. They stated that the test that ought to be applied is whether or not there was a reasonable basis for the issuance of the Pandemic Directive. They emphasized that the issue of whether or not masking and social distancing and other elements of the Pandemic Directive are supported by science, or are ineffective in reducing the transmission of COVID-19, are not issues that the Tribunal is required to determine. Rather, the Hearing Tribunal must determine whether the College acted reasonably when issuing the pandemic directive.

The College then reviewed the test of reasonableness in such circumstances and noted that the Courts have repeatedly determined that the question that is to be asked is whether the decision is one that would fall within a range of reasonable outcomes. Further, the Tribunal should only interfere with the decision of the College if that decision is outside the range of possible outcomes that are defensible with respect to the facts and the law. The College also noted that case law has identified that professional associations are given a broad public interest mandate, and have broad regulatory powers in order to accomplish that mandate. As a result, the issue the Tribunal must determine is whether the College's decision to develop and impose a Pandemic Directive was reasonable. The issue is not whether the Pandemic Directive's masking and social distancing obligations are based in science, or are even valid.

The College argues that in determining whether or not the College's Pandemic Directive was reasonable, the College undertook considerable research and consultation, which included:

- (1.) Reviewing documents that Alberta Health was publishing.



- (2.) Consultation with the Federation of Chiropractic Colleges.
- (3.) Consultation with other Alberta HPA regulators.
- (4.) Consultation with other Canadian Chiropractic colleges.
- (5.) Consultation with a microbiologist.
- (6.) Consultation with the College's Competence Committee.
- (7.) Consultation with the Alberta Federation of Regulated Health Professionals.
- (8.) Review of the AHS Exhibits.

In addition to reviewing the above reference materials, the College also underwent a consultation process with its members. Less restrictive directives were considered, but were rejected given that chiropractors work in close proximity with the people they treat, and are not able to maintain a physical distance of two meters. Human rights and constitutional rights were also considered, and it ultimately was determined that patient safety was paramount.

In considering whether or not the Pandemic Directive was reasonable, the College asked the Tribunal to consider the unrefuted evidence that every profession and college adopted a masking requirement. In addition to other colleges adopting a masking requirement, health care institutions did so as well. These include:

- (1.) The Alberta Chief Medical Officer of Health
- (2.) The Government of Alberta
- (3.) The Public Health Agency of Canada
- (4.) Alberta Health Services
- (5.) Alberta Hospitals

It was also established that there is no evidence the College at any time acted in bad faith, in either the preparation or dissemination of the Pandemic Directive.

The College next addressed the Charter issues raised, being the right to freedom of conscience and religion, as well as the right to freedom of expression, and the right to life, liberty and security of the person. The College maintained that none of these rights were properly demonstrated, or are applicable. In any event, Section 1 of the Charter is a complete answer to any Charter claim made by Dr. Wall.

The College argued that Section 1 of the Charter provides that the rights and freedoms set out in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The case law interpreting Section 1 of the Charter has established that it is necessary to limit rights and freedoms where exercising them would be contrary to the collective goals of society. The College also made reference to the case law which states that the limitation on rights is not required to be perfectly calibrated, but only has to be reasonably and demonstrably justified. Further, courts are to take a differential position when performing a Section 1 analysis. Counsel for the College framed the question for the Tribunal as being one of determining whether the College had a rational foundation for relying on reasonable scientific research regarding masks. Overall, the College argues that if there is any infringement of any rights arising from the Pandemic Directive, that infringement is a reasonable limit that, while imposing limited rights infringements, operates to benefit public health. The College then reviewed the case law dealing with the COVID-19 pandemic restrictions and Charter challenges.

In both *Taylor v. Newfoundland and Labrador*<sup>9</sup> and *Beaudoin v. British Columbia*<sup>10</sup>, the Court held that any interference with Charter rights was justified under Section 1 of the Charter. The Court in these cases held that the restrictions at issue were based upon available scientific evidence, and fell within the range of reasonable outcomes.

The College next addressed the human rights matters arising from Dr. Wall's medical condition, and his religious views. The College states that any alleged discrimination is justified on the basis of there being a bona fide occupational requirement (BFOR). In support, the College's counsel reviewed several recent Alberta Human Rights Commission Cases that found that the implementation of a masking mandate satisfied a bona fide occupational requirement. In those cases, the Alberta Human Rights Commission found that the masking policies at issue were rationally connected to a legitimate business purpose, were adopted in good faith, and that it was not possible to accommodate the complainants without there being undue hardship.

The College then argued that for Dr. Wall to successfully maintain that he had been discriminated against, he would have to prove that (1) he had a characteristic that is protected from discrimination under the Alberta Human Rights Act (2) he experienced an adverse impact with respect to an area protected by the Code and (3) the protected characteristic was a factor in the adverse impact. With respect to the first component of the test, the College argued that Dr. Wall failed to comply with the Pandemic Directive, on the basis of his self-diagnosis of a medical condition. The subsequent medical letters that were provided by his physician, Dr. Salem were

<sup>9</sup> *Taylor v. Newfoundland and Labrador* 2020 NLSC 125

<sup>10</sup> *Beaudoin v British Columbia*, 2021 BCSC 512

brief, and they contained no formal diagnosis, no treatment plan, and no prognosis. The College also stated that Dr. Wall has failed to satisfy the onus of establishing his having experienced an adverse impact, or that any protected ground was a factor in that adverse impact.

The College further states that the Pandemic Directive was clearly and unequivocally adopted for a purpose rationally connected to job performance, and that the Pandemic Directive was adopted in good faith and for legitimate purpose. When accommodating any alleged disability, the accommodation must be balanced with other legal obligations to coworkers and other customers.

Dr. Wall should also have made attempts to request accommodation. He failed to do so. The College noted that at no time did Dr. Wall make any request to receive accommodation, it was therefore impossible for the College to provide any accommodation to Dr. Wall.

The College further noted that the CMOH Orders that permitted exemptions for masking were issued on November 24, 2020 and December 11, 2020, well after June 2020, when Dr. Wall stopped wearing a mask due to his self-diagnosed medical condition.

#### Submissions of Dr. Wall:

Dr. Wall argues that the Tribunal ought to find the Pandemic Directive issued by the College to be a violation of the Alberta Human Rights Act, and that Dr. Wall suffered unlawful discrimination on the basis of both his mental disability and his religious beliefs. As a result, all charges related to him refusing to wear a mask must fail.

With respect to the remaining charges, Dr. Wall takes the position that he lawfully exercised his freedom of expression rights pursuant to Section 2(b) of the Charter, that he acted professionally by protecting his patients from the harms arising from masking, and that he did not breach any CMOH orders.

Dr. Wall maintains that he has two protected characteristics, mental disability and religious beliefs. He states that the actions of the College resulted in him experiencing an adverse impact, and that his mental disability and religious beliefs are protected characteristics.

With respect to establishing his mental disability, Dr. Wall described the symptoms he experienced when he wore a mask while treating patients, and that his description of his symptoms were verified by his physician, Dr. Salem. Dr. Wall notes that there has been no evidence produced to the contrary, and that Dr. Salem's medical notes identifying the medical basis for his exemption were not contested by the College. Dr. Wall further relies upon the expert opinion evidence from the respirologist, Dr. Bao Dang, and from the occupational health and safety witness Chris Schaefer, who stated that some individuals who wear a mask do experience symptoms similar to those experienced by Dr. Wall.

Dr. Wall also claims a protected religious belief. He explained his Christian beliefs regarding masking. He argues that his religious beliefs are sincere, have a basis in Christianity, and would be substantially interfered with, should he be required to wear a mask. He stated that he is a Christian, and follows the requirements of the Holy Bible. He referred to quotes from Genesis 1:27; "God created mankind in his own image. In the image of God, he created them. Male and female, he created them." Dr. Wall then stated that he believes his face is sacred to him and also

sacred to God, as it is a manifestation of his image. Dr. Wall believes that to cover up his face would be a barrier between him and Jesus Christ. He further stated that complying with an order to wear a mask is essentially fearing man and not God. He then cited other quotes from the Bible, and stated that the requirement to wear a mask violates his life of faith. Dr. Wall argues that there is no question that his belief was sincere.

Dr. Wall maintains that he suffered two adverse impacts as a result of being required to wear a mask. The first adverse impact arose when the College applied to suspend his practice permit. The second adverse impact is the charges brought against him and the ongoing prosecution of them.

In response to the College taking the position that Dr. Wall never requested an accommodation of his alleged disabilities, Dr. Wall maintains that he did in fact request an accommodation when he spoke to Dr. Halowski and Mr. Lawrence via telephone on or around December 5, 2020. He further states that in a subsequent call with Mr. Lawrence, the issue of accommodation of his mental disabilities was discussed. Dr. Wall states that where there is inconsistency between his evidence and that of Dr. Halowski and Mr. Lawrence, Dr. Wall's evidence ought to be preferred. In addition, on approximately December 14, 2020, Dr. Wall provided a doctor's note from his physician stating that he was unable to wear a mask. Dr. Wall maintains that the provision of that doctor's note resulted in the College being obligated to work towards an accommodation. The religious exemption was also brought to the College's attention in the submissions made by Dr. Wall's counsel when responding to the Complaint Director's permit suspension application.

Dr. Wall relied upon the *Telus v. T.W.U.*<sup>11</sup> decision, where the Court of Appeal of Alberta stated that it was unnecessary for an employer to demonstrate knowledge of an employee's disability in cases involving adverse effect discrimination. In that case the Court found that the 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. Dr. Wall maintains that he has established a prima facie case of discrimination as a result of his mental disability and religious beliefs. As a result, the duty to accommodate was triggered without the College needing to become aware of it.

When determining whether or not the discrimination may be seen to be justified as a bona fide occupational requirement the onus is to be shifted to the College. In support, Dr. Wall refers to the three part test set out in the Supreme Court of Canada's *Meiorin*<sup>12</sup> decision; the first is that the standard adopted is rationally connected to the activity within the issue; the second is that the standard was adopted in the good faith belief that it was necessary; the third is to show that the standard was reasonably necessary.

Dr. Wall concedes the first two components of the test; that universal mandatory masking is rationally connected to a practicing chiropractic, and that the mandatory masking was adopted in good faith. However, Dr. Wall maintains that the College has the onus of demonstrating the third part of the test; that it could not accommodate Dr. Wall without experiencing undue hardship.

<sup>11</sup> *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262

<sup>12</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 SCR 3

The *Meiorin* decision in turn cites the earlier Supreme Court of Canada decision in *Central Okanagan School District v. Renaud*<sup>13</sup>, which held that undue hardship infers that some hardship is acceptable, and that in order to justify a rule or requirement it must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. Dr. Wall maintains that the College has not produced any evidence of any attempts to accommodate Dr. Wall in December of 2020. Dr. Wall maintains that it is no answer for the College to state that it was required to adhere to the CMOH order, as the *Alberta Human Rights Act* is quasi-constitutional legislation that supersedes the provisions set out in the *Public Health Act*. Dr. Wall further argues that this supremacy was accepted by the CMOH and AHS, who expressly permitted exemptions for masking based upon mental concerns and limitations. He states an accommodation was clearly possible, and was demonstrated when AHS permitted Dr. Wall to reopen his clinic in 2021, and treat patients without Dr. Wall being required to wear a mask.

With respect to masking being a bona fide occupational requirement, Dr. Wall states that it is not. He stated that there is abundant evidence to establish that masks are ineffective. He maintains that masks do not have any impact on transmission, and there is no increase to the risk of transmission in failing to wear a mask.

Dr. Wall then critiqued the evidence of Dr. Hu, and challenged both his credibility and reliability. He pointed out that Dr. Hu maintains that asymptomatic transmission of COVID-19 is high, but

<sup>13</sup> *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970



that both Dr. Bridal and Dr. Warren testified that asymptomatic transmission of COVID-19 is very low or negligible.

Dr. Dang also disagreed with the evidence of Dr. Hu, and referenced a study that showed masks have no impact on viral transmission. He also challenged Dr. Hu's claim that viral transmission was reduced in all countries that implemented mandatory masking, stating there was no report or study that would support Dr. Hu's claim. He also challenged Dr. Hu's comment with respect to the number of health workers who contracted COVID-19 while being masked. Dr. Dang stated that he observed hundreds of healthcare workers becoming infected with COVID-19 in Medicine Hat alone, contrary to Dr. Hu's comment that there were less than a hundred transmissions as identified by AHS arising between a healthcare worker and a COVID-19 positive individual in the entire province. He then stated that mask mandates are not based on science, but were politically influenced.

Dr. Bridal's evidence is that aerosol transmission of COVID-19 is significant, and that masks do not prevent aerosol transmission by symptomatic individuals. He stated that aerosols are able to escape the mask in areas where it does not seal directly to the face and as a result of the large pore size of the mask. This is contrary to the evidence of Dr. Hu, who testified that healthy individuals were able to regularly transmit the virus to others. Where their evidence conflicts, Dr. Wall states that Dr. Bridal's evidence is to be preferred over Dr. Hu's.

Dr. Wall maintains that the College has the onus to establish that masks are a bona fide occupational requirement, and that they are only able to do so if they establish the effectiveness of masking. Dr. Wall maintains that the College failed to meet that onus.

Dr. Wall also commented on the minimal cross-examination of Dr. Wall's witnesses, and stated that much of their evidence was unchallenged.

Dr. Wall argued that as a result of the College's wrongful discrimination against him, charges 1(a), 1(b), 1(c), 2(a), 2(b), 4(a), 4(b) and 5(b) have not been established. He states that all of these charges effectively are a violation of his human rights, and that the Pandemic Directive requirements are discriminatory and unlawful. He maintains that he did not commit unprofessional conduct by refusing to obey them.

On the issue of reasonable accommodation, Dr. Wall argues that Telehealth is not a viable accommodation. Chiropractors must be able to provide physical manipulation to their patients, and are only able to perform their services by physically touching their patients. He stated it is also not a reasonable accommodation to close the office. Dr. Wall states that it is very apparent that he could have been accommodated as proven by the conditions subsequently imposed on him. In the particular circumstances of Dr. Wall's practice, where he was the only chiropractor in the office and only saw one patient at a time, these restrictions were viable.

Dr. Wall also maintains that he did not breach any CMOH order. He states that CMOH Order 16-2020 was inapplicable, as the Pandemic Directive superseded it. The masking orders (being CMOH 38-2020 and CMOH 42-2020) also contained exemptions which Dr. Wall claims he has qualified for. Dr. Wall also states that those CMOH orders allowed individuals to self-diagnose any medical conditions, and that this did not require any medical evidence. The CMOH orders only required medical evidence after May, 2021. This postdates the relevant dates, being June-December 2020.

Dr. Wall also maintains that charges 3-b and 3-c violate Dr. Wall's right to freedom of expression as protected by Section 2(b) of the Charter. Dr. Wall states that telling the truth about masking to patients cannot be unprofessional conduct, as charges 3(a) and 3(c) amount to compelled speech which is a violation of the Charter. Charge 3(c) attempts to penalize Dr. Wall for telling his patients information that the College does not want him to say. The only possible justification for this compelled speech and censorship is if the College is able to establish that the comments they wanted Dr. Wall to make were true, and that the comments Dr. Wall made were untrue. Dr. Wall maintains that the College has not been unable to demonstrate either.

With respect to the patient masking charges, being 1(d), 2(c) and 3(b), Dr. Wall states that these charges have no basis. He relies upon the Pandemic Directive, which makes no mention of patients masking. He also relies on CMOH Order 16-2020, which does not instruct chiropractors to have patients mask. Similarly, neither the Pandemic Directive nor AHS have any requirements with respect to charting, or with respect to patients being required to mask. Dr. Wall states that the only possible grounds for any charges with respect to patient masking, is paragraph 4 of the Reopen Notice. That paragraph requires Dr. Wall to ensure that the patients he treats continue to wear a mask. Dr. Wall questions the lawfulness of that notice, on the basis that neither the CMOH or the *Public Health Act* is made reference to. He also points out the contradiction in the Reopen Notice issued by AHS with respect to the mask exemptions contained in CMOH Orders 38-2020 and 42-2020. He states that the CMOH Order supersedes the Reopen Notice, and that if the Reopen Notice contains anything contrary to the CMOH orders it ought not to be considered. He also states that paragraph 4 is unenforceable, as he has no way of knowing what might constitute a mask exemption, or what evidence of that exemption might be sufficient. Finally, he

states that the charges against him make no mention of the AHS Reopen Notice, nor has the College ever charged Dr. Wall with being in contravention of any AHS order. He maintains that he has never been properly charged, and as a result all the patient masking charges must fail.

Dr. Wall further argues that he could not have committed professional misconduct by requiring his patients to wear a mask in his clinic, as masks are harmful. He maintains that he acted in accordance with his professional obligations by protecting his patients from harm. Dr. Wall maintains that the evidence that was provided to the Tribunal makes it clear that masks are harmful. He argues that politics and power sometimes supersede reason and science, and that by allowing his patients to determine whether or not they wear masks in his clinic he upheld his professional requirements of the Code of Ethics and Standard of Practice, and that doing whatever the Government says, or whatever the College says, is not to be prioritized over the interest of patients. He maintains that he at all times acted with the utmost professionalism, by speaking the truth and protecting his patients.

#### Hearing Tribunal Analysis:

The facts in this case are not in dispute. Dr. Wall has candidly admitted to all of the facts underlying each of the five charges the College has brought against him.

Dr. Wall is also not challenging the authority of the College to create policies in order to satisfy the requirements set out in the *Health Professions Act*, and he has acknowledged that he is bound by the College's Rules and Standards of Practice.

Dr. Wall has also acknowledged the authority of the College to create the Pandemic Directive in satisfaction of the requirements set out in the Health Professions Act. Dr. Wall is not challenging the College's motivation and reasonableness when it created and established that directive.

Dr. Wall has agreed that practicing as a chiropractor is a privilege, not a right. He has also acknowledged that he is bound by the College's rules. He has previously always abided by the College's rules and requirements since he started practicing in Alberta in 1987. The only time that Dr. Wall operated offside the College's requirements began in June of 2020 when he unilaterally determined that he would no longer wear a mask, contrary to the College's Pandemic Directive, and chose not to notify the College of his decision.

Dr. Wall has further expressly acknowledged that practicing chiropractic is a privilege, not a right. This is an appropriate point on which to commence our analysis.

In *Mussani v. College of Physicians and Surgeons of Ontario*, the Ontario Court of Appeal clearly stated that:

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

This principle was accepted and reinforced in *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA482 where the Ontario Court of Appeal stated:

*"Nor is there a common law right to practice a profession free of regulation... the right to practice a profession... is a statutory right – an important right, to be sure, but a right that is subject to adherence to the governing legislation and rules made under it. There is no common law, proprietary or constitutional right to practice medicine, as this court reiterated in Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario..."*

It has been made very clear by the Courts that regulated professionals have an obligation to follow the rules and regulations instituted by their governing bodies. Failure to do so will result in punishment and sanctions.

Dr. Wall admitted that he initially complied with the Pandemic Directive and did wear a mask when treating his patients. Dr. Wall found that the mask became problematic, as he had feelings of claustrophobia and anxiety, and an inability to concentrate. He then attempted to wear a face shield, but experienced similar symptoms. He then self-diagnosed a mental disability and stopped wearing either a mask or face shield. His failure to wear a mask was directly contrary to the Pandemic Directive issued by the College, and also directly contrary to the then current CMOH Order, as neither the Pandemic Directive nor the CMOH Order provided for any exemptions for mask wearing. Dr. Wall's defense to the charges against him is that the College has unlawfully discriminated against him on the basis of his mental disability and his religious beliefs, and has refused to accommodate him.

Dr. Wall failed to advise the College that he was not complying with the requirements of the College's Pandemic Directive. He also did not provide any explanation as to why he did not immediately obtain a Doctor's note confirming his self-diagnosed mental condition. He stated that he did not believe a doctor-confirmed medical exemption was necessary, and claimed that he did not understand that the Pandemic Directive required him to contact the College. When Dr. Wall initially spoke to Dr. Halowski on December 2, 2020, he did not indicate that he had any medical disability, nor did he request any accommodation. Rather, that conversation involved

him commenting that he believed COVID-19 wasn't serious, and that he did not like how he felt when he wore the mask.

It is evident that Dr. Wall made a unilateral decision to stop wearing a mask contrary to the express requirements of both the Pandemic Directive and the CMOH Order. This is very concerning. We can come to no other conclusion but that Dr. Wall had unilaterally decided to practice contrary to the express requirements of both the Pandemic Directive and the CMOH Order. He did so deliberately, and was either willfully blind or deliberately ignorant of his obligations. It is also concerning that the first medical note provided was only obtained after the College contacted him and requested one. That first medical note from Dr. Salem was deemed unsatisfactory by the College, and a further medical note was requested. The second medical note from Dr. Salem contained no diagnosis, no prognosis and no treatment plan. Nevertheless, the College allowed Dr. Wall to continue to practice under certain conditions. These conditions included requiring him to inform the patients that he had a public exemption for masking, and to obtain a signed, written confirmation from each patient to agree to be seen and treated by Dr. Wall without him being required to wear a mask or face shield.

Dr. Wall also made a claim for a religious exemption for not wearing a mask. Dr. Wall stated that he was a very religious person, and that he had deeply held beliefs that he should not wear a mask. However, he made no requests for religious exemption during the period of June 2020 to early December 2020. He also made no mention of any religious beliefs when he first spoke to the College in December of 2020. Based upon his evidence of his deep faith, one would have expected that Dr. Wall would have made such a claim at that time, if not earlier. Instead, the

religious exemption claim was only made via his legal counsel in response to the College's request for an interim suspension, and after his offices were shut down by AHS. Based on Dr. Wall's claim of deep and devout faith, one would have expected him to raise his religious exemption claim earlier.

We find that Dr. Wall knowingly and continually disobeyed the Pandemic Directive based on his own personal beliefs that COVID-19 was not as harmful as the authorities said it was. He has provided no explanation as to why he failed to contact the College once he self-diagnosed his medical disability. We also have serious doubt about his claimed religious exemption. Although he testified that he is devoutly religious, and initially had intentions of making his life career that of a youth pastor, he failed to invoke any religious exemption request until after his clinic was shut down and did so only when his counsel responded to the College in mid-December, 2020. He admits that he made no mention of any religious exemption in either of the discussions he had with Dr. Halowski or Mr. Lawrence.

Following the close of arguments, counsel for Dr. Wall forwarded two further decisions that he asked the Tribunal to consider. The first of these decisions was *CM v Alberta, 2022 ABKB 716*. That decision dealt with parents who opposed the removal of masks at schools based upon their children's heightened health risks. In particular, the parents sought to challenge CMOH Order 08-22, stating that the Order was unreasonable, and violated Sections 7 and 15 of the Charter. The Court in that case concluded that the Order of the Chief Medical Officer of Health was unreasonable, as it was based on an interpretation of the Public Health Act as giving final authority over public health orders to public officials. The Court further dismissed the application



for Charter relief. This case dealt primarily with the issue of political impact on public health orders and, in particular, political involvement in CMOH Order 08-2022.

The second case, *R v Stephens*, 2022 ABPC 220 involved a pastor who was charged with failing to comply with an order of a Medical Officer of Health. The pastor was charged with failing to ensure his congregation maintained a minimum 2 meter distance from another person. After a thorough review of the facts, the Court concluded that while the pastor may not have taken the steps necessary to ensure that his congregation complied with the 2 meter requirement, there was no evidence that the pastor himself had failed to comply with the 2 meter requirement. As a result, the pastor was found not guilty.

Neither of these cases are helpful, as they fail to address the fundamental issues in this matter. The pastor was not a regulated professional governed by the HPA.

When the College did become aware of the request for the exemptions they accommodated him by permitting him to practice pursuant to the terms of the January 25, 2021 AHS rescind notice. That rescind notice was issued in conjunction with a letter from Dr. Linford of the College dated December 18, 2020 where the following express conditions were placed upon Dr. Wall:

*(1.) Dr. Wall shall inform each client he sees that Dr. Wall has a medical exemption from the public health order that all persons in a public place must wear a face mask, and Dr. Wall shall obtain the written confirmation signed by each patient that the patient agrees to be seen and treated by Dr. Wall without him wearing a face mask or face shield. Dr. Wall shall provide copies of the written confirmation from each to the Complaints Director by 5 p.m. on Friday of each week in which Dr. Wall sees any patients. This requirement will remain in effect as long as the public health order for physical barriers, social distancing and face masks are in effect.*

*(2.) Dr. Wall shall direct any staff person assisting in his office, whether that person is paid or unpaid, to comply with the current public health order requiring*

*use of physical barriers, social distancing and face masks. If any staff person claims an exemption from the wearing of a face mask, Dr. Wall shall consult with Alberta Health Services as to whether the claim of an exemption is supported by objective proof.*

*(3.) Dr. Wall shall maintain a log of screening questions asked and answered by all patients and daily screening of his staff and himself, regarding any symptoms or events that would require isolation and/or testing for Covid 19. The list of screening questions is set out on page 10 of the ACAC (now CCOA) Pandemic Practice Directive issued May 3 and revised May 25, 2020. Dr. Wall shall provide a copy of the log to the Complaints Director by 5 p.m. on Friday of each week that the public health orders for physical barriers, social distancing and face masks are in effect.*

*(4.) In the event that Dr. wall shows any symptoms or answers positive to the screening questions, he shall not see or treat any patients until he has been tested for Covid 19 by Alberta Services and received confirmation of a negative test result. Dr. Wall shall provide proof, satisfactory to the Complaints Director, of the negative test result on the same date that Dr. Wall receives the test result. Dr. Wall shall not see any patient until he has received confirmation from the Complaints Director that he can return to seeing and treating patients.*

Dr. Wall at no time challenged the closure order, and at no time appealed any of these conditions.

Dr. Wall's defense to the charges is that the Pandemic Directive is a violation of his Human Rights and that his Charter Rights have been violated. He argues that The Human Rights legislation is quasi-constitutional, and that all Provincial statutes, including the *Public Health Act* and the *Health Professions Act*, are subject to it. We agree that this is a correct statement of the law. However, the *Alberta Human Rights Act* is limited in its application where a bona fide occupational requirement can be established.

It is well-established that a requirement may be imposed on an individual even if, on the face of it, the requirement appears to be discriminatory. This is known as a bona fide occupational requirement. In order for the College to be successful in arguing that the Pandemic Directive is a

bona fide occupational requirement, they must satisfy the three part test that is set out in the Supreme Court of Canada Meiorin decision.

It is also difficult to conceive that the College ought to be responsible for accommodating Dr. Wall for the period of June-December, 2020, when he at no time requested any accommodation. During that period of time Dr. Wall practiced in contravention of the Pandemic Directive, and only stopped doing so when a patient complaint was made to AHS, and ultimately was forwarded to the College. Dr. Wall's comments about his personal beliefs regarding the spread of COVID-19 and the health impacts of contracting COVID-19 support the conclusion that Dr. Wall operated in open defiance of the Pandemic Directive.

While we have difficulty with Dr. Wall's conduct in the manner of defying the Pandemic Directive, and his failure to claim his medical and religious exemptions until after a complaint was received by the College, it is not necessary for us to delve deeply in to the validity of these exemption claims given the conclusion arising from our analysis of the *Meiorin* decision.

*Meiorin* established a three part test when determining whether or not an imposed standard is a bona fide occupational requirement (BFOR). In *Meiorin* the court stated:

2. Steps One and Two

71     *The first two elements of the proposed BFOR analysis, that is (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; and (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose, have been fulfilled.*

3. Step Three

72     *Under the third element of the unified approach, the employer must*

*establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. As noted, the burden is on the government to demonstrate that, in the course of accomplishing this purpose, it cannot accommodate individual or group differences without experiencing undue hardship.*

Dr. Wall has expressly conceded steps one and two of the analysis. What is at issue is whether the College is able to establish that the pandemic directive was reasonably necessary to accomplish a legitimate work related purpose, and that it was impossible to accommodate Dr. Wall without experiencing undue hardship. *Meiorin* has established that the concept of undue hardship means that some hardship is acceptable. In order to satisfy the test the College must show that the hardship is “undue”. Undue hardship is an amorphous concept, and must be considered in the context of each individual case it is applied to.

The Supreme Court in *Meiorin* provides useful commentary with respect to the application of this third step:

63. *When determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose, it may be helpful to refer to the jurisprudence of this Court dealing both with the justification of direct discrimination and the concept of accommodation within the adverse effect discrimination analysis. For example, dealing with adverse effect discrimination in Central Alberta Dairy Pool, supra, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer’s duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also Renaud, supra, at p. 984, per Sopinka J. **The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in Chambly, supra, at p. 546, such considerations “should be applied with common sense and flexibility in the context of the factual situation presented in each case”.***

64. Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. **Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.**

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered **or alternatively the employer's reasons for not offering any such standard**: see generally Lepofsky, *supra*.

67 If the *prima facie* discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defense to the charge of discrimination. Although not at issue in this case, as it arose as a grievance before a labour arbitrator, when the standard is not a BFOR, the appropriate remedy will be chosen with reference to the remedies provided in the applicable human rights legislation. **Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination.**

(“emphasis added”)

The situation facing the College in the spring of 2020 was entirely unprecedented. A worldwide pandemic was under way. In this case, in order to assess the existence of undue hardship we must consider the particular facts at play at that time. In the Spring of 2020 the SARS COVID-2 virus and COVID-19 had been declared a pandemic. Countries around the world were wrestling

with how to contain its spread. There was uncertainty as to the manner and nature of its spread, and as to its infection fatality rate. The Province of Alberta, along with many other jurisdictions, imposed various lockdowns. Entire industries were shuttered, and Governments around the world issued trillions of dollars of relief and subsidizing payments. It was a chaotic and unpredictable time. One of the many professions impacted by the lockdowns involved the practice of chiropractic. That practice was completely shut down, throwing all Alberta Chiropractors into a period of uncertainty. It was only following the issuance of CMOH Order 16-2020 that chiropractors were able to practice. That CMOH Order required that as a condition of reopening the College was required to publish COVID-19 guidelines applicable to their profession. CMOH Order 16-2020 required guidelines for masking, social distancing and the installation of plexiglass barriers. The objective was to prevent transmission of infection. The College had a positive obligation to either support or create mandatory mask wearing by its members. This was a legal obligation, and one which must be carefully considered in counterbalance to Dr. Wall's individual rights. CMOH Order 16-2020 stated that:

*2. Effective May 4, 2020, and subject to section 6 of this Order, a regulated member of a College established under the Health Professions Act practicing in the community must comply with the attached Workplace Guidance For Community Health Care Settings to the extent possible when providing a professional service.*

*3. Subject to section 5 of this Order, each College established under the Health Professions Act must, as soon as possible, publish COVID-19 guidelines applicable to the regulated members of the College that are substantially equivalent to the guidance set out in the Workplace Guidance For Community Health Care Settings developed by Alberta Health, along with any additional guidelines specific to the usual practice of the regulated profession.*

*6. Section 2 of this order does not apply in respect to the regulated member under the Health Professions Act whose College has published covid 19 guidelines as required under section 3 of this order.*

The Workplace Guidance For Community Health Care Settings document specifically required that:

*“All staff providing 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 if they are either involved in direct client/patient contact or cannot maintain adequate physical distancing (2m) from clients/patients and coworkers.”*

There is no question that the College was obligated to follow the Workplace Guidance For Community Health Care Settings or implement equivalent requirements. In the circumstances it is very clear that the College acted reasonably in invoking the mandatory masking requirement. There is also no question that the pandemic directive was rationally connected to the practice of chiropractic and imposed with honest and good faith belief in its necessity. It was also reasonably necessary in order to have the College have its members return to work. If the College refused to implement the mandatory Workplace Guidance For Community Health Care Settings its members would have been unable to return to work. The College clearly had a legal obligation to comply with CMOH Order 16-20. That is a significant consideration in this matter. Had the College not complied and allowed Dr. Wall to practice without wearing a mask they would have been in breach of that Order.

The only issue to be addressed is whether Dr. Wall is able to successfully argue that there would not be undue hardship to the College if it accommodated his claimed medical and religious disabilities. Fortunately, the issue of reasonable accommodation for people claiming exemption from masking has been directly addressed by the *Human Rights Commission*, both on their website and in a number of decisions of the Chief Commissioner.

The *Alberta Human Rights Commission* website expressly states that:

*“when accommodating a relevant, protected ground, consideration will be given to the need to balance accommodation obligations with other legal obligations to coworkers and/or customers.”*

The Alberta Human Rights Commission has also recently considered five complaints involving individuals who claimed discrimination as a result of their being required to wear a mask. These cases have all addressed circumstances where the claimant alleged discrimination on the basis of provision of goods, services, accommodations or facilities on the ground of a physical or mental disability. All of the claims were dismissed by the Director in the first instance, with that dismissal then being upheld by the Chief of the Commission and Tribunals of the Alberta Human Rights Commission. In all instances the Commission found that the masking requirement was rationally connected to a legitimate business purpose, adopted in good faith, and that it was not possible to accommodate the complainant without incurring undue hardship.

While each of the above cases involve fact scenarios that differ from the one before this Tribunal, they are illustrative of the approach and considerations of the Alberta Human Rights Commission, and establish that organizations are able to establish and maintain mandatory masking requirements without running afoul of the Alberta Human Rights Act.

Dr. Wall argues that masks cannot be a BFOR as the evidence establishes that masks are ineffective and do little or nothing to protect the public from transmission of COVID-19.



There is much evidence provided in this case by medical experts. They addressed at great lengths the efficacy of masking, and the manner by which COVID-19 is spread, as well as the infection fatality rate of those who contracted COVID-19. Dr. Wall argues that masking is ineffective, and that COVID-19 is not as serious of a concern as those in authority made it out to be. All of this evidence is inconsequential as he has, in argument, expressly conceded that universal mandatory masking was rationally connected to practicing chiropractic, and that universal masking was adopted in the good faith belief that it was necessary.

In reviewing that evidence, the Hearing Tribunal agrees with the College's submission that we should be focused on regulatory compliance and not the efficacy of masking. It is very telling that, notwithstanding whatever beliefs or positions Dr. Wall's experts have on the efficacy of masking, each and every one of the experts called by Dr. Wall acknowledged in cross examination that they either have, or would have, complied with a mandatory masking requirement. By doing so, they have demonstrated that they recognized the obligation to be bound by mandated requirements notwithstanding their beliefs on masking efficacy.

Dr. Wall maintains that even if the College is able to successfully establish undue hardship, the supremacy of the Alberta Human Rights legislation supersedes any requirements of the Public Health Act or Health Professions Act.

While courts have established both the paramountcy of the Alberta Human Rights legislation, as well as its quasi-constitutional nature, they are also prepared to enforce mandatory masking policies. As indicated above, the five recent decisions of the Chief of the Commission and Tribunals of the Alberta Human Rights Commission upheld the Directors' decisions to dismiss

masking discrimination complaints in the first instance. This is a powerful statement from the Alberta Human Rights Commission. It indicates that such complaints have no merit and are not even worthy of a hearing.

In this context, Dr. Wall cannot successfully argue that the College's mandated masking requirement would be found to be offside the Alberta Human Rights legislation.

Dr. Wall further argues that there cannot be a bona fide occupational requirement for masking, as the evidence produced at the hearing establishes that masks are entirely ineffective.

While there was conflicting evidence as to the efficacy of masking there is no doubt that masks have some ability to reduce or minimize transmission and do prevent droplet transmission from symptomatic people. While the evidence is admittedly contradictory, we find Dr. Hu's evidence compelling. Not only was he directly involved with the Government of Alberta's COVID response as a Medical Officer of Health with Alberta Health Services in the Calgary Zone, he also had significant exposure to the specific issue of masking in a health care setting. He also identified that it is not easy to determine when an individual is symptomatic or asymptomatic as there are many low grade symptoms that are difficult to identify. Of particular importance is that Dr. Hu provided evidence with respect to the relevant period, being May 2020 to December 2020. The expert evidence produced by Dr. Wall was provided much later, i.e., between one to one and a half years following the relevant events. It is apparent from the evidence before us that there were many twists and turns in the development of responses by scientists and governments to the COVID-19 pandemic over that period of time. COVID-19 did

not remain static. Dr. Hu's evidence is most temporally relevant. Dr. Hu also presented his evidence reasonably and fairly throughout.

While we do not dispute that there are differences of opinion amongst the experts as to the nature of the spread of the virus and the effectiveness of masks in controlling that spread, where there are contradictions in the evidence we prefer the evidence of Dr. Hu. As a result, we find that to the extent that the Pandemic Directive may have conflicted with any applicable Human Rights Legislation, that conflict is justified as a bona fide occupational requirement.

The College has also raised the principle of ungovernability that arises when members fail to respect their regulatory body. The College cites *College of Physicians and Surgeons of Ontario v. Savic*:

*"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."*

There is no doubt that Dr. Wall failed to contact the College when he decided to unilaterally stop wearing a mask. It is also apparent from the facts that Dr. Wall showed no intention of ever contacting the College; he stated that he viewed his claimed medical disability as an issue between him and his physician. The only reason the College became aware that Dr. Wall was not following the Pandemic Directive was a result of a patient complaining to AHS, who then contacted the College. Dr. Wall did not provide any independent medical evidence of any disability until after the complaint was filed and after he had been contacted by the College.

Similarly his claim for religious exemption only arose after his counsel became involved in response to the College's attempt to obtain an order suspending his practice.

It is clear to the Hearing Tribunal that it was Dr. Wall who was required to contact the College. He failed to make any effort to advise the College that he was operating offside the Pandemic Directive. As a member of the College he had a fiduciary responsibility to the College to advise them of his actions. He failed or neglected to do so. This is unacceptable. These actions speak loudly to his ungovernability.

There is also an overarching theme to the submissions of Dr. Wall that speak to his questioning of authority and his refusal to follow government directives based upon his personal beliefs. Throughout his submissions, Dr. Wall made reference to bowing to the authority of the government and questioning the legitimate orders made by the government and its various health agencies. We are satisfied that Dr. Wall intended to defy the Pandemic Directive requirements issued by the College. In doing so, he has clearly demonstrated ungovernability.

The College has also asked us to place no weight on the evidence of Dr. Wall's patients. We agree. Their opinions and perspectives have no bearing whatsoever on this matter and their evidence is of little or no use to this Tribunal.

#### Decisions Re: The Allegations:

Dr. Wall attempts to avoid charge 5(a) by arguing that his admission to the factual basis was somehow retracted or rescinded by him subsequently stating that he did not believe that he failed to follow any CMOH orders. The standard that we must consider is an objective one. Dr.

Wall's subjective belief as to what he did or did not believe constituted a failure to follow CMOH orders is irrelevant. We find that he has admitted to this charge.

Dr. Wall argues that charges 1(a), 1(b), 1(c), 2(a), 2(b), 4(a), 4 (b) and 5(b) cannot stand as they arise from the alleged unlawful discrimination against him contrary to the Alberta Human Rights Act. As we had previously indicated, we are fully satisfied that the College has established the required bona fide occupational requirement for its actions. This, combined with Dr. Wall's admission to the factual underpinnings of these charges fully satisfies, both in fact and in law, that they have been breached.

Dr. Wall argues that charges 3(a) and 3(c) are an unjustified limitation of his right to freedom of expression. He maintains that he was telling his patients the truth about masks and that as a result he could not have contravened the College's Standards of Practice or the *Health Professions Act*.

In support, Dr. Wall references *Strom v. Saskatchewan Registered Nurses Association*<sup>14</sup>. In that case, the Saskatchewan Court of Appeal found that a nurse's unfavorable comments about a nursing home were protected by her freedom of expression. That case was very different factually; Strom had made several negative comments in relation to the care her grandfather was receiving in a nursing home. She was not employed at that nursing home and her comments were made when she was off duty. The Court found in that case that her comments presented a balanced view and were a matter of common sense. The facts before us are very different. As

<sup>14</sup> *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112

evidenced by the testimony of the various experts produced by the parties, there is no common ground as to the efficacy of masking. While we have no doubt that Dr. Wall does not believe that masks are effective, and while he is certainly entitled to that view and is free to not wear a mask in his personal life, he remains a regulated professional and must comply with the College's requirements. When the College makes a reasonably grounded requirement, based on sound scientific evidence it is not for Dr. Wall to unilaterally determine they are incorrect. His failure to advise patients of the increased risk of transmission when masks are not worn and his advising patients that masks have no effect on the transmission of COVID-19 was improper. Dr. Wall was also not presenting a balanced view on masking.

There is also another basis on which to deny Dr. Wall's Charter defense to charges 3(a) and 3(c). The Courts have firmly established that "the right to freedom of expression is not absolute and limitations of expression may be justified under section 1" (*Saskatchewan v. Whatcott*)<sup>15</sup>. Section 1 of the Charter states that:

*"The Canadian Charter of Rights and Freedoms 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."*

Dr. Wall is not alone in attempting to invoke the protection of the Charter when taking issue with the constitutional validity of public health orders. To date there have been a number of cases where people have attempted to utilize the Charter to have the Courts void the COVID-19 restrictions.

<sup>15</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC11

In *Taylor v Newfoundland [TAB 21]* the Supreme Court of Newfoundland and Labrador found that the provincial government's travel restrictions into the province violated the Charter's s.6 mobility rights (the Court also rejected a claim to the same travel restriction based on s.7). The Court found that the restriction on mobility rights was to be upheld as a reasonable limit under Section 1 of the Charter, as it was to be considered in the context of the global pandemic. The opening line of the case conveys the context important to the judicial determination:

*"145. 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.*

*147. Accordingly, [i]n 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." (paragraph 411).*

*148. In finding the travel restrictions proportionate to the rights infringement of being denied entry to the province to attend her mother's funeral the Court concluded that "the collective benefit to the population as a whole must prevail. COVID-19 is a virulent and potentially fatal disease. In the circumstances of this case Ms. Taylor's Charter right to mobility must give way to the common good. (see paragraph 492)"*

A similar challenge to Public Health Orders occurred in *Beaudoin v. British Columbia*. In that case the Court found:

*150. Viruses can be spread by people who do not have symptoms. As long as the reproduction rate (the average number of people to whom an infected person is likely to transmit the Virus) is greater than 1, the Virus will spread exponentially, with the capacity to overwhelm the health system." (paragraph 10). The government conceded that its restrictions on gatherings infringed a number of the fundamental freedoms under s. 2, and the Court having accepted the concession of rights infringements under s. 2 of the Charter, did not assess the claims advanced under ss. 7 and 15.*

*151. The Court held that any interference with s.2 Charter Rights was justified under s.1 of the Charter. The public health orders, the Court held, were premised upon "available scientific evidence ... including epidemiological data regarding transmission of the Virus." (paragraph 239). The restrictions on gatherings, the Court found, were "attempting to address ... the risk of accelerated transmission of the Virus, protecting the vulnerable, and maintaining the integrity of the healthcare system." Accordingly, the restrictions "fell within a range of reasonable outcomes. There is a reasonable basis to conclude that there were no other reasonable possibilities that would give effect to the s. 2 Charter protections more fully, in light of the objectives of protecting health, and in light of the uncertainty presented by the Virus. (paragraph 246).*



As a result, the alleged violations of the Charter were found to be justified under Section 1 of the Charter.

To the extent that there were any violations of Dr. Wall's Charter Rights, those rights are subject to the provision of Section 1 of the Charter. In the circumstances of the pandemic it was reasonable for the College to implement the restriction that it did.


Dr. Wall next maintains that charges 1(d), 2 (c), 3 (b), and 4(c), relating to Dr. Wall and his son failing to require patients to wear masks and failing to chart patient masking, have no basis in law.

Dr. Wall argues that nothing in the Pandemic Directive requires patients to mask, and that subsequent CMOH orders did not require masking or allowed individuals to be mask exempt.

We find that the amendments made at the commencement of proceedings and in particular the directions of Alberta Health Services Reopen Order are directly applicable. There is no doubt that the Reopen Order required Dr. Wall to have his patients wear a mask. Dr. Wall has expressly admitted that he was not in compliance with paragraph 4 of the AHS January 5, 2021 Reopen Order. As a result, he was operating contrary to Alberta Health Services directions and requirements as charged. We find that these charges have been met.

Having determined that all of the allegations are factually proven, and that the conduct of Dr. Wall does rise to the level of unprofessional conduct as defined in s.1(1)(pp)(i), (ii), (iii) and (xii) of the HPA, we will now await further submissions from the parties as to the appropriate sanction.

Dated this 27<sup>th</sup> day of January, 2023 in Edmonton, AB

A handwritten signature in blue ink that reads "James Lees". The signature is written in a cursive style. A large, loopy circle is drawn around the first part of the signature, and a long horizontal line extends from the end of the signature.

James Lees, Public Member and Chair