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BY EMAIL: gordon@rmtbc.ca

Registered Massage Therapists
Association of British Columbia
#180 – 1200 W 73rd Avenue
Vancouver, BC V6P 6G5

Attn: Gordon MacDonald, Executive Director

Dear Sirs/Mesdames:

Re: Mask requirements for patients of Registered Massage Therapists (“RMT”) arising as a result of Covid-19 (“Covid”)

I. BACKGROUND INFORMATION

We have been requested to provide a memorandum concerning the following:

1. Do RMTs have the right to decline treatment to patients who refuse to wear a mask, on the basis that the patient suffers from a disability, during their massage therapy treatment (“treatment”)?
2. Can a registered massage therapist request proof or evidence that an individual suffers from a disability if that individual refuses to wear a mask during treatment?
3. What are the implications if an individual massage therapist either refuses treatment to those who claim they cannot wear a mask during treatment or demand proof of disability?

Our response to these issues are based on the following facts and assumptions:

1. The College of Massage Therapists of British Columbia (“CMTBC”) issued a publication on November 19, 2020 that provides “that masks must be worn both by RMTs and patients, including in the treatment room, unless either or both is physically unable to wear a mask (a medical note or other similar proof is not required and cannot be demanded).”¹
2. The CMTBC website provides an Interim Guideline for Return to Practice (the “Guidelines”) which states that “the RMT may require patients to wear masks, and may refuse to treat patients who will not wear a mask provided that (1) this is communicated to the patient in

¹ College of Massage Therapists of British Columbia, *Province-wide restrictions: New COVID-19 measures*, <<<https://cmtbc.ca/2020/11/19/province-wide-restrictions-new-covid-19-measures/>>> (accessed December 3, 2020).

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advance of the appointment; and (2) the RMT considers accommodations or provides alternatives for patients who are unable to wear masks.”²

3. RMTs offer healthcare services, which cannot be provided while maintaining physical distance from patients.

If any of the foregoing facts or assumptions are incorrect, please advise us immediately as this could change our analysis and conclusion.

II. BRIEF CONCLUSION

RMTs may impose a mask policy that applies to all patients, but likely must accommodate the needs of persons with disabilities. A policy that does not accommodate the needs of persons with disabilities is likely discriminatory within the meaning of the B.C. Human Rights Code (the “Code”).³ Service providers, including RMTs, have a duty to accommodate persons with disabilities to the point of undue hardship.

RMTs must employ their professional discretion to determine whether and when to proceed with treatment of a patient. A patient who fails to meet the pre-screening requirements⁴ for treatment must be refused treatment until they are cleared of Covid.⁵ Additionally RMTs are encouraged to use the pre-screening measures as a means to opening a dialogue with the patient to ensure that treatment is in the best interests of the patient. Where the RMT in good faith determines that even if they employed all appropriate and available accommodation measure, the risks and consequences for the patient from potentially contracting Covid outweigh the health needs of the patient for massage therapy, then the RMT can likely decline to offer their services.

III. ANALYSIS

On November 24, 2020, Mike Farnworth, the Minister of Public Safety and Solicitor General signed Ministerial Order No. M425,⁶ (the “Order”) requiring the use of face coverings while inside an indoor public space. Section 4 of the Ministerial Order provides an exemption to the mandatory mask requirement for individuals in the following circumstances:

4. [The requirement] does not apply as follows:

(b) to a person who is unable to wear a face covering because of

² College of Massage Therapists of British Columbia, *Interim Guidelines for Return to Practice (COVID-19)* <<<https://cmtbc.ca/registrants/interim-guidelines-for-return-to-practice/>>> (accessed December 3, 2020).

³ *Human Rights Code*, RSBC 1996, c. 210.

⁴ BC COVID-19 Self-Assessment Tool, <<<https://bc.thrive.health/covid19/en>>> (accessed December 3, 2020).

⁵ Guidelines, *supra* footnote 2.

⁶ Province of British Columbia, Order of the Minister of Public Safety and Solicitor General, *Emergency Program Act*, Ministerial Order No. M425 <<https://www.bclaws.gov.bc.ca/civix/document/id/mo/mo/m0425_2020/>> (accessed December 4, 2020).

- (i) a psychological, behavioural or health condition, or
- (ii) a physical, cognitive or mental impairment;

[...]

- (h) while receiving a personal service, or a service at a health professional's office, if removing the face covering is necessary in order to receive the service.

The Order provides at section 7 that “[n]othing in this order prevents an operator from having additional requirements in relation to face coverings.”

The Order contemplates that individuals suffering from certain conditions or impairments are not required to wear masks in indoor public spaces. RMTs must comply with the Order in the provision of their services. They are further required by the CMTBC to develop a safety plan for their clinics, which must be communicated to patients, colleagues and others.⁷

Competing Rights

The issue of whether an RMT may decline her services to an individual patient who claims to have a disability that prevents the patient from wearing a mask is one of competing rights.

The *Occupational Health and Safety Regulation*,⁸ (“OHS Regulation”) at section 3.12 provides that a worker must refuse work if they reasonably believe that such work creates an undue hazard to the health and safety of any person. It further sets out a mandatory procedure to investigate whether unsafe work conditions exist.⁹

The right to refuse unsafe work generally arises in exceptional circumstances where the worker is exposed to hazards in the workplace that are not otherwise inherent risks in their ordinary work. In *British Columbia Public School Employers' Assn. v BCTF* (“BCTF”),¹⁰ the Arbitration Tribunal considered the complaint of pregnant teachers that teaching in a classroom environment surrounded by children who had a high risk of contracting and spreading parvovirus amounted to an unsafe work environment. The arbitrator noted that “the law accepts that a certain degree of risk may inevitably accompany the nature of the particular employment” and went on to defer to the jurisdiction of the Workers Compensation Board (“WCB”) to determine if the risk posed an undue hazard. In BCTF, the arbitrator acknowledged that the WCB had investigated and determined that while there was a risk of contracting the virus in the workplace, it did not pose an undue hazard.¹¹

⁷ Guidelines, *supra* footnote 2.

⁸ *Occupational Health and Safety Regulation*, BC Reg 296/97.

⁹ *Ibid* at s. 3.12.

¹⁰ *British Columbia Public School Employers' Assn v BCTF*, [2006] BCCAAA No 20, [2007] BCWLD 1329.

¹¹ *Ibid* at paras 121-124 and 183.

WorkSafe B.C., which has jurisdiction over the OHS Regulation, has developed materials to assist health care workers to mitigate the risks of Covid in the clinical setting.¹² In our view, the materials explicitly acknowledge that health care workers will encounter risks associated with the spread of Covid, as such risks inevitably accompany the nature of their employment in health care professions. We are of the view it would be unlikely for the WCB to conclude that the risk of contracting Covid is an undue workplace hazard. We note further that the concept of an undue workplace hazard primarily applies in an employer-employee context, and we note that many RMTs offer their services to the public independently, and without the direct oversight of an employer. Consequently, as a practical matter, the refusal of unsafe work procedures provided in the OHS Regulation likely do not apply to the working arrangements of many RMTs. The decision as to whether to offer services for many RMTs will fall within the RMT's own discretion. We discuss the professional discretion of RMTs below in greater detail.

Individual members of the public have a competing right to access services without encountering discrimination on a protected ground in accordance with section 8 of the Code.¹³ The Code provides that individuals have the right to obtain a service without discrimination on the basis of a physical or mental disability, as follows:

Discrimination in accommodation, service and facility

8 (1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.¹⁴
[emphasis added]

Section 8 includes the qualification “without bone fide and reasonable justification”, which may be applied to balance the competing rights of individuals.

The test for applying section 8 is found in the unanimous decision of the Supreme Court of Canada *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*

¹² Worksafe B.C., *Health Professions, Protocols for Returning to Operation*, <<<https://www.worksafebc.com/en/about-us/covid-19-updates/covid-19-returning-safe-operation/health-professionals>>> (accessed December 3, 2020) and WorkSafe B.C., *Reviewing and Updating your Safety Plan: A guide for Employers*, <<<https://www.worksafebc.com/en/resources/health-safety/books-guides/reviewing-updating-covid-19-safety-plans-guide-for-employers?lang=en>>> (accessed December 3, 2020).

¹³ *Human Rights Code*, *supra* footnote 3 at s. 8.

¹⁴ *Ibid.*

(“*Grismer*”).¹⁵ In *Grismer* the Court considered whether an individual with a vision impairment had been discriminated against by the Superintendent of Motor Vehicles as a result of a universal policy providing that any person with his specific medical condition could not obtain a driver’s license. The Superintendent’s policy was prefaced on the need to maintain road safety, and the conclusion that persons whose peripheral vision fell below a certain threshold could never drive safely.

The Court in *Grismer* held that service providers are required to accommodate members of the public, including the needs of persons with disabilities, to the point of undue hardship. If discrimination can be established, the onus falls to the service provider to show that the discriminatory standard has a *bona fide* and reasonable justification. To establish a *bona fide* and reasonable justification the service provider must be able to demonstrate that:

- (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant [service provider] cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.¹⁶

If it can be established that the goal or purpose has been made legitimately, or in good faith, the analysis is then focused on whether the means used to achieve the goal or purpose are tailored to the intended ends. The means cannot arbitrarily exclude certain individuals or classes of individuals unless doing so is somehow rationally connected to the goal or purpose. That is, exclusion is only justifiable where the service provider has made every possible accommodation short of undue hardship. Accommodation, in this context, means that which is required in the circumstance to avoid discrimination.¹⁷

Applying *Grismer*

If a policy is implemented requiring all persons to wear a mask in order to obtain a service, such as RMT treatment, people with disabilities who are legitimately unable to wear a mask can likely demonstrate that they have been discriminated against by the policy.

The onus would fall to the RMT providing the service to demonstrate that the discriminatory policy, being the requirement that all members of the public wear a mask for the duration of the treatment, has a *bona fide* and reasonable justification. The RMT would be required to demonstrate that the purpose of the policy requiring masks during treatment is rationally connected to the treatment to be provided, has been adopted in good faith, and is reasonably necessary to achieve the purpose of the policy. Moreover, that

¹⁵ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868.

¹⁶ *Grismer* at paras 20 to 22.

¹⁷ *Ibid.*

accommodation of the individual member of the public was impossible without imposing undue hardship on the RMT.

Part one of the test requires the service provider to demonstrate that the standard for a purpose or goal is rationally connected to the function being performed. Effectively, the RMT would be required to demonstrate that the standard of wearing masks throughout treatment to achieve the purpose or goal of preserving the health and safety of patients is rationally connected to the function being performed, being the provision of RMT health care services. Creating policies that protect patients against the spread of a potentially deadly virus while providing services that may alleviate other health conditions is likely rationally connected for purposes of the *Grismer* analysis. In our view, an RMT could likely demonstrate that the first step of the test has been met.

We assume for the sake of step two of this analysis that an RMT who adopts a mask policy would do so in good faith, and with a genuine belief that requiring all patients to wear a mask during treatment would diminish the risk of transmission of Covid. An RMT might rely on the Order, which contemplates in the recitals that “face coverings help prevent, respond to or alleviate the effects of the Covid-19 pandemic”. We assume for the sake of this analysis that the second step of the test could be met.

The third step of the *Grismer* test would require the RMT to demonstrate that wearing a mask throughout treatment is reasonably necessary to accomplish the purpose or goal of preserving the health and safety of patients. Further, the service provider would need to demonstrate that she cannot accommodate individuals with disabilities who are unable to wear a mask without incurring undue hardship.

The degree of risk faced is not an independent justification for discrimination.¹⁸ The onus would be on the RMT to demonstrate that the standard that all patients must wear a mask during treatment incorporates “*every possible accommodation* to the point of undue hardship” [emphasis added].¹⁹

In considering possible accommodations that may be available, the RMT could likely demonstrate that there is no current Covid test that is readily available to allied health care practitioners. As such, the RMT would be unable to determine with certainty that a patient with a disability who could not wear a mask did not have Covid. In the absence of certainty, the RMT may contract and spread the Covid virus to other patients, putting her own health and the health of other members of the public at risk.

The RMT may be successful in demonstrating that due to the lack of Covid testing availability, she could never be certain of the risk posed by treating a patient without a mask whose Covid status was unknown. The RMT could request or require each patient to obtain a Covid test prior to treatment; however, due to the regulation of medical tests and control of those tests by health service providers other than the RMT, it is likely not within the RMTs power to provide Covid tests to each of her patients.²⁰ Additionally, the risk of a false negative result exists, as does the possibility of contracting Covid after a test has been administered and before attending at an RMT’s office.

¹⁸ *Grismer* at para 30.

¹⁹ *Ibid* at para 32.

²⁰ BCCDC, Information for Health Care Providers on Testing Asymptomatic Individuals for COvid-19, <<http://www.bccdc.ca/Health-Professionals-Site/Documents/COVID19_Testing_Asymptomatic_Individuals.pdf>> (accessed December 4, 2020).

The RMT may also try to demonstrate that the use of personal protective equipment (“PPE”) by both the RMT and patient is the only way to effectively avoid contracting Covid during treatment. In our view, this argument would be unlikely to succeed. The formal guidance prepared for health care workers, including RMTs, and the materials produced by the Centre for Disease Control B.C. (“BCCDC”) tend to undermine this argument.

Specifically, the mask protocols developed by the BCCDC contemplate that a healthcare worker faces “Low Risk” if the health care worker wears a mask and eye protection, but no gloves or gown, and the patient wears no mask.²¹ WorkSafe B.C. has provided materials for health care professionals that provide, among other things, that workers should “Conduct a point of care assessment for risk of COVID-19 for every client interaction”, and “Health services should not be performed on ill or symptomatic clients, if that is clinically appropriate.”²² The Worksafe BC materials reference the BCCDC materials which provide directions to health care workers as to how to deal with clients with confirmed or presumptive cases of Covid.²³ Importantly, the BCCDC guidelines provide that when treating patients “with suspected and/or confirmed COVID-19 disease [...] Contact and Droplet precautions” should be used.²⁴ The contact and droplet precautions include the use of surgical/procedure masks by the health care practitioner along with eye protection, gloves and gown when taking nasopharyngeal and throat swabs. However, it specifies that “An N95 respirator is NOT required.” The materials go on to direct that an N-95 mask is only required for “aerosol generating medical procedures”, which do not include massage therapy. The BCCDC materials do not contemplate that the patient must wear a mask during treatment in order to protect the health care provider, but rather that the health care provider will use the barriers recommended for the specific health services they are providing. In our view, BCCDC and WorkSafe B.C. have created resources designed to instruct health care providers as to the kinds of accommodations necessary to treat patients, with or without masks.

Further, while the Order contemplates the use of masks in all indoor public spaces, it specifically carves out the requirement to wear masks for individuals who suffer from a psychological, behavioural or health condition, or a physical, cognitive or mental impairment. The Order therefore contemplates that the benefits of a universal mask policy in all indoor public spaces do not outweigh the individual needs of persons with conditions or impairments that prohibit the use of a mask. The recitals to the Order state “AND WHEREAS it is not possible for some persons to wear face coverings and I have taken that into consideration in this order”.²⁵ The explicit exemption for people who cannot wear masks therefore creates a potential diminishment in general public health and safety, which seems to be afforded as a reasonable accommodation.

²¹ BCCDC, Exposures and return to work for health care workers, <<http://www.bccdc.ca/health-professionals/clinical-resources/covid-19-care/testing-and-case-management-for-healthcare-workers>> (accessed December 4, 2020).

²² WorkSafe B.C., *Health Professions: Protocols for returning to operation*, <<<https://www.worksafebc.com/en/about-us/covid-19-updates/covid-19-returning-safe-operation/health-professionals>>> (accessed December 4, 2020) at “Provision of health services”.

²³ BCCDC, *Personal Protective Equipment*, <<<http://www.bccdc.ca/health-professionals/clinical-resources/covid-19-care/infection-control/personal-protective-equipment>>> (accessed December 4, 2020).

²⁴ *Ibid.*

²⁵ Order, *supra* footnote 6, at the recitals.

Based on the foregoing analysis, we consider it more likely than not that RMTs in B.C. have a duty to accommodate persons with disabilities who cannot wear a mask when providing treatment. Such treatment by RMTs may expose the RMTs (and her subsequent patients) to a greater risk of transmission of Covid; however, the recommended accommodations are directed at enhancing the level of PPE worn by the health care service provider, rather than requiring patients to don additional PPE or forego treatment.

Issue 2: Can a registered massage therapist request proof or evidence that an individual suffers from a disability if that individual refuses to wear a mask during treatment?

It is likely not appropriate for a service provider to request or require proof of a disability that impedes the ability of an individual to wear a mask during treatment.

In *Feldman v. The Real Canadian Superstore*,²⁶ the B.C. Human Rights Tribunal (“BCHRT”) considered a situation in which a greeter at a Superstore location requested that a visually impaired person provide identification for a harnessed guide dog before permitting the individual to enter the store. The Human Rights Tribunal concluded that while the store greeter had not intended to discriminate by requiring her to show proof of her dog’s status as a guide dog; nevertheless, the action was discriminatory within the meaning of the legislation.²⁷ The Tribunal further noted that it is not discriminatory intent, but discriminatory results that are prohibited by human rights legislation. The request for proof that the dog was a guide dog constituted discrimination regarding a service customarily available to the public because of a disability, contrary to section 8 of the Code.

An RMT may be able to decline services to an individual with a disability where they have taken time to properly assess the needs of the individual and appropriate accommodations, and where they have determined in their professional opinion it is not appropriate to proceed with treatment. The circumstances where declining treatment may be appropriate are likely to be fact specific.

The materials on the CMTBC website are voluminous and provide considerable detail on how to mitigate the risk of Covid while continuing to offer massage therapy services to the public; however, the recommendations concerning treatment of patients at greater risk are sparse:

Patients at greater risk: take additional precautions, discuss alternatives for care, postpone treatment – explore options. RMTs may provide massage therapy when the patient and therapist agree that the benefits of care outweigh the risk to the patient.²⁸

A recent decision of the BCHRT provides some further direction as to what considerations the RMT should consider in their clinical analysis prior to declining treatment of a patient. In *D.T. v. Dr. M. and Others*,²⁹ the BCHRT considered a complaint by a patient who had attended at the offices of three physicians with the intention of becoming a regular patient. The patient suffered from chronic back pain and had been prescribed opioids for 32 years. She wanted her new physician to continue prescribing

²⁶ *Feldman v The Real Canadian Superstore*, 1997 BCHRT 18.

²⁷ *Ibid* at para 24.

²⁸ Guidelines, *supra* footnote 2.

²⁹ *DT v Dr M and others*, 2018 BCHRT 129.

opioids. Each of the physicians with whom she met conducted a preliminary analysis of her medical issues, and declined to continue to prescribe opioids in the manner they had previously been prescribed. Instead, alternate treatment plans were discussed between the physicians and the patient. The patient disagreed with the recommended course of treatment (i.e. refusal to continue prescribing opioids). Two of the three physicians refused to take the patient into their practice as there was a lack of trust between the physicians and the patient, and the patient disagreed with the physicians' prescribed treatment plan. In the case of the third physician, the patient chose not return to the physician's care. The BCHRT noted:

The Tribunal has consistently held that it is not its role to second-guess the good faith clinical judgments of medical practitioners. These cases all conclude that, where the medical professionals treat the patient in good faith and use their best medical judgment, the question of the standard of medical care is not an issue for the Tribunal to decide, as long as that judgment is exercised in a non-discriminatory manner, and as long as the complainant's disabilities were accommodated.³⁰

In *D.T.*, the physicians were able to show that the disability of the patient was not the reason they chose not to take on the patient. Rather, the doctors could demonstrate that they had each reviewed the patient's clinical history, assessed her condition, and offered a treatment plan based on their professional judgment.³¹

Based on *D.T.*, we can infer that where an RMT acts in good faith in determining an appropriate treatment plan for her patients, and exercises her professional judgment in a non-discriminatory manner with a view to accommodating disability where necessary, they may be able to decline treatment, or avoid taking on a new patient. This conclusion is further supported by the CMTBC published guidance as follows:

In circumstances where a mask cannot be worn for any reason, RMT discretion is required, including clear communication with the patient and consideration of what accommodations it may be possible to provide.³² [...]

RMTs are reminded that there is an element of professional discretion in application of the guidelines, because not all RMT practices are the same, or even similar.

The RMT's focus should be on the critical importance of pre-screening, and on communicating with patients (and potential patients) the rationale and need for honest and reliable pre-screening. CMTBC's Interim Guidelines are designed to help RMTs and the public understand that a therapeutic alliance is a two-way street, based on communication, trust, and informed consent.

No matter how the pre-screening and pre-appointment screen is completed, RMTs are reminded that the point is to have an authentic discussion that provides both the patient and the therapist an opportunity to choose to proceed, or to step back from treatment that day.

³⁰ *DT v Dr M and others*, at para 49.

³¹ *Ibid* at para 54 and 54.

³² Guidelines, *supra* footnote 2.

RMTs are required to employ their professional discretion in determining whether, how, and when to treat a patient.³³ In circumstances where a patient fails to meet the pre-screening requirements, the patient may not be treated until cleared by public health authorities. Additionally, an RMT may employ their professional judgement to balance the treatment needs of a patient (i.e. the benefits of RMT treatment) against the potential risks to that specific patient of receiving treatment. If the RMT determines in good faith, and after considering the reasonable accommodations that may be made to protect the individual patient, that the risks to the health and well-being of the individual patient outweigh the benefits, the RMT may determine to postpone the relevant treatment until it is safe to proceed.

Issue 3: What are the implications if an individual massage therapist either refuses treatment or demands proof of disability in contravention of the CMTBC directive?

An RMT who refuses treatment to an individual on the basis that the individual refuses to wear a mask throughout treatment risks being accused of discrimination. This may result in a hearing before the BCHRT at which the individual RMT may be called upon to defend her actions.

Additionally, an RMT may also risk a college complaint on the basis that the RMT has violated her ethical obligations if she fails to accommodate the needs of a disabled person. The Code of Ethics for RMTs provides: "RMTs must be aware of and comply with human rights legislation when determining whether to accept new patients and in the treatment of current patients."³⁴ The Bylaws of the CMTBC provide at section 75(1) that "Every Registrant must comply with the Code of Ethics [...]". The CMTBC website prescribes that "CMTBC will only investigate complaints that fall within its statutory mandate. [...] it must relate to unprofessional conduct or incompetent practice by an RMT. Such conduct may include sexual misconduct or unethical conduct." [Emphasis added]. How the CMTBC would treat such a complaint remains to be seen, as we were unable to locate any reported decisions concerning mask policies of RMTs in the Covid context. However, given the considerable materials on the CMTBC website directing RMTs on how to appropriately accommodate patients, we expect that the duty to accommodate patients with a legitimate disability is likely to be reinforced by the College if such a complaint were to arise.

Yours truly,

FARRIS LLP

Per:



Krista L. Isberg

KLI/kd

³³ Guidelines, *supra* footnote 2.

³⁴ College of Massage Therapists of British Columbia, Code of Ethics, <<<https://cmtbc.ca/law-standards/code-of-ethics/>>> (accessed December 3, 2020), at para 6.