ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Phillips,* 2023 ONPSDT 2
Date: January 19, 2023
Tribunal File No.: 21-023, 22-006, 22-012

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Drs. Patrick Brian Phillips, Mark Raymond Trozzi and Crystal S. Luchkiw

MOTION REASONS

Heard: November 23, 2022, by videoconference

Panel:

Mr. Raj Anand (chair)
Mr. Jose Cordeiro
Ms. Julia Goyal
Dr. Paul Hendry
Dr. James Watters

Appearances:

Ms. Elisabeth Widner, for the College
Mr. Michael Alexander, for Dr. Phillips, Trozzi and Luchkiw

RESTRICTION ON PUBLICATION

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names or any information that would identify patients referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

OVERVIEW

[1] This is a motion by three members of the College, Drs. Mark Trozzi, Patrick Phillips and Crystal Luchkiw. They move to dismiss the referrals against them on jurisdictional grounds, without a merits hearing. In the Notice of Motion and their factum, the members rely on two major grounds, relating to administrative law and constitutional law respectively.

[2] Their first argument is that the three prosecutions are unlawful, because the allegations are based on investigations that the Registrar lacked statutory authority to commence. The physicians' main submission under this first argument is that they are being prosecuted for breaching the directions contained in certain statements (described below) that the College issued to the profession about COVID-related issues. The moving parties make a secondary submission that the Appointments of Investigators (AOIs) that the Registrar issued in these cases are invalid because they authorized overbroad "fishing expeditions."

[3] The members' second argument is that the prosecutions cannot proceed because the allegations rely on the College's guidance or direction related to COVID-19 that itself breaches guarantees of freedom of expression (s. 2(b)) and life, liberty or security of the person (s. 7) in the *Canadian Charter of Rights and Freedoms.*

[4] In our view, several court decisions (involving physicians including the three moving parties before us) released before our hearing of the motion have effectively disposed of the administrative law arguments. We refer to these decisions below.

[5] In addition, having reviewed the positions taken in the facta that they exchanged, the parties agreed at the hearing of the motion that the *Charter* issues do not arise for decision at this point.

[6] In these reasons, we dismiss the physician's administrative law arguments, and we explain how their *Charter* arguments may remain relevant, if they wish to rely on them, when these allegations are heard on the merits.

THE ALLEGATIONS AGAINST THE PHYSICIANS

[7] Broadly speaking, the three physicians take issue with some of the public health measures relating to COVID-19 such as vaccination and treatment.

[8] The allegations in the three Notices of Hearing can be summarized as follows.

[9] The College alleges that Dr. Trozzi committed professional misconduct by making misleading, incorrect or inflammatory statements about vaccinations, treatments and public health measures concerning COVID-19 through his email and online communications about the pandemic.

[10] In Dr. Phillips' case, the allegations of professional misconduct include making misleading, incorrect or inflammatory statements about vaccinations, treatments and public health measures for COVID-19; disclosing information from a College investigation, including posting such information online and failing to remove it when requested; and failing to cooperate with College investigations. The College alleges that he failed to maintain the standard of practice of the profession and engaged in disgraceful, dishonourable and unprofessional conduct in different aspects of his treatment of patients and public health reporting, that he engaged in unprofessional conduct and communications at his hospital workplace and also breached terms, conditions and limitations on his certificate of registration.

[11] The College alleges that Dr. Luchkiw committed professional misconduct by failing to cooperate with College investigations relating to her infection control practices, communications about COVID-19 and issuance of vaccine exemptions.

THE MOVING PARTIES' CHALLENGE TO THE COLLEGE STATEMENTS

[12] The physicians' administrative law arguments focus on four statements that the College published on its website in 2021 and 2022 ("the Statements") to provide guidance to the profession about COVID-19:

a) A statement on "COVID-19 FAQs for Physicians" concerning medical exemptions for vaccines, indicating that a patient must have a "legitimate medical condition that would warrant an exemption," and providing links to guidance from the National Advisory Committee on Immunization (NACI) and the Ministry of Health on criteria for acceptable exemptions;

b) A statement on whether precautionary drugs should be prescribed to combat COVID-19;

c) A statement on public health misinformation, followed by a clarifying statement ten days later. Together, the College recognized the important role physicians play in advocating for change but expressed concern when some of them make misleading or deceptive comments that put the public at risk by rejecting scientific evidence and encouraging conduct that is contrary to public health orders and recommendations.

[13] The moving parties submit that together, the Statements amount to a direction that limits medical exemptions, curtails physician comments about COVID-19, targets “anti-vaxxers” and “anti-maskers” and impedes the discussion for informed consent of patients to the use of precautionary medications.

[14] The physicians describe the Statements as attempts by the College to limit their free expression and discipline them on the basis of prohibitions or directions that it has no statutory authority to order. They point to *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario,* 2019 ONCA 393 at para. 16, where the Court of Appeal stated that policies are not binding regulatory norms, and cannot therefore be used on their own as the basis for a finding of professional misconduct:

> The Policies are not "regulations", nor are they a "code, standard or guideline relating to standards of practice of the profession" adopted pursuant to s. 95(1.1) of the Health Professions Procedural Code, Schedule 2 of the *RHPA*. Accordingly, non-compliance with the Policies is not an act of professional misconduct under the College's professional misconduct regulation: *Professional Misconduct*, O. Reg. 856/93.

[15] The moving parties extrapolate from this principle that “through the Registrar…the College can also issue Statements, which are merely guidelines or recommendations for physician conduct, and as such, do not constitute binding legal norms.”

[16] At this point, the physicians and the College find common cause. The College agrees that the Statements are properly characterized as guidance documents, not binding rules. As the Court of Appeal confirmed 25 years earlier in *Ainsley Financial Corp. v. Ontario (Securities Commission)*, 1994 CanLII 2621 at paras. 11-13:

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those

> who are subject to regulation is well established in Canada. The jurisprudence clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: (citations omitted)
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> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner….
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> …Nor, in my view, are pronouncements which are true guidelines rendered invalid merely because they regulate, in the broadest sense, the conduct of those at whom they are directed. Any pronouncement by a regulator will impact on the conduct of the regulated. A guideline remains a guideline even if those affected by it change their practice to conform with the guideline.

[17] The instrument at issue in *Ainsley* was in fact interpreted by the court as a mandatory provision. Unlike the College's Statements, the Commission's document incorporated "a minutely detailed regime complete with prescribed forms, exemptions from the regime and exceptions to the exemption" (para. 19).

[18] Quite apart from characterizing the Statements, it is clear from the allegations against the physicians that the College is not seeking a finding of professional misconduct based on a breach of the Statements. Indeed, the College confirmed at the motion that it will not rely on the Statements as binding norms or prohibitions when these matters reach a merits hearing. There is no gap or absence of statutory authority, because the College does not assert that the Statements on their own constitute a standard of the profession.

[19] The Divisional Court considered the same issue of characterization, in the context of a constitutional challenge to the same misinformation statement.

[20] In *Turek v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 8105 at para. 13, and came to the same conclusion about its status:

> …[T]he Statement that the College issued on April 30, 2021 is not an instrument that can attract a declaration of invalidity. It is a guideline and a recommendation only. As such, it is not binding on any tribunal that may consider the matter further. The Applicant is not being investigated for breaching or violating the Statement; she

> is being investigated for professional misconduct and/or incompetence.

[21] That said, the College is entitled to rely on the Statements at the merits hearing to inform its position on the standard of practice and professionalism. Conversely, the physicians are entitled to argue that the Tribunal should not rely on the Statements when it is asked to make findings of professional misconduct against them.

[22] While this motion was pending, Dr. Luchkiw brought an application for judicial review to challenge an order of the College's Investigation Complaints and Reports Committee (ICRC) to suspend her certificate of registration. She argued there as well that the College's statement on medical exemptions is a non-binding guideline or recommendation. The Divisional Court stated (*Dr. Luchkiw v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 5738 at para. 65):

> I am satisfied that guidelines, such as those established by NACI and the MOH, inform the standard of practice and may be considered by the ICRC when determining whether a physician's conduct exposes or is likely to expose a patient to harm and/or injury: *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, at paras. 16, and 17.

[23] To similar effect, see the Divisional Court decisions in *Sigesmund v. Royal College of Dental Surgeons of Ontario*, 2005 CanLII 27325 at para. 30, and *Pitter v. College of Nurses of Ontario*, 2022 ONSC 5513 at para. 28.

[24] There is no basis to dismiss the referrals merely because the College may rely on non-binding statements in the merits hearing.

THE ICRC'S AUTHORITY TO REFER THESE ALLEGATIONS TO THE TRIBUNAL

[25] The moving parties' secondary argument about statutory authority is that these allegations cannot proceed before the Tribunal because the referral relies on actions of the Registrar, who exceeded her jurisdiction and authorized overly broad "fishing expeditions." The investigations have in fact concluded, the ICRC has referred the allegations to this Tribunal and there is in fact no evidence that anything improper took place during the investigations.

[26] We will nevertheless make brief reference to the Registrar's actions in these cases.

[27] The Registrar issued a formal AOI in each case under s. 75(1)(a) of the Health Professions Procedural Code, Schedule 2 to the *Regulated Health Professions Act*, *1991*, SO 1991, c. 18 (Code) stating that she had "reasonable and probable grounds" to believe that the member had committed an act of professional misconduct or is incompetent. The ICRC is a statutory committee of the College that approved each appointment.

[28] Section 76 of the Code gives the investigator the power to "make reasonable inquiries" of the member "on matters relevant to the investigation," and to "enter at any reasonable time the place of practice of the member and may examine anything found there that is relevant to the investigation." The section also requires the physician to cooperate fully with the investigator and not to obstruct the investigation. As the Court of Appeal has stated, these investigative powers are given a "broad and purposive interpretation to enable an investigator to carry out his or her duty to investigate" (*Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para. 99).

[29] The ICRC then considered the information and referred the allegations that are now before this Tribunal.

[30] There is no merit in the argument that the Registrar exceeded her jurisdiction by failing to meet the standard of "reasonable and probable grounds." Following the standards set by the Court of Appeal in *Sazant*, the AOI documents contain a brief description of the acts of professional misconduct that she believes were committed, and we have considered the material provided to us by the College that was put before the Registrar. In our view, the scope of the investigations, the validity of the appointments and the existence of reasonable and probable grounds are evident.

[31] Indeed, in her judicial review application, Dr. Luchkiw argued:

> "…that the investigation was unlawful because of fatal defects in the investigation orders and the College's lack of authority to regulate medical exemptions. She states that she was under no obligation to co-operate with an unlawful investigation…" (para. 66)

[32] Therefore, she made the same argument as she put forward before us: there were no reasonable and probable grounds, and the Registrar empowered the investigators to engage in a "fishing expedition" (para. 56).

[33] While this "backdoor" attack in an application challenging her suspension was premature, the Divisional Court nevertheless ruled at para. 60 that the Registrar had reasonable and probable grounds for believing Dr. Luchkiw had committed an act of professional misconduct or incompetence:

> Before the investigators were appointed, the College received multiple reports of issues with respect to Dr. Luchkiw's IPAC practices and the suspicion that she may have issued a vaccine exemption to an immunocompromised patient. The multiple reports provided the grounds to justify the appointment of the investigators.

[34] The Divisional Court's conclusion is persuasive, and we have not been given any basis to refuse to follow it.

[35] The obligation of Drs. Trozzi and Phillips to cooperate with the investigators under their AOIs was also the subject of a judicial decision in which the College applied to the Superior Court and obtained an order under s. 87 of the Code directing them (and one other member) to comply with their obligations under s. 76 (*College of Physicians and Surgeons of Ontario v. O'Connor*, 2022 ONSC 195). Again, the validity of the AOIs was directly in issue.

[36] Justice Morgan stated:

> [1] The three Respondents in this set of Applications are physicians who believe that vaccinations are a misguided and ineffective way to address the ongoing health issues caused by COVID-19. Although the specifics of each of their cases differ somewhat, they are each under investigation by the Applicant for their conduct and practices in acting on this belief.
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> [2] None of the Respondents [is] prepared to cooperate in the usual way with the Applicant's investigation. They are each of the view that the investigation and the disclosure and production requirements that accompany an investigation amount to an abuse of the regulator's power….
>
> [5] In the words of the formal Appointment of Investigator documentation, the inquiries were to examine each of the Respondents' practices "including in relation to COVID-19 and [his or her] completion of medical exemptions for COVID-19 vaccinations

> and diagnostic testing". For the Respondent, Patrick Brian Phillips, the Applicant had an additional concern regarding his use of online websites and social media to disseminate what the Applicant characterized as misleading health information about COVID-19, as well as his posting on social media, copies of what were supposed to be confidential communications from the Applicant. The Appointment of Investigator in respect of Dr. Phillips mandated the investigator to investigate his medical practice "including in relation to communications and conduct relating to the COVID-19 pandemic".
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> …
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> [23] The record demonstrates through correspondence and other statements that the Respondents have no intent to provide the requested documents or to otherwise cooperate with the investigator. Their communications to the Applicant indicate that they are not prepared to respond to the matters that the investigator is investigating.
>
> [29] The Respondents are all in continual breach of their obligations under the Code. They have put forward no reason for their refusal to comply with their obligations in this regard, except to reiterate their objection to vaccines. As indicated, what the investigator seeks is production of records; the investigation does not seek to compel vaccinations or any other specific medical treatment. Accordingly, the Respondents' position is unresponsive to the investigator's request and their argument about the efficacy or inefficacy of COVID vaccines is a *non-sequitur*.

[37] In our view, the Superior Court's rulings on these contested applications leave no room for the three moving parties to argue that the College lacks statutory authority to proceed with the Tribunal applications that have resulted from the investigations in question.

THE PHYSICIANS' CONSTITUTIONAL ARGUMENTS

[38] In the decisions referred to above, the courts noted these physicians' argument that the College's investigations violated their *Charter* rights.

[39] Justice Morgan, for example, recapped the *O'Connor* court application and noted at para. 20 that Drs. Trozzi and Phillips and the other physician had put forward a *Charter* defence but did not pursue it when the College's application came on for hearing.

[40] The Divisional Court, in the *Luchkiw* judicial review, considered the physician's argument that the ICRC decision was unreasonable because it failed to consider her s. 2(b) *Charter* argument. The court held that this was not a central issue to which the ICRC was obliged to respond in its decision.

[41] At the motion before us, the moving parties again did not pursue their *Charter* argument. In this case, their counsel said he was shocked to read in the College's factum that its "main defence" was that the Statements are only guidelines. The result, he argued, was that the College had removed the basis for his clients' *Charter* challenge on this motion. He nevertheless put forward what he called "hypothetical" constitutional arguments and told us we had to "take the bull by the horns" and could not defer a decision under the *Charter* to the panel that conducts the merits hearing.

[42] The College's position is twofold. First, the Statements, which are attacked as breaches of s. 2(b) and s. 7 rights, do not have the force of law and are not subject to *Charter* review. Nevertheless, these Statements can be considered by the panel hearing the professional misconduct allegations against the physicians.

[43] Therefore, with the exception of the physicians' "hypothetical" arguments, which we do not need to address, the parties before us again made common cause in submitting that a *Charter* ruling should not be made on this motion. In that sense, the argument is premature.

[44] For clarity, we will address the status of the physicians' *Charter* arguments at this point.

[45] In the *Turek* decision, the applicant made similar submissions to the ones before us on this motion. She argued that the College was attempting to regulate free speech, and the College's Statement on misinformation (one of the Statements at issue in this motion) violated the *Charter* and should be declared unconstitutional and invalid. The Divisional Court held:

> [13] …[T]he Statement that the College issued on April 30, 2021 is not an instrument that can attract a declaration of invalidity. It is a guideline and a recommendation only. As such, it is not binding on any tribunal that may consider the matter further. The Applicant is not being investigated for breaching or violating the Statement; she is being investigated for professional misconduct and/or

> incompetence. If there is a hearing on the merits, and the Respondent College takes a position similar to the one outlined in the Statement or relies on the Statement, at that point the tribunal hearing the merits will have an opportunity to consider and rule upon whether the position taken in the Statement constitutes an unconstitutional violation of the Applicant's free speech rights.

[46] The Divisional Court's reasoning is consistent with the Supreme Court jurisprudence in a different context on *Charter* review of guidelines that do not have the force of law: they are not subject to *Charter* scrutiny in the abstract, but "are capable of informing the debate as to whether a Crown prosecutor's conduct was appropriate in the particular circumstances": *R. v. Anderson*, 2014 SCC 41 at para. 56.

[47] In our view, and in light of the conclusion we reached earlier about the proper characterization of the Statements before us, the Divisional Court's conclusion in *Turek* applies equally to all four of the guidelines. Thus, the College stated the following for the record when these allegations go to a merits hearing.

[48] If the College relies on these Statements at the merits hearing, the members can argue that the panel has to apply a constitutional analysis to determine whether and to what extent the Statements can support findings of professional misconduct. The panel at that point may need to determine the proper methodology – the *Doré/Loyola* analysis (*Doré v. Barreau du Québec*, 2012 SCC 12 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12) or the *Oakes* test (*R. v. Oakes*, 1986 CanLII 46 (SCC)) – to assess the alleged *Charter* infringement, having regard to the Court of Appeal's reasons in *Christian Medical and Dental Society of Canada* (see for example, paras. 37, 58 and 60).

CONCLUSION

[49] The physicians' motion is dismissed. The Tribunal Office will schedule a CMC to set hearing dates. This panel is not seized of any of these cases.