

## ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

**Citation:** *College of Physicians and Surgeons of Ontario v. Kustka*, 2025 ONPSDT 7

**Date:** March 5, 2025

**Tribunal File No.:** 23-009

### BETWEEN:

College of Physicians and Surgeons of Ontario

**College**

- and -

Sonja Sophia Kustka

**Registrants**

### FINDING REASONS

**Heard:** December 19 & 20, 2024, by videoconference

#### **Panel:**

Sherry Liang (panel chair)

Madhu Azad (physician)

Veronica Mohr (physician)

Rob Payne (public)

Linda Robbins (public)

#### **Appearances:**

Sayran Sulevani and Elisabeth Widner, for the College

Paul Slansky, for the registrant

### RESTRICTION ON PUBLICATION

Pursuant to Rule 2.2.2 of the OPSDT Rules of Procedure and ss. 45-47 of the Health Professions Procedural Code, no one shall publish or broadcast the names of patients or any information that could identify patients or disclose patients' personal health information or health records referred to at a hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this restriction.

## Introduction

[1] In late 2021, a member of the public made a report to the College of Physicians and Surgeons of Ontario (the College) about exemptions from COVID-19 mask requirements that the registrant gave to two patients. The College initiated an investigation into the registrant's conduct in February 2022, but the registrant has refused to provide the information sought by its investigator. As a result, the College has been unable to complete its investigation.

[2] The College then initiated an investigation into the registrant's failure to cooperate, which led to these proceedings. The College alleges that the registrant has breached her statutory duty to cooperate with its investigation by, among other things, failing to provide information, records and documents as requested and breaching an interim order made under s. 25.4 of the Health Professions Procedural Code, Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c. 18. The College asserts that the registrant's actions amount to professional misconduct and is conduct that members of the profession would reasonably regard as disgraceful, dishonourable or unprofessional.

[3] The registrant takes the position that the College's demand for information is unlawful. Even if this Tribunal does not find the demand is unlawful, she states that her non-compliance is not professional misconduct because she is acting on a good faith belief that the demand is unlawful. In any event, she maintains her non-compliance is not disgraceful, dishonourable or unprofessional conduct.

[4] For the reasons below, we are satisfied that the Tribunal has already ruled on the lawfulness of the College's demand for information and the registrant cannot seek to re-litigate those findings before this panel. We find that she has failed in her statutory duty to cooperate with the investigation, failed to respond appropriately or within a reasonable time to a written inquiry from the College and, in failing to provide information required under an interim order, contravened a term, condition or limitation on her certificate of registration. Her actions amount to conduct that members of the profession would reasonably regard as disgraceful, dishonourable or unprofessional.

## **Background**

[5] The parties provided the panel with an Agreed Statement of Facts on Liability. Those facts were supplemented by the registrant's oral evidence. The registrant also provided other documents, not as proof of facts set out in the documents, but for the purpose of showing positions she has taken in related proceedings.

[6] It is not in dispute that in late 2021, a member of the public, a Girl Guide leader, made a report to the College about mask exemptions the registrant had provided to two sisters. Just before this report, the College had also received a complaint from another individual about a prescription for ivermectin that the registrant had given the individual's deceased mother, who had tested positive for COVID-19.

[7] The College initiated investigations after receiving these two reports. With respect to the report from the Girl Guide leader, the College's Registrar signed a memorandum, addressed to the Inquiries, Complaints and Reports Committee (ICRC), stating that she "formed the opinion on reasonable and probable grounds that Dr. Kustka, in her general medicine practice and in her conduct, including her care and conduct in relation to the COVID-19 pandemic, her completion of medical exemptions from mask requirements and her prescribing of Ivermectin for COVID-19, has engaged in professional misconduct or is incompetent". The ICRC approved of the Registrar's appointment of investigators and the Registrar appointed investigators to investigate the registrant's conduct in relation to the above matters.

[8] The College dealt with the complaint from the daughter of the registrant's deceased patient in a separate investigation. The registrant provided the College with documentation relating to the deceased patient and advised the College that she would no longer prescribe ivermectin for patients with COVID-19. The ICRC resolved this complaint in May 2023 with a caution and undertaking from the registrant to participate in professional education, among other things.

## Notice of investigation and demand for documents

[9] The College's investigator notified the registrant of the Exemptions and Prescribing Investigation on February 25, 2022 and requested the following information and documents:

- Completion of a Physician Practice Questionnaire and Electronic Records Questionnaire;
- A list of all patients, in specified chart form, to whom she has: (1) provided COVID-19 related medical exemptions (Vaccine, Masks, Testing) and (2) prescribed Ivermectin; and
- A complete copy of each identified patient's medical record.

[10] Following notification, the College sent repeated requests for the documents and information outlined above. In a telephone call with the College investigator, the registrant's then-counsel stated that the registrant did not want to provide the records for patients she provided exemptions for unless she could redact their names and identifying information at the request of her patients. The College investigator advised that the complete records would need to be provided with no redactions.

[11] A few weeks later, the registrant advised the College, through new counsel, that "[b]ased primarily on her concern for her patients' privacy and privilege rights, Dr. Kustka will not be providing patient names, contact information or files in respect of masking exemptions, ivermectin prescription or any other covid exemptions (without admitting that any exemptions or prescriptions were issued)." The registrant has not, at any time, provided the requested charts to the College, in any format. She has not provided a list of patients to whom she provided COVID-19 related medical exemptions or to whom she prescribed ivermectin. Nor, since she has not provided those lists, has she provided any medical records for any patients.

[12] On May 2, 2022, the ICRC reviewed the Exemptions and Prescribing Investigation and issued an interim order under s. 25.4 of the Code, prohibiting the registrant from providing medical exemptions in relation to mask requirements for COVID-19 or prescribing ivermectin. The order also included terms and conditions intended to monitor compliance with the prohibitions.

### Non-compliance with interim order

[13] Among the monitoring conditions in the interim order were requirements that the registrant provide details of each of her practice locations and office hours, together with the name of each Medical Director/Chief of Staff; consent to make appropriate inquiries to OHIP to monitor her compliance with the interim order; and provide a log of all professional encounters with patients (“the Patient Log”). The interim order set out the information required with respect to each patient. College counsel wrote to the registrant’s counsel confirming that the registrant was “not entitled to withhold, redact or de-identify patient charts or other records that may be required for the purpose of monitoring her compliance with the order.”

[14] The registrant responded that she would: fully comply with the prohibitions regarding masking exemptions and ivermectin prescriptions; not comply with the signing of a release of OHIP billings; based on her patients’ objections, only identify patients by initials, age and gender; and only make available redacted monitoring sub-files for each patient, editing out all personal identifiers. By letter the same day, the registrant provided her practice address, stated this was her only work location and stated she had no Medical Director/Chief of Staff.

[15] The registrant also provided an anonymized Patient Log that included patients’ initials, age, sex and reason for visit. The College’s Compliance Case Manager responded by advising that anonymized Patient Logs were not acceptable and reiterating the requirement that OHIP consent be provided. The registrant continued to send biweekly anonymized Patient Logs to the College. Each time, the College responded by advising that anonymized Patient Logs were not acceptable and that the registrant was required to comply with the interim order.

### Inspections of the registrant’s office

[16] In July 2022, College staff attempted to perform an unannounced inspection of the registrant’s practice location, as permitted by the interim order. The door was locked. When the Compliance Case Managers knocked, a woman answered the door. The College explained why they were there and that the interim order permitted them to perform an unannounced compliance visit. The Compliance Case Managers were not permitted to enter. The registrant was not on the premises at this time.

[17] In October 2022, College staff again attended the registrant's office. This time, they were permitted to enter. They asked to see five patient records and, for each patient selected, the registrant provided an envelope containing an anonymized encounter note.

#### The failure to cooperate investigation and referral to hearing

[18] In June 2022, the ICRC approved the Registrar's appointment of investigators under s. 75(1)(a) of the Code to investigate the registrant's cooperation in relation to the Exemptions and Prescribing Investigation and her compliance with the interim order. The ICRC referred to the Discipline Tribunal in May 2023 the allegations of professional misconduct before this panel. As of the date of the referral, the College has been unable to complete the Exemptions and Prescribing Investigation due to the registrant's refusal to comply with the investigation and the investigation is therefore on hold, pending her cooperation.

#### Court proceedings

[19] In May 2022, the registrant initiated a judicial review application challenging the lawfulness and constitutionality of the Exemptions and Prescribing Investigation, including the reasonable and probable grounds (RPG) for the investigation and the appointment of investigators. She initiated a second judicial review application to challenge the ICRC's interim order. The Divisional Court dealt with these together.

[20] The Court released its decision dismissing the registrant's application for judicial review in April 2023 (*Kustka v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 2325) (*Kustka* ONSC 2023). The registrant's motion to appeal this decision was dismissed by the Court of Appeal in October 2023.

[21] In its decision, the Divisional Court found the registrant's challenge to the appointment of investigators and interim order to be premature and that the registrant should raise these issues before this Tribunal. However, the court made certain observations about the merits of the registrant's position on the issues. It reviewed the information that was before the Registrar when she determined there were reasonable and probable grounds to appoint investigators and found this information "sufficiently detailed as to be beyond mere suspicion." The court concluded that it "was reasonable for the Registrar to conclude that the test to appoint investigators was met" (para. 38).

[22] The court also rejected the registrant’s contention that the Registrar and ICRC impermissibly relied on policy documents and a regulation in their decision-making (para. 39). It found that the ICRC had good reason to impose monitoring obligations given the registrant’s failure to cooperate with the College’s investigation, stating:

Dr. Kustka had an obligation under s. 76(3.1) of the Code to “co-operate fully” with the CPSO’s investigation. Her refusal to do so has escalated this litigation and delayed the proceedings before the CPSO (para. 42).

[23] In its decision, the Divisional Court also gave reasons for its decision to quash proceedings brought by some of the registrant’s patients, in which the patients challenged the College’s ability to obtain their medical records without their knowledge and consent and argued that the investigation violates their rights under ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. The court, at para. 17, referred to *Kilian v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 1654 (*Kilian* ONSC 2023) in which a judge rejected a challenge by patients to the College’s ability to obtain their medical records during an investigation.

[24] In *Kilian* ONSC 2023, the judge held that the expectation of privacy in medical records is subject to the higher need to maintain appropriate standards in the profession, noting that patient records are protected by the requirement that the College maintain their confidentiality under s. 36 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18. In *Kustka* ONSC 2023, the court concluded that “courts have rejected the argument that patient-physician privilege precludes an order requiring the production of patient records” (para. 17). It also found that the patients’ claims under ss. 7 and 8 of the *Charter* were “fatally flawed” because patients have no reasonable expectation of privacy against a medical regulator accessing patient records and because the ICRC’s interim order does not affect the patients’ choice of medical treatment or bodily autonomy (para. 21).

#### Motion for a stay

[25] The final piece in the background to this case is the registrant’s pre-hearing motion to a panel of this Tribunal for a stay of proceedings. As will be discussed below, we find that the panel hearing that motion has decided the registrant’s challenges to the lawfulness of the investigation and associated demand for documents and information

(*College of Physicians and Surgeons of Ontario v. Kilian*, 2024 ONPSDT 23) (*Kilian* ONPSDT 2024). The registrant cannot relitigate those issues.

### **The Tribunal found that the investigation and demand are lawful**

[26] In response to the allegations that the registrant has failed in her statutory duty to cooperate with the College's investigation and failed to comply with the terms of the interim order, the registrant takes the position that the College's demands are unlawful and she is under no obligation to comply with an unlawful demand. She asserts that the ICRC's decision to investigate and therefore the associated demand is unlawful because:

- It is based on an allegation of a failure to comply with non-binding policy, which cannot by itself constitute misconduct.
- The grounds presented to the ICRC did not meet the standard of "reasonable and probable grounds."
- The ICRC and the Registrar failed to provide a description of the RPG as required by the Court of Appeal in *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727.
- The Code does not allow for the privilege or privacy rights of patients to be overridden by the College's search powers.

[27] We are satisfied that the issue of the lawfulness of the investigation and associated demand for information has been determined and the registrant cannot seek to relitigate this before the hearing panel. In *Kilian* ONPSDT 2024, this Tribunal dismissed the pre-hearing motion of this and another registrant to stay their discipline proceedings. In the motion, the registrant relied on all the arguments she has made to the current panel. The panel considered her arguments and dismissed the registrants' motions. The panel rejected their arguments and concluded that "[t]he registrants were required to respond to their regulator's request for records of their work in the regulated practice of medicine" (para. 54).

[28] In its reasons, the panel rejected each of the grounds on which the registrant sought to challenge the lawfulness of the investigation and demand. With respect to the allegation that the investigation was unlawful because it was based on an allegation of a

breach of a non-binding policy, the panel stated that “[a]rguments like these have been rejected on multiple occasions” (para. 44) and adopted the reasoning in other decisions in which this issue was considered, both at the Tribunal and in the Divisional Court: *Kilian v. College of Physician and Surgeons of Ontario*, 2022 ONSC 5931 (Div. Ct.); *Kustka* ONSC 2023; *College of Physicians and Surgeons of Ontario v. O’Connor*, 2022 ONSC 195; *College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 2; and *College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 7.

[29] The panel also dismissed the argument that the appointment of investigators failed to provide a description of the RPG, stating that “the scope of the investigation was clearly defined in the appointments” (para. 47).

[30] With respect to the registrant’s assertion that the grounds presented to the ICRC did not meet the RPG standard, the panel rejected the notion that the Tribunal should place itself in the position of the Registrar or the ICRC and consider this question anew. Based on its interpretation of the Code, as informed by institutional and policy considerations, the panel concluded that a registrant facing an allegation of failure to cooperate can contest the decision to authorize the investigation, but only on the basis of limited grounds. The panel referred to the wording in s. 75(1), providing that the Registrar “may” appoint investigators where “the Registrar believes” there are reasonable and probable grounds. It stated that

properly interpreted... s. 75(1)(a) leaves the determination of whether there are reasonable and probable grounds to the Registrar, and the review of that decision to the ICRC. It does not make discipline hearings about failure to cooperate a third stage of decision making (para. 35).

[31] The panel referred to the different institutional roles assigned to the Registrar, the ICRC and the Tribunal in the investigation and adjudication of professional misconduct and the need to interpret legislation so that professional regulators have “sufficiently effective means at their disposal” to conduct effective investigations (para. 39). It adopted the approach taken by the Law Society Tribunal in similar circumstances (see *Law Society of Upper Canada v. Cusack*, 2016 ONLSTH 7) and found that, in considering arguments that the Registrar did not have reasonable and probable grounds, the Tribunal considers only whether they were in “bad faith, an abuse of process, for an improper purpose or clearly wrong” (para. 43).

[32] Applying this standard, the panel concluded that “[t]here is no basis to find that the Registrar’s decisions to appoint investigators was in bad faith, an abuse of process, for an improper purpose or clearly wrong.” Having regard to the information before the Registrar, the panel found her decision that there were reasonable and probable grounds for the investigation to be “logical and reasonable” (para. 51). We see no reason to revisit the panel’s finding and reasoning on this issue.

[33] Finally, the registrant argues before us that the Code does not allow for the privilege or privacy rights of patients to be overridden by the College’s search powers. Again, the motion panel addressed this argument in its reasons. It referred to the decision in *College of Physicians and Surgeons v. SJO*, 2020 ONSC 1047 in which the court “emphasizes that physicians and patients cannot expect medical records to be kept confidential from the regulator and there is no physician-patient privilege in relation to the College” (para. 28). The panel also relied on *College of Physicians and Surgeons of Ontario v. Kilian*, 2023 ONCA 281, in which a motion judge of the Court of Appeal held that patients have no “reasonable expectation of privacy in health records which can be asserted as against a regulator seeking access to those records for the purpose of investigating a physician” (para. 15). This conclusion was re-affirmed by a three-person panel of the same court in *College of Physicians and Surgeons of Ontario v. Kilian*, 2024 ONCA 52, at para. 48 (*Kilian* ONCA 2024). This panel sees no reason to revisit the conclusions and reasoning of the motion panel on this issue.

[34] The registrant submits that the motion panel only considered her arguments about the unlawfulness of the College’s demand on limited grounds and that this panel must determine whether the request was unlawful on other grounds not addressed by the motion panel. Specifically, she states that the motion panel did not address her arguments that the demand was unlawful because it was arbitrary, unfair or in excess of jurisdiction.

[35] We reject the submission that the motion panel did not address all of the registrant’s challenges to the lawfulness of the appointment of investigators or request for documents. Nothing in the motion panel’s reasons suggests that it left some of the registrant’s arguments for this panel to deal with. Nothing could be clearer than the panel’s introduction, at para. 4, in which it states:

In this motion, the physicians put forward a host of reasons why they say they should not have to share records of their professional work

with the College. These include everything from an assertion that they have a constitutional right to privacy in their patients' records to alleged deficiencies in the wording of the order appointing investigators. They ask that the Tribunal end the proceedings without a hearing. *None of these legal arguments are well founded*, and most are contrary to established principles that the Tribunal must follow, some decided in previous court decisions involving Drs. Kilian and Kustka. We therefore dismiss the motion. [emphasis added]

[36] The motion panel concluded for the reasons described above that it should approach its review of the Registrar's decision that reasonable and probable grounds exist with deference and consider only whether her decision was made in bad faith, an abuse of process, for an improper purpose or clearly wrong. It concluded, at para. 51 of its reasons, that "there is no basis to find that the Registrar's decisions [with respect to this and the other registrant] to appoint investigators was in bad faith, an abuse of process, for an improper purpose or clearly wrong."

[37] While the motion panel did not explicitly address all the registrant's arguments about why the material before the Registrar did not support a finding of reasonable and probable grounds, its conclusion that the Registrar's decision was "logical and reasonable" can only be read as rejecting those arguments. We find that the motion panel's analysis disposes of the arguments made to this panel that the information before the Registrar did not meet the RPG standard. We do not accept the registrant's contention that the motion panel left additional review of the Registrar's decision that RPG exists to this panel. A further review of the Registrar's decision would be inconsistent with the motion panel's careful analysis of the role of the Registrar, the ICRC and the Tribunal under the Code, an analysis with which we agree.

[38] We also reject the registrant's submission that this approach "abdicates" the authority of this Tribunal to determine whether a defence is made out. First, it is well-established in administrative law that different standards of review of decision-making may apply depending on the statutory and institutional context. A court does not "abdicate" its responsibilities simply by applying deference to its review of a tribunal's decision. The Tribunal does not abdicate its responsibilities by applying deference to its review of the reasonable and probable grounds before the Registrar.

[39] Second, the motion panel's reasons apply to the Registrar's determination that RPGs exist. It does not preclude the registrant from raising other challenges to the lawfulness of the investigation and demand. She has done so and, as we set out above,

the motion panel dismissed all those challenges. Third, it does not prevent the registrant from raising the defence before this panel that her refusal to cooperate with an investigation that she believes in good faith to be unlawful is a defence to the allegation of misconduct. We now turn to this defence.

**The registrant's belief that the investigation is unlawful is not a defence to the allegation of misconduct**

[40] The registrant testified about the reasons that led her to refuse the College's demand. Essentially, she believed that its demand for records that included her patient's information was unlawful, overly broad and unnecessary for the purpose of its investigation.

[41] The registrant testified that she cooperated with some of the College's requests and complied with some parts of the interim order. She stated that even before the ICRC issued the interim order prohibiting her from prescribing ivermectin, she voluntarily agreed not to do so. She complied with the other practice restrictions contained in the interim order. She also provided to the College the medical records relating to a patient to whom she prescribed ivermectin.

[42] The registrant also testified that from the beginning, she offered to provide the College with all the records sought, as long as she could redact information revealing the patients' identities. Although she felt that the demands were unlawful for reasons beyond her patients' privacy rights, she was willing to provide anonymized records as a compromise, to demonstrate her willingness to cooperate. If the College's review of those records raised concerns about a particular patient's well-being, she would have been willing to provide non-redacted records for that patient.

[43] The registrant held the view that redacted records would have met the College's purpose of identifying any issues with respect to her competence. She also believed that some of the information sought under the ICRC's interim order, such as the patient logs and OHIP records, were not relevant to monitoring compliance with the order. That, as well as her concern for her patients' privacy, led to her refusal to comply fully with the terms of the order.

[44] The registrant testified about the College's attempt to perform an inspection as provided for in the interim order. As described above, the College attempted an unannounced inspection of the registrant's office in July 2022. The office was locked and the College staff were refused entry by an individual who answered the door. The registrant testified that she had advised the College that she wished to be present for any inspection and she was away on vacation at this time. She learned of the attempted inspection after it occurred, from her employee. The College returned on a later date and at that time she allowed its staff to enter but provided them with only redacted patient records.

[45] The registrant testified that she generally agrees that the College has the authority to regulate the medical profession and that, apart from her specific objections in this case, she has always cooperated with it. She states that she has never ignored a communication from the College and has always responded promptly. As examples of her cooperation, she cited her decision to stop prescribing ivermectin to patients and her release of records to the College relating to a patient to whom she prescribed ivermectin. She described the resolution of the complaint relating to this patient, which resulted in her receiving a caution from the ICRC and her undertaking, which she fulfilled, to complete specified education.

[46] Beyond the registrant's oral evidence, her written submissions state that the reasons for her beliefs the demands are unlawful are set out in those submissions, as well as her court pleadings and factums. Based on this background, she argues that she has promptly responded to the demand and, in good faith, honestly and openly advised the College that she believes the demand is unlawful and explained why. She has also sought to have the issue determined in the courts. In these circumstances, in her submission, her actions are not professional misconduct.

[47] For the reasons below, we do not accept the registrant's position and find that the College has proven the allegations of misconduct.

The duty to cooperate is an essential tool for the College in protecting the public

[48] As the College submits, membership in a regulated health profession is a privilege, conferred by statute, where the member establishes that they possess the necessary qualifications, and undertakes to abide by the governing regime. The Supreme Court has long recognized the crucial role of self-regulation of the health

professions and the onerous responsibility placed on health regulatory colleges to ensure the public interest is protected. In light of this onerous responsibility, there is a corresponding need to ensure that the self-regulatory bodies are not unduly restricted in carrying out this important task, and that they have “sufficiently effective means at their disposal” to gather relevant material (*Pharmascience Inc. v. Binet*, 2006 SCC 48 at paras. 36-37; *Rocket v. Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC) at p. 249).

[49] Registrants have an obligation under s. 76(3.1) of the Code to “co-operate fully with a College investigator”. It is professional misconduct, under s. 1(1)30 of Regulation 856/93 made under the *Medicine Act, 1991* (the professional misconduct regulation), to fail to respond appropriately or within a reasonable time to a written inquiry from the College. The duty to cooperate has been described by the Tribunal as “an essential tool for the College to fulfill its primary objective of protecting the public interest” (*College of Physicians and Surgeons of Ontario v. Chandra*, 2018 ONCPSD 28, at p. 28). Further, as the Tribunal stated in *College of Physicians and Surgeons of Ontario v. Trozzi*, 2024 ONPSDT 2, at para. 22, a registrant’s willingness to be governed is key to maintaining public confidence:

A registrant’s willingness to be governed by the College is key to maintaining public confidence in the profession and in the College’s ability to govern the profession in the public interest. As the Tribunal stated in *College of Physicians and Surgeons of Ontario v. Savic*, 2019 ONCPSD 40 at p. 22, “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.”

#### The mandatory nature of the duty to cooperate

[50] A registrant is required to cooperate despite and pending any legal challenge to the College’s investigation. This principle is well-established and recently confirmed by the Court of Appeal in *Kilian* ONCA 2024, at paras. 30-34:

...As the application judge correctly noted, Dr. Kilian is required to comply with the law pending any challenge to it.

....

...noncompliance while a challenge is pending “would substantially undermine the effective and efficient regulation of health care professionals”. As the College notes, it would allow a physician “to

engineer premature judicial review simply by refusing to cooperate with an investigation and waiting for the regulator to commence a s. 87 application. This would simply be a different way to fragment administrative proceedings.”

[51] The motion panel in this proceeding rejected this registrant’s submission that she could “refuse to cooperate with impunity” until allegations of misconduct are referred to the Tribunal, the Tribunal makes a decision and appeals are exhausted, stating that

[a] registrant who refuses to cooperate on the basis the appointment of investigators or a request for information is invalid takes the risk of a finding of professional misconduct if their arguments are not accepted (para. 36).

#### Mistake of law is not a defence

[52] The registrant argues even where a challenge to the lawfulness of the investigation fails, the refusal to comply is not misconduct if it was based on a sincerely held belief about the law. She relies on the decision in *Groia v. Law Society of Upper Canada*, 2018 SCC 27 in support of her submission.

[53] We do not agree that the *Groia* decision applies to the circumstances before us. In *Groia*, the Supreme Court found unreasonable a finding of professional misconduct based on incivility, when a lawyer’s actions were based on a genuine mistake of law in advocating for a client. We agree with the Court of Appeal in *Law Society of Ontario v. Diamond* 2021 ONCA 255, when it states that the duty to cooperate has “nothing to do” with the overarching policy considerations in the legal profession discussed in the *Groia* decision (para. 56). In our view, *Groia* must be understood as balancing a lawyer’s duty of resolute advocacy in advancing a client’s right to make full answer and defence with the duty of civility.

[54] The duty to cooperate, by contrast, is situated in the context of the responsibility placed on health regulatory colleges to protect the public interest and the corresponding need to ensure they have sufficiently effective means at their disposal to carry out this responsibility. It is this policy and regulatory context that gives rise to the mandatory nature of the duty to cooperate. To excuse the registrant’s noncompliance because she holds a sincere albeit mistaken belief that the investigation is unlawful would, as the Court of Appeal stated in *Kilian* ONCA 2024, “substantially undermine the effective and efficient regulation of health care professionals” (para. 34). It is not hard to imagine the

harm to the College's mandate of protecting the public if a registrant could bring an investigation to a halt for an indefinite period while bringing legal challenges which are ultimately unsuccessful.

[55] The above principles apply regardless of whether the belief is the registrant's alone or is informed by a legal opinion. In *Trozzi v. College of Physicians and Surgeons of Ontario*, 2024 ONSC 6096, at paras. 85-86, the court stated that

...there is no basis to argue that Dr. Trozzi was free to disregard his obligation to cooperate with the College and produce documents even if a lawyer told him that the charging documents could be void if challenged. The lawyer's opinion, even if stated as a legal fact, is just an opinion...

No law provides that a physician is excused from cooperating with the College on the basis that his lawyer says he has grounds to challenge the investigatory process.

[56] While, in this case, the registrant testified that she acted on the basis of her own views, albeit with input from her counsel, the point is that a physician's subjective belief is not a justification for refusing to cooperate with the College's investigation.

#### The "honest, open and helpful" requirement

[57] Given all of the above, what is required of a registrant in order to fulfill the obligation to cooperate with a College investigation? In answering this question, the Tribunal has found the approach applied to the legal profession under the *Law Society Act*, RSO 1990, c. L.8, to be helpful, since section 1(1)(30) is similar to the Rule of Professional Conduct under the *Law Society Act*, under which a lawyer has the obligation to "reply promptly and completely to any communication from the Law Society in which a response is requested" (Rule 7.1-1).

[58] In *Diamond*, the Ontario Court of Appeal summarized the "good faith" test to be applied in considering whether a regulated professional has failed in their duty to cooperate:

In the end, the test for determining a failure to cooperate with the Law Society's requests, as espoused by the Hearing Division, the Appeal Division, and the Divisional Court, focusses on the determination of a licensee's good faith efforts to cooperate with the Law Society. While articulated slightly differently by the Hearing Division, the Appeal Division, and the Divisional Court, the following considerations emerge

from these decisions: (a) all of the circumstances must be taken into account in determining whether a licensee has acted responsibly and in good faith to respond promptly and completely to the Law Society's inquiries; (b) good faith requires the licensee to be *honest, open, and helpful* to the Law Society; (c) good faith is more than an absence of bad faith; and (d) a licensee's uninformed ignorance of their record-keeping obligations cannot constitute a "good faith explanation" of the basis for the delay.(para. 50) [emphasis added]

[59] We find that the registrant's conduct was not "honest, open and helpful." She has at no time made an effort to comply fully with the College's demand in this investigation. She has refused throughout to identify patients to whom she provided COVID-19 related medical exemptions or prescribed ivermectin and refused to provide medical records of her patients, as requested by the College on numerous occasions. She has also refused to provide the College with the information required under the interim order.

[60] She persists in her refusal despite the Divisional Court's assessment of the merits of her legal challenges (*Kustka* ONSC 2023) and the motion panel's decision affirming the lawfulness of the College's investigation (*Kilian* ONPSDT 2024). To the extent that her noncompliance is based on her belief that she is protecting her patients' privacy interests, repeated and recent court rulings, which have been brought to her attention, have confirmed that those interests do not stand in the way of the College's ability to obtain patient information during an investigation.

[61] This registrant has signalled that she has no intention of complying with the College's demands until she has exhausted legal proceedings. She places her right to pursue those legal proceedings to the end above the College's ability to regulate the profession in the public interest. We find that the registrant cannot profess to cooperate while taking the position that she should be able to pick and choose what information the College is entitled to or needs in order to continue its investigation.

#### Conclusion on allegations of failure to cooperate and failure to comply with interim order

[62] We accept the College's submission that the registrant has not acted responsibly or in good faith to respond promptly and completely to the College's inquiries. She has simply refused to cooperate with the investigation based on her beliefs and opinions. Her actions have impeded the completion of an outstanding investigation and have frustrated the College's ability to monitor her compliance with the interim order. We find that the College has proven the allegation that the registrant failed in her duty to cooperate with

the College's investigation and committed an act of misconduct under s. 1(1)(30) of the misconduct regulation. We also find that the registrant contravened a term, condition or limitation on her certificate of registration by refusing to provide the information required under the interim order and thus committed an act of misconduct under s.1(1)1 of the misconduct regulation.

[63] Given the registrant's testimony, we find the College has not proven that the registrant refused to permit the College's investigators to perform an unannounced inspection in July 2022. Although the interim order requires her to submit to and not interfere with unannounced inspections of her practice locations, her evidence is that she was not aware of the College's attempted entry or the refusal by her staff to permit entry, until after the event. We do not find it established, on the balance of probabilities, that the registrant breached this term of the order.

**The registrant's conduct would reasonably be regarded by members of the profession as disgraceful, dishonourable or unprofessional**

[64] Under s. 1(1)33 of the professional misconduct regulation, an act of professional misconduct includes an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. In *College of Physicians and Surgeons of Ontario v. Kadri*, 2023 ONPSDT 10, at para. 29, the Tribunal found that

...disgraceful, dishonourable or unprofessional conduct is often referred to as a broad catch-all provision and is intended to capture any improper misconduct that is not caught by the wording of the specific definitions of professional misconduct. The conduct does not have to be dishonest or immoral to fall within the definition. *A serious or persistent disregard for one's professional obligations* is sufficient. [emphasis added]

[65] We agree with this approach and apply it here.

[66] The registrant submits that it is not disgraceful or dishonourable to not comply with a demand if it is an unlawful demand or if one believes in good faith that the demand is unlawful, even if that belief is based on an error of law. She also submits that the words "disgraceful" and "dishonourable" connote an element of intentional misconduct, such as dishonesty or flagrant misdeed.

[67] In her submission, unprofessional conduct need not be dishonest, but something more than non-compliance is required. She takes the position that, in the present context, to amount to professional misconduct, the noncompliance must amount to ungovernability.

[68] We agree that the registrant's conduct is not of a kind which would reasonably be considered disgraceful or dishonourable. Further, we find it unnecessary to determine whether her conduct amounts to ungovernability. The cases the registrant referred us to in which the question of ungovernability is addressed occur in a context where a regulatory authority revokes or seeks to revoke a member's right to carry on a profession. *Park v. Royal College of Dental Surgeons of Ontario*, 2021 ONSC 8088, for example, arose out of a dentist's appeal from the penalty of revocation imposed by a discipline committee. In *Mundulai v. Law Society of Upper Canada*, 2014 ONSC 7208 and other cases the registrant cites, the Law Society's discipline tribunal revoked members' licences after finding they were ungovernable.

[69] Nothing in these cases suggests that a finding of ungovernability is required for a determination that the registrant's actions would reasonably be regarded as unprofessional. Applying the approach in *Kadri*, we are satisfied that her conduct demonstrated a "serious or persistent disregard" for her professional obligations and is thus unprofessional within the meaning of this section.

[70] Not every case of noncompliance or a failure to cooperate with a College investigation will lead to a finding under this section. In this case, the noncompliance has persisted for well over two years and despite the Divisional Court's finding that the registrant has a duty to cooperate fully with the investigation and the motion panel's conclusion to the same effect. In the face of her mandatory duty to cooperate and the directions and findings applicable directly to her circumstances, we regard her continuing refusal to provide the information requested to be a "serious and persistent" disregard for her professional obligations.

## **Conclusion**

[71] The College has proven that the registrant failed in her duty to cooperate with its Prescribing and Exemptions Investigation and committed acts of misconduct under ss. 1(1)30, 1(1)33 and 1(1)1 of the professional misconduct regulation. The Tribunal will schedule a hearing to receive the parties' evidence and submissions on penalty and costs.