ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Kilian,* 2025 ONPSDT 14
Date: May 2, 2025
Tribunal File No.: 23-013

BETWEEN:

College of Physicians and Surgeons of Ontario

College

- and -

Rochagné Kilian

Registrant

FINDING REASONS

Heard: January 22 & 23, 2025, by videoconference

Panel:
Sherry Liang (panel chair)
Madhu Azad (physician)
Veronica Mohr (physician)
Lucy Becker (public)
Linda Robbins (public)

Appearances:
Elisabeth Widner and Sayran Sulevani, for the College
Paul Slansky, for the registrant

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Introduction

[1] In September 2021, two individuals made a complaint to the College of Physicians and Surgeons of Ontario (College) about exemptions from the COVID-19 vaccine signed by the registrant. The exemptions did not include any medical explanation as to why the patients should be exempted from COVID-19 vaccines. They contained references to various sources such as the *Charter of Rights and Freedoms* and the Nuremberg Code. In the same month, another individual contacted the College, stating that the registrant was "speaking at anti-vaxx protest rallies and is against the COVID-19 vaccines and the vaccine mandate."

[2] The College initiated an investigation (the "underlying investigation") into the registrant's conduct. For more than three years, the registrant refused to provide any of the information sought by its investigator, only taking steps to answer the College's requests in the late fall of 2024. As a result, as of the date of this hearing, the College has been unable to complete its investigation.

[3] The College initiated an investigation (the "non-cooperation 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. 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.

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

[5] 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 her actions amount to conduct that

members of the profession would reasonably regard as disgraceful, dishonourable or unprofessional.

Preliminary Issue

[6] At the end of the hearing, an issue arose for which the parties provided written submissions after their final arguments. The issue relates to the relevance and admissibility of certain documents submitted by the registrant. We find that the registrant cannot rely on the documents as evidence of any facts. They are only relevant and admissible to the extent they set out the registrant's positions about the lawfulness of the College's investigation.

[7] The background for our ruling begins with the allegations in the hearing and the registrant's defences, as described above. The parties provided the panel with an Agreed Statement of Facts on Liability, which was supplemented by the registrant's oral evidence. The registrant also provided a 3270-page brief titled "Registrant's Record" (Record), containing numerous documents. At the outset of the hearing, after hearing from the registrant and the College, this brief was marked as an exhibit, subject to certain limitations on its use.

[8] In speaking to the proposed use of the Record, the registrant indicated that some of it contains "facta, written submissions and the like" and "any facts asserted in that are not being offered as evidence or for the truth of their contents." Counsel stated that the written submissions are just to indicate positions taken in earlier proceedings. In response, the College indicated that, with the clarification that the Record was not being offered for the truth of its contents, it was not objecting to it being marked as an exhibit.

[9] The Record contains material filed by the registrant in related court and College proceedings. It contains, among other things, a Notice of Application for Judicial Review seeking to overturn the decision of the College's Inquiries, Complaints and Reports Committee (ICRC) to suspend the registrant's certificate of registration and the registrant's affidavit of July 2022 in support of the application. That affidavit included, in turn, an affidavit filed in December 2021 by the registrant in response to the College's earlier application under s. 87 of the Health Professions Procedural Code, Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (Code). This affidavit has numerous exhibits totalling hundreds of pages. Among the topics covered in this affidavit and its exhibits are the dangers of COVID-19 vaccines and the benefits of ivermectin

and other alternative treatments for COVID-19. The exhibits come from a variety of sources.

[10] At the conclusion of this hearing and during his reply submissions, registrant counsel asserted that the registrant's affidavits in the Record were submitted for the truth of their contents. The College objected to this, taking the position that this was contrary to its understanding at the time the Record was made an exhibit. The Tribunal directed the parties to provide written submissions on the admissibility of these affidavits.

The parties' submissions

[11] The College takes the position that it did not object to the registrant filing her Record because it understood that the contents were not being offered for their truth. It was not made clear that three of the affidavits within the 3,270-page Registrant's Record were being offered as factual evidence. It states that, had this been made clear at the outset, College counsel would have objected to the admissibility of these affidavits for the truth of their contents, as they contain discredited claims about COVID-19 vaccine safety and efficacy, suppression of alternative treatments for COVID-19 and alleged widespread censorship of physicians by regulators, all of which are irrelevant to the present proceeding.

[12] The College submits that it did not object to the filing of the registrant's Record, including the affidavit evidence, as it understood that she would use these affidavits to illustrate her motives for not cooperating with the College investigation, consistent with her anticipated evidence. While it does not consider the registrant's motive to be a valid defence against the allegations, it does not object to her presenting this argument in her evidence and her defence.

[13] In the College's submission, debates about COVID-19 science and public health policies during the pandemic are irrelevant to the material issue in this case. This proceeding focuses solely on the registrant's failure to cooperate with the College's investigation. None of the affidavits directly address this issue.

[14] The registrant submits that while the College's consent to the admissibility of the disputed evidence was based on a misunderstanding, it was tendered as "substantive evidence for the truth of the contents to support the good faith of Dr. Kilian and to

expand the record in support of RPG." In her submission, the 2021 affidavit, in particular, explains and supports her thinking as to why there were no reasonable and probable grounds (RPG) to believe that she had engaged in misconduct and is also relevant to her good faith belief that the demand was unlawful. The affidavit explains the *bona fides* of her beliefs and is therefore relevant to good faith.

[15] The registrant states that objections on the basis of relevance to the registrant's oral evidence providing such reasons were made and overruled. The affidavit is merely a more detailed explanation of her reasons.

The affidavits are not admissible for the truth of their contents

[16] Evidence is only admissible in a hearing if it is relevant to a material issue. As described above, this hearing is about the College's allegation that the registrant failed in her duty to cooperate with its investigation. The registrant presents a two-pronged defence to this allegation: the College's investigation and associated demand for information and records are unlawful and she has no duty to cooperate with an unlawful demand and, in any event, she has not committed professional misconduct because she believed in good faith that the demand was unlawful.

[17] Below, we reject the contention that the investigation and demand are unlawful, because the Tribunal has already ruled on this question and the registrant cannot re-litigate it. The registrant's affidavits are not admissible as evidence with respect to the lawfulness of the investigation (including whether reasonable and probable grounds existed) because this question is not before us.

[18] Arguably, to the extent that it records her reasons for resisting the College's requests, the Record is relevant to the registrant's defence that she has acted in good faith. This is consistent with the registrant's explanation at the outset of the hearing of the purpose of these documents. As the registrant states in her written submissions, her position is that she was "trying to protect the rights and privacy of her patients and…she believed that the demands were unlawful…The details of her position were set out in communications to the regulator and in pleadings and facta served on the CPSO and filed in court."

[19] By agreeing to receive the Record, the Tribunal (and the College) accepted the registrant's assertion as to the limited use to which it would be put. This was not an

open-ended invitation to adopt the registrant's affidavits as evidence of the facts set out in them.

[20] Ultimately, the Record added little to the issues before the panel. The registrant gave oral evidence about the reasons for her non-cooperation and was given ample opportunity to explain the basis for her beliefs that the underlying investigation and request for information were unlawful.

Facts regarding non-compliance

The underlying investigation and request for documents and information

[21] Dr. Kilian was notified of the underlying investigation in October 2021. At that time, the investigator requested that she provide information including a complete list of all patients (if any) for whom she had:

- Completed a COVID-19 medical exemption for vaccination;
- Completed a COVID-19 medical exemption for mask;
- Completed a COVID-19 medical exemption for screening/testing;
- Prescribed Ivermectin;
- Prescribed Hydroxychloroquine;
- Prescribed any other treatment or medication for the management/ treatment of COVID-19 that is not currently or was not at the time of prescription recommended by Health Canada.

[22] The College also asked the registrant to provide the complete medical record for each patient listed.

[23] The registrant asked for time to consult with the Canadian Medical Protective Association (CMPA) and her legal advisor and requested that the College forward her the "charge" being made against her. In response, the College sent the registrant the materials that were before the Registrar when she formed reasonable and probable grounds to initiate the underlying investigation.

[24] The registrant then sent the College a letter in which she stated she would not comply with the College's request for records of her patients. She stated, among other things, that the College's materials did not show reasonable and probable grounds , that even if there were RPG she would refuse the request based on her "fiduciary relationship" with her patients and the College needed to show patients' approval to authorize release of their records. The registrant stated she was "committed to cooperate in good faith with this investigation and will do so based upon the law, the tenets of the fiduciary doctor-patient relationship and [her] basic contractual obligations."

Non-cooperation investigation and court proceedings

[25] Following the registrant's refusal to provide the records requested by the College's investigator, the College received further complaints about her conduct. The ICRC imposed interim restrictions on the registrant's certificate of registration prohibiting her from providing various forms of COVID-19 exemptions. Then, in late October 2021, following receipt of additional information, it imposed an interim suspension of her certificate. The College initiated an investigation into the registrant's non-cooperation with the underlying investigation, which led to this hearing.

[26] In late 2021, the College and the registrant began parallel court proceedings. In October, the College made an application to the court under s. 87 of the Code, seeking an order directing the registrant to comply with the underlying investigation. After numerous steps in that proceeding, including an unsuccessful effort by some of the registrant's patients to intervene, the Superior Court granted the College's application in May 2023: *Kilian v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 2689 (*Kilian* 2023 ONSC 2689). In its reasons, the court stated, at para. 35:

> I have no difficulty in concluding that the CPSO has established grounds for a s. 87 order. The request made by the investigator for the records he sought was a proper one given the terms of the investigation ordered by the ICRC. The records sought are relevant to the relatively broad terms of his appointment to assess the Respondent's conduct concerning the COVID-19 pandemic. The Respondent is indisputably refusing to cooperate and has not established any legitimate reason for doing so.

[27] The court also commented on the unduly protracted proceedings, observing that

> …the primary underlying cause has been the Respondent's own scorched earth litigation strategy whereby she and her patients

> have taken every possible procedural step and advanced every imaginable argument to avoid cooperating with the investigation, continuing to do so in the face of a series of adverse decisions. (para. 44)

[28] The Court of Appeal dismissed the registrant's appeal of that decision and, on October 15, 2024, the Supreme Court of Canada dismissed the registrant's application for leave to appeal the Court of Appeal decision.

[29] About a month after the College initiated the s. 87 application, the registrant, along with 37 unnamed patients, brought an application for judicial review of the College's decisions to initiate the investigation, place restrictions on her certificate and suspend her certificate. The Divisional Court quashed the patients' application for lack of standing and dismissed the registrant's application in November 2022: *Kilian v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 5931 (*Kilian* 2022 ONSC 5931). It found the registrant's application to review the College's decision to initiate the investigation to be premature and its decisions to restrict and then suspend her certificate of registration to be reasonable. The Court of Appeal subsequently refused the registrant's motion for leave to appeal the decision of the Divisional Court.

The registrant delivers records to the College's office

[30] Between October 2021 and October 2024, the registrant persisted in her refusal to provide the documents and information in the underlying investigation, despite the College's repeated requests. Following the denial of leave by the Supreme Court of Canada in October 2024, the registrant wrote to the College through counsel indicating that "[i]n light of the SCC's refusal to grant leave to appeal", she was "now in the process of gathering the files to comply with the demand of the CPSO under s. 76 of the Code."

[31] The College responded to the registrant confirming the documents and information sought, enclosing copies of previous correspondence providing the details of its requests and asking that the material be delivered by November 8. On November 1, the registrant sent a letter by email to all patients whose charts she was preparing to provide to the College. In the letter, the registrant advised the patients that the Supreme Court's decision "requires that I hand over all patient files to the CPSO on November 8, 2024."

[32] On November 3, the registrant posted information on her publicly accessible Facebook and Instagram pages stating that, as a result of the Supreme Court dismissing her leave application, 519 patient records "will be handed over to the CPSO at 11am on the 8th of November at 80 College Street, Toronto." The registrant spoke on a podcast and in a video interview, both of which were posted online on November 4, in which she repeated her intent to deliver 519 patient records to the College and provided the time and date of her attendance at the College's office. On November 6, 2024, an article was published in a local newspaper in Owen Sound entitled, "Doctor who spoke out against vaccine mandates will turn over records," stating that the registrant "will hand over 519 patient records on Friday to the College."

[33] At about 11 am on November 8, the registrant and her husband came to the College's office with boxes of patient records. In her evidence, the registrant estimated the volume of records to be over 17,000 pages. In an email from her counsel to the College on the same day, the records were described as the "hard copy original files." Counsel conveyed a request from the registrant that the College copy the portions it required and return the originals to her.

[34] Subsequent correspondence between the College and counsel for the registrant contain varying accounts of what occurred on November 8. It is not in dispute that a patient came to the College's office, apparently objecting to the delivery of her records to the College. It is not in dispute that an individual videotaped the encounter between the registrant and the College's employees.

[35] On November 20, the College was still in the process of copying the files and sent the registrant a request for additional information arising out of the delivery of the files, including details about the registrant's electronic file system. It also asked for confirmation that the records delivered on November 8 comprised all the information requested in the College's original demand. On November 27, the College sent an additional request for information. Among other things, it asked for original copies of certain handwritten notes found amongst the records. It also requested that arrangements be made to give it access to the registrant's electronic records. The College also asked for confirmation as to whether the registrant had prescribed ivermectin, hydroxychloroquine or any other treatment or medical for the management / treatment of COVID-19 that was not, at that time or the time of prescribing,

recommended by Health Canada, information that it had requested at the outset of the investigation.

[36] The College sent additional correspondence on December 19, January 10 and January 17, 2025 to the registrant's counsel, following up on the requests made in the November 27 letter and requesting additional information. Counsel for the registrant later informed the College that the registrant was not aware of the November 27 correspondence until January 16. The registrant's husband sent a response to the January 17 letter on January 20, on the eve of this hearing.

[37] There is inconsistent evidence about whether the registrant has fully answered the requests made in the College's correspondence above. In the ASF dated January 22, the parties agree that, apart from confirming the handwritten notes provided to the College on November 8 were original documents, the documents and information requested in the letter of November 27, 2024, have not been provided. In contrast, the registrant testified that she had satisfied all those requests. As of the date of the hearing, the College's investigation remains open.

The registrant failed in her duty to cooperate with the College's investigation

<u>The duty to cooperate is an essential tool for the College in protecting the public</u>

[38] 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).

[39] 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 investigation and demand are lawful

[40] As described above, the registrant takes the position that the College's investigation and demand 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 assertions of the complainants amounted to uninformed speculation.
    - The policy in respect of vaccine exemptions is unconstitutional as violating the rights of patients under s. 7 of the *Charter* and failure to comply with it cannot give rise to RPG for misconduct.
    - The CPSO, the ICRC and the OPSDT have no authority or jurisdiction to regulate public expression unless it is directly linked to the provision of medical services. If there is no authority or

jurisdiction to regulate public expression, such expression cannot give rise to RPG of misconduct.

- 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.

[41] 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 *College of Physicians and Surgeons of Ontario v. Kilian,* 2024 ONPSDT 23 (Kilian 2024 ONPSDT 23), this Tribunal dismissed the pre-hearing motion of this and another registrant to stay their discipline proceedings. 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).

[42] In the motion, the registrant relied on all the arguments she has made to the current panel. In its reasons, the panel rejected each of the grounds on which the registrant challenged 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* 2022 ONSC 5931; *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.

[43] 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. For Dr. Kilian, it was her public statements and exemptions related to COVID-19)" (para. 47).

[44] 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).

[45] 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).

[46] 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.

[47] The panel also addressed the registrant's argument that the College's vaccine policy amounts to an unconstitutional vaccine mandate which (in her submission) cannot be the basis of a finding of misconduct, finding that: "[w]hether vaccine mandates are unconstitutional does not affect the obligation of registrants to respond in investigations about COVID-related exemption practices and public communication" (para. 45). It also

addressed and rejected her argument that the College has no authority to regulate physicians' expression because it is a matter falling under exclusive federal jurisdiction. The panel also found that whether the investigation into the registrant's communications violates her freedom of expression rights under s.2(b) of the *Charter* is a matter to be determined if allegations about those communications are referred to the Tribunal, not in a proceeding about a failure to cooperate.

[48] 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* 2024 ONCA 52). This panel sees no reason to revisit the conclusions and reasoning of the motion panel on this issue.

[49] 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.

[50] 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]

[51] 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."

[52] 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 RPGs exist 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.

[53] 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.

[54] Second, the motion panel's reasons with respect to deference 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.

[55] 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. For the following reasons, we do not accept this defence.

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

[56] The registrant testified about the reasons that led her to refuse the College's demand. These are also found in her communications to the College. She believed that the College did not have RPG to support its demand. She believed that complying with the demand, without the consent of her patients to release of their records, would violate her relationship with them. Her court pleadings also set out the positions she took in the various court proceedings related to this investigation.

[57] As we describe above, the registrant's challenges to the lawfulness of the investigation have been dismissed by the courts as well as by this Tribunal. She maintains, however, that despite this ultimate lack of success, her good faith belief that the College's actions were unlawful is a defence to the allegation of misconduct.

[58] We do not accept this argument. 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 her own litigation, in *Kilian* 2024 ONCA 52, 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."

[59] 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 at para. 36 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.

Mistake of law is not a defence

[60] 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.

[61] 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 (*Diamond*), 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.

[62] 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 above in *Kilian*, 2024 ONCA 52, "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.

[63] 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...
>
> [86] 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."

[64] 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

[65] Given all of the above, what was required of the registrant in order to fulfill her obligation to cooperate with the College's 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).

[66] In *Diamond,* a case arising out of Law Society proceedings, 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]

[67] We find that the registrant's conduct was not "honest, open and helpful." She plainly refused, over the course of several years, to provide information, records and documents requested by College staff. She refused to identify patients to whom she provided COVID-19 related medical exemptions or prescribed ivermectin or other treatments for COVID-19, and refused to provide medical records of those patients, as repeatedly requested by the College.

[68] As a result, as of the date of this hearing, the College has been unable to complete its investigation, more than three years after it was initiated. The registrant's actions have frustrated one of the core elements of the College's regulatory function, which is to investigate potential professional misconduct pursuant to its duty to regulate the profession in the public interest.

[69] After the Supreme Court of Canada denied leave in the registrant's effort to have the investigation and demand declared unlawful, she stated that she would comply. She announced publicly and repeatedly her intention to deliver the documents at a given time, date and place. She chose to deliver some 17,000 pages of documents in boxes despite having testified during the court proceedings that her patient files were all in electronic format: *Kilian*, 2023 ONSC 2689, at para. 47. We view her actions to be an effort to rouse her patients into attending at the College's offices and create conditions that would interfere with the delivery of the documents. While we were not asked to make a specific finding about this conduct, we question whether the way in which the registrant chose to ultimately respond to the College's demand was fully "honest, open and helpful".

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

[70] 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]

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

[72] 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.

[73] 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.

[74] For the purpose of our finding under s.1(1)(33) of the professional misconduct regulation, it unnecessary to determine whether the registrant's 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.

[75] 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 disgraceful, dishonourable or unprofessional. Applying the approach in *Kadri*, we are satisfied that her conduct demonstrated a "serious or persistent disregard" for her professional obligations.

[76] 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 persisted for over three years. It included a litigation strategy that the court described as "scorched earth." It continued after the Divisional Court's finding (in *Kilian*, 2023 ONSC 2689) that the registrant had a duty to cooperate with the investigation and the motion panel's conclusion in August 2024 to the same effect.

[77] To the extent that her noncompliance was based on her belief that she is protecting her patients' privacy interests, repeated and recent court rulings, some in the very litigation in which she has been involved, have confirmed that those interests do not stand in the way of the College's ability to obtain patient information during an investigation. To the extent that the registrant decided to pursue her right to appeal adverse court rulings, those rulings also made it clear that she has a duty to cooperate pending her legal challenges.

Conclusion

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