

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Luchkiw*, 2023 ONPSDT 14

Date: July 6, 2023

Tribunal File No.: 22-012

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Crystal S. Luchkiw

FINDING REASONS

Heard: May 17 and 19, 2023, by videoconference

Panel:

Ms. Sherry Liang (chair)
Dr. Marie-Pierre Carpentier
Mr. Shahab Khan
Dr. Joanne Nicholson
Mr. Peter Pielsticker

Appearances:

Ms. Elisabeth Widner and Ms. Sayran Sulevani, for the College
Mr. Michael Alexander, for Dr. Luchkiw

RESTRICTION ON PUBLICATION

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

Introduction

- [1] Dr. Luchkiw practises family medicine in the Barrie area. The College's Inquiries, Complaints and Reports Committee (ICRC) referred to the Tribunal allegations that she engaged in disgraceful, dishonourable or unprofessional conduct and/or failed to respond appropriately or within a reasonable period of time to a written inquiry from the College. The College alleges that the member failed to cooperate with its investigations by not providing information, records and documents requested by College staff and refusing to permit College investigators to enter and/or inspect her practice location. The College also alleges that the member contravened a term, condition or limitation on her certificate of registration by breaching the terms of 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 (Code).
- [2] The member did not dispute the evidence about her actions. Her defence to the allegations is that she had no duty to cooperate with the College's investigations because they were initiated without reasonable and probable grounds and seek to regulate matters beyond the College's authority.
- [3] We find that the member has a duty to cooperate with the College's investigation and comply with the terms of the interim order. We are satisfied that the College has proven its case. Accordingly, we find the member has committed professional misconduct and failed to respond to a written inquiry from the College. We also find that she has breached the terms of an interim order.

The member's obligation to cooperate with a College investigation

- [4] As set out in the College's submissions, the Supreme Court of Canada has recognized the crucial role that self-regulated professions play in protecting the public interest. The court observed in *Pharmascience Inc. v. Binet*, 2006 SCC 48 that the "privilege of professional self-regulation...places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public." (para. 36) The court also stated that, in light of this onerous responsibility, there is a corresponding need to ensure that 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 (para. 37).

- [5] The investigative powers granted to the College under s. 75 of the Code are key elements of its regulatory function and are the means by which an investigator gathers relevant material in an investigation. Supporting these powers are ss. 76(3) and (3.1), which place obligations on the College's members with respect to such investigations:

(3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation.

(3.1) A member shall co-operate fully with an investigator.

- [6] In addition, para. 1(1)30 of Ontario Regulation 856/93 made under the *Medicine Act, 1991*, SO 1991, c. 30 (O. Reg. 856/93) provides that it is an act of misconduct to fail to respond appropriately or within a reasonable time to a written inquiry from the College.
- [7] As the Tribunal has stated, every member of the profession is obliged to cooperate with the College in its investigations and to respond appropriately and within a reasonable time to College inquiries when requested to do so. This is part of the responsibility of belonging to an independent, self-regulating body. The credibility of the medical profession, and the College as its regulator, depends on the College being able to investigate complaints or other issue of potential concern and to take appropriate action in a timely way (see *College of Physicians and Surgeons of Ontario v. Hanmiah*, 2022 ONPDST 9 at para. 11).
- [8] On November 10, 2021, the College's Registrar, in response to information received from a public health unit and an individual, appointed investigators to investigate the member's infection prevention and control (IPAC) practices and her communications about the COVID-19 pandemic. On December 6, 2021, in response to information received from a hospital, the Registrar appointed investigators to investigate the member's practice in relation to issuing medical exemptions from the COVID-19 vaccine. Following a series of interactions between the member and the College, the College initiated an investigation on May 4, 2022 into her conduct with respect to those investigations.
- [9] The member asks this panel to find no breach of the obligation to cooperate with the College because the College lacked reasonable and probable grounds to appoint the investigators in November and December of 2021. She argues that the

May 2022 appointment of investigators on the issue of her lack of cooperation was invalid because it was based on the two earlier, invalid, investigation orders. To the extent that two Tribunal decisions have already decided that the November and December 2021 appointments were based on reasonable and probable grounds, the member asks this panel to reconsider those decisions. The member also submits she had no duty to cooperate with investigators because the College lacks authority to regulate medical exemptions, freedom of expression and IPAC protocols.

The investigation orders are based on reasonable and probable grounds

- [10] In *College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 7 (*Phillips #2*), the member argued that the applicable investigation orders against her lacked any basis for a reasonable and probable belief that she committed professional misconduct. Acting as a single member panel, I dismissed this argument, finding that this issue had already been argued and determined in *College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 2 (*Phillips #1*). I found, in any event, that the investigation orders were valid and there was no basis to exclude evidence gathered during the ensuing investigations, as the member requested.
- [11] In addition to these Tribunal rulings, the Ontario Divisional Court also found, in dismissing the member's challenge to the interim suspension of her certificate, that the investigation orders were based on sufficient reasonable and probable grounds for believing Dr. Luchkiw had committed an act of professional misconduct or is incompetent: *Dr. Luchkiw v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 5738. Although this finding was not strictly necessary to its main determination that the decision to suspend the member's certificate was reasonable, the panel in *Phillips #1* found it persuasive.
- [12] Once again, the member asks the Tribunal to find the investigation orders against her invalid. She recognizes that the Tribunal has already disposed of this issue twice but argues that we should reconsider those prior rulings. The member provides no legal authority in support of this request apart from the following passages from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65:

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, “a lack of unanimity is the price to pay for the decision-making freedom and independence” given to administrative decision makers, and the mere fact that some conflict exists among an administrative body’s decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

...

[131] Whether a particular decision is consistent with the administrative body’s past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[13] We do not find the above excerpts helpful to the member’s case. The court was considering the doctrine of *stare decisis*, or the principle that like cases should be treated alike. It found that this principle does not bind administrative decision-makers in the same way as the courts. This is not the situation before us. Here, the member is not suggesting that this panel deviate from a precedent set by another, similar case. She is asking that the panel reopen and decide, once again, an issue which has already been decided in her case.

[14] There is no basis for the Tribunal to reopen the issue. The member justifies the request with reference to what counsel describes as a “problem” resulting from the decision in *Phillips #2*, leading to (in his argument), the absence of reasonable and probable grounds to support the investigation orders. He states that “the effect of

the second decision is to deny that the orders contain identifiable verbiage that would justify the investigations.” We are satisfied that this theory amounts to an effort to repackage and advance the submissions made and dismissed in *Phillips #1* and *Phillips #2*. It provides no reason to reconsider the Tribunal’s finding that the College had reasonable and probable grounds to initiate the investigations.

[15] The member also states that reconsideration is justified because of “confusion about the appropriate standard for tribunal decision-making manifested in the two prior motion hearing decisions.” Counsel for the member submits that an implication of the decision in *Vavilov* is that “the Tribunal can no longer apply cases decided on the standard of reasonableness to its own decision-making.” In his submission, the decisions in *Phillips #1* and *Phillips #2* are “suspect since they depend on citations of cases based on the standard of reasonableness.” Among the decisions counsel submits the Tribunal was wrong to refer to were *Luchkiw, Sigesmund v. Royal College of Dental Surgeons of Ontario*, 2005 CanLII 27325 (Div. Ct.) and *Pitter v. College of Nurses of Ontario*, 2022 ONSC 5513.

[16] We reject this submission. In *Vavilov*, the Supreme Court of Canada clarified and simplified the law governing the courts’ review of decisions of administrative tribunals. We do not read anything in its decision or reasoning which restricts administrative tribunals from relying on relevant court decisions, regardless of the standard of review they applied.

[17] It is unnecessary for us to consider in what circumstances this Tribunal might reconsider its own decisions in the same case. Whatever factors may justify such an extraordinary step, they are not present here. To permit reconsideration on the basis argued before us would open the door to endless relitigation of the Tribunal’s decisions and no finality in its proceedings, a result obviously contrary to fundamental principles of justice.

The duty to cooperate exists despite legal defences on the merits

[18] The investigation orders of November and December 2021 were thus based on reasonable and probable grounds. Despite this, the member argues that she has no duty to cooperate because the College lacks the authority to regulate medical exemptions, freedom of expression and IPAC protocols.

[19] We reject this submission. As the College states in its submissions, regulated health professionals have no common law, proprietary or constitutional right to practise medicine. A certificate of registration from 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 Tribunal has described the duty to cooperate 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 pp. 23-24 and 32).

[20] In this context, the duty to cooperate applies despite the existence of legal challenges to the College’s investigations, such as those relied on by this member. This principle has been made clear in numerous decisions of the court and this Tribunal, including the member’s own court case, cited above. In its decision dismissing Dr. Luchkiw’s challenge to the interim order suspending her certificate of registration, the court stated, among other things:

[66] Dr. Luchkiw argues that the investigation was unlawful because of fatal defects in the investigation orders and the College’s lack of authority to regulate medical exemptions. She states that she was under no obligation to co-operate with an unlawful investigation and as a result, the ICRC cannot rely on her failure to co-operate as a reason to suspend her certificate of registration.

[67] Section 76(3.1) of the Code, requires all members to co-operate with an investigation. Even if Dr. Luchkiw believes that the investigation is unlawful, she is under a positive obligation to co-operate: *College of Physicians and Surgeons of Ontario v. Ravikovich*, 2010 ONSC 571, at para. 12. (*Luchkiw*, paras. 66-67)

[21] Other decisions by Ontario courts have also confirmed the mandatory nature of a member’s duty under s. 76(1.3) of the Code: *Kustka v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 2325, *College of Physicians and Surgeons of Ontario v. O’Connor*, 2022 ONSC 195, *Kilian v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 2689 (unreported) and *Thirlwell v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 2654. In *College of Physicians and Surgeons of Ontario v. Ravikovich*, 2010 ONSC 5714 (unreported), the court stated:

While the respondent sought to challenge the investigators’ authority in his judicial review application, the Divisional Court has dismissed the application on the grounds of prematurity. Even if he

believes the investigations are unconstitutional, he is required to obey the law pending a determination of his constitutional and administrative law arguments by the Courts or the College in its processes (*Municipality of Metropolitan Toronto v. NB. Theatrical Agencies, Inc.* (1984), 44 O.R. (2d) 574 (H.C.J.) at p. 6. (para. 12)

- [22] We agree with these principles and are satisfied that despite the member's legal arguments challenging the College's authority to regulate medical exemptions from vaccines, freedom of expression and IPAC protocols, her obligations under s. 76(3.1) of the Code still apply.

The member's failure to cooperate with the College's investigations

The first investigation

- [23] In September 2021, the Simcoe Muskoka District Health Unit wrote to the College requesting that it investigate the member's infection prevention and control (IPAC) practices. The health unit had received a complaint about this matter but at the time, due to COVID-19-related capacity issues, was referring IPAC-related complaints to the relevant health professional college.
- [24] On the same day, a member of the public emailed the College expressing concern about an online video interview in which the member discussed various issues relating to COVID-19. The writer stated that the video was full of misinformation about COVID-19, including the claim that the government and local hospital were exaggerating the number of cases and that it was a government hoax. The writer also alleged that the member claimed the vaccine, among other things, had not been properly researched. The writer stated that, as a result, their own family members were refusing to get a second vaccine. The writer asked the College to investigate the member and prevent her from spreading lies.
- [25] As a result of these complaints, the College's Registrar appointed investigators on November 10, 2021 to investigate whether the member, "in her family medicine practice, and also in her conduct, including in relation to infection prevention and control practices and communications and conduct regarding the COVID-19 pandemic, has engaged in professional misconduct or is incompetent." On November 29, a College investigator and nurse inspector went to the member's office, intending to notify her of the investigation and conduct a review of her adherence to public health protocols around the COVID-19 pandemic.

[26] The investigators spoke with the member's assistant, stating that they were from the College and wished to see her. The assistant consulted with the member, who was in an inaccessible area of the office, and told the investigators the member would not be speaking with them and would call the police unless they had a warrant. The member did not come out of her office and communicated with the investigators through the assistant, telling the investigators she was calling her lawyer and was refusing to cooperate with the College. The assistant gave the investigators a piece of paper with the member's counsel's name and phone number.

[27] Since they were denied entry to the rest of the office, the investigators took photos and made observations of the waiting area and bathroom and then left, giving the assistant the notification package. Shortly after, the member's counsel sent an email to College counsel, stating, among other things:

You have Mr. Bellefontaine stationed at [the member's] office with colour of authority. I have advised Ms. Luchkiw not to co-operate.

As you already know, my position is that the College has no legal standing to police exemptions or dictate their terms, as the Registrar has unlawfully attempted to do, and further, the College has no jurisdiction to regulate a doctor's right to agree or disagree with public health information on numerous grounds, including the Charter-based right to freedom of expression.

[28] College counsel responded to the member's counsel in the next few days, referring to the provisions of the Code and other legal authority requiring the member to cooperate with the College's investigators. A few weeks later, a College investigator sent a letter to the member with a list of deficiencies observed during the partial inspection of November 29 and stating that the College would conduct a reinspection about eight weeks after the initial visit. The member did not respond to two requests to set a date for the reinspection.

The member failed to cooperate with the College's first investigation

[29] In a decision about the Law Society of Ontario's regulation of the legal profession, the Court of Appeal clarified the test to be applied when evaluating a regulated professional's lack of cooperation:

(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. (*Law Society of Ontario v. Diamond*, 2021 ONCA 255 at para. 50)

- [30] The member makes no claim that she cooperated with the College's investigator. In fact, she signalled clearly, and through her lawyer, that she had no intention of cooperating. This was despite the College advising her of her duties under the Code. We found above that her legal objections to the investigation did not provide a legitimate reason for her refusal to cooperate. In these circumstances, we find an absence of good faith efforts to respond promptly and completely to the College's inquiries. We conclude that the member did not cooperate with the College's first investigation. Her actions in this regard constitute an act of misconduct under s. 1(1)(30) of Ontario Regulation 856/93.

The second investigation

- [31] The College initiated the second investigation after the Royal Victoria Regional Health Centre wrote to it advising it that the member had recently resigned her privileges at the hospital, during a time when it had been investigating her in relation to two matters: (i) an interview in which she gave inaccurate information about the COVID-19 pandemic and (ii) a COVID-19 vaccine exemption obtained by an immunocompromised patient, which the hospital had reason to believe was given by the member. The hospital was also concerned that, in the interview, the member discussed another patient in a manner which may have breached their privacy.
- [32] On December 6, 2021, the Registrar appointed investigators to investigate whether the member, "in her family medicine practice, and also in her conduct, including in relation to her completion of medical exemptions for COVID-19 vaccines, has engaged in professional misconduct or is incompetent" (the second investigation).
- [33] A College investigator notified the member of this investigation by email dated December 9, 2021. She asked the member to complete a questionnaire and provide a list of all patients for whom she had provided various types of treatments and medical exemptions related to COVID-19, including vaccine exemptions, mask

exemptions and test exemptions, together with complete medical records for each patient listed, by December 23.

- [34] The member did not complete the questionnaire or provide the requested information. On the date set for receipt of this information, the member's counsel wrote to the College suggesting that production of patient files be postponed until the College's right to request patient files had been decided by the courts in another proceeding. The College did not agree to this suggestion and, on January 10, 2022, asked that the files be provided immediately. It also advised her of her duties under the Code. The member did not comply.
- [35] On February 2, the College asked the member to confirm whether she provided a vaccine exemption for a named patient and provide that patient's medical records. On February 4, the member's counsel wrote to the College setting out the member's objections to providing the information sought about COVID-19 exemptions and treatments. To date, the member has not provided any of the information the College requested.

The member failed to cooperate with the second investigation

- [36] As with the first investigation, Dr. Luchkiw makes no claim that she cooperated with the College's investigator. She made it plain that she had no intention of cooperating. The College advised her of her duties under the Code. It also brought her attention to the decision in *Ravikovich* and stated that she was not permitted to wait for the outcome of unrelated legal proceedings before complying with her duties towards the College. As above, her legal objections to the investigation did not provide a legitimate reason for her refusal to cooperate. In sum, the member's actions did not amount to good faith efforts to respond promptly and completely to the College's inquiries. We conclude that the member did not cooperate with the College's second investigation. Her actions constitute an act of misconduct under s. 1(1)30 of Ontario Regulation 856/93.
- [37] Although we arrived at our own conclusions, we note that the Divisional Court also found the member did not comply with her duty to cooperate with the College's investigations (*Luchkiw*, paras. 68-69 and 85).

The member did not comply with an interim order

[38] Under s. 1(1)1 of Ontario Regulation 856/93, it is an act of misconduct for a member to contravene a term, condition or limitation on the member's certificate of registration.

[39] At its meeting of February 22, 2022, the ICRC decided to make an order under s. 25.4 of the Code (the restriction order), which gives the ICRC the authority to make an interim order directing the Registrar to suspend or impose terms, conditions or limitations on a physician's certificate of registration if it is of the opinion that the conduct of the member exposes or is likely to expose the member's patients to harm and/or to injury. The ICRC ordered the member not to provide COVID-19 vaccine exemptions and ordered other measures to support this practice restriction, including requiring her to post a sign advising of the restriction and informing the College of her practice locations.

[40] Also included in the order were monitoring conditions. These required the member, among other things, to inform the College of her practice locations; to provide a consent form allowing the College to obtain information from the Ontario Health Insurance Plan (OHIP); to maintain a patient log and provide it to the College every two weeks; and to submit to inspections of her office and patient charts. In discussing the monitoring conditions in its decision, the ICRC explained that an order including practice restrictions is only effective at protecting patients if the College has the means to monitor whether the member is complying with these restrictions.

[41] The College notified the member of the interim order and also advised her of its intention to consider a suspension of her certificate of registration under s. 25.4 of the Code. It gave her 14 days to make written submissions on the potential suspension. In her submissions, the member (through counsel) disputed the validity of the investigations and claimed that she had no obligation to "submit" to the College's demands. She also asserted that the College had no jurisdiction to investigate a doctor's practice with respect to medical exemptions from COVID-19 vaccines and that "as a matter of law," a doctor may provide medical exemptions for COVID-19 vaccines "as he or she sees fit." On March 16, 2022, the ICRC made an order suspending Dr. Luchkiw's certificate of registration (the suspension order).

[42] The member provided the College with her practice location but did not, despite two specific requests in February and March of 2022, provide the OHIP consent or patient logs required by the restriction order. In January 2023, the College notified the member of its investigation into her failure to comply with an interim order. This investigation resulted in referral to the Tribunal of the allegation of breach of an order currently before this panel.

Finding on the failure to comply with an interim order

[43] The member did not dispute the College's evidence about her non-compliance with the terms of the restriction order. We find that she failed to abide by the monitoring terms of that order. In doing so, she withheld information necessary for the College to ensure that the practice restrictions were being respected. Compliance with orders issued by the ICRC is fundamental to the College's regulatory role. This includes compliance with monitoring terms which are part of the order. The member's actions amounted to an act of misconduct under s. 1(1)1 of Ontario Regulation 856/93.

Disgraceful, dishonourable or unprofessional conduct

[44] In *College of Physicians and Surgeons of Ontario v. Kadri*, 2023 ONPSDT 10, the Tribunal discussed the meaning of disgraceful, dishonourable or unprofessional conduct, at para. 29:

[29] According to s. 1(1)33 of O. Reg. 856/93 under the *Medicine Act, 1991*, SO 1991, c. 30, 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. As noted in *College of Physicians and Surgeons of Ontario v. Rabi*, 2020 ONCPSD 15, 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 (p. 26).

[45] In *College of Physicians and Surgeons of Ontario v. Khan*, 2022 ONPSDT 5, the Tribunal found that a member's refusal to provide patient records in connection with

a College investigation was conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, stating:

[1252] To perform its duty to protect the public, the College must be able to investigate physicians to ensure that their care meets the standard of practice of the profession. This requires that it be provided with access to patient records.

[1253] The Code articulates the legal framework for the release of patient records to the College. Furthermore, the courts have provided detailed guidance on this matter. Dr. Khan's behaviour actively obstructed the College's mandate to serve the public interest. We find that Dr. Khan's failure to provide the records was conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

[46] In the case before us, the member did not cooperate with the College investigations, did not provide medical records and other documents and information the College requested and refused to permit College investigators to inspect her practice. She also impeded the College's efforts to monitor her compliance with an order restricting her practice. Her actions have prevented the College from completing two College investigations and interfered with its ability to regulate the profession in the public interest. In these circumstances, we are satisfied that the member's conduct would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

Conclusion

[47] The College has proven the allegations against the member. We are satisfied that she has engaged in disgraceful, dishonourable or unprofessional conduct, failed to respond appropriately or within a reasonable period of time to a written inquiry from the College and failed to cooperate with its investigations. We also find that the member contravened a term, condition or limitation on her certificate of registration by breaching the terms of an interim order made under s. 25.4 of the Code. The Tribunal will schedule a hearing on penalty and costs.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Luchkiw*, 2024 ONPSDT 4

Date: January 26, 2024

Tribunal File No.: 22-012

BETWEEN:

College of Physicians and Surgeons of Ontario

College

- and -

Crystal S. Luchkiw

Registrant

PENALTY REASONS

Heard: November 28, 2023, by videoconference

Panel:

Sherry Liang (Panel Chair, public)
Marie-Pierre Carpentier (physician)
Joanne Nicholson (physician)
Peter Pielsticker (public)

Appearances:

Elisabeth Widner and Sayran Sulevani, for the College
Crystal S. Luchkiw, self-represented

RESTRICTION ON PUBLICATION

The Tribunal ordered, pursuant to s. 45(3) of the Code, that there shall be a ban on publication or broadcasting of the names or any information that would identify patients referred to orally at the hearing or in the exhibits filed. There may be significant fines for breaching this restriction.

Introduction

[1] In our decision of July 6, 2023, we found that Dr. Luchkiw engaged in disgraceful, dishonourable or unprofessional conduct, failed to respond appropriately or within a reasonable period of time to a written inquiry from the College and failed to cooperate with its investigations. We also found that the registrant contravened a term, condition or limitation on her certificate of registration by breaching the terms of 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 (Code).

[2] We subsequently held a hearing to receive the parties' evidence and submissions on what penalty should follow from our findings. The College takes the position that, in the circumstances of this case, revocation of the registrant's certificate of registration is the appropriate order, along with a reprimand. It also seeks legal costs of \$28,370. The registrant, representing herself, argues that the Tribunal has no jurisdiction over this matter.

[3] We are satisfied that we have jurisdiction to decide the issue before us. We find that the appropriate penalty is a suspension of the registrant's certification of registration until the later of six months or the registrant's compliance with the College's outstanding investigation requests. In the event she persists in her non-compliance and remains suspended for a further six months (or six months after any appeal rights are exhausted, as the case may be), we direct the Registrar to revoke her certificate of registration. We also order the registrant to appear before the panel to be reprimanded and pay the College costs as requested.

The registrant's challenge to the Tribunal's jurisdiction

[4] The registrant argues that she has a constitutional right to have her issues heard by a judge. She also argues that s. 40b of the College's General By-Law (as it was before December 7, 2023) purported to establish the Tribunal when the College had no authority to do so. In her submission, among other things, the College cannot transfer the power to order penalties, which traditionally fall within the jurisdiction of courts, to the Tribunal.

[5] The registrant relies on s. 71.2 of the Code, which permits the College to apply to the court for an order that a penalty ordered by the Tribunal take effect immediately, in

support of her argument that she has the right to be heard by a court. She also submits that any decision of this Tribunal which the College relies on in its arguments before us is “moot” since it was made by a body (the Tribunal) without authority.

[6] Further, the registrant submits that if this panel proceeds, in the face of her jurisdictional challenge, to order a penalty, it will be acting in bad faith. The only path that is a good faith alternative is to permit her to resume the practice of medicine. She states that she has made an Application for Judicial Review to the Divisional Court to which she plans to attach a Notice of Constitutional Question for the purpose of having s. 40b of the General By-Law abolished.

Analysis

[7] We find no merit in the registrant’s jurisdictional and constitutional arguments. It is well established that provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 24). Section 10(1)4 of the Code creates the College’s Discipline Committee. Among the powers of the Discipline Committee set out in ss. 36 to 56 of the Code are the powers to make findings of professional misconduct and orders with respect to penalty.

[8] Section 40b of the General By-Law (which, as of December 7, 2023, with minor amendments, is now s. 8.9.1 of By-Law No. 168), does not establish a new Discipline Committee or Tribunal. It merely renames the existing Discipline Committee the Ontario Physicians and Surgeons Discipline Tribunal. This is evident from the plain wording of the section:

The Discipline Committee shall be known as the Ontario Physicians and Surgeons Discipline Tribunal (OPSDT) in English and Tribunal de discipline des Médecins et chirurgiens de l’Ontario (TDMCO) in French, and each reference to the Ontario Physicians and Surgeons Discipline Tribunal or the Tribunal de discipline des Médecins et chirurgiens de l’Ontario, whether orally or in writing, shall be deemed to be a reference to the Discipline Committee of the College as specified in the Code and the Medicine Act, and any other legislation or policy where the context requires.

[9] Having all the powers of a Discipline Committee under the Code, this panel has full authority to make a penalty order under s. 51(2), which may include an order that the registrant’s certificate of registration be revoked or suspended, that terms, conditions or

limitations be placed on her certificate or that she appear before the panel to be reprimanded.

[10] Section 71.2 of the Code does not have the meaning the registrant gives to it. Sections 71 and 71.1 of the Code provide that certain Tribunal orders (relating to incompetence, incapacity, and specified findings of sexual abuse) take effect immediately despite any appeal. Under s. 71.2, the College may apply to the Superior Court to have other types of Tribunal orders take effect immediately despite any appeal. None of these sections detracts from the Tribunal's authority to order a penalty. None of these sections has the effect of requiring an order from the court before the Tribunal issues a penalty order.

Penalty principles

[11] The most important goal of a penalty order is the protection of the public. The public must have confidence in the registrant, the profession and in the College's ability to govern the profession in the public interest. Other penalty goals that support protection of the public include discouraging the registrant and other physicians from committing misconduct (specific and general deterrence), rehabilitating the physician, ensuring a safe return to practice where appropriate and expressing the Tribunal and the profession's disapproval of the misconduct (*College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 22 at paras. 7-8).

[12] In assessing which penalty best achieves these purposes, relevant factors include the seriousness of the misconduct, any discipline history, the registrant's actions since the misconduct and their personal circumstances. Penalties ordered in other cases are also important, in that penalties in similar circumstances should be similar and, where they diverge, there should exist a principled basis for the difference.

[13] Evidence that a registrant is ungovernable is also a relevant consideration on penalty. In *College of Physicians and Surgeons of Ontario v. Savic*, 2019 ONCPSD 40, the Tribunal described a finding of ungovernability as an aggravating factor in determining the appropriate penalty. Where such a finding is made and a registrant shows by their actions that they are unwilling or unable to abide by the profession's direction and guidance, revocation may be the only penalty that will protect the public and maintain public confidence (see, for example, *College of Physicians and Surgeons of Ontario v. Sweet*, 2017 ONCPSD 40; *College of Physicians and Surgeons of Ontario*

v. Guirguis, 2021 ONCPSD 13; *College of Physicians and Surgeons of Ontario v. Botros*, 2018 ONCPSD 51).

Applying the penalty principles to this case

Seriousness of the misconduct

[14] Factors that are relevant to the seriousness of the misconduct include:

- what the physician did;
- the motivations of the physician;
 - a. Intentional misconduct and misconduct for personal gratification or financial or other gain make the misconduct more serious.
 - b. The fact the physician knew or should have known the misconduct was wrong is also important.
- the number of times the misconduct happened and how long it lasted;
- the effects or potential effects of the misconduct on others.

[15] We found that the registrant did not cooperate with the College's investigations, did not provide documents and information as required and refused to permit College investigators to inspect her practice. She also impeded the College's efforts to monitor her compliance with an order restricting her practice, by failing to provide information as required by the order. Through her actions, the registrant prevented the College from completing two investigations.

[16] As the Supreme Court of Canada has observed, the privilege of professional self-regulation places on the College the responsibility for providing adequate protection for the public: *Pharmascience Inc v Binet*, 2006 SCC 48 at para. 36. "The credibility of the medical profession, and the College as its regulator, depends upon the College being able to investigate complaints or other issue of potential concern and to take appropriate action in a timely way": *College of Physicians and Surgeons of Ontario v. Hanmiah*, 2022 ONPSDT 9 at para. 11.

[17] We find the registrant's actions to be serious misconduct in that they interfered with the College's ability to regulate the profession in the public interest. The College began its two investigations of the registrant's conduct in November and December of 2021. In our earlier decision, we described the registrant's failure to cooperate with those investigations up to the date of the hearing. At the penalty hearing, the College called as a witness one of its investigators, to give evidence about the registrant's actions following our decision. Taken as a whole, the evidence at both hearings establishes that, beginning with her refusal to allow the College's investigators to inspect her practice on November 29, 2021 and continuing over the next two years, the registrant resisted the College's attempts to obtain the information and documents sought from her, thus thwarting its efforts to advance the two investigations. The College's recent letter of November 15, 2023, contains the details of the information it still seeks.

[18] About a month before the penalty hearing, the registrant provided excerpts from her clinical records with respect to one patient. Although this responds to part of the College's request for information (which includes a list of patients and complete medical records for patients to whom the registrant issued vaccine exemptions), we do not find it a meaningful effort to cooperate. It comes almost two years after the College requested the information and contains what is clearly only part of the patient's medical records. It is a partial response, made on the registrant's own terms.

[19] In assessing the seriousness of the misconduct, we recognize that, unlike in some of the cases the College relies on, the actions we found to constitute misconduct were not based on concerns about patient care. She did not, for example, put patient safety at potential risk by continuing to practise in areas where she was restricted. We also have no evidence that the misconduct arose out of reasons of personal gain or benefit, or that she was deceitful. Thus, while we consider the misconduct to be serious, it is not at the gravest end of the spectrum.

Other factors

[20] The registrant has no prior discipline history. In her submissions, she asked the Tribunal to consider her years as a physician without any disciplinary allegations in her favour. She also points to her good character as attested to by the individuals, including patients, who submitted letters of support. She states that her qualities as described by

these individuals are identical to those set out in the CanMEDS framework for family physicians. We discuss these letters below.

[21] The registrant did not point to any personal circumstances that might weigh in favour of a lesser penalty. She describes herself as a palliative care physician. She pleaded with the Tribunal not to revoke her certificate of registration but to lift the suspension and allow her to return to practice.

[22] We find the registrant's actions since these proceedings began to weigh in favour of a greater penalty. As we stated, late in the day, she provided some clinical notes responsive to part of the College's requests for documents. We consider this selective compliance at best. Apart from this, her failure to cooperate with the College's investigations persisted throughout the proceedings.

Governability

[23] In arguing for revocation of the registrant's certificate of registration, the College urges us to find her ungovernable. It relies on the decision in *Dr. Luchkiw v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 5738 in which the Divisional Court dismissed the registrant's application for judicial review of the ICRC's interim suspension order. In its decision, at para. 85, the court stated that "the conclusion of the ICRC, that she was ungovernable and as a result her patients were exposed to harm and/or injury, is reasonable and supported by the evidence." The College does not assert that the court's conclusions as to the registrant's governability are binding on us, submitting only that they should be accorded "significant weight" as they arise out of the same conduct on which this panel's findings of misconduct are based.

[24] The Divisional Court did not make a finding that the registrant was ungovernable. Further, in reviewing the ICRC's decision, the court did not decide it was correct, only that it was reasonable. It is open to us to make a different finding from the ICRC, with the benefit of a full evidentiary record.

[25] The cases the College referred us to in which the Tribunal has made this finding (including *Botros*, *Sweet*, *Guirguis* and *Savic*) involve serious and repeated failures to comply with directions, undertakings or restrictions on practice, as well as findings of misconduct or incompetence arising out of patient care. The Tribunal has described ungovernability as a "pattern of conduct that demonstrates that the member is

unprepared to recognize his or her professional obligations and the regulator's role" (*Sweet* at p. 17). It does not just relate to the serious nature of a prior disciplinary record but occurs "when the member's present attitude to his or her governing body makes it clear that the member is unlikely to cooperate with the College in the future" (same).

[26] We conclude that the evidence does not establish that the registrant is ungovernable. We find helpful the Tribunal's description, in *Savic* at p. 27, of the facts that led to such a finding in *Botros*:

In *CPSO v Botros*, 2018 ONCPSD 51, the physician engaged in a pattern of misconduct that was repetitive and persisted over a long period of time. The Committee found that the physician was ungovernable. It recognized that the penalty of revocation bears very serious consequences for the physician and that, in other circumstances, the misconduct at issue – failure to comply with an undertaking and failure to cooperate with a College investigation – would not necessarily result in revocation. However, the Committee looked to the pattern of ongoing misconduct, its finding of intentional and dishonest behaviour, the lengthy history including cautions and discipline findings, the lack of response to previous orders and directions, and the physician's lack of recognition of his professional obligations and the regulator's role, and concluded that public protection required that he no longer be permitted to practise as a physician. There were no mitigating factors.

[27] As in the *Botros* decision, the misconduct before us largely concerns a failure to cooperate with a College investigation. Unlike the circumstances in *Botros*, however, the misconduct does not follow other serious disciplinary findings, including some rooted in substandard patient care.

[28] In its submissions, the College emphasizes that the registrant's refusal to comply with its investigation requests arises out of an "explicit denial of the College's authority to conduct its investigations" and this shows she is ungovernable. It is true that the registrant has questioned the College's authority, suggesting at various times that it needed a warrant to enter her clinical premises, or a court order to enforce compliance with its requests. However, we do not find the registrant's mistaken understanding of her legal rights sufficient on its own to warrant a finding of ungovernability.

[29] While the registrant's refusal to cooperate with the College's investigations raises concerns about her willingness to accept the authority of the College, it is not as a whole comparable to the conduct of other registrants the Tribunal has found ungovernable. We

find no precedent for a finding of ungovernability based on a single, albeit prolonged episode of non-cooperation. Other elements of this case, including the registrant's self-declared reasons for her failure to cooperate and the breach of the monitoring terms of the interim order, do not bring this case within the realm of those other decisions.

Prior cases

[30] The College referred us to penalty decisions involving various types of non-cooperation in which the Tribunal has imposed suspensions in the range of three to six months. It distinguishes those cases, however, arguing that the circumstances in those are far less serious and did not involve outright rejection of the College's authority, as demonstrated in this case. It argues that the appropriate penalty is revocation and, in the alternative, a suspension in the range of 12 months.

[31] We do not agree that those cases are unhelpful. One case we find useful for comparison purposes is *College of Physicians and Surgeons of Ontario v. Gill*, 2021 ONPSDT 51. In *Gill*, the registrant failed over many months to provide information and documents to the College and respond to a request for an assessment. The Tribunal did not find the registrant's explanations for his lack of cooperation credible and concluded that he was not "honest, open and helpful" in his dealings with the College. After a penalty hearing in which the length of suspension was in dispute, the Tribunal imposed a suspension of four months as well as agreed terms, stating at para. 17:

Ultimately, given our conclusion Dr. Gill's misconduct was deliberate and prolonged, this impaired the College's ability to govern its members, carry out its public protection responsibilities and maintain public confidence in the profession. This calls for a significant period of suspension. There was no precedent to support a 12-month suspension and we find none. Nor do we find significant mitigating factors that might support a one-month suspension. A suspension of significance is necessary to act both as a specific and general deterrent. As such it is our decision to impose a four-month suspension.

[32] As in *Gill*, the registrant's failure to cooperate with the College's investigations was deliberate and prolonged, impaired the College's ability to govern its members, carry out its public protection responsibilities and maintain public confidence in the profession. Unlike *Gill*, in which the merits hearing proceeded on the basis of an agreed statement of facts and some of the penalty terms were agreed to, there has been no effort by the registrant to reduce the length of the hearing and eliminate the need for

witnesses. The case before us also includes failure to comply with the monitoring terms of an interim order. Thus, we consider the facts of this case to warrant a more severe penalty than in *Gill*.

Letters of support

[33] As indicated above, the registrant provided us with letters of support from patients and other individuals who have either witnessed her work or had other dealings with her. The registrant submitted that these letters should be given great weight in our deliberations when considering whether to order the most severe penalty of revocation requested by the College. She states that these letters speak to the core of who she is as a person and a physician.

[34] It is evident that these individuals see the registrant as a compassionate and dedicated doctor and hold her in high regard. They are helpful to us in understanding her character and reputation. Although most of the letters were written following our decision, it is not apparent from the letters that the writers read the decision and are aware of the specific findings of misconduct, relating to her failure to cooperate with the College's investigations. They are, therefore, of limited assistance in addressing the issues this panel considers in determining the appropriate penalty based on our findings of misconduct. Nevertheless, they provide some grounds for hoping that the registrant will be motivated to take the necessary steps to remedy the misconduct so that she has a path to return to the practice of medicine which she clearly holds dear.

Conclusion on penalty

[35] Having regard to the discussion above, we determine that a six-month suspension is appropriate. The registrant's conduct calls for a penalty significant enough that it will serve as both specific and general deterrence. Other registrants must understand that thwarting the College's investigations and impeding the ability to carry out its mandate of regulating the profession in the public interest will not be tolerated. They must understand that this Tribunal will treat this as serious misconduct, meriting serious sanctions. We find a 12-month suspension, which the College puts forward in the alternative to revocation, beyond the reasonable range of comparable cases.

[36] The College provided us with cases involving continuing non-compliance with directions in which the Tribunal has imposed suspensions and a requirement that the

physician remedy the non-compliance, whichever takes the longest time (see *The College of Physicians and Surgeons of Ontario v. Dr. Wagdy Abdalla Botros*, February 22, 2016 (unreported) and *College of Physicians and Surgeons of Ontario v. Beauchemin*, 2021 ONCPSD 30). It argues that such an approach should not be applied here because even if the registrant provides the information requested in what it describes as “now-stale” investigations, it does not address her “explicit and continued denial and rejection of the College’s regulatory authority.”

[37] We disagree that such an approach is not appropriate in this case. By rejecting the College’s request for revocation of the registrant’s certificate of registration and imposing a suspension instead, we have opened the door to her eventual return to practice. In this context, it is in the public interest that the College’s investigations continue to their completion. They will either indicate the absence of any concerns from her most recent period of practice or identify issues that will need to be addressed. We thus find it appropriate to direct that the suspension be for a minimum of six months, or until the registrant fulfills the outstanding information and documentation requests to the College’s satisfaction, whichever is later. In order that there is no ambiguity, we have set out the outstanding requests in our order.

[38] While it is our hope that the registrant takes the necessary steps to end the suspension of her certificate, we acknowledge the possibility that she may continue to resist complying with the outstanding information request. If that happens, the six-month suspension could be followed by an open-ended impasse. This would not promote public confidence in the profession and in the College’s ability to govern the profession in the public interest. Thus, while we rejected the College’s request that we order revocation of the registrant’s certificate as of this date, we find it in the public interest to order revocation if the registrant persists in her non-compliance despite being given the opportunity to make things right. Such conduct would demonstrate that she is unwilling to accept the obligations accompanying the privilege of being a member of a self-regulating health profession.

[39] We find support for such a measure in *Ontario (College of Pharmacists) v. Rosenberg*, 2011 CanLII 99440 (ON CPDC) and *Ontario (College of Pharmacists) v. Hopkins*, 2019 ONCPDC 33. Although they are not decisions of this Tribunal, they demonstrate that a health professional’s lengthy and persistent unwillingness to be governed by their regulatory college can result in losing the right to practice.

[40] We remind the registrant that even beyond the specific matters detailed in our order, she has a continuing obligation to cooperate with the College's ongoing investigations, as set out in ss. 76(3) and (3.1) of the Code:

(3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation.

(3.1) A member shall co-operate fully with an investigator.

[41] In addition, para. 1(1)30 of Ontario Regulation 856/93 made under the *Medicine Act*, 1991, SO 1991, c. 30 provides that it is an act of misconduct to fail to respond appropriately or within a reasonable time to a written inquiry from the College. We discussed these provisions in our earlier decision, and we bring them to the registrant's attention again in the hope that, with her cooperation, the College's investigations can continue to their completion without generating unnecessary further proceedings.

[42] The College requests, in the event we order a suspension, that we also direct the registrant to complete the PROBE course. The registrant did not address this in her submissions and we find it appropriate to include it in our penalty order.

[43] The registrant made no submissions on the College's request for a reprimand and in the circumstances, we also order a reprimand.

Costs

[44] The registrant asks the Tribunal to exercise its discretion against ordering her to pay costs to the College. She provided no reasons in support of her position and made no additional submissions with respect to the costs.

[45] Under s. 53.1 of the Code, the Tribunal has discretion to order a registrant to pay costs of a hearing following a finding of professional misconduct. The College requests costs in the amount of \$28,370.00, representing three days of hearing in this matter as well as the registrant's share of the costs of three motions brought (unsuccessfully) by the registrant and two other physicians.

[46] The College's costs are reasonable and in accordance with the Tribunal's tariff. We find it appropriate to order that the registrant pay these costs to the College, in accordance with the usual time frame for such payments.

Order

[47] We order:

- a. Dr. Luchkiw to attend before the panel to be reprimanded;
- b. the Registrar to suspend Dr. Luchkiw's certificate of registration commencing at 12:01 am on January 27, 2024, and continuing until the later of:
 - i. six months from the date of this order;
 - ii. the date that Dr. Luchkiw provides the following information and documents, to the College's satisfaction:
 - 1. a list of all patients for whom she has:
 - a. Completed a COVID-19 medical exemption for Vaccination;
 - b. Completed a COVID-19 medical exemption for Mask;
 - c. Completed a COVID-19 medical exemption for screening/ testing;
 - d. Prescribed Ivermectin;
 - e. Prescribed Hydroxychloroquine; and
 - f. 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.
 - 2. the complete medical record for each patient listed.
- c. the Registrar to revoke Dr. Luchkiw's certificate of registration on a date set by the Registrar if:

- i. six months have passed since the initial six-month suspension period or since any appeal rights have been exhausted, whichever comes later;
 - ii. Dr. Luchkiw remains suspended under this order; and
 - iii. the Registrar has provided Dr. Luchkiw an opportunity to make comment.
- d. the Registrar to place the following term, condition and limitation on Dr. Luchkiw's certificate of registration:
 - i. Dr. Luchkiw will participate in the PROBE Ethics & Boundaries Program offered by the Centre for Personalized Education for Professionals, by receiving a passing evaluation or grade, without any condition or qualification. Dr. Luchkiw will complete the PROBE program at her own cost within six months of the date of this Order, and will provide proof to the College of her completion, including proof of registration and attendance and participant assessment reports, within one (1) month of completing it.
- e. Dr. Luchkiw to pay the College costs in the amount of \$28,370.00 by February 26, 2024.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Tribunal File No.: 22-012

BETWEEN:

College of Physicians and Surgeons of Ontario

College

- and -

Crystal S. Luchkiw

Registrant

**The Tribunal delivered the following Reprimand
by videoconference on Monday, March 25, 2024.**

*****NOT AN OFFICIAL TRANSCRIPT*****

Dr Luchkiw,

Despite multiple opportunities over several years, you have chosen not to cooperate with two investigations into your medical practice by the College of Physicians and Surgeons of Ontario. You failed to provide information, records, and documents requested by College staff. You refused to cooperate with College investigators when they attended your practice to, in part, review your adherence to public health protocols during the Covid-19 pandemic. You did not comply with the College's interim order made under section 25.4 of the code by failing to abide by its monitoring terms. This failure to cooperate demonstrates a lack of respect for the College as your regulator, and a disregard for your professional obligations as a member of a self-regulated profession. Your misconduct hampered the ability of the College to carry out its duty to regulate the medical profession in the public interest. When members fail to cooperate with the College, it affects the confidence of the public in the entire profession and its governance.

This panel finds your misconduct to be serious. Persistent disregard and unwillingness to be governed by your regulatory body can result, as noted in our penalty order, to revocation of your certificate of registration to practice medicine in Ontario.

This panel is hopeful that during your suspension, you will reconsider your position with respect to the investigations, and thus open the door to returning to your career as a family and palliative care physician.