Court File No.: 243/23

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N :

DR. KULVINDER KAUR GILL

Applicant

– and –

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, MARK BROWN, SUZANNE KARRER, SARAH BEZANSON, DR. ALEXANDER NATAROS, MICHAEL SARAI, MARIA HAUSCHEL, DR. TERRY POLEVOY

Respondents

FACTUM OF THE APPLICANT, DR. KULVINDER KAUR GILL

December 7, 2023

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CONTENTS

PART I — OVERVIEW

1. Science and medicine should never be subject to the "no debate" ethos that is increasingly taking hold in our society. Indeed, the protection of speech in these areas must be especially robust, particularly where the stakes are high, both on a societal and individual level, as they are in the present case.

2. Dr. Kulvinder Kaur Gill ("**Dr. Gill**") is a specialist physician practicing at two allergy, asthma and clinical immunology clinics in Brampton and Milton. Her undergraduate training was in microbiology. She completed significant post-graduate training in pediatrics, and allergy and clinical immunology, including scientific research in microbiology, virology and vaccinology at the Public Health Agency of Canada's highest security level biosafety laboratory in Canada, and has published widely in these areas.[1]

3. She is before this Honourable Court because she expressed opinions on social media with which some members of the public did not agree and filed complaints about those opinions to her regulator, the College of Physicians and Surgeons of Ontario ("**CPSO**" or the "**College**").

4. The Inquiries, Complaints and Reports Committee ("**ICRC**" or the "**Committee**") of the CPSO issued seven decisions arising out of the public complaints, two of which ordered cautions (the "**Cautions Decisions**"), and five of which were dismissed but referenced those cautions in the decision (the "**Dismissed Complaints**").

5. All seven related decisions were reviewed and upheld by the Health Professions Appeal and Review Board ("**HPARB**" or the "**Board**"), and this matter is a judicial review of the decisions from both of the previous administrative bodies.

6. The CPSO is also the Respondent in a separate judicial review proceeding under Court File No. 221-21, being heard contemporaneously, for a review of a related ICRC Decision to issue a caution to

[1] Letter from Rocco Galati to CPSO, dated October 14, 2020, at p. 25 [HPARB Record of Proceedings, Vol. 7B at p. 417].

the Applicant following an investigation by the Registrar under s. 75(1) of the *Health Professions Procedural Code*[2], over which the HPARB did not have jurisdiction in its review. All eight decisions are interconnected, and the facts, law and argument in each factum apply, *mutatis mutandis*, to the other.

7. Not only are these decisions unreasonable in their failure to proportionately balance Dr. Gill's *Charter*[3]-protected expression rights with the statutory objectives of the College, but they lack reasonableness and procedural fairness in the issuance of public and cumulative cautions, which have created a highly punitive impact on the Applicant.

PART II — SUMMARY OF THE FACTS

A. Dr. Gill's Opinions Contributed to Necessary Public Debate

8. The Covid period was a time of great upheaval in the approach to the management of pandemics. Never before had societies locked down the healthy on such a wide scale and for such a long period. Politicians acted quickly, often based on social pressure. An illusion of consensus soon emerged, as dissenting voices were stifled.

9. Although she was initially alarmed about Covid-19 like most other people, Dr. Gill began examining the data more closely and, a few months into the pandemic, started sharing her evidence-based views on the social media platform now known as "X" (previously Twitter).

10. Dr. Gill's general concerns that she expressed, properly understood, are that (1) the risks posed by Covid-19 were exaggerated; (2) lockdowns were scientifically unjustified; (3) the authorization and production of a Covid-19 vaccine should not be a condition precedent to ending harmful lockdowns; (4) early outpatient hydroxychloroquine ("**HCQ**") could be safely used in treating high-risk Covid-19 patients; (5) the critical importance of cellular (T-cell) immunity was being ignored; (6) pandemic

[2] Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18.
[3] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Section 2(b) provides that everyone has "freedom of thought, belief, opinion and expression…"; section 2(a) protects Canadians' "freedom of conscience and religion" (the "***Charter***").

measures did not reflect the known age-stratified risk of Covid-19 (i.e. a 1000 times greater risk to the elderly than to the youth); and (7) the importance of returning to Canada's and the World Health Organization's response plans (prepared prior to the pandemic), which were abruptly abandoned in favour of unprecedented and damaging lockdowns.

11. At the time her comments were made, they were well-supported in the developing medical and scientific literature, much of which she provided to the ICRC and which she typically referenced in her social media commentary. The Applicant was compelled by her conscience, adherence to medical ethics and concern for marginalized communities in Canada and the developing world, to speak against harmful government policies.[4] Her comments were also within the range of rational public debate and in accordance with a long history of public health pandemic plans and World Health Organization guidance.

12. Although she has expressed reservations about the necessity of the Covid-19 injection for every single person (regardless of their risk profile), Dr. Gill has always been pro-vaccination. She has been an advocate for existing routine childhood vaccinations for years on her personal Twitter account.[5] She supported giving the Covid-19 vaccine to high-risk individuals with their informed consent. Dr. Gill is a medical professional who regularly administers vaccines, including to children, and has devoted years of her life conducting scientific research for the development of HIV-1 candidate vaccines.[6] She approached this issue, like the other impugned comments, from the perspective of an ethical, evidence-based, medical scientist, whose opinions are subject to change on better evidence. Indeed, in the early days of the pandemic, she had lobbied the government for more and better measures to protect healthcare workers and the public.[7]

13. But that evidence-based approach, which led her to criticize governments' public health policies, was at odds with the regulator of the medical profession, the CPSO, which had taken a different approach

[4] Letter from Rocco Galati to CPSO, dated February 1, 2021, p. 2 [HPARB Record of Proceedings, Vol. 1B at p. 494].
[5] Ibid, p. 5 [HPARB Record of Proceedings, Vol. 1B at p. 497].
[6] Letter from Rocco Galati to CPSO, dated October 14, 2020, p. 25 [HPARB Record of Proceedings, Vol. 7B at p. 417].
[7] Ibid, p. 29 [HPARB Record of Proceedings, Vol. 7B at p.421].

during the pandemic – centralized messaging for all of Ontario's physicians.

B. The College's Edict Invited Public 'Cancellation' Attempts

14. In the CPSO's publication, COVID-19 FAQs for Physicians,[8] first published in April of 2020, the College gives the following "guidance" with respect to social media posts and Covid:

> *What should I be thinking about as I engage on social media about issues relating to the pandemic?*
>
> Physicians are reminded to be aware of how their actions on social media or other forms of communication could be viewed by others, especially during a pandemic. Your comments or actions can lead to patient/public harm if you are providing an opinion that does not align with information coming from public health or government. It is essential that the public receive a clear and consistent message. [Emphasis added.]

15. Physicians are bound by an ethical and moral duty to *do no harm*, and it is sometimes essential and in the public interest to question public health decisions and government policies. To threaten physicians for their medical and scientific skepticism was an astonishing edict for the regulator to publish. Public health policy is a blunt instrument that can cause its own downstream adverse impacts which can and should be scrutinized; and governments most certainly should not be beyond reproach for their policies.

16. To date, Dr. Gill has never received a patient complaint to the CPSO and has always been in good standing—until members of the public complained about her. It was only because she shared scientific studies and opinions on Twitter, which contradicted a Covid narrative that had quickly become politicized and dogmatic, that she found herself being publicly censured by her regulator. The complainants were, in fact, complete strangers to Dr. Gill before they wrote to the CPSO to report their displeasure with her comments on Twitter.

17. The complaints, all but one dating to between August 5-10, 2020, appear to have been part of a coordinated campaign against Dr. Gill by several other physicians and members of the public, who

[8] *Covid-19 FAQs for Physicians*, updated October 19, 2020 [HPARB Record of Proceedings, Vol. 7B, p. 537].

encouraged people to write in.[9]

18. Their pile-on evidently swayed the CPSO to change course from its earlier, more charitable view of Dr. Gill's commentary, as noted in the submissions prepared by her former counsel:[10]

> On May 28, 2020, the CPSO emailed Dr. Gill stating they wished to discuss a public complaint they had received about her tweets regarding Covid-19, where they pointed to her tweets which discussed actual published research articles, mostly regarding T-cell immunity, HCQ efficacy, comments regarding vaccine research, and concerns with lockdowns. On May 29th, 2020 the CPSO told her that they will not be acting on it as they had reviewed the tweets and her twitter feed, and identified no concerns. On the contrary, the CPSO intake investigator indicated that she had found Dr. Gill's tweets informative and appropriate, and indicated that during the pandemic, the CPSO has been receiving a high volume of complaints from the public and is using their discretion not to act or investigate the majority.

19. Dr. Gill had asked the investigator then if there was anything she should do differently, and was told everything was fine. Yet shortly thereafter, a deluge of complaints over very similar tweets and topics commenced, and resulted in cautions-in-person being ordered by the ICRC. The complainants had claimed that Dr. Gill's tweets contained "misinformation" or were not supporting the public health policies without question, as the CPSO's guidance expected. The edict of the College was referenced by at least one of the complainants in his complaint on August 5, 2020.[11]

20. Dr. Gill's opinions were certainly not "misinformation" (the evidence for them is canvassed in the companion factum). In the three years since the ICRC's decisions in February 2021, the arc of history continues to bend toward Dr. Gill. Much of the public paranoia and anxiety during the pandemic has passed, and criticism of lockdowns and mandates is now widespread. People have moved on. But Dr. Gill's prescient and conscientious early objections have left a long-term taint on her Public Register.

C. The Dismissed Complaints

21. On February 22, 2021, the ICRC released separate reasons for decision in respect of each of the eight investigations. In the five Dismissed Complaints, the ICRC did not recommend any further action,

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[9] Letter from Rocco Galati to CPSO, dated October 14, 2020, p. 42 [HPARB Record of Proceedings, Vol. 7B at p. 434].
[10] Ibid, p. 26 [HPARB Record of Proceedings, Vol. 7B at p. 418].
[11] Complaint by Mark Brown [HPARB Record of Proceedings, Vol. 6A, p. 3].

finding that Dr. Gill's comments were sufficiently well-supported in the medical literature at the time. In each of the Dismissed Complaints, the ICRC included a paragraph referencing the cautions ordered in the Cautions Decisions, essentially admonishing her a further five times, even though the underlying complaints were unfounded.

22. Although it is unusual to judicially review decisions that went in an Applicant's favour, the Dismissed Complaints are all interconnected with the Cautions Decisions by reference. If the cautions are overturned on review, then the references to them should be removed from the Dismissed Complaints as well. The cumulative impact of these Decisions is discussed below, beginning at paragraph 92.

23. Several of the Dismissed Complaints referenced an August 5, 2020 tweet about HCQ as an effective treatment. The ICRC considered the submissions of Dr. Gill, which included references by Yale and Harvard professors,[12] and wrote (with similar or identical wording in each instance):

> [A]t that time, there were, in fact, small studies, largely observational in nature, that suggested HCQ may be effective in prophylaxis and early treatment of Covid-19. At that stage of the pandemic and lacking any "proven" alternatives in treating Covid, the existing evidence for the use of HCQ was at least worthy of consideration. If a relatively safe drug can be effective in reducing the progression from mild to severe disease by early use, that would be considered a major development. It is now known that there are other alternatives that may be more effective, but at the time much of the focus was on HCQ, including some research done by prominent experts in relation to other coronavirus diseases in the past. Statements by professors at Yale and Harvard universities outline convincing evidence for the use of the medication in early treatment of Covid-19. This fact lends support to the Respondent's views with respect to HCQ and therefore her views were not misleading or without evidence at the time she posted her opinions via Twitter.[13]

24. In another decision,[14] the ICRC concluded that there was reasonable evidence in early August 2020 that HCQ may be effective in prophylaxis and/or early treatment:

> [A] fairly large retrospective study from Detroit, Michigan, USA, published in the *International Journal of Infectious Diseases* on August 1, 2020, did show a 50% reduction in mortality in patients who received early treatment with HCQ; thus, it would be unfair to characterize the Respondent's HCQ comment as outright misinformation.

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[12] Letter from Rocco Galati to CPSO, dated November 23, 2020 [HPARB Record of Proceedings, Vol. 6B, p. 435].
[13] ICRC Decision re: Dr. Terry Polevoy, p. 5 [Application Record, Tab 8, p. 67].
[14] ICRC Decision re: Mark Brown, p. 5 [Application Record, Tab 6, p. 52].

25. The Dismissed Complaint of Dr. Alexander Nataros (File 1113562) involved a physician in British Columbia who filed a complaint[15] against Dr. Gill and encouraged others to do so in a public post. His letter to CPSO expressed concern that Dr. Gill had spread "misinformation" via a post on Twitter and that this post was a threat to his own patients' health (in BC) as well as the health of Ontarians. The tweet he targeted stated: "Humanity's existing effective defences against Covid-19 to safely return to normal life now: The Truth; T-cell immunity; Hydroxychloroquine." The Dismissed Complaint of Dr. Michael Sarai (File 1113581), another physician outside Ontario, referenced the same August 6, 2020 tweet.[16]

26. In both instances, the ICRC declined to act on the complaints, finding that nothing in that tweet constituted "misinformation" i.e., was verifiably false. Further, the ICRC wrote, while it was known that T-cell immunity generally plays a significant role in the immune response to viral diseases, whether that is any different in Covid-19 was not known.[17] On this point, the ICRC was incorrect, although it did not impact its decision. As noted in Dr. Gill's submissions to the ICRC,[18] by August 2020 there were several peer-reviewed studies, published in prominent medical and scientific journals globally, highlighting the critical importance of both pre-existing cross-reactive and post-infectious natural T-cell immunity to SARS-CoV-2. There was no evidence to suggest that natural T-cell immunity to SARS-CoV-2 would not be robust, broad and durable. Indeed, it was not the virus that was unprecedented, but the government response that was unprecedented.

27. The Dismissed Complaint of Dr. Terry Polevoy (File 1114499) involves a retired MD who has attacked Dr. Gill's reputation publicly and repeatedly, over which there was a defamation lawsuit filed by her previous counsel. In his original complaint, made on October 22, 2020, he stated the following:

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[15] Complaint by Dr. Alexander Nataros, dated August 6, 2020 [HPARB Record of Proceedings, Vol. 3A, p. 3].
[16] Complaint by Dr. Michael Sarai, dated August 6, 2020 [HPARB Record of Proceedings, Vol. 4A, p. 3].
[17] ICRC Decision re: Dr. Michael Sarai, p. 4 [Application Record, Tab 5, p. 45].
[18] Letter from Rocco Galati to CPSO, dated October 14, 2020, pp. 13 ff. [HPARB Record of Proceedings, Vol. 7B at pp. 405 ff.].

> Ontario pediatrician Kulvinder K Gill, who promoted the insane use of hydroxychloroquine for Covid-19 earlier this year, has hired a lawyer, Rocco Galati, who has threatened to sue me for libel and defamation this month.
>
> Please prioritize this complaint. This physician has no credibility in regards to her opinion about hydroxychloroquine for Covid-19. There have been previous complaints and your investigations have not been completed.
>
> For a registered MD to accuse me like this is unprofessional.[19]

This complaint was dismissed, and was the subject of a cross-review at the HPARB, which was also dismissed.

D. The Caution Decisions

28. In one of the two Caution Decisions by the ICRC (File 1113583), the complainant, Mark Brown, had stated that Dr. Gill had made comments on Twitter that were "diametrically opposed to the messages being disseminated by local and federal officials", in particular:

> "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown. #FactsNotFear." [the "**Lockdown Tweet**"]
>
> "If you have not yet figured out that we don't need a vaccine, you are not paying attention." [the "**Vaccine Tweet**"]

29. In the other Caution Decision involving the complaint by Maria Hauschel (File 1113576), this complainant had likewise expressed concern about "false and misleading information" being stated by Dr. Gill that went against the recommendations of public health authorities and pointed out a number of similar tweets to those in the Dismissed Complaints.

30. The two tweets which merited a caution in the Hauschel complaint, in the view of the Committee, were identical to those in the Brown complaint, namely the Lockdown Tweet and the Vaccine Tweet. They were also two of the three tweets in the related s. 75 investigation decision that resulted in an order for a caution-in-person.

[19] Complaint by Dr. Terry Polevoy, dated October 22, 2020 [HPARB Record of Proceedings, Vol. 1A, p. 4]. Dr. Gill's former lawyer responded to this complaint on November 10, 2020, highlighting the aggressive comments and threats Dr. Polevoy made about Dr. Gill and her lawyer [HPARB Record of Proceedings, Vol. 1B, p. 561 (p. 190 in PDF)].

31. It is worth emphasizing that Dr. Gill received *three* separate caution orders for the *same two tweets*.

E. Reasoning of the Committee with Respect to Two Caution Decisions

32. In concluding that these tweets merited a caution, the Committee noted that the issues for their consideration were: i) whether statements made by Dr. Gill would have been verifiably false (i.e. misinformation) at the point in time they were disseminated; and ii) whether the statements were consistent with the guidance posted by the CPSO.[20]

33. The ICRC apparently failed to recognize that there could be an inherent conflict between these two considerations. Something might be *both* not verifiably false *and at the same time* inconsistent with the guidance posted by the CPSO. In other words, true—but not permissible to say aloud.

34. Instead of performing a similar analysis to the Lockdown and Vaccine Tweets as was done with the HCQ tweet (finding that there was sufficient evidence to support her statements, such that they were not "verifiably false") the Committee appeared to apply a different standard.

35. For the Lockdown Tweet, the Committee found[21] that: i) Dr. Gill did not question whether benefits outweigh negative aspects of lockdowns, but stated unequivocally that there was no medical or scientific reason for lockdown, without providing evidence; ii) her statement did not align with information from public health; iii) her statement was inaccurate, since China and South Korea provide evidence that lockdowns can and did work in reducing the spread of Covid-19; iv) for Dr. Gill to state otherwise was "misinformed and misleading and irresponsible to state on social media during a pandemic."

36. For the Vaccine Tweet (which, it should be noted, pre-dated the completion of preliminary Covid-19 vaccine clinical trials as well as the government authorization of any Covid-19 vaccine by at least five

[20] ICRC Decision re: Michael Brown, p. 5 [Application Record, Tab 6, p. 52].
[21] Ibid, p. 6 [Application Record, Tab 6, p. 53].

months), the Committee found[22] (then six months after the tweet) that it was unprofessional on the basis that: i) Health Canada had [now] approved several vaccines and that a safe, tested vaccine is the ideal solution to protecting the population and bringing about the end of the pandemic with the lowest possible number of deaths; ii) while it is possible for a return to "normal life" without vaccinating the public, this is a high-risk strategy and one that could potentially take years to achieve; iii) in the absence of a vaccine, complete eradication of the virus from the human population as occurred with SARS or herd immunity are the only choices, and the herd immunity route would involve considerable death among vulnerable populations; iv) Dr. Gill did not provide any evidence to support her statement that a vaccine is not necessary.

37. The ICRC was dismissive of the considerable trove of scientific literature that Dr. Gill submitted to support her statements and did not materially engage with it. Instead, it made its own findings of fact that were not provided by either the complainants or Dr. Gill, and without obtaining an expert report. As the ICRC is a screening committee and not a fact finding body (except to a limited degree), this was not only unreasonable, but *ultra vires* its powers and procedurally unfair. It was not within the expertise or mandate of the ICRC to make such a finding, and their findings were largely wrong in any event.

38. Additional details about the submissions made by Dr. Gill to support the Lockdown Tweet and the Vaccine Tweet are contained in the factum in the companion judicial review, which involves the same two tweets.

F. Order of Committee with Respect to Two Caution Decisions

39. The Decision was essentially the same for both of the Caution Decisions.[23] The Committee stated that it would require Dr. Gill "to appear before the Committee to be cautioned in person regarding a lack of professionalism and failure to exercise caution in her posts on social media, which is irresponsible

[22] Ibid, p. 6 [Application Record, Tab 6, p. 53].
[23] Ibid, p. 2 [Application Record, Tab 6, p. 49].

behaviour for a member of the profession and presents a possible risk to public health."

40. Although there were ample submissions provided by Dr. Gill which addressed her protection under the *Charter* from unjustified state interference into her freedoms of expression, conscience, opinion and belief, there was no mention at all of the *Charter* in the ICRC Decisions. The closest thing that was said was: "The Committee has no interest in shutting down free speech or in preventing physicians from expressing criticism of public health policy."[24] It then proceeded to do exactly that.

G. Mandate of HPARB: Adequacy of Investigation & Reasonableness of the Decisions

41. The mandate of the HPARB in a complaint review is to consider either the adequacy of the Committee's investigation, the reasonableness of its decision, or both.[25] At the review hearing, on October 12, 2022, extensive oral and written submissions were provided by Dr. Gill's counsel[26] directed to these issues.

42. On March 23, 2023, the HPARB released seven decisions, all largely identical except for the description of the facts, upholding the ICRC decisions as reasonable and adequate in all respects.

PART III — ISSUES AND THE LAW

43. The issues for this Court are:

i) whether the ICRC proportionately balanced appropriate statutory objectives with the *Charter* rights of Dr. Gill;

ii) whether the decisions of the ICRC were reasonable and justified, having regard to the impact of the Decisions on Dr. Gill, the medical profession at large, and the public; and

iii) whether the ICRC breached Dr. Gill's right to procedural fairness, given the compounding of the cautions and their widespread distribution, without first holding a hearing and making a finding of professional misconduct.

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[24] Ibid, p. 6 [Application Record, Tab 6, p. 53].
[25] *Health Professions Procedural Code*, s. 33(1).
[26] Submissions of Dr. Gill to HPARB Review Panel, dated October 12, 2022, pp. 29 ff. [HPARB Record of Proceedings, Supplemental Volume, p. 30 (33 of PDF)].

A. The ICRC Failed to Proportionately Balance Statutory Objectives with the *Charter*

i) Reasonableness is the Standard of Review & Justification is the Focus

44. As confirmed by this Court in the recent *Peterson*[27] decision, there is no dispute that the standard of review is reasonableness, and that the principles set out in *Doré/Loyola* and *Vavilov* must be applied in reviewing the decisions.

45. *Vavilov* focuses the reviewing court on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome.[28] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker."[29]

46. Further, and importantly in this case, "the degree of justification found in reasons, like the reasonableness review itself, must reflect the stakes of the decision."[30]

47. As will be described below, the impact of the decisions on Dr. Gill, on the medical profession as a whole, and on the public interest are such that the curtailment and punishment of her speech requires a high degree of justification in order to be considered reasonable, and to ensure continued public trust in the CPSO. After all, "reasoned decision-making is the lynchpin of institutional legitimacy."[31]

48. Finally, it is important to note that *Vavilov* now requires an overall "culture of justification" from administrative decision makers. As the Supreme Court described this culture:

> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness"…

49. To satisfy a culture of justification, administrative decision makers need to show their reasoning,

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[27] *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685 (CanLII) (Div. Ct.) ("***Peterson***"), at para. 29.
[28] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 ("***Vavilov***"), at paragraph 83.
[29] Ibid, para. 85.
[30] *Peterson*, *supra* note 27, at para. 37.
[31] *Vavilov*, *supra* note 28, at para. 74.

and that requires that they consider evidence and explain why the evidence leads to one conclusion and not another. This applies as much to the *Doré* analysis on *Charter* balancing, discussed in the next section, as it does to any other administrative decision-making process.

ii) Minimal Impairment of Charter Rights Required Under Doré Analysis

50. The Supreme Court of Canada has made it clear that regulated professionals have robust protections under the *Charter* when they express their opinions in the public square, as Dr. Gill has done. Writing about lawyers in *Doré,*[32] Abella J, as she then was, said they "should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint." Likewise with doctors and other professionals, the first consideration is that they do, indeed, have the right, freedom, pleasure and sometimes duty to speak freely. The analysis must begin from that generous, classical liberal proposition.

51. Constraints, if any, are applied secondarily, and must impair the right "as little as reasonably possible."[33]

> [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test: *Doré*, at para. 5.

52. The onus is on the administrative decision maker to ensure that any limit on that protection is minimally impairing. This framework requires an actual effort on the part of administrative decision maker to strike a balance and to "show their work." A mere nod to free speech, as was proffered in the Caution Decisions of the ICRC, is not sufficient.

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[32] *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 SCR 395 ("***Doré***"), para. 68.
[33] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 SCR 613 ("***Loyola***"), at para. 40.

iii) A Lack of Proportionality Means a Lack of Reasonableness

53. Despite considerable submissions from her previous counsel on the *Charter* issues at stake, the word "*Charter*" did not make it into the ICRC decisions. The extent of the balancing exercise was contained in this passage:[34]

> The Committee accepts that there is a range of views about the effectiveness of using provincial lockdown as a means of controlling the spread of COVID-19. The Committee has no interest in shutting down free speech or in preventing physicians from expressing criticism of public health policy. It is valid to point out that there are drawbacks to lockdown. It is also valid to question whether the benefits outweigh the negative aspects or whether the measure is working as expected in Ontario.
>
> The Respondent did not raise these points in her tweet, however. She stated unequivocally and without providing any evidence that there is no medical or scientific reason for the lockdown. Her statement does not align with the information coming from public health, and moreover, it is not accurate. The lockdowns in China and South Korea provide evidence that lockdowns can and did work in reducing the spread of COVID-19. For the Respondent to state otherwise is misinformed and misleading and furthermore an irresponsible statement to make on social medial during a pandemic.

54. The ICRC appears to have started the balancing exercise, acknowledging that physicians have a right to speak on these issues; however, it then noted that the statement did not align with the information coming from public health, substituted its own opinion (without evidence), and concluded that Dr. Gill was misleading the public. The inherent inconsistency of these two points shows that the decision is incoherent and it provides no meaningful guidance to the physician.

55. As noted above, the *Doré* decision, modified by *Loyola*, makes it clear that a proportionality exercise must occur. A recent decision of the Ontario Court of Appeal summarized the requirement:

> [148] What does a "robust proportionality analysis" involve? In my view, the analysis must advert to the proportionality analysis developed by the Supreme Court in *Oakes* for cases in which a government actor is seeking to limit a *Charter* right. The proportionality analysis from *Oakes* asks whether the limit on the right is proportionate in effect to the public benefit conferred by the limit. Two aspects must be carefully assessed: the negative effects on the individual whose rights are engaged, and the positive effects on the public good. Using the court's own words, this analysis is to take "full account of the 'severity of the deleterious effects of a measure on individuals or groups'", that is, whether the "benefits of the impugned law are worth the cost of the rights limitation", or, more precisely, whether "the deleterious effects are out of proportion to

[34] ICRC Decision re: Michael Brown, p. 6 [Application Record, Tab 6, p. 53].

> the public good achieved by the infringing measure". This is to be a "broader assessment". These principles apply with necessary modifications to tribunal decisions such as the disposition decision in this case.[35]

56. The Court in *Lauzon* was critical of the administrative panel's half-hearted attempt at a balancing exercise, when it said it would be "guided by *Charter* principles" and then did not revisit the matter. "The *Doré* approach should not tempt tribunals to elide key steps in the analysis. Because the rights limitation analysis in this case was complex and involved many competing public interests, the Hearing Panel had to do more."[36]

57. But what does this look like? The Court of Appeal provides practical guidance in *Lauzon*:

> The Panel was required to undertake a robust analysis of the impact of its proposed disposition on JP Lauzon's rights. To structure this analysis, the Panel was required to undertake three inquiries: first, to assess the negative or deleterious effects that the removal recommendation would have on the exercise of right asserted by JP Lauzon (on the assumption that the recommendation would be accepted by the Attorney General and implemented by Cabinet) as well as any collateral effects, for example, creating a chilling effect on the rights of others; second, to assess the positive effects or benefits of that disposition in terms of the public good; and third, to undertake the proportionality analysis by assessing, for example, whether the disposition involves means that are always impermissible, whether the disposition is needed to achieve the good sought, or whether the deleterious effects or costs imposed by the disposition are out of proportion to the public good to be achieved. The Panel did not do that work, and it is not up to this court, in an effort to salvage the disposition, to reconstruct what the Panel's approach would have been. It is not the reviewing court's function to fill a "fundamental gap" in a tribunal's reasoning by mining the record.[37]

58. In Dr. Gill's case, the ICRC also failed to "do the work." There was no consideration of the negative or deleterious impacts and collateral effects on Dr. Gill's side of the scale; and there was little consideration of the public good, beyond paternalistic concern that some members of the public might not follow public health measures if they listened to Dr. Gill. There was certainly no balancing undertaken. The ICRC paid only lip service to there being a "range of views" about lockdowns, and that it is "valid to point out question whether the benefits outweigh the negative aspects," as it then proceeded

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[35] *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 (CanLII) ("***Lauzon***"), at para. 148.
[36] Ibid at para. 149.
[37] Ibid at para. 151.

to say that her statement did not align with the information coming out of public health.

59. While it may seem onerous for a panel comprised mostly of physicians—more skilled and accustomed to applying medical standards than weighing broader social goals and individual *Charter* rights—that job is now part of their territory, as professional regulators increasingly attempt to stretch their mandates into regulating members' speech. The onus is on them to engage in this robust analysis, and if they fail to do so, deference should not be assumed or granted.

60. Here, as Dr. Gills's comments were critical of government lockdowns and were thus political in nature and a "highly valued form of expression", [38] they should have been afforded the highest level of protection under the *Charter* and an exceptionally robust *Doré/Loyola* analysis.

61. The decision of the Saskatchewan Court of Appeal in *Strom,* [39] in which a nurse was accused of professional misconduct for speaking out on social media about care her grandfather had received, stands for the proposition that the right of individuals to their *Charter*-guaranteed freedom of expression is not forfeited upon becoming a regulated health professional, and that their voices make important contributions to public debate, even when they are questioning the system of which they are a part:

> [160] The freedom to criticize services extends equally to public services. Indeed, the right to criticize public services is an essential aspect of the "linchpin" connection between freedom of expression and democracy. In Canada, public healthcare is both a source of pride and a political preoccupation. It is a frequent subject of public discourse, engaging the political class, journalists, medical professionals, academics, and the general public. Criticism of the healthcare system is manifestly in the public interest. Such criticism, even by those delivering those services, does not necessarily undermine public confidence in healthcare workers or the healthcare system. Indeed, it can enhance confidence by demonstrating that those with the greatest knowledge of this massive and opaque system, and who have the ability to effect change, are both prepared and permitted to speak and pursue positive change. In any event, the fact that public confidence in aspects of the healthcare system may suffer as a result of fair criticism can itself result in positive change. Such is the messy business of democracy.

62. It is worth reflecting, in light of this passage, on whether the CPSO's admonition against doctors

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[38] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 SCR 295, at para. 77.
[39] *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII) ("***Strom***").

expressing opinions contrary to public health and government policies did more to damage public trust in our institutions, especially the College itself, than anything Dr. Gill ever said.

63. The ICRC failed to give proper (or any) consideration to the importance of the freedoms of expression and opinion that are protected under the *Charter*. Freedom of expression is of fundamental importance to democracy. As was cited by the Supreme Court of Canada in *Ford v. Quebec AG*[40] at paragraph 56:

> The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision making, and (4) as maintaining the balance between stability and change in society.

64. Dr. Gill's goals in expressing her opinion serve these values in all respects. To punish and therefore effectively prohibit the type of commentary that was being offered by Dr. Gill would be to prevent doctors from participating in the public square in support of those described values—unless they happen to align with currently acceptable views. The right to hold and express opinions that go against the prevailing orthodoxy is sacrosanct in a liberal democracy, or at least it was. Every encroachment on these first principles serves to invite more of the same, and chips away at the very foundations of our society. Before long, the edifice can no longer stand.

iv) The College's Statutory Objectives

65. The proportionality exercise in *Doré* requires that *Charter* protections "are upheld to the fullest extent possible given the statutory objectives within a particular administrative context."[41] The first question is, what statutory objectives is the decision-maker tasked to uphold? The College has a duty under s. 3 of the *Regulated Health Professions Act* to regulate physicians in the public interest and to develop and maintain appropriate standards of practice.

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[40] *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712, para. 56.
[41] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293, para. 57.

66. While this does suggest legislative breadth, one must always be wary of subjective terms that can be conveniently applied as necessary – "public interest" is such a term. It was assumed by the College that it was in the public interest for everyone to follow government policies during Covid-19; but, for many people, and in many situations, those policies were against their interests and even harmful to them. For *those* members of the public, it was in their interest to have a physician who scrutinized and challenged the policies that upended their lives and caused damage in manifold ways. It is not enough to say "it is in the public interest" without more.

67. In *Strom*, this was one of the considerations the Court of Appeal expected the panel below to engage with. The Court first noted (at para. 115) that "the right to participate in social and political discourse is an important aspect of personal autonomy and free speech and is at the heart of a liberal democracy." It then held (at para 124):

> Crucially, although the Discipline Committee did briefly address the s. 2(b) *Charter* argument as a separate issue, it did not otherwise refer to the impact on Ms. Strom's personal autonomy or freedom of speech. Nor did it refer to the related issue of public discourse relating to the healthcare system, including the possibility that participation by registered nurses in activity of that kind might, depending on the circumstances, enhance the reputation of registered nurses and advance the public interest. [Emphasis added.]

68. In other words, the public has a right to hear opinions from professionals which might be critical or skeptical, and not just those that toe the party line; and it may very well be in the public interest that they do. These deficiencies, among others, led the Court to conclude that the panel below had unjustifiably infringed the nurse's right to free expression, and decline to even return the matter for reconsideration.

69. Another recent case, involving nurses speaking out at public events about Covid-19 vaccine harms, led to a finding by the Divisional Court that the ICRC had conducted a satisfactory *Doré* proportional analysis when it concluded that the nurses' statements were dangerous to public health.[42]

[42] *Pitter v. College of Nurses of Ontario*, 2022 ONSC 5513 (CanLII) (Div. Ct.) ("***Pitter***").

The rather paternalistic assumption was made that the regulator needed to step in and control "misinformation" to protect the public interest. Again, it presumes that the regulator understands what is in the public interest in all respects. Can it say confidently and accurately that there were *no harms* from the Covid-19 vaccines—or from their arrival being a condition precedent to ending damaging lockdowns, as Dr. Gill opined? Perhaps being alerted to potential side effects and harms was more in the public interest than suppressing it.

70. The *Pitter* case is, however, distinguishable from Dr. Gill's because the nurses were advising the public about what they should do (avoid the vaccine). Dr. Gill did not say that. Her comments did not involve treatment recommendations at all,[43] but were expressions of opinion on government policy. This, again, is at the extreme edge, if not outside the bounds, of appropriate regulatory control. The assertion of regulatory authority over such speech must be based on an obvious connection to the professional services under its jurisdiction, and "edge cases" should be resolved in favour of expansive freedoms. Alternative viewpoints and vigorous advocacy alone are not grounds for censure. Regulators must tolerate "a degree of discordant criticism"[44] in a free and democratic society.

71. The further the regulator moves away from regulating professional standards and competence, the more it must demonstrate the existence of an applicable statutory objective to balance against the restriction on *Charter* rights, and the more stringently the protections of those rights must be upheld. Neither the "public interest" nor "upholding standards of practice" were served by curtailing Dr. Gill's speech in the public square.

72. Although an ICRC decision is not technically a disciplinary proceeding and a finding of "professional misconduct" is not made, there must be some rational connection to statutory objectives in

[43] While treatment recommendations are more appropriate for regulatory limits, even here, practitioners have the right to adhere to a minority viewpoint supported by a "responsible and competent body of professional opinion" (*Brett v. Ontario (Board of Directors of Physiotherapy), 1991 CanLII 8286 (ON SCDC),* 77 D.L.R. (4th) (Div. Ct.), at para. 35).
[44] *Doré*, *supra* note 32, at para. 65.

order to issue a caution. The *Medicine Act*[45] describes the various acts which might trigger a finding of professional misconduct. Among them are "conduct unbecoming a physician," "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," and "failing to maintain the standard of practice of the profession." None of these are applicable here on any reasonable assessment of the facts.

73. Standards of practice in the profession evolve as better knowledge becomes available. They cannot be static, or medical science would never improve. All of this is predicated on physicians being able to communicate, debate, hear new recommendations, test hypotheses, and simply share experiences with colleagues around the watercooler (in its digital form, Twitter). This open communication refines and sharpens the practice of medicine, which improves the lives of patients and the general public. Even during a pandemic, and particularly when the approach that was adopted deviated dramatically from all previous pandemic plans and was quickly politicized, open communication and debate is critical.

74. It is not unreasonable to expect professionals to adhere to objective standards in self-governing professions. Regulatory bodies are statutorily empowered to ensure that their members are competent, ethical and professional while they are performing their roles as doctors, lawyers, nurses, etc. In what should be rare instances, and where there is a clear nexus with the profession, off-duty and non-client or non-patient related conduct can also be subject to regulation. But such bodies cannot be permitted to run roughshod over professionals' lives or abuse their powers by extending beyond their statutory mandate.

75. It *is* unreasonable to demand that educated professionals, with different perspectives and often with more insight and experience than decision-makers in government, public health, and the College, be barred from publicly challenging policies they believe to be harmful. Any "guidance," such as the

[45] *Medicine Act, 1991*, S.O. 1991, c. 30, O. Reg. 856/93 "Professional Misconduct"

COVID-19 FAQs for Physicians relied on by the ICRC herein, that seeks to arbitrarily suppress or cause a chilling of one side of a debate, or requires opinions to parrot government policy, cannot be presumed to prevail over the *Charter* rights of professionals, and it is potentially dangerous and against the public interest to do so.[46] The College's duty is not to the government, but rather to the public, and those interests are not necessarily aligned. This cannot be a "standard of practice," and to suggest so is unreasonable on its face. It should not have been relied upon in determining whether a caution was appropriate.

76. There was a time when the ICRC would have dismissed public complaints over a physician's opinions. In the pre-pandemic HPARB decision involving a complaint against a physician for her gun control stance, [47] the Board restated the ICRC decision as follows:

> The Committee determined to take no action on the basis that the Applicant was using the College's complaints process as a tool to advance his own political/policy agenda, constituting an abuse of the complaints process. The Committee stated that it was concerning that the Respondent has been subjected to what appears to be a campaign to dissuade her from voicing her views. The Committee stated that physicians' roles include responsible advocacy with respect to matters affecting public health. The Committee stated that the complaints process should not be used as a tool to silence or intimidate physicians. The Committee determined that there were no issues of clinical care or professional conduct raised in this complaint. The Committee opined that the Applicant's sole concern related to the Respondent's statements in a public forum, as part of a political discourse, and as such, the College has no role in regulating this political debate.

77. It bears asking whether it is the nature of the political views, and whether they align with the dominant views of the Committee, that warrants such an outcome, or whether this principle that the complaints process should not be used as a tool to silence or intimidate physicians from their political opinions has general application. It is respectfully submitted that it is not for the CPSO to decide *which* political and policy perspectives are permitted to be held and expressed by physicians.

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[46] The term "Lysenkoism" comes from the extreme Soviet example of political intrusion into agricultural and other areas of science, supressing "counter-revolutionary" scientists (who were correct) with imprisonment or worse, and resulting in widespread starvation. This is not that—but punishing doctors for medical skepticism and counter-narrative opinions does not typically lead to good places. https://www.encyclopedia.com/science/science-magazines/science-philosophy-and-practice-lysenkoism-study-dangers-political-intrusions-science.

[47] *M.R.M. v N.A.A*, 2020 CanLII 22968 (ON HPARB), para. 25.

78. In terms of "professional misconduct" or "conduct unbecoming" it was not unprofessional or irresponsible to raise concerns about draconian government-imposed lockdown measures that had never been attempted on such a mass scale, or for such a long duration, and that were contrary to all prior pandemic plans over the previous century—indeed, by Dr. Gill's ethical standards, it was irresponsible not to do so.

79. The ICRC had no appropriate statutory objective or standard to balance against the infringement of Dr. Gill's rights, and its decision purporting to do so is unreasonable and cannot be justified. Furthermore, the proportionate balancing analysis cannot be presumed to have taken place at all.

80. It warrants repeating: *Vavilov* applies as much to the *Doré* proportionality exercise as it does to any other administrative decision. They are not separate considerations—one dealing with standard of review and justification, and the other with *Charter* balancing—but they must be understood together. As *Vavilov* refines *Doré*, it means that statutory decision-makers must justify on the record how and why placing statutory objectives over the subject's *Charter* rights reflects a proportionate balancing. A failure to even mention the *Charter* by the ICRC (or HPARB after it) should be damning—and determinative. Deference follows justification. It does not precede it.

B. Decision was Unreasonable Considering Impact on the Physician and the Profession

81. The ICRC failed to adequately justify its decision in light of the high stakes and impacts associated with its censuring of a physician's speech and the imposition of public cautions. As the Supreme Court of Canada stated at para. 133 of *Vavilov*:

> Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

i) Impact on the Physician

82. Although Dr. Gill provided written submissions to the ICRC, there was no due process commensurate with the impact that the formality and public nature of the cautions would have on her professional reputation. There was no hearing or opportunity to assess or challenge the evidence on which the ICRC relied to form its conclusion that Applicant's tweets were incorrect and/or misleading and/or harmful to the public. This impact also informs the question of whether Dr. Gill was afforded procedural fairness, which will be addressed further below.

ii) Cautions are remedial in intention, but punitive in effect

83. A caution is the highest level of sanction this Committee can order, short of sending the matter to a Disciplinary hearing.[48] As was noted in the Goudge Report,[49] a review by then Justice Stephen Goudge of the Ontario Court of Appeal of the CPSO's disciplinary processes, "even non-disciplinary outcomes can have potential negative implications for physicians." Notably, this statement was written before the public posting of cautions began.

84. Cautions are ostensibly a remedial tool, available to the ICRC under s. 26(1) of the *Code*. However, in recent years,[50] they have been placed on the physician's Public Register pursuant to sections 23(2)7 and 23(5) of the *Code*. As noted recently by this Court, "Although such orders are seen as remedial, because they remain indefinitely on the Public Register, which is readily accessible on the College's website, such actions have a significant impact on a nurse's reputation and livelihood. Moreover, a caution can be considered if the member faces discipline at some point in the future…" [51]

85. Accordingly, and particularly when used as a form of censure for public speech unrelated to patient care, cautions carry highly punitive consequences for a physician.

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[48] Hon. Stephen Goudge, K.C., "*Report: Streamlining the Physician Complaints Process in Ontario*" (February 9, 2016), at para. 148.
[49] Ibid, para. 141.
[50] Since approximately 2017, see *Longman v. Ontario College of Pharmacists*, 2021 ONSC 1610 (CanLII) (Div. Ct.) ("***Longman***"), at para. 45.
[51] *Young v. College of Nurses of Ontario*, 2022 ONSC 6996 (CanLII) (Div. Ct.) ("***Young***"), para. 43.

86. In addition to being placed on the Public Register for all to see, the College took extraordinary measures to circulate these cautions widely. In its cover letter to each of the ICRC decisions sent to Dr. Gill, the CPSO states:

> In addition to posting the summary on the public register, the College will email a summary notice of the caution-in-person or SCERP decision to organizations outside the College, including all Ontario hospitals, Canadian medical regulatory authorities, the Federation of State Medical Boards, and other regulatory authorities.[52]

87. Although recent Divisional Court decisions reviewing cautions state that they are purely remedial and not punitive, even with the advent of their publication on the CPSO's Public Register,[53] there is no Court of Appeal guidance on this, and they do not address this additional concern: it cannot be said that circulating a warning message about a physician to every hospital in Ontario and to virtually every medical regulatory institution across the continent is anything other than punitive. This is not a private and remedial slap on the wrist to get a fellow colleague to correct the error of their ways before they find themselves before a disciplinary panel. This is a public shaming. And it is being done without appropriate and commensurate due process.

88. While such wide circulation might be appropriate in cases where there was a genuine risk of patient harm, perhaps where there has been an interim licence suspension or sexual assault, it is an extremely punitive consequence for a physician under these extraordinary circumstances of being censured by a regulator over weaponized public complaints that have nothing to do with patient care. The prejudice to Dr. Gill outweighs any benefit to the public in posting and circulating the cautions. The impact in terms of opportunities for advancement and mobility for a physician are significant, as is her ability to earn a living from referrals from other physicians, as Dr. Gill does as a specialist.

89. *Vavilov* is instructive on this point. To reiterate from earlier in these submissions: "Where the

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[52] Letter to Dr. Gill from CPSO, dated February 22, 2021 [HPARB Record of Proceedings, Volume 6B, page 485 (PDF p. 190)].
[53] Following the Divisional Court in *Longman*, which the HPARB notes in each of its decisions as well. See also *Griffith v. Health Professions Appeal and Review Board*, 2021 ONSC 5246 (CanLII) (Div. Ct.), following *Geris v. Ontario College of Pharmacists*, 2020 ONSC 7437 (CanLII) (Div. Ct.).

impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes."[54] In other words, to be reasonable, *Vavilov* requires decision makers to demonstrate that their powers have been exercised rationally and fairly, particularly where the stakes are high.

90. The ICRC in Dr. Gill's case did not appear to turn their minds to this at all. In fact, they chose to compound the impact by issuing multiple cautions for the same communications.

91. Dr. Gill has not yet appeared before the ICRC to be "cautioned in person" about her "lack of professionalism and irresponsible behaviour." However, the three Caution Decisions have been posted her Public Register since February of 2021, and the notification letters have been disseminated.

iii) Multiple Complaints, Merging Decisions, Mounting Prejudice

92. The ICRC appears not to have turned its mind to the cumulative effect of multiple cautions, or it was indifferent to that effect. Again, this increases the stakes that *Vavilov* instructs the decision maker to reflect upon and justify in its reasons.

93. The CPSO opened seven separate files for each of the complainants, plus an additional s. 75 Registrar's investigation which is the subject of the companion judicial review. The ICRC then issued separate decisions for all eight matters, despite the fact that they related to the same issues and even the same tweets.

94. In doing so, it created the appearance of multiple discipline concerns, which is highly prejudicial and punitive to Dr. Gill since the cautions are listed individually on her Public Register. It also seems to be an extraordinary outcome compared to other cautions decisions, and examples of multiple cautions being ordered at the same time could not be found.[55] Despite having never received a single patient

[54] *Vavilov*, *supra* note 28, at para. 133.
[55] For example, in *College of Physicians and Surgeons of Ontario v. Gerber*, 2023 ONPSDT 11, a physician received complaints from ten different women about painful internal examinations over a 17-year period. He had received a single caution-in-person before ultimately being sent to discipline, where he received a single reprimand (and suspension).

complaint throughout her entire medical career, she now appears to have an extensive discipline history with the CPSO. It is also not clear, unless someone clicks on the caution reference and reads the underlying decision, that this is about her comments on Twitter. At a glance, one would assume that there are practice concerns—a significant liability for a specialist relying on referrals.

95. By referencing the cautions in the Dismissed Complaints, the CPSO violated Dr. Gill's privacy and will prejudice her in future investigations by the ICRC, if any. All prior complaints, whether dismissed or not, will be reviewed should she ever have another matter before the ICRC, and will include the five Dismissed Complaints with references to cautions given in the other three. This will have a compounding effect, and particularly with principles of progressive discipline, will ensure that she is treated as a "high-risk repeat offender" with multiple transgressions, and future complaints will be escalated accordingly, without the opportunity of discretionary diversion. This will have an unreasonably punitive effect on the Applicant. Indeed, the ground has been seeded for her to be found "irremediable" or "ungovernable."[56]

96. On review of the Dismissed Complaints, the HPARB found that the "caution issued as a result of the broad, parallel Registrar's Investigation was a factor in the Committee's decision and reference to it cannot be removed."[57] This is not coherent. Either there was a basis for a caution or there was not. Incorporating by reference cautions in separate complaints on separate topics is akin to writing in a decision that someone's complaint for improper dosing is dismissed, but the physician was cautioned on someone else's complaint about her bedside manner. As noted above, all it does is multiply the number of decisions which reference cautions, making Dr. Gill appear to be a repeat offender. She is required to disclose this information for any position to which she applies. This has professional, reputational, and potentially disciplinary consequences to her which both the ICRC and the HPARB failed to consider

[56] See, for example, *Hanson v. College of Physicians*, 2021 ONSC 513 (CanLII) (Div. Ct.).
[57] HPARB Decision re: Dr. Terry Polevoy, p. 13, para. 53 [Application Record, Tab 9, p. 82].

adequately or at all, contributing to the unreasonableness and procedural unfairness of the decisions.

iv) Impact on the Medical Profession & the Public

97. Delivering cautions to professionals for engaging in counter-narrative speech comes at a cost that goes beyond Dr. Gill's professional reputation and ordeal. While the Court in *Peterson* declared that "The ICRC decision does not prevent Dr. Peterson from expressing himself," that is an extremely narrow understanding of "freedom of expression". The freedom is not merely to be at liberty to speak, it is about "freedom from post-speech, content-based sanctions from the state, or a publicly regulated professional body."[58]

98. As noted by one scholar, there is a societal good to most speech. When considered in economic terms, the originator of an idea that is expressed publicly cannot keep others from benefitting from that idea for free. Assuming that the speech contains valuable information, and that on the basis of this information there is public outrage and subsequent reform, society ends up better (including the author). But if there is negative feedback to the speech, all negative consequences are born by the author alone. For this reason, he posits, non-commercial expression is often very susceptible to stifling or chilling, and therefore tends to receive greater constitutional protection.

99. Looking at the example of Dr. Peterson, the author notes that he is a poor test case because he is so unrepresentative of most professionals:

> Given the economics of non-commercial expression, the costs imposed do not have to be substantial to chill expression. One simply needs to impose enough institutional costs to make a disagreeable or dissenting speaker decide that it is not worth the trouble – why bother? A single moment of displeasure or disagreement can launch a tweet. A single tweet can launch an investigation, a 'constructive conversation', or even panel hearings. The costs of these proceedings are not borne by the complainant, who has probably moved on to their next twitter fight, but will be borne by the professional body, and by the speaker, of course.

100. Indeed, the costs are borne by the rest of the medical profession, as they prudently choose to keep

[58] Michael Ilg, "*It's Not Easy Being Mean*", (September 6, 2023), The University of Calgary Faculty of Law Blog.

silent in these censorious times on matters of medical, scientific and/or political controversy. The public's *Charter* right to hear the expression is violated, even though they may never appreciate the value of that which was silenced.

101. The ICRC (and the HPARB after it) failed to consider the chilling effect on the medical profession at all. *Vavilov*'s focus on justification requires reasons which reflect the stakes. In a case such as this, the stakes clearly include the impact on the broader profession. The decisions fail on a reasonableness standard by disregarding this impact.

C. The HPARB Decisions Are Also Unreasonable

102. On a review, the HPARB is required to consider both the adequacy of the investigation and the reasonableness of the ICRC's decision, pursuant to s. 33(1) of the *Code*. With respect, they failed in this responsibility and their decisions should be quashed.

103. The HPARB failed to acknowledge that Dr. Gill's *Charter* rights were implicated in any way and made no finding as to whether the ICRC engaged in an appropriate *Doré/Loyola* analysis. Submissions on the implication of the *Charter* were expressly made in writing and orally at the HPARB review,[59] yet the only mention of the *Charter* found in its written decisions was in the recitation of the submissions.

104. The HPARB also failed to consider whether deference was appropriate in a non-medical matter: the HPARB unreasonably deferred to the ICRC on the basis that it included three physician members applying their expertise in the standards of the profession,[60] without considering whether the CPSO's guidance on communications constituted a standard of the profession within their expertise, and for which a caution could be issued.

105. While the HPARB panel acknowledged the requirements of *Vavilov* in assessing the

[59] Submissions of Dr. Gill to HPARB Review Panel, dated October 12, 2022, pp. 29 ff. [HPARB Record of Proceedings, Supplemental Volume, p. 30 (33 of PDF)].
[60] HPARB Decision re: Mark Brown, p. 16, para. 45 [Application Record, Tab 14, p. 165].

reasonableness of the ICRC decision, namely whether, as a whole, the decision was transparent, intelligible and justified, it did not engage with this question on its review in any meaningful way. It acted, essentially, as a rubber stamp without considering whether the outcome of the decision was supported by a rational and coherent chain of analysis that was justified in relation to the relevant facts and laws applicable to the decision-making process.

106. It was apparently of no concern to the HPARB that the *Charter* was engaged, that a robust proportional balancing was required, that the ICRC decisions might chill the speech of the medical profession, or that the stakes in ordering multiple public cautions were high to Dr. Gill and warranted greater justification. It did not appear to matter that the ICRC did not engage with Dr. Gill's submissions on the science supporting her posts, or that it substituted its own "evidence" and found them as facts. The HPARB held the ICRC decisions to be properly investigated and reasonable. It issued seven largely identical decisions of its own. No deference should be shown to the HPARB for this effort.

D. The ICRC Breached Dr. Gill's Right to Procedural Fairness

107. The details of the compounding cautions and the dissemination of them across the continent were set out above in the context of the impact, which a reasonable decision should consider. But these concerns are also relevant to the question of procedural unfairness, a finding of which does not require a reasonableness standard or deference to the administrative decision maker. For questions of procedural fairness, the court is to apply the factors in *Baker* to determine the level of procedural fairness required in the circumstances of the case.[61]

108. A recent Divisional Court decision[62] is on point. In *Mirza*, the Law Society of Ontario ("**LSO**") found that numerous students had cheated on their online licensing exams. After receiving written submissions, but without a hearing, it voided their exams. This was found to be reasonable by the Court;

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[61] *Vavilov*, supra note 28, para. 23. The criteria for assessing procedural fairness continue to be as set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 ("***Baker***"), para. 21-28.
[62] *Mirza et al. v. Law Society of Ontario*, 2023 ONSC 6727 (CanLII) (Div. Ct.).

however, additionally voiding their LSO registration and circulating the decision to all legal regulators in the country, in the absence of a hearing, was unduly punitive and therefore a breach of procedural fairness. The same finding should follow in the case at bar, with a similar order that the CPSO send a correction to the original recipients.[63]

PART IV — ORDER REQUESTED

109. The Applicant requests that this application be allowed and that all seven of the Decisions of the HPARB, which either upheld the Caution Decisions of the ICRC, or which refused to order the removal of the caution references in the Dismissed Complaints. be quashed.

110. The Applicant requests that the Caution Decisions of the ICRC be quashed and states that, given the complexity of the related decision proceeding directly to judicial review from the ICRC, this would be an appropriate case for the Court to quash the Decisions at both levels, without returning them to HPARB.[64]

111. The Applicant requests an order of *mandamus* requiring the ICRC to amend the Dismissed Complaints to expunge the reference to cautions.

112. The Applicant further requests an order of *mandamus* requiring the CPSO to circulate a retraction to all recipients of the notice of caution and to remove references to the cautions on the public register forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2023.

Lisa D.S. Bildy
Counsel to the Applicant

[63] The Court in *Mirza* ordered the LSO to advise the legal regulators across Canada that the decision had been quashed.
[64] In *Kastner v. Health Professions Appeal and Review Board*, 2023 ONSC 629 (CanLII) (Div. Ct.), the HPARB had come to the unreasonable conclusion that the ICRC had conducted an adequate investigation, which the Divisional Court found it had not. Rather than send the decision back to the HPARB for a new review, which would be pointless, it was ordered that both levels of decisions be quashed. The Court ordered the ICRC to conduct a new investigation in accordance with its reasons.

SCHEDULE "A" - LIST OF AUTHORITIES

Jurisprudence

1. *Peterson v. College of Psychologists of Ontario*, 2023 ONSC 4685 (CanLII) (Div. Ct.)
2. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653
3. *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 SCR 395
4. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 SCR 613
5. *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 (CanLII)
6. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 SCR 295
7. *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 (CanLII)
8. *Ford v. Quebec (Attorney General*), 1988 CanLII 19 (SCC), [1988] 2 SCR 712
9. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293
10. *Pitter v. College of Nurses of Ontario*, 2022 ONSC 5513 (CanLII) (Div. Ct.)
11. (*Brett v. Ontario (Board of Directors of Physiotherapy), 1991 CanLII 8286 (ON SCDC),* 77 D.L.R. (4th) (Div. Ct.)
12. *M.R.M. v N.A.A*, 2020 CanLII 22968 (ON HPARB)
13. *Longman v. Ontario College of Pharmacists*, 2021 ONSC 1610 (CanLII) (Div. Ct.)
14. *Young v. College of Nurses of Ontario*, 2022 ONSC 6996 (CanLII) (Div. Ct.)
15. *Griffith v. Health Professions Appeal and Review Board*, 2021 ONSC 5246 (CanLII) (Div. Ct.)
16. *Geris v. Ontario College of Pharmacists*, 2020 ONSC 7437 (CanLII) (Div. Ct.)
17. *College of Physicians and Surgeons of Ontario v. Gerber*, 2023 ONPSDT 11
18. *Hanson v. College of Physicians*, 2021 ONSC 513 (CanLII) (Div. Ct.)
19. *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817
20. *Mirza et al. v. Law Society of Ontario*, 2023 ONSC 6727 (CanLII) (Div. Ct.)
21. *Kastner v. Health Professions Appeal and Review Board*, 2023 ONSC 629 (CanLII) (Div. Ct.)

Secondary Sources

1. Hon. Stephen Goudge, K.C., "*Report: Streamlining the Physician Complaints Process in Ontario*" (February 9, 2016)

2. Michael Ilg, "*It's Not Easy Being Mean*", (September 6, 2023), The University of Calgary Faculty of Law Blog

SCHEDULE "B" - STATUTES AND LEGISLATION

1. *Health Professions Procedural Code*, being Sched. 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, ss. 23(2)7 and 23(5):

Register

23 (1) The Registrar shall maintain a register. 2007, c. 10, Sched. M, s. 28.

Contents of register

(2) The register shall contain the following:

7. A notation of every caution that a member has received from a panel of the Inquiries, Complaints and Reports Committee under paragraph 3 of subsection 26 (1), and any specified continuing education or remedial programs required by a panel of the Inquiries, Complaints and Reports Committee using its powers under paragraph 4 of subsection 26 (1).

Access to information by the public

(5) All of the information required by paragraphs 1 to 19 of subsection (2) and all information designated as public in the by-laws shall, subject to subsections (6), (7), (8), (9) and (11), be made available to an individual during normal business hours, and shall be posted on the College's website within a reasonable amount of time of the Registrar having received the information and in a manner that is accessible to the public or in any other manner and form specified by the Minister. 2017, c. 11, Sched. 5, s. 11 (3).

2. *Health Professions Procedural Code*, being Sched. 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 26:

What a panel may do

26 (1) A panel, after investigating a complaint or considering a report, considering the submissions of the member and making reasonable efforts to consider all records and documents it considers relevant to the complaint or the report, may do any one or more of the following:

1. Refer a specified allegation of the member's professional misconduct or incompetence to the Discipline Committee if the allegation is related to the complaint or the report.
2. Refer the member to a panel of the Inquiries, Complaints and Reports Committee under section 58 for incapacity proceedings.
3. Require the member to appear before a panel of the Inquiries, Complaints and Reports Committee to be cautioned.
4. Take action it considers appropriate that is not inconsistent with the health profession Act, this Code, the regulations or by-laws. 2007, c. 10, Sched. M, s. 30.

Prior decisions

(2) A panel of the Inquiries, Complaints and Reports Committee shall, when investigating a complaint or considering a report currently before it, consider all of its available prior decisions involving the member, including decisions made when that committee was known as the Complaints Committee, and all available prior decisions involving the member of the Discipline Committee, the Fitness to Practise Committee and the Executive Committee, unless the decision was to take no further action under subsection (5). 2007, c. 10, Sched. M, s. 30.

3. *Health Professions Procedural Code*, being Sched. 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 33(1):

Conduct of review

33 (1) In a review, the Board shall consider either or both of,

(a) the adequacy of the investigation conducted; or

(b) the reasonableness of the decision.

4. *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 3:

Duty of Minister

3 It is the duty of the Minister to ensure that the health professions are regulated and co-ordinated in the public interest, that appropriate standards of practice are developed and maintained and that individuals have access to services provided by the health professions of their choice and that they are treated with sensitivity and respect in their dealings with health professionals, the Colleges and the Board. 1991, c. 18, s. 3.

5. *Professional Misconduct*, O. Reg. 856/93 under *Medicine Act, 1991*, S.O. 1991, c. 30,

1. (1) The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code:

2. Failing to maintain the standard of practice of the profession.

33. 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.

34. Conduct unbecoming a physician.

6. *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 2:

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

DR. KULVINDER KAUR GILL	-and-	**HEALTH PROFESSIONS APPEAL AND REVIEW BOARD, et al.**
Applicant		Respondents

Court File No. 243/23

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT TORONTO

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