SCC Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

DR. KULVINDER KAUR GILL

APPLICANT
(Appellant)

– 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
(Respondents)

A N D B E T W E E N:

DR. KULVINDER KAUR GILL

APPLICANT
(Appellant)

– and –

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO (THE INQUIRIES, COMPLAINTS AND REPORTS COMMITTEE)

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

(DR. KULVINDER KAUR GILL, APPLICANT)
(Pursuant to s. 40(1) of the *Supreme Court Act*, R.S.C. 1985 and Rule 25 of the *Rules of the Supreme Court of Canada*)

LIBERTAS LAW
341 Talbot Street
London, ON N6A 2R5

Lisa D.S. Bildy
Tel: 519-852-6967
bildy@libertaslaw.ca

Counsel for the Applicant

WATSON JACOBS MCCREARY
4711 Yonge St., Suite 509
Toronto, ON M2N 6K8

David Jacobs (LSO #23088N)
Steven Bosnick (LSO #45890S)
Tel: 416-222-0055
Email: djacobs@wjm-law.ca /
sbosnick@wjm-law.ca

Counsel for the Respondent,
Health Professions Appeal and Review Board

COLLEGE OF PHYSICIANS AND
SURGEONS OF ONTARIO
Legal Office
80 College Street
Toronto, ON M5G 2E2

Elisabeth Widner (LSO #30161R)
Tel: 416-967-2600
Email: ewidner@cpso.ca

Counsel for the Respondent,
College of Physicians and Surgeons of Ontario

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PART I – OVERVIEW & STATEMENT OF FACTS

Overview

1. Canadians in modern society are increasingly impacted by regulatory and administrative decisions in their day-to-day lives. This is particularly true of regulated professionals. As McLachlin J stated in *Cooper*[1]: "Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals".

2. The present leave application is about judicial deference to administrative bodies that fail in this responsibility. Decision-makers must engage with and justify infringements of *Charter*[2] rights, or they should not be afforded deference on a reasonableness standard of review.

3. This case involves a specialist physician who raised concerns on social media through posts on X (formerly Twitter) in August of 2020 about government and public health Covid policies, particularly regarding lockdowns and their harmful impacts. Her concerns were valid and reasonable. However, this was contrary to an edict by the College of Physicians and Surgeons of Ontario ("**CPSO**") that physicians were not to speak against the government – a clear infringement of *Charter* rights. A committee of the CPSO, the Inquiries, Complaints and Reports Committee ("**ICRC**") simultaneously ordered a series of three cautions against Dr. Kulvinder Kaur Gill ("**Dr. Gill**") in February of 2021 which were placed on her public record and disseminated widely to health institutions and medical regulators across North America.

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[1] *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), at para 70
[2] *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

4. The ICRC failed to conduct a robust analysis – indeed it did not even mention the *Charter*. A passing reference to "not wishing to curtail her free speech" was made, before proceeding to do exactly that.

Clear Question of Public Importance

5. There are two questions of public importance that this Honourable Court is asked to resolve: i) whether a correctness standard of review applies where an administrative decision is primarily centred around the infringement of *Charter* rights, which the administrative decision-maker failed to consider adequately or at all; and ii) whether the permanent publication and wide dissemination of "cautions" issued by a professional regulator are punitive in effect and warrant a higher degree of justification. There is conflicting law across Canada on the latter point.

6. Given the number of Canadians who are members of the hundreds of regulated professions across the country, and efforts by one provincial government to legislatively address the infringement of *Charter* rights by professional regulators,[3] clarity on these issues is of national importance and interest.

Procedural History

7. Dr. Gill filed a judicial review application to quash a series of eight decisions of the ICRC, three of which ordered her to receive concurrent cautions-in-person with respect to three of her "tweets" on X and the remainder of which incorporated the cautions by reference. A caution-in-person is the highest level of sanction available to the ICRC, short of sending the matter to a disciplinary panel.

[3] Alberta government news release, "Protecting Albertans' rights and freedoms", October 23, 2024

8. All but one of these decisions involved public (non-patient) complaints and these were first reviewed and upheld by the Health Professions Appeal and Review Board ("**HPARB**"), before joining with a related decision arising out of a high-level Registrar's investigation, initiated under s. 75(1) of the *Health Professions Procedural Code* ("**the *Code***")[4], which was also as a result of these public (non-patient) complaints. The two applications were judicially reviewed concurrently by the Divisional Court. The individual complainants and the Attorney General of Ontario did not take part in the Divisional Court proceedings.

9. The Divisional Court released its reasons for decision on May 7, 2024, denying the applications with costs. Leave to appeal to the Court of Appeal of Ontario was denied on October 3, 2024, also with costs. Dr. Gill now seeks leave to appeal to this Honourable Court.

Statement of Facts

10. 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.

11. To date, Dr. Gill has never had a patient complaint to the CPSO. These proceedings are solely the result of her expression of evidence-based opinions and ethical concerns about government and its public health policies on social media with which some members of the public

[4] *Health Professions Procedural Code*, being Sched. 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18

did not agree, resulting in an aggressive targeted and malicious online public campaign against her that ultimately resulted in public complaints about those opinions to her regulator.

12. 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. Dr. Gill was compelled by her conscience and her concern for marginalized communities in Canada and the developing world to speak against harmful government policies. 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.

13. Dr. Gill is a medical professional who regularly administers vaccines, including to children, and has devoted years of her life to conducting scientific research for the development of HIV-1 candidate vaccines. She supported giving the Covid-19 vaccine to high-risk individuals with their informed consent, and 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.

14. But that evidence-based approach, which led her to criticize governments' public health policies, was at odds with the regulator of the medical profession, which had taken a different approach during the pandemic: centralized public messaging for all of Ontario's physicians.

15. In the CPSO's publication, *COVID-19 FAQs for Physicians,* in effect beginning in April of 2020 and subsequently removed from their website, the College provided 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.]

16. The tweets for which Dr. Gill was to be cautioned stated the following:

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**"]

Contact tracing, testing and isolation…is ineffective, naïve & counter-productive against COVID-19… and by definition, against any pandemic. [the "**Kulldorff Retweet**"]

17. The ICRC took the view that these statements demonstrated a "lack of professionalism and failure to exercise caution in her posts on social media, which is irresponsible behaviour for a member of the profession and presents a possible risk to public health."[5]

18. In concluding that these tweets merited cautions, the ICRC 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 in the "*COVID-19 FAQs for Physicians*".

19. The ICRC 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.

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[5] Decision of the ICRC, Tab A (viii) of Schedule A to the Notice of Application, p. 4

20. Dr. Gill's Lockdown Tweet was in keeping with past pandemic plans and with numerous esteemed scientists around the globe. It was certainly not "verifiably false" and served to sound an alarm bell about the contentious policies being enacted by the government.

21. The Vaccine Tweet was taken out of context and treated as though it were a general statement against Covid vaccines (which, at that time in 2020, had not completed clinical trials and were still five months away from authorization anywhere in the world), rather than a refutation of the idea that the Covid vaccines were going to end damaging lockdowns. It was made in the context of a national news conference moments earlier by the head of the Public Health Agency of Canada, Dr. Theresa Tam, in which she said that lockdowns would continue despite the arrival of vaccines.

22. The ICRC's concern with the Kulldorff retweet focused on only a portion of the quoted tweet, significantly changing the context from what was actually said by Dr. Kulldorff. In any event, as a former Harvard infectious diseases epidemiologist, Dr. Kulldorff's expertise in public health measures far exceeded that of the ICRC, but the committee dismissed his comment as being contrary to government policy, to which it deferred.

23. Although there were ample submissions provided by Dr. Gill which addressed her protection under the *Charter* from unjustified state interference into her freedom of expression, 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."[6] It then proceeded to do exactly that.

[6] *Ibid*, p. 4

24. The public complaints were then reviewed, as required, by the HPARB, which essentially rubber stamped the decisions of the ICRC with seven nearly identical decisions of its own. At no point did the HPARB address the *Charter* issues involved, although extensive oral and written submissions on this point were made by Dr. Gill at the HPARB review.[7]

The Divisional Court Decision

25. Dr. Gill commenced two applications to Divisional Court for judicial review: i) of the ICRC's s. 75 decision and, ii) of the HPARB review decisions, confirming the ICRC's seven other decisions arising out of the public complaints.

26. The Applications were heard at the same time before a panel of the Divisional Court on April 10, 2024. In its Decision,[8] released on May 7, 2024, the Divisional Court misconstrued the ICRC's decisions by stating that the ICRC recognized Dr. Gill's right to engage in political speech, but did not support breaching her professional responsibilities as a physician by stating as medical facts things that were verifiably false (para 6). In fact, the ICRC did **not** find that Dr. Gill's impugned tweets were verifiably false. It had dismissed complaints over some other tweets, particularly around HCQ, that were not verifiably false, but when it came to the impugned tweets, the test changed: these tweets were found to be irresponsible because they conflicted with government policies that doctors were expected by CPSO not to contradict. Only the Lockdown Tweet was said to be "misinformed", as the ICRC expressed its own misinformed opinion that the "lockdowns in China and South Korea provide evidence that lockdowns can and do work in reducing the spread of COVID-19."

[7] Decisions of the HPARB, Tab B of Schedule A to the Notice of Application
[8] *Gill v. Health Professions Appeal and Review Board*, 2024 ONSC 2588 (CanLII), at para 6

PART II – QUESTIONS IN ISSUE

27. The proposed appeal raises the following questions for this Honourable Court to answer:

a) Should a correctness standard of review apply where an administrative body fails to consider the implication of the *Charter*?

b) Does the publication of "cautions" on a professional's public register warrant a higher degree of justification?

PART III – STATEMENT OF ARGUMENT

Issue 1: Should a correctness standard of review apply where an administrative body fails to consider the implication of the *Charter*?

28. The proposed appeal seeks to clarify the appropriateness of deference to administrative decision-makers where their decisions are primarily centred around *Charter* infringements. Since the question of the scope of *Charter* rights is to be determined on a correctness standard, so it should where the decision-maker fails to consider *Charter* rights adequately or at all.[9]

29. Courts have been struggling with this question,[10] particularly following this Honourable Court's decision in *York Region.*[11] Indeed, the apparently very fine distinction between scope and application of the *Charter* is unstable in practice. This will continue to invite argument over how to characterize the decision, and will turn on whether the decision-maker failed to address *Charter* rights adequately or at all. As in the case at bar, the *York Region* decision demonstrates this difficulty, particularly where reviewing courts are inclined to "read in" a *Charter* analysis that is not apparent on its face.

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[9] See, for example, *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025
[10] See, for example, *Flegel v. Canada (Attorney General)*, 2024 FC 1389 (CanLII)
[11] *York Region District School Board v. Elementary Teachers' Federation of Ontario* ("*York Region*"), 2024 SCC 22

30. In light of this Honourable Court's decisions in *Vavilov*[12] and *York Region*, the direction of the highest court appears to be moving away from judicial deference and administrative constitutionalism, toward the historical role of the courts as "interpreter and guardian of the Constitution."[13] Where an administrative decision is centred on the infringement of *Charter*-protected rights and freedoms, it is respectfully submitted that reviewing courts must therefore ensure that both the *scope* of the right and the *justification* for its infringement are analyzed correctly.[14]

31. In the case at bar, the Divisional Court erred in deferring to an administrative body which first created "guidance" which was *designed to infringe* the constitutional rights of its regulated professionals on its face, and then failed to conduct a robust proportionality analysis (or any meaningful analysis at all) in its application. The *Charter*-infringement was not incidental to another purpose—it **was** the purpose. As such, the Divisional Court had a duty to guard the Constitution and review the decisions on a correctness standard.

32. As Rowe J explained in *York Region*:

> The arbitrator ought to have applied the *Charter*, but failed to do so. Once she failed to appreciate the constitutional dimension of the searches conducted by the principal, there was no intelligible way for her to continue the analysis while fully engaging with the gravity of the alleged violations of the *Charter* right at issue. Courts cannot dilute the sacrosanct nature of *Charter* rights by accepting a different substitute. Nor can courts supplant the reasons proffered by the decision-maker and read the reasons as if it applied a *Charter* right when it fact it applied a different right (at para 68).

[12] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653
[13] *York Region*, para. 64; *Vavilov*, paras. 53-54
[14] *Vavilov*, as confirmed by *York Region*, "used non-exhaustive language in articulating the constitutional questions category, including within it 'other constitutional matters' (para. 55 (emphasis added)). This category [subject to a correctness standard] should not be unduly narrowed." (*York Region*, para. 65)

In other words, it is not enough to merely mention the *Charter* in passing – the decision maker had to demonstrate compliance within the constraints of the *Charter*'s protections.

33. A correctness standard should apply to the question of the appropriate framework of constitutional analysis – if decision makers are to be entrusted with constitutional questions, they must also be cognizant of the level of analysis and framework (such as proportionate balancing) that must be conducted to ensure *Charter* compliance. A failure to consider such a framework must not enjoy a deferential reasonableness standard – this is a 'constitutional question', as per *Vavilov* and *York Region*, that requires a final and determinate answer from the courts.

34. As noted by this Court in *York Region*, it is not for the reviewing court to fill in the gaps in a decision that, as in the case at bar, merely makes a cursory reference to the *Charter* right being infringed:

> When a *Charter* right applies, it is not sufficient that the arbitrator made some references to the *Charter* jurisprudence. Any administrative action must, as a matter of course, always comply with the Constitution (*Vavilov,* at para. 56). However, when a *Charter* right applies, there must be clear acknowledgement of and analysis of that right" (para. 94).

35. Here, the Divisional Court failed to respect the clear limit on the authority of the ICRC emanating from the *Charter*. This limit cannot simply be ignored, nor can the courts fill in the missing analysis *ex post facto*.

36. Nor should such an inadequate justification effort by the administrator be afforded deference, whether the "sanction" is "remedial" or not, as will be discussed further below. A *Charter* infringement is a *Charter* infringement. The Divisional Court erred in excusing the ICRC from performing the necessary robust analysis on the basis that the "sanction" was not disciplinary, but only remedial.

Charter expertise cannot be presumed

37. The Divisional Court erred in applying a post-*Dunsmuir* paradigm of presumed deference, even when expertise is not clearly engaged.[15] It should have applied a *Vavilov* paradigm of robust justification and a correctness standard of review, particularly given that the case was primarily about the delimiting of *Charter* rights for regulated professionals.

38. This Honourable Court in *Vavilov* has, as noted by Sirota and Mancini, "jettisoned the concept of presumptive expertise, which previously supported the presumption of reasonableness review" and now "accepts that it is inappropriate to assume expertise regardless of whether an administrative decision maker possesses it in a given case."[16]

39. The Divisional Court deferred to the "expertise" of the ICRC (comprised of three surgeons and a member of the public) on the CPSO's "guidance" warning physicians not to express opinions that were not aligned with government policies. But the ICRC, itself, had deferred to government pronouncements in its decisions to caution Dr. Gill (whose own medical and scientific expertise with significant post-graduate medical training and scientific research in immunology, microbiology, pediatrics, virology and vaccinology was more relevant than that of the ICRC members) for speaking out against these harmful government policies. The Divisional Court failed to recognize that the ICRC had largely deferred to the "expertise" of the government, resulting in a feedback loop that starts and ends with the administrative state and required an independent judiciary to break the chain of unquestioning deference.

[15] Professors Mark Mancini and Leonid Sirota describe the post-*Dunsmuir* period as hardening the conception of deference, while unravelling the original *Dunsmuir* promise of justified, transparent and intelligible reasons. See "*The End of Administrative Supremacy in Canda*," UBC Law Review, Volume 57, Issue 1, Article 3, pages 59-60.
[16] *Ibid* at page 84, citing *Vavilov* at para 28

40. A presumption of expertise, and therefore deference, in a matter almost entirely involving *Charter* balancing is not rational. Instead, "the invocation of expertise can serve as a euphemism for the state's claims to a right to oppress disempowered citizens."[17]

Fundamental values are at stake

41. Delivering cautions to professionals for engaging in counter-narrative speech compelled by conscience comes at a cost that goes beyond Dr. Gill's professional reputation and ordeal. Indeed, the costs are borne by the rest of the medical profession, as they prudently choose to keep 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.

42. The effect of the case at bar is to embolden regulatory bodies to infringe their members' *Charter* rights with impunity, without due process, and with the same public sanction and censure that would result if a full hearing and finding of professional misconduct were conducted and a reprimand ordered as a penalty. There is no appreciable difference between reprimands and cautions, except that the professional is not afforded a hearing with the latter. In matters involving *Charter* rights of expression and conscience, this will have an obvious chilling effect on the profession.

43. 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

[17] *Ibid,* page 67

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."[18]

44. The ICRC (and the HPARB and Divisional Court 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 include the impact on the broader profession. The decisions fail even on a reasonableness standard by disregarding this impact.

45. The proposed appeal raises issues of public importance and its determination will transcend the interests of the parties involved. Specifically, the public's *Charter* right to hear a variety of perspectives is infringed if the speech of medical professionals is unreasonably curtailed, chilled or punished, and this may have an adverse impact on public trust in regulatory institutions engaging in such unreasonable censure of opinions critical of government or its public health policies. This is particularly critical in matters of scientific debate.

Issue 2: Does the publication of "cautions" on a professional's public register warrant a higher degree of justification?

Public cautions raise the stakes

46. As alluded to above, cautions may be remedial in intention, but they are punitive in effect. They are now publicly posted for an indefinite period and, in Dr. Gill's case, they were widely disseminated across the continent. Do they require more robust justification and procedural fairness in light of *Vavilov*? There is conflicting law on this question and this Honourable Court's clarification is necessary.

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[18] *Vavilov*, at para 74

47. Cautions are available to the ICRC under s. 26(1) of the *Code*, and, since approximately 2017, they have been placed on the physician's Public Register pursuant to sections 23(2)7 and 23(5) of the *Code*. Although recent Divisional Court decisions reviewing cautions state that they are purely remedial and not punitive, this position follows a line of earlier cases which specifically held that they were remedial because they were NOT public. But even with the advent of their publication on the CPSO's Public Register, the Divisional Court and the HPARB have continued to assert in most cases that cautions are purely remedial, handwaving away the impact of this change.[19]

48. In once instance, the impact was acknowledged by the Divisional 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…[20]

49. In addition to being placed indefinitely on the Public Register for all to see, the College in Dr. Gill's case circulated these cautions across the entire continent. 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.

50. Lower courts and tribunals do not address this *additional* concern: it cannot be said that circulating a warning message about a physician (similar to physicians found to have engaged in sexual misconduct) to every hospital in Ontario and to virtually every medical regulatory

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[19] See for example: *Geris v. Ontario College of Pharmacists*, 2020 ONSC 7437 (Div. Ct.), para. 34; *Longman v. Ontario College of Pharmacists*, 2021 ONSC 1610 (Div. Ct.), para. 44; *Griffith v. Health Professions Appeal and Review Board*, 2021 ONSC 5246 (Div. Ct.), para. 81

[20] *Young v. College of Nurses of Ontario*, 2022 ONSC 6996, para. 43

institution across the entire 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 with ongoing harms. And it is being done without the necessity of a finding of professional misconduct and therefore without appropriate and commensurate due process which normally accompanies such a finding.

Conflicting jurisprudence on the nature of cautions

51. This perfunctory conclusion at the Ontario Divisional Court level – that a caution, which is effectively the same as a punitive reprimand in form and substance but which is ordered by a screening committee in the absence of due process, is merely "remedial" – also does not reflect appellate jurisprudence elsewhere and is not in keeping with *Vavilov*'s more onerous expectations of both the administrative decision-maker and the reviewing court.

52. In the recent *Buckingham* decision of the Newfoundland and Labrador Court of Appeal (leave to appeal to the SCC denied), the Court found that a caution can have adverse consequences and requires a reasoning and a justification process reflecting that. As the Court held, "a counsel or caution is not a private matter between the Law Society and the member, and so may negatively impact a lawyer's professional reputation in the community…and its reasonableness must be evaluated in this context."[21]

53. As noted by Professor Paul Daly,[22] it is "clear that the decision-maker's perception that the stakes are low will not justify shortcomings in responsiveness." There would be important

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[21] *Law Society of Newfoundland and Labrador v. Buckingham*, 2023 NLCA 17, paras. 57, 60 and 61

[22] "*2023 Developments in Administrative Law Relevant to Energy Law and Regulation*," by Paul Daly, in Energy Regulation Quarterly, April 2024 – Volume 12, Issue 1, page 9

consequences for Buckingham in the future, should he face other disciplinary proceedings or seek a judicial appointment, hence the decision was unreasonable for want of justification.[23] Therefore, notes Daly, "even a mere screening decision – which resulted in a more favourable outcome for B than a reference to a formal disciplinary hearing – triggers the requirements of *Vavilov* and obliges decision-makers to be responsive."[24]

54. 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 or other regulated professional and should attract a higher degree of justification. 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 Dr. Gill's tweets were incorrect and/or misleading and/or harmful to the public, other than the ICRC's unquestioning deference to government edicts. This impact also informs the question of whether Dr. Gill was afforded procedural fairness.

55. Notably, the Divisional Court in the case at bar also found that there was an appreciable difference between the dissemination of the caution orders against Dr. Gill to "all Ontario hospitals, Canadian medical regulatory authorities, the Federation of State Medical Boards, and other regulatory authorities," and the decision in *Mirza*, where notices of a sanction were sent to law societies across the country, because "<u>the sanction imposed</u> [in Gill] was not punitive, but remedial" (paragraph 87, emphasis added). Yet it earlier cited the decision in *Longman* where the Divisional Court found that, "Cautions and educational directives are remedial in nature and <u>not</u>

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[23] *Buckingham* at para 86

[24] *Supra*, note 21, at page 10

sanctions or penalties" (paragraph 61, emphasis added). Calling a sanction "remedial" does not change its nature – if it looks like a sanction and is identical in form and substance to a sanction, then it probably is a sanction. The Divisional Court's inadvertence may really be a Freudian slip.[25]

56. Clarification of the law on this point is necessary, particularly in light of *Vavilov*, which requires a higher degree of justification where the stakes in a matter are higher (para. 133).

Did the ICRC engage in a robust proportionality analysis in light of the stakes?

57. The Divisional Court appears to acknowledge and then dismiss this concern on the basis that the effect on Dr. Gill was minimal: the response from the ICRC was "proportionate," given the Divisional Court's finding that the cautions were merely remedial (para. 81). If this had been a case of a punitive sanction, the jurisprudence is clear that the ICRC's process was inadequate and the Divisional Court's analysis was wrong. And as argued above, that is the point: This IS a punitive sanction.

58. 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 the government's public health arm (to which it deferred itself), substituted its own opinion (without evidence), and concluded that Dr. Gill was misleading the public (something she vigorously denies). Without any particular expertise (the panel was comprised of three surgeons: a general surgeon, an ophthalmologist and an obstetrician-gynecologist, along with a public member), it preferred its own views on controversial scientific matters, and deemed hers to be "misleading" or "irresponsible" without the benefit of a hearing.

[25] *Mirza et al. v. Law Society of Ontario,* 2023 ONSC 6727 (Div. Ct.)

59. Reviewing *Charter* infringements within the administrative law framework requires the reviewing court to determine if, in exercising its statutory discretion, the decision-maker properly balanced the relevant *Charter* rights and protections with its statutory objectives. In this instance, there is no evidence that the ICRC considered the scope and nature of the *Charter* protections, or the implications of "guidance" cautioning physicians not to contradict the government. As was held in *Doré*, "It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values" and "administrative decisions are *always* required to consider fundamental values" (emphasis in original).[26]

60. The Court of Appeal for Ontario in *Lauzon* was critical of the administrative panel's half-hearted attempt at a balancing exercise in that case, 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."[27]

61. *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.

[26] *Doré v. Barreau Du Québec,* 2012 SCC 12*,* para. 24 and 35, 57-58
[27] *Lauzon v. Ontario (Justices of the Peace Review Council)* ("*Lauzon*"), 2023 ONCA 425, para. 149

Conclusion

62. The ICRC failed to adequately justify its decision in light of the stakes and impacts associated with its censuring of a physician's constitutionally-protected speech and conscience, and the imposition of widely-disseminated, indefinitely-posted, public cautions. The Divisional Court improperly deferred to the ICRC. Clarity from this Honourable Court on the standard of review in such matters is of general public interest and national importance.

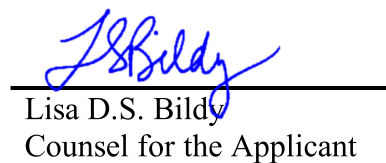
PART IV – ORDER REQUESTED

63. The Applicant requests that leave to appeal be granted.

PART V – COSTS

64. The Applicant does not seek costs and asks that costs not be ordered against her. Should leave be granted, Dr. Gill will seek leave to appeal the costs ordered against her at the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2024.



Lisa D.S. Bildy
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

APPLICANT'S AUTHORITIES	CITED AT PARAGRAPH NO.
JURISPRUDENCE	
Cooper v. Canada (Human Rights Commission), 1996 CanLII 152 (SCC), [1996] 3 SCR 854	1
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SECONDARY SOURCES	
"The End of Administrative Supremacy in Canda," UBC Law Review, Volume 57, Issue 1, Article 3, pages 59-60. https://commons.allard.ubc.ca/ubclawreview/vol57/iss1/3	37
"*2023 Developments in Administrative Law Relevant to Energy Law and Regulation*," by Paul Daly, in Energy Regulation Quarterly, April 2024 – Volume 12, Issue 1, page 9	53

PART VII – LEGISLATION

APPLICANT'S AUTHORITIES	CITED AT PARAGRAPH NO.
STATUTORY PROVISIONS	
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(b)	2
Health Professions Procedural Code, being Sched. 2 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, sections 23(2)7, 23(5), 26, 75(1)	8