

## ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

**Citation:** *College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 7

**Date:** March 23, 2023

**Tribunal File No.:** 21-023, 22-006, 22-012

### **BETWEEN:**

College of Physicians and Surgeons of Ontario

- and -

Drs. Patrick Brian Phillips, Mark Raymond Trozzi and Crystal S. Luchkiw

### **MOTION REASONS**

**Heard:** March 10, 2023, by videoconference

#### **Panel:**

Ms. Sherry Liang (chair)

#### **Appearances:**

Ms. Elisabeth Widner and Ms. Sayran Sulevani, for the College

Mr. Michael Alexander, for Dr. Phillips, Trozzi and Luchkiw

### **RESTRICTION ON PUBLICATION**

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

## Introduction

- [1] In this motion, three physicians against whom the College's Inquiries, Complaints and Reports Committee (ICRC) referred allegations of misconduct ask the Tribunal to exclude (with one exception) all the evidence produced under the relevant investigation orders issued against them. As a corollary, the members ask that the allegations against them be discontinued. At the hearing of the motion the members withdrew their request to call the College's Registrar as a witness in the proceedings.
- [2] The College alleges that Dr. Luchkiw committed professional misconduct by failing to cooperate with the College's investigations relating to her infection control practices, communications about COVID-19 and issuance of vaccine exemptions. The ICRC also referred to the Tribunal an allegation that Dr. Luchkiw breached the terms of an interim order made under the Health Professions Procedural Code (Code), Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c. 18 (RHPA).
- [3] The College alleges that Dr. Phillips made misleading, incorrect or inflammatory communications about the COVID-19 pandemic, including about vaccinations, treatments and public health measures. The College also alleges Dr. Phillips failed to cooperate with the College's investigation, posted College investigatory information online and refused to remove it upon request and failed to maintain the standard of practice of the profession. It also alleges he breached an interim order made by the ICRC.
- [4] The College alleges that Dr. Trozzi made misleading, incorrect or inflammatory communications about the COVID-19 pandemic, including about vaccinations, treatments and public health measures.
- [5] The certificates of registration of all three members are currently suspended, by orders of the ICRC under s. 25.4 of the Code. In addition to the investigations which led to the current proceedings, other College investigations against Dr. Luchkiw and Dr. Trozzi are ongoing, have not been disposed of by the ICRC and are not currently before this Tribunal. Among those are the investigations with which the College alleges Dr. Luchkiw is failing to cooperate.

[6] Each of the referrals to the Tribunal followed investigations which were initiated by Appointments of Investigator (AOIs or investigation orders) signed by the College's Registrar and approved by the ICRC. The members submit that the AOIs do not meet the requirements of s. 75(1)(a) of the Code that the Registrar believe on reasonable and probable grounds that a member has committed professional misconduct or is incompetent. The members assert that the alleged misconduct is based on the College's statements about COVID-19 conduct and communications. They refer specifically to the College's COVID-19 FAQs for Physicians dealing with vaccine exemptions and the precautionary use of drugs in treating COVID-19, as well as its Statement on Public Health Misinformation and follow-up message from the College's Registrar (all of which I will collectively refer to as the "College's statements"). The members argue that since these statements are merely recommendations or guidelines, without binding effect, they cannot be the basis for the belief that the members may have committed acts of professional misconduct or are incompetent. In their submission, to the extent the AOIs rest on these statements, they cannot stand.

[7] For the reasons below, I dismiss the members' motion. I find that the Tribunal has already determined the investigation orders at issue are valid and, in any event, I reject the submission that they are invalid.

### **Background and prior motion**

[8] The College licenses and regulates doctors under the RHPA, the Code, the *Medicine Act, 1991*, SO 1991, c. 30, and associated regulations. Under s. 75(1)(a) of the Code, the Registrar may appoint an investigator if she believes on "reasonable and probable grounds" that a College member has committed an act of professional misconduct or is incompetent and the ICRC approves of the appointment. The ICRC considers requests from the Registrar to initiate investigations, may issue temporary practice restrictions and suspensions to members under investigation and considers and disposes of investigations. In reviewing the results of investigations, the ICRC may decide to refer allegations to the Tribunal for a hearing.

[9] This is not the first time the members have sought to have the allegations against them dismissed without a hearing on their merits. On January 19, the Tribunal

issued a decision refusing the members' motion to have the referrals against them dismissed (*College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 2). In its reasons, the Tribunal described the two arguments on which the motion was based.

[10] In the first argument, the members asserted that the referrals are unlawful because the allegations are based on investigations that the Registrar lacked statutory authority to commence. The physicians' main submission under this first argument is "that they are being prosecuted for breaching the directions contained in certain statements...that the College issued to the profession about COVID-related issues." Their second submission on this argument was that the AOs authorizing investigations against them were invalid because they were overly broad. The members' second argument before the Tribunal was based on guarantees of freedom of expression (s. 2(b)) and life, liberty or security of the person (s. 7) in the *Canadian Charter of Rights and Freedoms* (paras. 2-3).

[11] The members' main submission focused on the same College statements that are the target of the current motion. As set out in the Tribunal's decision on the prior motion, the members argued that the statements were attempts by the College to limit their free expression and discipline them on the basis of prohibitions or directions it had no statutory authority to order (para. 14).

[12] The Tribunal rejected this submission. Among other things, it noted that both the physicians and the College characterize the statements as guidance documents and not binding rules. Further, the College was not seeking a finding of professional misconduct based on a breach of the statements. The Tribunal stated that:

...the College is entitled to rely on the Statements at the merits hearing to inform its position on the standard of practice and professionalism. Conversely, the physicians are entitled to argue that the Tribunal should not rely on the Statements when it is asked to make findings of professional misconduct against them. (para. 21)

[13] It found that "[t]here is no basis to dismiss the referrals merely because the College may rely on non-binding statements in the merits hearing." (para. 24)

[14] The Tribunal also rejected the contention that the investigation orders were issued without authority. On this issue, it concluded:

There is no merit in the argument that the Registrar exceeded her jurisdiction by failing to meet the standard of “reasonable and probable grounds.” Following the standards set by the Court of Appeal in *Sazant*, the AOI documents contain a brief description of the acts of professional misconduct that she believes were committed, and we have considered the material provided to us by the College that was put before the Registrar. In our view, the scope of the investigations, **the validity of the appointments and the existence of reasonable and probable grounds are evident.** (para. 30) (emphasis added)

[15] The Tribunal’s reasons also refer to court decisions related to the College’s investigations of these members, in *Dr. Luchkiw v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 5738 and *College of Physicians and Surgeons of Ontario v. O’Connor*, 2022 ONSC 195. In these decisions, the courts confirmed the validity of the ICRC’s suspension order against Dr. Luchkiw and the obligation of Drs. Phillips and Trozzi to cooperate with the College’s investigations.

[16] Against this background, I turn to my reasons for dismissing the members’ motion.

#### **The Tribunal has already disposed of the issue in this motion**

[17] As described above, the members’ position in this motion is that the investigation orders authorizing the investigations into their conduct are invalid because the alleged misconduct or incompetence is based on their failure to comply with the College’s non-binding statements with respect to COVID-19.

[18] While agreeing that the prior motion decision also dealt with the members’ challenge to the investigation orders, they submit that the issue before me is new. Their counsel argues that, in finding that the College’s COVID-19 statements are not binding, the Tribunal’s prior decision ruled in the members’ “favour” but “neglected to draw out the consequences of its ruling for the investigation orders that triggered the current proceedings, and in particular, how it affects the evidence gathered under the authority of those orders.” In argument, the members also sought to limit the Tribunal’s previous decision by suggesting that it focused on the use that the College may make of the statements at the *hearing* of the allegations. They suggest that the Tribunal did not make a finding on the validity of the *investigation orders*, to the extent they are based on these statements.

[19] Reviewing each relevant investigation order, counsel argues that the phrases “postings regarding Covid-19 on the Internet and Social Media,” “communications

and conduct relating to the Covid-19 pandemic and vaccinations” and “completion of medical exemptions for COVID-19 vaccines,” describing the nature of the potential misconduct, are necessarily references to the College’s “restrictions” which have been found to not have the force of law. Counsel asserts that these phrases accordingly must be excised and, in the result, the orders lack any basis for a reasonable and probable belief that the members have committed professional misconduct. Since, in his submission, the investigation orders were not authorized, any evidence gathered pursuant to those orders must be excluded.

[20] I find that the question of the validity of the investigation orders was squarely before the panel deciding the prior motion. The panel concluded that the Registrar had “reasonable and probable grounds” to initiate the investigations, as required by s. 75(1)(a) of the Code. It concluded it was “evident” that those grounds existed.

[21] I find nothing “new” which distinguishes the issue before me and that before the prior panel. The impact of non-binding guidelines on the validity of the College’s investigations was at issue in the prior motion, as it is before me. As described in the prior decision, the College did not claim that its statements are binding rules or prohibitions, the breach of which amounts to professional misconduct. The College’s factum in that motion made clear its position that the statements are “properly characterized as guidance documents.” In fact, the Tribunal described the parties finding “common cause” on this question.

[22] Even if the Tribunal’s decision to accept the parties’ characterization of the College’s statements was a “new” legal determination on that question, it went on to confirm the validity of the College’s investigations in the context of that finding. I therefore fail to see anything new which distinguishes the issue before that panel and the issue before me.

[23] There is no merit to the argument that the Tribunal “neglected to draw out” the consequences of its determination as to the non-binding nature of the College’s statements by considering “how it affects the evidence gathered under the authority of those orders.” The Tribunal considered the impact of the College’s statements on these proceedings and found no defect in the investigation orders. Since it found no defect in the investigation orders, it had no reason (and the members did not argue the existence of any) to consider whether evidence was improperly collected.

[24] Indeed, since the members, in the prior motion, challenged the Registrar's authority to initiate the investigations for reasons including her purported reliance on the statements, it was incumbent on them to "draw out" any consequences of a finding in their favour before the same panel, including the status of any evidence gathered during the investigations. They cannot claim that the Tribunal failed to address an issue they believe necessarily follows from their challenge to the validity of the investigations while holding back arguments which were fully available to them to make. In any event, I have found that the panel's decision confirming the validity of the investigations, after considering the parties' arguments as to the impact of non-binding guidelines, disposed of the issue the members have put before me.

[25] In sum, the members' efforts to reframe their current challenge to the validity of the investigation orders to appear different from their prior motion cannot succeed. I am satisfied the Tribunal has already ruled that those orders are valid and there is no reason to exclude evidence gathered during the investigations or discontinue the proceedings.

**In any event, the investigation orders are valid**

[26] In any event, even if the issue had not already been decided by the Tribunal, I am satisfied that the investigation orders are valid and there is no basis to exclude evidence gathered during the ensuing investigations.

[27] First, I reject the submission that the orders refer to the College's statements, the breach of which was the basis for the Registrar's belief that reasonable and probable grounds exist. There is simply no such reference in those documents, and it is unreasonable to extrapolate such a reference from the phrases used in those orders.

[28] Second, even if the Registrar considered the College's statements in arriving at the belief that reasonable and probable grounds exist, there is nothing improper about this. Nothing in the legal authorities before me suggests that she is prohibited from considering those statements. Court and Tribunal decisions support the conclusion that guidelines such as the College's statements may inform the standard of practice or professionalism. In *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, for example, the court found that while non-compliance with College policies (in that case, related to

Medical Assistance in Dying) is not an act of professional misconduct, “they may be used as evidence of professional standards in support of an allegation of professional misconduct.” (paras. 16-17)

[29] To the same effect is the following statement by the Divisional Court in *Luchkiw* at para. 65:

I am satisfied that guidelines, such as those established by NACI and the MOH, inform the standard of practice and may be considered by the ICRC when determining whether a physician’s conduct exposes or is likely to expose a patient to harm and/or injury: *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393, at paras. 16, and 17.

[30] Having regard to the above, I agree with the College’s submission that the “weight of the jurisprudence supports a conclusion that guidance documents can be used to inform the Registrar’s belief that reasonable and probable grounds exist, despite not having the force of law.”

[31] In arriving at this finding, I reject the members’ argument that the court’s decisions above only address the use of guidance documents as evidentiary aids during the *hearing* process and have no application to establishing reasonable and probable grounds for an investigation. Related to this, I reject the submission that the Registrar may only initiate an investigation based on standards of practice where those standards have been promulgated through the process in s. 95(1)(n) of the Code, which was not done in the case of the College’s statements.

[32] In *Yazdanfar v. The College of Physicians and Surgeons*, 2013 ONSC 6420 at para. 36, the Divisional Court dismissed the argument that standards of practice must be contained in formal written codes:

A standard of practice exists even when it is not explicitly set out in a written code; a reviewing tribunal may ascertain it “by reference to evidence of a common understanding within the profession as to expected behavior of a reasonable professional, or by deducing it from the profession’s fundamental values”: *Walsh v. Council for Licensed Practical Nurses*, 2010 NLCA 11, 295 Nfld. & P.E.I.R. 222, at para. 48, Green C.J.N.L., concurring.

[33] Counsel for the members argues that the court’s conclusion applies only in the context of a disciplinary hearing and not to the initiation of an investigation or a referral of allegations to a hearing. I see no reason to limit the court’s reasoning in



this manner. The court found that the physician in the case before it had a responsibility to be aware of common understandings in the profession as to standards of practice, even when not formally promulgated. While a disciplinary tribunal may, in the court's expression, "ascertain" what the standards are, common understandings or the profession's fundamental values pre-exist and are expected to govern physicians' conduct before any disciplinary process or hearing is initiated. The Registrar can consider those understandings and values in deciding whether to initiate an investigation.

[34] In the investigation orders before me, the documents before the Registrar included but were not limited to the College's statements. As did the panel deciding the prior motion, I find the existence of reasonable and probable grounds to be "evident." To be clear, I arrive at that conclusion accepting and adopting the Tribunal's prior finding, as well as the members' and College's positions, that the College's statements are non-binding guidelines.

[35] In conclusion, I dismiss the motion to exclude evidence and discontinue the proceedings.

[36] Counsel for the College requested its costs of the motion and reserved the right to raise the issue at the conclusion of the hearings.