

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Lederer, McCarthy JJ

BETWEEN:

DR. CELESTE JEAN THIRLWELL

Applicant

)
)
) *Neil M. Abramson and Robert Barbiero, for*
) *the Applicant*

– and –

COLLEGE OF PHYSICIANS AND
SURGEONS OF ONTARIO

Respondent

)
) *Ruth Ainsworth, for the Respondent*
)
)

) **HEARD** at Toronto: April 7, 2022 (by
) video)

Lederer, J.

Introduction

[1] The applicant Celeste Jean Thirlwell is a psychiatrist. She is a member of the College of Physicians and Surgeons of Ontario. As a result of certain expressed concerns and complaints an investigation was undertaken under the auspices of the College. The concern was that Celeste Jean Thirlwell may have been improperly issuing, and assisting individuals in how to obtain, exemptions from vaccination available in response to the Covid-19 pandemic. Upon receipt of the report resulting from the investigation, in advance of the commencement of any formal discipline process, the College made an Interim Order restricting the practice of Celeste Jean Thirlwell. The Interim Order provided the means by which her practice would be monitored, by the College, as part of ensuring that no exemptions would be issued while the investigation and any ensuing discipline process were ongoing.

[2] Among its terms, the Interim Order requires Celeste Jean Thirlwell to provide her consent to allow the College to make enquiries of, and to obtain the release of billing information from, the Ontario Health Insurance Plan (“OHIP”). Celeste Jean Thirlwell objects to the inclusion of that term in the Interim Order and by this application for judicial review seeks to quash it.

Facts

[3] In the fall of 2021, the College of Physicians and Surgeons received information and documentation from several sources that Celeste Jean Thirlwell was providing improper medical exemptions from Covid-19 vaccination. On September 24, 2021 the College received an email from Wellington-Dufferin-Guelph Public Health indicating that Celeste Jean Thirlwell, identified as a psychiatrist, had delivered three “inappropriate exemption letters”. The “exemption notes” were described as “vague – they mention risks due to the patient’s (unspecified) medical conditions and that the ‘risk outweighs the benefit’ and the patient therefore ‘cannot give informed consent’”.¹ This followed an email dated September 21, 2021 received by the College advising that Celeste Jean Thirlwell was “exchanging cash for medical exemption letters for Covid vaccinations”. The email included, as enclosures, communications between Celeste Jean Thirlwell and individuals apparently seeking an exemption. One of these advised that exemptions would be provided for \$300 for a first exemption, \$100 for an additional letter, and \$75 -with “family package” pricing also available.² Further sources provided additional vaccine exemptions completed by Celeste Jean Thirlwell, all of which were vague, and failed to identify the medical condition which purported to justify the exemption.³

[4] On October 19, 2021, the College received a telephone call, followed by what appears to be a letter reporting that during a train ride between Ottawa and Kingston, Celeste Jean Thirlwell was overheard talking on her cell phone to a series of individuals about Covid-19 vaccine exemptions. It was reported that during these calls Celeste Jean Thirlwell made, among others, the following statements:

You should consider yourself like a Nazi resistor during those times.

...

I also heard that they are gassing people in Australia.

...

You are being pressured into being vaccinated, so you don’t have the capacity for informed consent, and therefore should be exempt from the vaccine.

...

¹*Responding Application Record, College of Physicians and Surgeons of Ontario, February 2, 2022* at p. 28 (Letter from Wellington-Dufferin-Guelph Public Health dated September 24, 2021) (Caselines B67)

² *Ibid* at p. 33-38 and in particular p. 35 (E-mail dated September 21, 2021 and enclosed screenshots) (Caselines B72-B77 in particular B74)

³ *Ibid*

- at p. 39 (in particular p. 41) (Email, October 5, 2021: Re: Vaccine exemptions) (Caselines B78 and B80),
- at p. 42 (in particular 43, 46 and 48) (University of Guelph, Medical Statement- Faculty, Staff, and Students) (Caselines B81, B82, B85 and B87)
- at p. 50 (Email, October 26, 2021: Complaint regarding provision of medical exemption for Covid vaccine) (Caselines B89)

The government will only care when 15% of people have died.⁴

[5] The follow-up letter suggests that Celeste Jean Thirlwell coached one of the individuals with whom she spoke “using language that she said would justify such a letter”:

...if you tell me that you feel you are being pressured into doing something unsafe or without enough information...then I can provide you a letter...and then my assistant will send you an invoice.⁵

[6] On October 7, 2021, in response to these expressions of concern, the Registrar of the College of Physicians and Surgeons pursuant to s. 75 (1)(a) of the *Health Professions Procedural Code*⁶ appointed investigators to “investigate whether Dr. Celeste Jean Thirlwell (CPSO# 76629) in her Sleep Medicine and Psychiatric practice and in her conduct, including her conduct in relation to the COVID-19 pandemic and her completion of medical exemptions for vaccinations, face masks, and diagnostic testing, has engaged in professional misconduct or is incompetent.”⁷

[7] Celeste Jean Thirlwell’s first response to the investigators’ inquiries was to demur until she had retained counsel. Once retained, on October 15, 2021 her (now former) counsel responded advising that the College “lacks jurisdiction to police medical exemptions based on its current justification of authority.”⁸ I pause to point out that, once appointed, investigators acting pursuant to the authority of the College have an array of actions they can take in furtherance of the inquiry they are directed to undertake:

76 (1) An investigator may inquire into and examine the practice of the member to be investigated and section 33 of the *Public Inquiries Act, 2009* applies to that inquiry and examination. 2009, c. 33, Sched. 6, s. 84.

Reasonable inquiries

(1.1) An investigator may make reasonable inquiries of any person, including the member who is the subject of the investigation, on matters relevant to the investigation. 2009, c. 6, s. 1.

⁴ *Ibid* at pp. 51-52 (Phone Call: October 19, 2021) (Caselines B90-B91)

⁵ *Ibid* at pp. 53-53 (Letter dated October 19, 2021) (Caselines B92-B93)

⁶ Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, Ch. 18. Section 75(1)(a) states:

75 (1) The Registrar may appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if,

- (a) the Registrar believes on reasonable and probable grounds that the member has committed an act of professional misconduct or is incompetent and the Inquiries, Complaints and Reports Committee approves of the appointment;

...

⁷ *Responding Application Record, College of Physicians and Surgeons of Ontario, February 2, 2022* at p. 55 (Appointment of Investigators) (Caselines B94).

⁸ *Ibid* at p. 67 (Email, October 15, 2021 Michael Alexander) (Caselines B106)

Idem

(2) An investigator may, on the production of his or her appointment, enter at any reasonable time the place of practice of the member and may examine anything found there that is relevant to the investigation. 1991, c. 18, Sched. 2, s. 76 (2); 2007, c. 10, Sched. M, s. 54.⁹

No person is to obstruct and doctors are required to co-operate with an investigation:

Obstruction prohibited

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

...

Member to co-operate

(3.1) A member shall co-operate fully with an investigator.¹⁰

[8] Nonetheless, (now former) counsel for Celeste Jean Thirlwell went on to advise she would not co-operate and others on her behalf would obstruct investigators to the point of what could easily be understood as a threat of an aggressive, if not violent, response:

Regarding, the prospect of search and seizure by College investigators at Dr. Thirlwell's office, I take the position on her behalf that this would be an illegitimate exercise of authority and it will be resisted physically, by private security, if necessary.¹¹

[9] In response, on October 21, 2021, the College filed a Notice of Application in the Superior Court of Justice seeking an order that Celeste Jean Thirlwell comply with, and not obstruct, the investigation.¹²

[10] On October 22, 2021, the day after the Notice of Application was issued, investigators did attend at the office of Celeste Jean Thirlwell, at a time when she was not present. There is no suggestion that those who were present opposed or obstructed the investigation. However, any patient records of Celeste Jean Thirlwell relating to vaccine exemptions could not be located. The investigators reported:

We then randomly reviewed some [of] the charts and documentation and there was no indication that any of the charts/ patients had medical exemptions written for

⁹ *Health Professions Procedural Code*, supra (fn. 6) at s. 76(1)- (2)

¹⁰ *Ibid* at s. 76(3)- (3.1)

¹¹ *Responding Application Record, College of Physicians and Surgeons of Ontario, February 2, 2022* at p. 67 (Email, October 15, 2021 Michael Alexander) (Caselines B106)

¹² *Application Record of the Applicant, Dr. Celeste Jean Thirlwell* at Tab 2 (Notice of Application, issued October 21, 2021) (Caselines A12)

Covid Vaccines/ Masks or Testing. Several of the charts were noted to have an indication stating “letter required for work” but when we accessed the charts there was [sic] no notes or letters on the date for that visit.¹³

...

Several attempts were made to find exemption letters, in recent appointments. No attached exemption letters were found. In a further attempt to locate exemption letters, Mr. [redacted] located files and folders on the computer having an appearance of being potential exemption letters, which Mr. [redacted] took a copy of in order to conduct searches using forensic tools later.¹⁴

[11] On October 28, 2021 Celeste Jean Thirlwell retained new counsel. On November 4, 2021 she consented to an order requiring her to co-operate with the investigation.¹⁵ Thereafter, on the same day, counsel for the College of Physicians and Surgeons asked that Celeste Jean Thirlwell enter into what would have been a voluntary undertaking restricting her from providing exemptions in relation to Covid-19 vaccinations. Celeste Jean Thirlwell refused. While she accepted the practice restrictions that were proposed, she was unwilling to accept the terms directed to monitoring her compliance with the restrictions. In view of the restrictions, she and her counsel believed these additional terms to be unnecessary.¹⁶

[12] Each College governed by the *Regulated Health Professions Act* is required pursuant to the *Health Professions Procedural Code* to have an Inquiries, Complaints and Reports Committee.¹⁷ This committee oversees all investigations into physicians’ care and conduct. The Registrar, having appointed the investigators under s. 75(1)(a), is directed by s. 79(a) of the *Health Professions Procedural Code* to report the results of the investigation to the Inquiries, Complaints and Reports Committee of the College.¹⁸

[13] On November 5, 2021 the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons met. It had before it the College of Physicians and Surgeons Investigative Report and the information gathered by the investigators to that date. This included information about exemptions provided by Celeste Jean Thirlwell, guidance documents from the Ministry of

¹³ *Responding Application Record, College of Physicians and Surgeons of Ontario, February 2, 2022* at p. 70 (Memorandum, October 22, 2021: Attended Dr. Thirlwell’s Primary Practice Location) (Caselines B109)

¹⁴ *Ibid* at p. 76 (November 1, 2021: Forensic Report Re: Dr. Celeste Thirlwell (Computer Forensics Inc.)) (Caselines B115)

¹⁵ *Ibid* at p. 85 (Consent signed by counsel for Celeste Jean Thirlwell) (Caselines B124)

¹⁶ *Ibid* at p.90 (Email, November 5, 2021: Peter Wardle to Ruth Ainsworth) (Caselines B129)

¹⁷ *Health Professions Procedural Code, supra* (fn. 6) at s. 10(1) 3.

¹⁸ Section 79(a) of the *Health Professions Procedural Code* states:

The Registrar shall report the results of an investigation to,
(a) the Inquiries, Complaints and Reports Committee if the investigator was appointed under clause 75 (1) (a) or (b) or subsection 75 (2);

...

Health, the College and the National Advisory Council on Immunizations (NACI) regarding the criteria for vaccine exemptions.¹⁹

[14] The Committee determined that based on the information before it, it was satisfied that the conduct of Celeste Jean Thirlwell exposed, or was likely to expose, patients to harm. The improper vaccine exemptions exposed not only her patients but the general public to an increased likelihood of contracting Covid-19. Information in the record being considered by the Committee demonstrated that the vaccine exemption letters were vague and lacked clear medical reasons as to why vaccinations were not indicated for the particular people involved. The Committee noted that information received by the College suggested that Celeste Jean Thirlwell had set up a special clinic devoted to providing “family packages,” with exemptions costing up to \$300. This suggested a generalized approach to vaccine exemptions for profit, rather than an individualized assessment as to whether the vaccine was medically contraindicated for each patient. The Committee noted that information from one of its sources suggested that Celeste Jean Thirlwell had made comments to patients espousing conspiracy theories (that 50% of the people who get vaccinated will die and that the Australian government was gassing people) and demonstrating ideological opposition to vaccine mandates using comparisons to Nazi Germany.²⁰

[15] As a result, the Inquiries, Complaints and Reports Committee directed the Registrar to impose interim terms, conditions and limitations on the certificate of registration of Celeste Jean Thirlwell pursuant to ss. 25.4 (1) and (7) of the *Health Professions Procedural Code*.²¹

[16] Among the terms and conditions imposed were:

Monitoring

The Respondent shall, within fourteen (14) days of the Order, provide to the College her irrevocable consent in the form attached as Schedule “B” for the

¹⁹*Application Record of the Applicant, Dr. Celeste Jean Thirlwell* at Tab 8 (Materials before the Inquiries, Complaints and Reports Committee, November 5, 2021) (Caselines A62-A474)

²⁰ *Ibid* at Tab 4 (Inquiries, Complaints and Reports Committee Decision and Reasons, dated November 5, 2021) (Caselines A41)

²¹ Sections 25.4 (1) and (7) state:

Interim suspension

25.4 (1) The Inquiries, Complaints and Reports Committee may, subject to subsections (2) and (6), at any time following the receipt of a complaint or following the appointment of an investigator pursuant to subsection 75 (1) or (2), make an interim order directing the Registrar to suspend, or to impose terms, conditions or limitations on, a member’s certificate of registration if it is of the opinion that the conduct of the member exposes or is likely to expose the member’s patients to harm or injury.

...

Extraordinary action to protect public

(7) Despite subsection (6), an order may be made under subsection (1) without notice to the member, subject to the right of the member to make submissions while the suspension or the terms, conditions or limitations are in place, if the Committee is of the opinion, on reasonable and probable grounds, that the conduct of the member exposes or is likely to expose the member’s patients to harm or injury and urgent intervention is needed.

College to make appropriate enquiries of the Ontario Health Insurance Plan (“OHIP”), to monitor her compliance with the terms of this Order.

The Respondent shall maintain a log of all professional encounters with patients, including both in-person encounters and encounters in a virtual setting, in the form attached as Schedule “C” (“Patient Log”). The Respondent shall include in the Patient Log the name of each patient with whom she has a professional encounter and of the date of the encounter; the patient’s date of birth; the reason for the visit; and of the type of visit (i.e. telemedicine or in-person).

The Respondent shall provide a copy of the Patient Log to the College every two (2) weeks, or at any time as requested by the College.

The Respondent shall submit to, and not interfere with, unannounced inspections of her Practice Locations and to inspections of patient charts by the College and to any other activity that College deems necessary in order to monitor the Respondent’s compliance with the terms of the Order.

The Respondent shall consent to the College providing the Order to any Chief(s) of Staff, or a colleague with similar responsibilities, at any Practice Location where she practices or has privileges (“Chief(s) of Staff”), and to provide said Chief(s) of Staff with any information the College has that led to this Order and/or any information arising from the monitoring of her compliance with this Order.²²

[17] By letter dated November 8, 2021, counsel for Celeste Jean Thirlwell responded, advising that she was prepared to accept and abide by all the terms of the Interim Order that had been made, save and except for two, both of which concerned the “Monitoring” of her continuing activities. Objection was made to the requirement that Celeste Jean Thirlwell give her irrevocable consent to the College being able to make enquiries of OHIP as part of its effort to monitor compliance with the Interim Order and to the acceptance of unannounced inspections of her practice. She was content that there be inspections but not to them being unannounced.²³

[18] The concerns expressed were taken up by the Compliance Case Manager for Celeste Jean Thirlwell’s file. A memorandum outlining the considerations taken into account was prepared. It said, in part:

Monitoring of these requirements will include OHIP inquiries, unannounced compliance visits, and review of logs and other documents, including charts.

While exemptions for vaccines, masks and testing for COVID-19 would not be services billable to OHIP, OHIP data would still be utilized for identifying patients

²² *Application Record of the Applicant, Dr. Celeste Jean Thirlwell* at Tab 4 (Inquiries, Complaints and Reports Committee: Decision and Reason) (Caselines A47)

²³ *Ibid* at Tab 9 (Letter, November 8, 2021: Torkin, Manes to Ruth Ainsworth) (Caselines A479)

who may have been seen by Dr. Thirlwell in a given time period and may have received exemptions.

OHIP monitoring facilitates identification of potential charts for random review, and also allows for monitoring of Dr. Thirlwell's compliance with the requirement to keep a log of all patient encounters.

With regards to compliance visits, these are conducted on an unannounced basis given that prior notification would defeat the objective of ensuring compliance when the College is not in attendance.²⁴

[19] The comments of counsel and the memorandum prepared by the Compliance Case Manager were taken up by the Inquiries, Complaints and Reports Committee at a meeting on November 15, 2021. The Committee declined to vary the Interim Order, made at its direction on November 5, 2021.

[20] As a result, on November 18, 2021, Celeste Jean Thirlwell commenced this application for judicial review. For the purposes of this judicial review, she no longer contests the provision allowing for unannounced inspections of her practice locations. The application is directed only to the quashing of the requirement that Celeste Jean Thirlwell sign an irrevocable consent allowing the College to make enquiries of OHIP.

Standard of Review

[21] The standard of review applicable to the impugned provision is reasonableness. Reasonableness is concerned with the presence of justification, transparency and intelligibility in the decision-making process.²⁵ There are Divisional Court cases which have applied this standard of review to determinations of the Inquiries, Complaints and Reports Committee of the College of Physicians and Surgeons:

In determining reasonableness, a committee with expertise such as the ICRC must be given deference when it comes to imposing measures to protect the public.^[4] Further, such deference must extend to the choice of modality through which practice restrictions are imposed.²⁶

²⁴ *Ibid* at Tab 10 (Monitoring of Dr. Thirlwell's s. 25.4 Order, dated November 10, 2021) (A482)

²⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), 312 ACWS (3d) 460, 59 Admin LR (6th) 1, 441 DLR (4th) 1 at para. 99:

A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

²⁶ *Morzaria v College of Physicians and Surgeons of Ontario*, 2017 ONSC 1940 (CanLII) at para. 26

...

In reaching its decision, the Committee was cognizant of the particular circumstances of this particular doctor and these particular patients. However, the Committee also took a broad policy-based view of its own mandate: to protect the public; to recognize the devastating impact on patients when the trust they place in doctors has been violated, particularly through sexual abuse; and to maintain public confidence in the ability of the medical profession to regulate itself in the public interest. These are matters squarely within the particular expertise of the Committee and are entitled to great deference. In our view, the Committee’s penalty decision is reasonable, defensible, and supported by cogent reasons.²⁷

Analysis

[22] The position taken in objection to the provision of the consent and the resulting ability of the College to make enquiries of OHIP is founded on the understanding that obtaining billing information would not assist or be relevant. There is no billing code attributable to exemptions from vaccination and no suggestion that Celeste Jean Thirlwell had made any attempt to bill OHIP for any letter providing such an exemption. Moreover, requiring the consent and the accompanying access to OHIP records was not “the least restrictive order necessary to protect the public”.²⁸ It duplicated protections in place through other terms of the Interim Order, in particular the requirement that Celeste Jean Thirlwell maintain and provide to the College a copy of a log indicating each and every patient “encounter” including the type of visit and reason for the visit. It was submitted that the provision is overbroad, as it seeks access to OHIP records from January 2021, when the Interim Order did not come into effect until November 2021.

[23] To my mind this misses the point. Section 25.4 of the *Health Professions Procedural Code* directs that the principal object of an interim order is the protection of patients. It provides that the Inquiries, Complaints and Reports Committee may make an interim order directing the Registrar to impose terms, conditions or limitations on a member’s certificate of registration if the Committee is “of the opinion” that the conduct of the member exposes or is likely to expose *the member’s patients to harm or injury* [emphasis added].²⁹ There are a number of terms in the Interim Order directed to this purpose which, by their nature, impinge on the practice of Celeste Jean Thirlwell.³⁰ The caselaw confirms the protection of patients as the primary goal:

The determination of whether a doctor “exposes or is likely to expose [his or her] patients to harm or injury” is a nuanced and difficult decision. Interim conditions are discretionary and extraordinary. They have the potential to greatly harm a doctor’s reputation and to do so quite unjustly if the underlying allegations are not made out. However, when dealing with issues of professional misconduct

²⁷ *College of Physicians and Surgeons of Ontario v McIntyre*, 2017 ONSC 116 (CanLII) at para. 62,

²⁸ *Fingerote v. The College of Physicians and Surgeons of Ontario*, 2018 ONSC 5131 (CanLII) (Div. Ct.) at para. 24

²⁹ See fn. 21 herein where the section is quoted in full

³⁰ *Application Record of the Applicant, Dr. Celeste Jean Thirlwell* at Tab 4 (Inquiries, Complaints and Reports Committee: Decision and Reason) (Caselines A46-A47) (See headings: *Practice Restrictions, Posting Signs and Translations and Notification of Practice Locations*)

generally, and sexual abuse in particular, it is absolutely imperative that vulnerable patients be adequately protected. If society once erred on the side of protecting doctors' reputations, times have rightly changed. The law prefers and gives primacy to the goal of protecting vulnerable patients. *If there is a demonstrated likelihood that a doctor will expose his or her patients to harm or injury, the Committee is free to act and its opinion and remedial discretion will be accorded deference.*³¹

[Emphasis added]

[24] In this case there was evidence that the physician, Celeste Jean Thirlwell had made it known to prospective patients, with whom she had no therapeutic history or experience, that she would provide vaccine exemptions. Not only did she indicate a willingness to provide exemptions to particular patients, she advised she would provide an exemption to a second patient for a lower price, and a family rate if that is what applied to the request being made. She was overheard coaching a prospective patient as to the information on which she was prepared to base an exemption. The letters provided were found, by the Committee, to be vague, meaning they did not reveal a meaningful medical justification for the exemption. The Record contains the following example:

September 1, 2021

Medical Exemption Letter

To Whom It May Concern:

I am a Sleep Medicine Specialist and Psychiatrist. I completed my Specialist in Neuroscience B.Sc. at the University of Toronto. I have been following [redacted] during the COVID-19 pandemic. At no time has he been infected with the COVID virus. Because of his ongoing medical issues, it is contraindicated medically for him to be given the COVID-19 vaccination.

This letter is a medical exemption from vaccination based on thorough evaluation of medical history of this patient. This letter is not intended to diagnose or treat the patient.

Sincerely,³²

[25] There is nothing in this that reflects on the patient as an individual and no substantive explanation as to the reasons or rationale, separate from general statements as “ongoing medical issues” and a “thorough evaluation of medical history”, that would justify the exemption being authorized.

³¹ *Fingerote v. The College of Physicians and Surgeons of Ontario*, *supra* (fn. 28) at para. 31

³² *Application Record of the Applicant, Dr. Celeste Jean Thirlwell* at Tab 8 (September 1, 2021, Exemption Letter, Sleep Wake Awareness Program) (Caselines A78)

[26] The mandate to protect patients confirms and dictates that “some evidence” is enough on which to base an Order of the type being imposed:

An order made under [s. 37\(1\)](#) of the [Code](#) [now s. 25.4] is done so on a paper record without the benefit of *viva voce* evidence from witnesses or an oral hearing. Section 37 orders are reasonable if there is “some evidence” to justify imposing the order.

[27] The concluding sentence of this paragraph underscores the premise:

Further, because s. 37 orders are both interim and result from a summary procedure, the court should be more tolerant in scrutinizing such decisions.³³

[28] The deference the court owes to the decision of the Inquiries, Complaints and Reports Committee reinforces the understanding that “some evidence” is enough:

The applicant challenges whether there is the necessary factual foundation justifying a [s. 37](#) order [now s. 25.4]. The role of the Court in review of such an order is not to re-weigh the evidence, but rather to determine whether there is *some evidence* before the Committee that is more than mere speculation.³⁴

[Emphasis added]

[29] Counsel for Celeste Jean Thirlwell suggested that, given the restriction placed on her practice and, once her second counsel had been retained, her co-operation with the investigation, that there was nothing other than speculation on which to base any continuing concern as justification for the term requiring access to OHIP records. The future is always speculative. It’s the past on which any concern is based. In this case, there is more than enough to evoke concern for the safety of patients. This is not a circumstance where the court is being asked to speculate based “in essence on one incident”³⁵ or where the court is being asked to search for the existence of the evidence.³⁶ The history demonstrates the willingness of Celeste Jean Thirlwell to put at risk, not just the health of these patients, but all members of the general public who may, without knowing of the exemption, come in contact with those patients.

[30] Even so counsel for Celeste Jean Thirlwell submitted reliance should be placed on a dissenting judgment found in *Morzaria v. College of Physicians and Surgeons of Ontario*:³⁷

Since each term of an interim order places restrictions, on a physician’s ability to engage in the practice of his profession, each of those terms should be shown to be necessary to achieve the goal of s. 37(1), namely, the protection of patients.³⁸

³³ *Morzaria v College of Physicians and Surgeons of Ontario*, *supra* (fn. 26) at para. 23

³⁴ *Yazdanfar v. College of Physicians and Surgeons of Ontario*, 2009 CanLII 30457 (ON SCDC) at para. 23

³⁵ *Liberman v. College of Physicians and Surgeons*, 2010 ONSC 337 (CanLII) (Div. Ct.) at para. 34

³⁶ *Fingerote v. The College of Physicians and Surgeons of Ontario*, *supra* (fn. 28) at para. 34

³⁷ *Supra* at fn. 26

³⁸ *Ibid* at para. 47

[31] The proposition behind the reliance on this statement is that each term of the Interim Order must be necessary on its own, in order to ensure that the Order, as a whole, is the least restrictive. I repeat this is found in a dissenting judgment. It is clear, as counsel for Celeste Jean Thirlwell submitted, that this dissent is referred to favourably in other cases but, I suggest, only insofar as to accept the general requirement that an Interim Order be the least restrictive, not that in order to demonstrate the test is met, each term or provision standing on its own must meet the test of necessity. As the Divisional Court stated in *Rohringer v. Royal College of Dental Surgeons of Ontario*:

Similarly in his dissenting reasons in *Morzaria*, Nordheimer J. stated at para. 46 that “[i]t is accepted that an interim order, of the type made here, ought to be the least restrictive order possible to protect the public.”³⁹

[32] The limited nature of what was taken from the dissent is made clear earlier in the case just quoted. It is the Order as a whole that was accounted for:

The test in s. 25.4 of the *Code* conforms to the College’s duty to protect the public. There is no doubt in my mind that if the ICRC failed to consider whether or not there were lesser restrictions that could be imposed on Dr. Rohringer’s licence than a full suspension; for example, the Monitoring Term offered by Dr. Rohringer, that would still protect the public from “likely harm”, the decision would be unreasonable.⁴⁰

[33] The nature of the advice provided by Celeste Jean Thirlwell and the lack of substance on which the exemptions were based is only part of the history. There was evidence to suggest that her motivation, in providing the exemptions, was not founded on a concern for the health of the patients. Rather it sprang from a personal, even ideological perspective, on the actions of the state (in this case Ontario and Canada) in response to the Covid-19 pandemic. There is no other way to understand the alleged references to Nazi Germany, the assertion that government will only care when 15% of the people have died and that she has heard they are gassing people in Australia.

[34] It is one thing to be careless or cavalier about medical care; it is another to act, where the health of people is concerned, through social or political belief or ideology. The uncertainty of the impact of this sort of personal conviction and her unwillingness to cooperate with the College in the past gives substance to the Committee’s concern that the ability to monitor the activities of Celeste Jean Thirlwell be ensured. As the Court stated in *Fingerote*:

If the doctor is found to be likely to expose his patients to harm, then as noted by Nordheimer J. above, the Committee is charged with providing the least restrictive order necessary to protect the public. Once the Committee determines that patients are at risk, the remedy must protect them from the risk. Providing a lesser remedy because the evidence of risk may be challenged just leaves people at risk in

³⁹ *Rohringer v. Royal College of Dental Surgeons of Ontario*, *supra* (fn. 29) at para. 71

⁴⁰ *Ibid* at para. 69

circumstances where the Committee has already decided that it has enough evidence to satisfy itself, on balance, that there is a risk of harm.⁴¹

[35] It may be that the logs required, by the Interim Order, to be produced and copied to the College will provide the sought-after identification of those served by Celeste Jean Thirlwell who may have asked for, been offered or provided with, an exemption. But the log is to be produced by her and relies on her, the person being investigated and who has allegedly acted outside the applicable standards, to be accurate and complete. OHIP’s records are controlled by it, a third party that presumably works to be sure that its records are accurate, complete and meet the standards it requires. In these circumstances, a measure of overlap or redundancy as between the logs and OHIP, in the terms and conditions imposed is reasonable to ensure the College will be able to monitor the continuing activities of Celeste Jean Thirlwell.

Conclusion

[36] I find that the requirement to provide the requested consent is reasonable. The application is dismissed.

[37] Costs to the College in the agreed amount of \$8,250

	Lederer, J.
I agree	_____
	Swinton, J.
I agree	_____
	McCarthy, J.

Released: May 10, 2022

⁴¹ *Fingerote v. The College of Physicians and Surgeons of Ontario*, *supra* (fn. 28) at para. 24

CITATION: Thirlwell v. College of Physicians and Surgeons, 2022 ONSC 2654
DIVISIONAL COURT FILE NO.: 893/21
DATE: 2022/05/10

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Lederer, McCarthy JJ

BETWEEN:

DR. CELESTE JEAN THIRLWELL

Applicant

– and –

COLLEGE OF PHYSICIANS AND SURGEONS

Respondent

RESPONDENT REASONS FOR JUDGMENT

Lederer, J.

Released: May 10, 2022