NATIONAL CITIZENS INQUIRY

Toronto, ON **Day 2**

March 31, 2023

EVIDENCE

Witness 8: Michael Alexander
Full Day 2 Timestamp: 05:59:46–06:46:51
Source URL: https://rumble.com/v2fm8wg-national-citizens-inquiry-toronto-day-1.html

[00:00:00]

Geneviève Eliany
Good afternoon. Could you tell us your full name and spell it for the record, please?

Michael Alexander
My full name is Michael Ian Beardall Alexander. I usually go my Michael Alexander and my last name is spelled A-L-E-X-A-N-D-E-R. And it's Michael M-I-C-H-A-E-L.

Geneviève Eliany
Thank you. Do you promise to tell the truth today?

Michael Alexander
I do.

Geneviève Eliany
Tell us a bit about the type of work you do. You're a lawyer, but specifically, what kind of cases have you been taking on recently?

Michael Alexander
Yes, I'm a lawyer. I'm trained in Canada and the United States. Recently, I've been representing doctors and nurses all across the country—primarily doctors, though—and have been defending them against charges that they have been spreading misinformation and harming the public by making comments that are contrary to the public narrative around COVID-19. Many of these doctors have already been suspended. Attempts are now being made to revoke their licences permanently. I am raising defences based on public law and the Charter of Rights and other basic principles in attempt to vindicate them and vindicate their right to speak freely about public matters.

Geneviève Eliany
And to be clear, these investigations and prosecutions are conducted by the regulatory colleges, is that right?

Michael Alexander
That's right. We have something called self-regulation in Canada. So there's legislation in each of the provinces that establishes a college, which is an administrative body that regulates the practice of medicine. These are not private bodies. They are in fact public bodies, since they are created in and through legislation. In Ontario in particular, the legislation is very clear that the Minister of Health is the boss of the various health colleges. So these are public bodies and they have two aims: they are to prevent patient harm and to establish standards of practice and competence for the profession.

Geneviève Eliany
And those two aims, is it fair to say, is ultimately to protect the public?

Michael Alexander
That's correct. In fact, the legislation here in Ontario says that the College is to act at all times in the public interest.

Geneviève Eliany
Let's talk about how the role of the colleges—in your view and certainly your legal arguments—has shifted through the pandemic. Can you give us some examples of investigations that were unusual and handled differently?

Michael Alexander
Well, that's a really nice question because, in some sense, the investigations have not been handled differently. What the investigations have done, they have highlighted existing problems and faults in the system and ways of exercising power that have been going on for three decades. We have in my opinion a chronic abuse of authority by the college system in Ontario and in other provinces. What has happened now is that they've just upped the level of abuse and lawlessness in pursuit of their objectives. So I can give you particular examples of what some of my clients are facing to illustrate that, unless you would like me to go somewhere else.

Geneviève Eliany
No. A couple examples would be great, just to illustrate what's happening.

Michael Alexander
All right. The College posted a statement here in Ontario. The College of Physicians [and Surgeons of Ontario] posted a statement to the effect that a doctor may not say anything contrary to public health policies and recommendations. A very clear restriction on freedom of expression, which is otherwise guaranteed to us under the Charter of Rights. And that's called a "statement" on the site. It's not a resolution passed by the College Council under the legislation— Every college has its own council of members of the profession and they have the right to vote on various things and establish policies.

So this is not a policy established by the College. It's not based on the legislation itself. There's no reference to the legislation. It's also, as far as we know, not a directive from the Ontario government. It's just a posting on the website, a statement endorsed by the registrar, Dr. Nancy Whitmore, to the effect that doctors may not say anything contrary to public health policies and recommendations. So all of my clients are being prosecuted for saying something contrary

[00:05:00]

to public health policies and recommendations.

But what's quite extraordinary about this is that the College can only order an investigation and proceed with a prosecution if it establishes "reasonable and probable grounds." That's the legal term. It's the criminal standard for conducting an investigation and a search and seizure. In Ontario, you cannot have an investigation, a search and seizure, and prosecution unless you have reasonable and probable grounds to believe that somebody has done something wrong, has actually committed an act of professional misconduct. So the problem here is that a statement—the decision not to follow a statement, which is merely a guideline—is not an act of professional misconduct. So to conduct an investigation because somebody didn't follow a guideline is quite extraordinary. It does not meet the standard of reasonable and probable grounds.

And what's even more extraordinary about this is that the College claims the right actually not to even make a reference to the guideline in the investigation order. So they write these orders in such a vague way—as we go further down the line in prosecution, they essentially can accuse the doctor of anything. And they can also conduct a search and seizure at the patient's office without any boundaries set by the order because it's so vague. So this is what is called a fishing expedition.

This all goes back to how the investigation is ordered and the reference that is made—or, in this case, not made—in the order. That's where the problem begins. The College of Physicians is acting without authority but yet somehow under the colour of authority.

Geneviève Eliany
I just want to pinpoint a few issues that you've raised before we move on to how the courts have dealt with judicial reviews of some of these complaints. You've highlighted that the difficulties with the colleges and some of the prosecutions have existed for decades now. When was this first detailed in a report and what were the main findings of that report?

Michael Alexander
Well, back in 1999, 2000, Michael Code, who at that time was recognized as a leading lawyer in the areas of constitutional law and criminal law, conducted an investigation that was commissioned by a group of doctors and patients. Michael Code by the way is now Justice Code and a professor at the University of Toronto Law School. So Mr. Code, as he then was, was given 10 patient files by this group of doctors and patients. Mr. Code had never practiced before in the area of regulatory law, had never represented doctors. So they asked him because they wanted a lawyer who would look at this with fresh eyes, without any preconceptions. And they provided 10 files from College prosecutions where they believed that doctors had been subject to the abuse of power and unjust prosecutions. And he drafted a report that's available online for anybody who would like to look. It's sort

of a riff on Boris Yeltsin and the idea of Glasnost. It's called, "Medicine in Ontario Needs Glasnost" [Exhibit TO-24e]. It Needs Openness.

And he concluded that none of these prosecutions were justified, that they all involved the abuse of power, and that many of them were conducted without establishing reasonable and probable grounds to initiate an investigation. All the problems that he highlighted in that report still exist today, 23 years later. I fought trying to vindicate the findings of his report for doctors back in the 2000s. I was not successful in that. But now I'm back at it. I'm taking a second run at the College and I'm still using the insights of the Glasnost Report. Because we now are going into three decades of, in my opinion, unlawful conduct and the abuse of power at the College of Physicians and at other colleges in the province.

Geneviève Eliany
He also highlighted that many of these investigations were brought against individuals or professionals practicing at the cutting-edge branch—these are his words—of their field. Often difficult fields like pain management, where there aren't that many solutions. Have you observed the same thing with respect to physicians and protocols for COVID?

[00:10:00]

Michael Alexander
There was a real hostility at that time to doctors who were attempting to innovate in medicine, who were addressing difficult problems such as the one you alluded to—pain management, where medicine had kind of come to the end of its rope. And so the College was very intolerant towards doctors who were attempting to establish new methods of treatment and experimenting with methods of treatment. Of course, with the consent of patients always in these cases. And they were actually hostile to innovation in medical science. And so that's partly what led to this report.

As to whether that's going on today, that's less of a problem today. Because, as a result of the Glasnost report, the Ontario government passed a new version of the *Medicine Act*. In 2000, they established a provision which allows doctors in Ontario to use non-traditional methods or modalities to treat patients as long as the risks of using non-traditional treatment are not greater than the risks of conventional treatment.

So that was a very big step forward for medicine in Ontario. But I can say, after this was established in 2000, I was representing doctors who were still being persecuted. And a whistleblower came to my group and said that there was a hit list within the College of doctors who they still wanted to eliminate because they were regarded as dangerous innovators somehow. Even though they were acting, in our view, consistent with the new legislative provision in the *Medicine Act*.

What's going on today has less to do with innovation in medicine than a turning back of traditional medicine. And for instance, it's always been the case. In fact, it's a fundamental right in Western medicine that, once a medication is approved by the government—in this case the federal government, Health Canada—once it approves a medication and puts it on our approved list of medications, any doctor in the country can prescribe that medication on an off-label basis. So in other words, you might have a medication that, I don't know, was for a certain kind of allergy. But doctors may determine through their own experience that it may be effective in treating other problems that people may have. The reason that you have an off-label right to prescribe medication is that with the authorization comes a

side effect profile. So if a doctor can see what the side effect profile is, then he or she is in a position to measure that profile against the needs and the conditions of a particular patient.

So let me bring this back to COVID-19. Health Canada issued a safety alert regarding ivermectin. It's still there on the site—and said that ivermectin was never authorized to treat COVID-19. And so the College here in Ontario took that to mean that this is no longer an authorized medication. And now you will be prosecuted if you prescribe ivermectin, or any other Health Canada approved medication, for the treatment of COVID-19. And what Health Canada doesn't tell you, and what the College doesn't tell you, is that Stromectal, which is the brand name for ivermectin as an approved medication, is still on the Health Canada database. The authorization has not been modified in any way. And so the safety alert is actually just an alert. It has nothing to do with the authorization. Any doctor in the country has the lawful right to prescribe ivermectin for the prevention and treatment of COVID-19. Again, it goes back to the fundamental right in Western medicine to prescribe on an off-label basis.

So the College is proceeding against my clients, some of whom have prescribed ivermectin, but they have done so completely in accordance with the law and the authorization around this medication. Yet the College is trying to take away their licences for doing so.

Geneviève Eliany
This is very much a continuation of the theme you have explained where policies, statements that are certainly not law or regulations, are being prosecuted as law.

Michael Alexander
Yes. And you know, we have to make a distinction here. We're supposed to be in a society that's governed by the rule of law. I've actually never been a straight rule-of-law guy, I'm kind of a justice guy.

[00:15:00]

Sometimes the law is just, sometimes it's not. But we do prefer the rule of law to the rule of tyrants and autocrats and people with very subjective ideas of how we should conduct ourselves. So the rule of law is very important.

But what the colleges have done is they have published statements and established policies and issued guidelines. Well, the Ontario Court of Appeal has said that a statement, a policy, or a guideline is not a law; it's just a recommendation. And yet, the colleges are treating these guidelines and recommendations which they post as if they have the force of law and as if they can be used as a basis for investigating and prosecuting doctors and other health care professionals. So it's a very troubling situation because essentially what we have—in particular with the College of Physicians—is bureaucrats simply inventing the law and then using it to prosecute doctors and rob thousands of patients of medical care.

Geneviève Eliany
So once someone has been found guilty or there's been a misconduct finding against a doctor or nurse or other health professional, they have the opportunity to bring a judicial review. And that's something that you've been involved in as well, correct?

Michael Alexander
Yes, that's right.

Geneviève Eliany
And how have the courts been treating these judicial reviews?

Michael Alexander
Well, what is going on in the courts is deeply troubling.

In Ontario, if a doctor, for instance, has been suspended—well, let me take a step back here. The courts will review the decisions of administrative tribunals. And all these colleges have tribunals and they make findings against doctors. They are discipline tribunals. They make findings as to whether a doctor, or another health care professional in other disciplines, has committed an act of professional misconduct. And they can revoke a license, or they can levy fines. The powers are very substantial.

The courts have taken the view that, "We prefer to see a final decision from a tribunal before we address an appeal of that decision and review it to determine whether it was properly decided." There is one exception, though: you can get into the system here in Ontario and have the Divisional Court review a decision if someone's licence has been suspended. And that's true in the case of my clients.

So I went to the Divisional Court with one of my clients, Dr. Luchkiw, who had her license suspended. Which robbed 1,700 patients of care, 20 per cent of whom were in palliative care. And all they had with Dr. Luchkiw was the mere suspicion that she may have written one medical exemption for COVID-19 exemptions. I brought this to the attention of the Divisional Court. Now, the Supreme Court of Canada made a very fundamental and important decision in public law in 2019, in a case called *Canada (Minister of Immigration and Citizenship) v. Vavilov*. It's referred to generally as the *Vavilov* decision [Exhibit TO-24h]. And in *Vavilov*, the Supreme Court says that when the courts are reviewing the decision of administrative tribunal, they must hold the tribunal to a very high standard of review when we're talking about basic statutory terms in the legislation that empowers the body in question, and if we're talking about well-understood legal concepts and terms. So you don't defer to the expertise of the body around things like that. They have to actually get the right answer in matters of law.

In this case, I am challenging whether the College had reasonable and probable grounds for actually initiating the investigation against Dr. Luchkiw—and by extension raising the question of whether they ever had the right to suspend her licence. If the Divisional Court were going to follow the ruling of the Supreme Court of Canada, then it would have to examine what "reasonable and probable grounds" means in our legal system. There are obviously criminal precedents for this. It's the term that's used in criminal law, as you know.

[00:20:00]

It's a well-understood concept, a concept in Anglo-American law. And the Divisional Court essentially refused to do that and just deferred to the College's interpretation of reasonable and probable grounds. I found that shocking. So the court found against us, even though there is an Ontario case called *Cezanne*, which the Ontario Court of Appeal issued in 2012, which is quite clear. It made very clear that this term, "reasonable and probable grounds" is

the criminal standard and there are many precedents which would inform us as to what that means. That was pretty well ignored by the Divisional Court. In fact, it was simply ignored.

And so now I'm asking— I'm seeking a motion [Exhibit TO-24a]. I've issued a motion document to have the Ontario Court of Appeal grant us leave to have this whole issue of reasonable and probable grounds addressed at the level of the Supreme Court and the Ontario Court of Appeal's previous decisions. But the court has discretion on whether to grant us leave. And so I have no idea whether this problem is going to be addressed. It will be very troubling for us if the court refuses to address it, because then we would never have access to go to the Supreme Court of Canada to ask the court to enforce its ruling in *Vavilov* against tribunals in Ontario.

Geneviève Eliany
If there's no court enforcement, ultimately it will worsen the college behavior. Isn't that fair to say? They'll be able to continue applying suspicious or poor standards without effective judicial review.

Michael Alexander
Yeah, you're essentially letting the colleges off the leash. You're not going to come in. I mean, nothing could be more fundamental than that you must meet the standard of reasonable and probable grounds to initiate an investigation. If you're not going to police that then you're essentially saying, "You can do whatever you want." I mean, it's essentially a blank cheque to oppress, intimidate, and tyrannize members of the health professions.

Geneviève Eliany
You've mentioned one case and you've named this case. Would you say that this is a pattern in Divisional Court? Or is it an outlier that you're working on?

Michael Alexander
I have to be careful about what I say. Because, as a member of the bar, I must—particularly if I'm criticizing a court—I must make very clear reasoned arguments. But I think it would be fair to say that the Divisional Court has essentially given up on its mandate to review the decisions of administrative bodies in Ontario. It is true that specialized administrative bodies deserve a certain degree of deference in the way they make their decisions. For instance, if I brought a case to the Divisional Court and said, "I want you to review how the College made this decision about whether a doctor should prescribe a certain type of anesthetic for laparoscopic surgery for heart valve replacement." Right, so yeah—maybe the court should think twice about whether it has the expertise. And it perhaps should recognize that there are a number of different decisions that the College might make or maybe that they shouldn't even be reviewing the College on that point.

There is some role for deference when taking a look at what a specialized body does and how it makes decisions. But the Supreme Court has said there should be no deference, as I've said before, when it comes to well-understood legal concepts and terms. And the problem with the Divisional Court is not just that it seems to be ignoring the Supreme Court, but it has established a doctrine of deference that is so encompassing and so broad that really, its whole mandate to review the decisions of these tribunals is really just now non-existent. They're essentially just rubber-stamping whatever the colleges do in these

kinds of matters. And so I would never advise a client today that we should go to the Divisional Court to solve their problems. I would say, "Well, we have to go to the Divisional Court. And then we have to hope that then we can go to the Court of Appeal and get what I believe to be a more nuanced and responsible reading of the duties of the court in this situation."

Geneviève Eliany
Let's chat about *JN v. CG*. Why don't you explain what kind of case that was?

Michael Alexander
This was a case decided by Justice Pazaratz in the family law courts [Exhibit TO-24f],

[00:25:00]

over a year ago.

This involved a case where you had two parents: the mother had custody of two children, they were separated or divorced. And a dispute arose between the parents as to whether the children should receive the COVID-19 injections. The father wanted them to receive it, the mother did not. So this had to be dealt with in the context of the court under family law legislation.

Now, neither the mother nor the father introduced expert evidence. The father produced printouts from the Health Canada website, essentially provided government information about the injections. And the mother provided some reports and studies by people like Dr. Tess Lawrie, Dr. Robert Malone, the founder of the mRNA technology that's been used in these injections. So she provided some kind of expert evidence, because they're not bringing forth experts. Now as you know, in a case like this, if people are not providing expert witnesses, the court is limited to the information that the two parties put in front of it and must make a decision based on that.

Justice Pazaratz was quite influenced by the fact that the mother had read the Pfizer monograph that comes with the injection. And it listed over 24 possible side effects and could I just read what those were? So the mother brought that forward and said, "I have concerns that my kids might be subject to some of these side effects." So this is in the case itself, this is quoting directly from the Pfizer monograph. These are the possible side effects: "difficulty breathing, swelling of your face and throat, a fast heartbeat, bad rashes all over your body, dizziness and weakness." And then there's a second list: "chest pain, shortness of breath, feelings of having a fast beating, fluttering, or pounding heart, severe allergic reactions, non-severe allergic reactions such as itching hives or swelling of the face, myocarditis, pericarditis, injection site pain, tiredness, headache, muscle pain, chills, joint pain, fever, injection site swelling, injection site redness, nausea, feeling unwell, swollen lymph nodes, diarrhea, vomiting, arm pain."

I might mention in relation to myocarditis, when this is mentioned in the press, it's kind of mentioned in passing. The doctors I represent have impressed upon me that if a child gets myocarditis, the inflammation in the heart actually destroys heart cells, which can never be replaced. It actually destroys nerve cells that are responsible for the beating of the heart. And 50 per cent of those children—and this would include adults as well—will die within five years of having myocarditis. So this is a very— This is essentially a death sentence for some people.

The judge was quite persuaded, just on the basis of the possible side effects, that the mother had legitimate concerns. And he actually decided this matter in favour of the mother and was not persuaded that the government printouts dealt in as much detail with these problems as the mother had in the materials that she addressed.

Geneviève Eliany
Unlike the Divisional Court cases that you've mentioned, would you agree that this case is an example of the judiciary pushing back? And even the language of the text is unusual? It made it to social media, which is unusual for case law. But the judge expressed frustration that people couldn't ask questions anymore.

Michael Alexander
Right. And right at the very beginning of the decision, he makes an extraordinary attack on the idea of misinformation. Perhaps I could read what he said here, because I've used it in my own cases. He says, "is 'misinformation' even a real word, or has it become a crass, self-serving tool to pre-empt scrutiny and discredit your opponent, to delegitimize questions, and strategically avoid giving answers? Blanket denials are almost never acceptable in our adversarial system. Each party always has the onus to prove their case, and yet 'misinformation' has crept into the court lexicon: a childish but sinister way of saying, 'you're so wrong, I don't even have to explain why you're wrong.'"

Geneviève Eliany
What happened with the JN case at the Court of Appeal level?

Michael Alexander
It was overturned by the Court of Appeal [Exhibit TO-24].

Geneviève Eliany
Did they have any commentary about it?

Michael Alexander
It's an extraordinary case, in particular because one of the judges presiding was the new Chief Justice of the Court of Appeal.

[00:30:00]

Well, first of all, the Court of Appeal said that the mother's evidence about the side effects should not, essentially, have played a role in the decision. The Pfizer monograph should not have played a role in the decision. Because in drawing attention to those side effects, the mother was holding herself out as an expert witness, and she was not qualified to be an expert witness. Think about that for a moment: the Court of Appeal has said that you have to be an MD or have a PhD in science to understand words like vomiting and diarrhea, swelling of the face. So that's one way in which the decision was attacked.

It was also attacked on another ground. Essentially the court did something— Like, I've been reading cases since 1980, for 43 years. I entered law school in 1980. And the court

came up with a new principle I've never heard of before, which is that government should always be given the benefit of the doubt. So it said that the government—and not just in relation to COVID—but the government has experts and it does analysis. And so if you come to the court and you want to challenge a government decision—in this case one which supposedly comes from Health Canada and the Ministry and experts are involved and so on—the burden is on you to rebut the presumption that the government is right.

How is that possible? I mean, we're supposed to have equal justice in our system. There is supposed to be no bias in the system in favor of either party. There's nothing more fundamental to adjudication in our court system than that. But if you decide to challenge the government on a point now, the Court of Appeal is going to say, "No, we begin with the assumption that the government is right and you, the citizen, you are wrong."

There's no authority for this proposition. In fact, what the court does by way of authority is very troubling. It quotes a provision from the *Evidence Act* to the effect that if the government issues a decision or makes a statement and actually publishes it officially in a document, in the Gazette, where you find new legislation, or through a statement by a ministry, you can take that to be confirmation that the statement was made. And they take that rule and they transform it and interpret it to mean that if the government publishes a statement, you can also assume the veracity of the statement. So it's not just that the government's made the statement, but that the statement is true. That is not what the rule says. This is such a misapplication of this basic rule of evidence that— I mean, if you wrote this on a first-year law school exam, you would flunk.

Geneviève Eliany
That's very true. They've made hearsay admissible for the truth of its contents, which is contrary to very basic law.

Michael Alexander
There's just one other thing they did, which is quite extraordinary. Which is, you know, they did say that— Essentially, they took it as a matter of judicial notice that the vaccines are safe and effective. In other words, that is a fact which is beyond dispute just because that's what the government has said, right? So this is where the assumption in favour of government comes in.

But they cite a case for that authority, which has recently been cited in Saskatchewan—also a family law case. And in that case, the Saskatchewan Court of Appeal was very clear: they took the very opposite position. They said you can never assume that what the government has said regarding the safety and well— You do not have to take at face value the statement by the government that the vaccines are safe and effective. For two reasons. First of all, that "safe and effective" conclusion is only made within certain parameters. And you, as a patient, may fall outside of those parameters or boundaries. So this kind of statement can never be treated as absolute. The second reason that they gave for not taking this as, so to speak, a judicial fact, is that we know that governments can get it wrong. And they pointed to the thalidomide disaster. So the government assured people that thalidomide was safe and effective until there were thousands of deformed babies. And so they took notice of the fact that you can never assume that government is right.

So how the Court of Appeal can take this case from the Saskatchewan Court of Appeal,

[00:35:00]

which is contrary to what the Court of Appeal here in Ontario is trying to prove, and use that as authority is to me astonishing. Absolutely astonishing.

Geneviève Eliany
Just to give the public, if you're able to answer, an idea of litigation costs. Let's say a parent, a regular citizen, wanted to litigate this sort of issue to rebut the benefit of the doubt that the government has about a vaccine issue, let's say. How much would it cost to get to the Supreme Court?

Michael Alexander
Hundreds of thousands of dollars. Just representing three clients of mine, who I'm representing on a pro bono basis. Mostly I've represented them using my own savings, but I have received some public donations. But in representing them over the past—well, let me say, representing them just since June 23rd, I mean, I did an invoice recently, just to give us some idea of what the actual costs have been. So billing at my normal rate since June 23rd, the cost for defending three doctors before the colleges would be $1.2 million.

Geneviève Eliany
Do the doctors' insurance, the malpractice insurance and so on, not cover any of the legal fees?

Michael Alexander
Well, this is another story in itself. You see, all doctors in the country pay into an assurance fund, it's called the Canadian Medical Protective Fund. And so it's referred to as the CMPA, Canadian Medical Protective Association. You pay those annual fees and you have lawyers at your disposal at a number of very high-level firms across the country who will defend you on malpractice litigation and they will also represent you if you have problems with the College.

But the CMPA will not defend doctors vis-a-vis the colleges based on a defence of the doctors' Charter rights or based on the defence that the College is not acting within its jurisdiction. So if I could put that in layman terms: essentially the insurance lawyers for the doctors will not challenge the framework for decision-making that is given to it by the college. It won't use the Charter to challenge the framework; it won't use the legislation to challenge the framework. So it negotiates within a framework that is already unjust and abusive.

Now, most doctors in this country don't know that. Some eventually find it out. But they cannot get a copy of the insurance policy where the CMPA has secretly decided that they will only provide a partial defense of doctors vis-a-vis the colleges. Okay. And so doctors can only get an adequate defence, with all of their rights fully pleaded before a college, if they hire an independent lawyer such as myself.

Now, what's going on here is quite extraordinary, you see, because there's a kind of collusion going on here. Because if the CMPA does not solve the major legal problems around these College investigations of prosecutions, it can keep on billing. And the College likes that. In fact, they endorse the CMPA, and they refer you to the CMPA whenever you get into trouble because the College gets to build up its resources if no problems are solved. It

gets to hire more lawyers. It gets to go to the members and the government and ask for more money. So they both have their little fortresses and they do battle, but it's a faux battle. And it's good for everybody except doctors and patients.

Geneviève Eliany
And the insurance is mandatory, is it not? Much like it is for lawyers, I would think?

Michael Alexander
It's mandatory to carry. But in some provinces, you need not carry it with the CMPA. You can get an alternative policy, but most doctors don't know that.

Geneviève Eliany
Right, the College won't be telling them.

Michael Alexander
The College certainly will not be telling them.

Geneviève Eliany
All right. I'm sure the commissioners have a number of questions for you. I'll turn it over to them.

Commissioner DiGregorio
Thank you for coming today and sharing your testimony with us. We heard from a witness yesterday about some of the extraordinary deference the courts have been giving to the administrative state, which I think probably is along the lines of what we've been talking about today with the tribunal that the doctors are dealing with. And I'm just trying to think about it. I asked our witness yesterday what the recommendation was to deal with

[00:40:00]

the problem of courts paying too much deference— And what I heard was that it would be very difficult to deal with because the deference comes essentially from the common law and from the Supreme Court of Canada case of *Vavilov*, which you referred to today. Which, as you mentioned, gives a very high standard of review when you're dealing with questions of law but has a very high standard of deference actually to administrative tribunals, the standard of reasonableness, when they're dealing with their own matters of expertise. And so presumably—and you can correct me if I'm wrong here—they've been applying this reasonableness level of deference in your cases, where the doctors are being prosecuted.

Michael Alexander
Right.

Commissioner DiGregorio
So I guess, what would be a solution to getting the proper level of deference applied in this type of situation?

Michael Alexander
Right. Well, I think that the Divisional Court has willfully misinterpreted *Vavilov*. I mean, I find Ontario has not dealt with the full consequences of this decision. It's a very long, complicated decision. It's almost 100 pages. I spent quite a bit of time studying it with my junior. It takes a lot of study to get it right. But the problem is that there doesn't seem to be the will in Ontario to, in fact, apply what the Supreme Court has said about these important matters going to core legal issues or straight legal issues—which considerably reduces or eliminates this doctrine of deference in the review of administrative bodies. I think, properly understood, *Vavilov* gives the citizen and regulated persons a much greater opportunity and more power to have decisions reviewed on the standard of correctness. Which is to say it's got to be right or wrong—either way, right?

And another thing that *Vavilov* does, which very little notice has been taken of, is, if within your statutory scheme there's a statutory right of appeal into the court system from a tribunal decision, that court must decide—or must review—your case on the standard of correctness, not reasonableness. In other words, you have to get every issue right. And that's quite an extraordinary ruling because that means, if you're back here at the tribunal stage, you better try to get it right on the standard of correctness. You can't be sloppy about how you're making your decision because if you say, "Well, we can make this decision in a number of different ways on statutory right of appeal," the court will come in and say, "Hey, wait a minute, you can't do that." So this has thrown a wrench into the administrative state that has not been fully dealt with. And I would say that there's enormous denial about what it really means.

Commissioner DiGregorio
And so is it your view that, if these cases you currently have were able to be appealed up to the Supreme Court of Canada, that the *Vavilov* case would actually result in the standard of correctness being applied?

Michael Alexander
On these issues of law in which we're fighting, I absolutely believe that to be the case.

Commissioner DiGregorio
So it's not that there's an issue with *Vavilov*, it's just the misapplication of it by a lower court.

Michael Alexander
Yeah, I would say so. We should be in a better position than we are.

Commissioner DiGregorio
And, sorry, did I just hear you mention that if there was a provision in the legislation that applied the standard of correctness, that that would also perhaps have a different result?

Michael Alexander
No, I believe the Supreme Court in *Vavilov* has said that. So for instance, in the *Regulated Health Professions Act*, there's a statutory right of appeal into the court system. So in the

statute, it says, if you don't like the decision your tribunal is made, you can appeal into the Superior Court—or it's actually into Divisional Court—to have it reviewed. But what *Vavilov* says, in the statutory regimes where there is a statutory right of appeal, then when it goes into the court system, it's not a reasonableness review, it's not a deferential review, it is a correctness review.

Now, the issue to be decided there is whether there's any deference that can be accorded to, say, the example I gave earlier about the use of anaesthetic. Like, maybe there are some small cut-outs here where some deference will be shown. But the standard will be, on appeal, correctness. Which means the tribunal has to get it right. If they don't get it right, then the court will correct them. I mean, it's no different than a high school math test or a chemistry test. You've got to get the right answer and, if you don't, you will be corrected.

Commissioner DiGregorio
Thank you. And I was surprised to hear that you need leave to apply to the Court of Appeal in these cases and—

Michael Alexander
Right.

Commissioner DiGregorio
I'm not an Ontario lawyer,

[00:45:00]

I don't practice in this area. So maybe you can just explain that to me.

Michael Alexander
Yeah. So normally, for instance, if you have a trial, you're at the trial level in the court system on Ontario; and you lose, you have an automatic right of appeal to the Ontario Court of Appeal. And then if you don't like what the Court of Appeal says, you can apply to be heard by the Supreme Court of Canada—although it only takes 10 per cent of the applications it receives every year, so your chances aren't very good. But that's how the system works. But if you appeal into the system under the category of judicial review and you don't like the decision that the court made on that review, then you actually have to bring a separate motion to persuade the Court of Appeal that it should actually hear you on the issues. And then if you're successful there, then the Court will review the lower court's decision.

Commissioner DiGregorio
And does that come from the rules of court?

Michael Alexander
No, that's been around for a long time.

Commissioner DiGregorio
That's common law?

Michael Alexander
Yeah, it's in the rules of civil procedure.

Commissioner DiGregorio
Okay. Thank you.

Geneviève Eliany
Thank you very much, Mr. Alexander, for explaining some of the difficulties with the courts and legal decisions.

Michael Alexander
Thank you. I apologize for being a bit halting in some of my comments. There are so many complications in how this has unfolded, it's just very difficult sometimes to just get it out clearly and cleanly. And particularly with people watching us, you know—get it out in a way that people can actually understand what these technical issues are about. So I hope I accomplished that today.

Geneviève Eliany
You certainly did. It's difficult to simplify these issues.

Michael Alexander
Thank you.

Geneviève Eliany
For the benefit of the commissioners, I can advise that all the cases, including the Glasnost Report that was referred to, they're exhibits [Exhibits TO-24, TO-24b to TO-24h].

[00:47:05]

Final Review and Approval: *Jodi Bruhn, August 16, 2023.*

The evidence offered in this transcript is a true and faithful record of witness testimony given during the National Citizens Inquiry (NCI) hearings. The transcript was prepared by members of a team of volunteers using an "intelligent verbatim" transcription method.

For further information on the transcription process, method, and team, see the NCI website: https://nationalcitizensinquiry.ca/about-these-transcripts/