CITATION: Gill v. Health Professions Appeal and Review Board, 2024 ONSC 2588
DIVISIONAL COURT FILE NO.: 243/23 and 221/21
DATE: 2024/05/07

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Myers and Shore JJ.

BETWEEN:	
DR. KULVINDER KAUR GILL Applicant	*Lisa Bildy*, for the Applicant
– and –	
HEALTH PROFESSIONS APPEAL AND REVIEW BOARD, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, DR. ALEXANDER NATAROS, MICHAEL SARAI, MARIA HAUSCHEL and DR. TERRY POLEVOY Respondents	*Sayran Sulevani* and *Victoria Cistrone*, for the College of Physicians and Surgeons *David P. Jacobs*, for the Health Professions and Appeal Board
– and –	
BETWEEN:	
DR. KULVINDER KAUR GILL Applicant	
– and –	
THE COLLEGE OF PHYSICIANS AND SURGEONS (INQUIRIES, COMPLAINTS AND REPORTS COMMITTEE Respondent	
	HEARD at Toronto: April 10, 2024

H. SACHS J.

Overview

[1] Dr. Gill, the Applicant in both these applications for judicial review, is a specialist physician practicing at two allergy, asthma and clinical immunology clinics in Brampton and Milton. During the height of the COVID-19 pandemic, she expressed opinions on social media about how the pandemic should be handled that several members of the public did not agree with. This led to complaints about her social media usage to her regulator, the College of Physicians and Surgeons (the "College").

[2] The Inquiries, Complaints and Reports Committee (the "ICRC") conducted seven investigations in relation to each of the complaints. On February 3, 2021, the ICRC issued seven separate decisions. In five of those decisions, the complaints were dismissed. In two, the ICRC ordered Dr. Gill to appear to be cautioned with respect to her social media usage. Dr. Gill sought a review of all seven decisions by the Health Professions Appeal Board ("HPARB"). In seven separate decisions, the same panel of the HPARB affirmed all the ICRC decisions. Dr. Gill seeks to judicially review each of these decisions.

[3] In the course of investigating the complaint files, College staff obtained additional information about Dr. Gill's online posts and decided to initiate a formal investigation into her conduct on social media. The results of the Registrar's investigation were reported to the ICRC and considered by the same panel at the same time it considered the seven other complaints. On February 3, 2021, the ICRC ordered Dr. Gill to appear before it to be cautioned with respect to three of the approximately 100 social media posts it had reviewed (the "Registrar's Decision"). Dr. Gill also seeks judicial review of this decision.

[4] Since both applications raised the same issues, they were ordered to be heard together.

[5] Dr. Gill submits that the Registrar's Decision as well as the seven HPARB decisions are unreasonable. According to her, they failed to conduct the necessary analysis to proportionately balance her *Charter*-protected expression rights with the College's statutory objectives, and in addition, the issuance of public and cumulative cautions caused procedural unfairness. Dr. Gill also argues that the Board and the IPRC failed to engage with her written submissions and made findings of fact that were unsupported by the evidence.

[6] For the reasons that follow, I would dismiss both applications for judicial review. As discussed below, the IPRC and the Board recognized and supported Dr. Gill's right to engage in political speech and to express her disagreement with the government's policies during the COVID-19 pandemic. What they did not support was her right to breach her professional responsibilities as a physician by stating as medical facts things that were verifiably false. No charge of professional misconduct was brought against Dr. Gill. Instead, the College called her in to provide direction to her in person about the issues it had with three of the more than one hundred tweets it investigated.

Background

The Context Surrounding the Complaints

[7] Ontario declared a state of emergency in relation to the COVID-19 pandemic in March of 2020: *Declaration of Emergency,* O. Reg. 50/20.

[8] In November of 2020, the College issued guidance to physicians about how they should be engaging on social media regarding issues related to the pandemic. That guidance stated:

> Physicians are reminded to be aware of how their actions on social media or other forms of communication could be viewed by others, especially during a pandemic. Your comments or actions can lead to patient/public harm if you are providing an opinion that does not align with information coming from public health or government. It is essential that the public receive a clear and consistent message. The College's statement on Social Media – Appropriate Use by Physicians outlines general recommendations for physicians including acting in a manner that upholds their reputation, the reputation of the profession and maintains public trust.

[9] The relevant College's Statement on Social Media directs that physicians "[p]rotect their own reputation, the reputation of the professions, and the public trust by not posting content that could be viewed as unprofessional."

The Decisions

The Nataros Complaint

[10] The complainant, Dr. Nataros, was a family physician in British Columbia. He complained that Dr. Gill was spreading false information about the pandemic on social media. In support of his complaint, he sent a screenshot of an August 6, 2020, post from Dr. Gill's account that said: "#Humanity's existing effective defences against #COVID19 to safely return to normal life now: The Truth; T-cell immunity; Hydroxychloroquine ["HCQ"]" (the "HCQ Tweet"). The complainant alleged that the tweet posed a threat to his own patient's health and the health of Ontarians.

[11] The ICRC decided to take no further action in relation to the complaint. In doing so, it focused on whether the statements made by Dr. Gill in the tweet were "verifiably false" on August 6, 2020. It found that there was a reasonable study dated August 1, 2020, that indicated that early treatment with HCQ could reduce mortality in patients with COVID-19. With respect to the comments about T-cell immunity, the ICRC accepted that its role in response to COVID-19 was not known at the time, and the comment about "truth" was vague and did no more than suggest that not all information about COVID-19 was being disseminated. According to the ICRC, this comment was not verifiably false.

[12] HPARB found that the ICRC decision to take no further action in relation to this complaint was reasonable.

The Hauschel Complaint

[13] Ms. Hauschel complained about the following posts from Dr. Gill's twitter account:

(i) The same tweet that formed the basis of the Nataros complaint, i.e., the HCQ Tweet

(ii) A tweet that states: "Current Status of #COVID-19 99.9% Politics, Power, Greed & Fear 0.1% Science & Medicine" (the "Politics, Power, Greed and Fear Tweet").

(iii) A tweet that states: "If at this point, you're an MD or scientist perpetuating the lie that only antibodies equate immunity to #SARSCoV2, you desperately need a crash course in Basic immunology 101. And if you know better & are still silent, you're complicit in the lie & harm it is causing to #humanity" (the "Antibodies Tweet").

(iv) A tweet that states: "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown" (the "Lockdown Tweet").

(v) A tweet that states: "If you have not yet figured out that we don't need a vaccine, you are not paying attention" (the "Vaccine Tweet").

[14] The ICRC dealt with the HCQ Tweet in the same way as it dealt with it in the Nataros complaint. With respect to the second and third tweets, the ICRC found that this was Dr. Gill's way of "stating her opinion that there may be other possible approaches to the pandemic that are not being openly discussed or pursued." Since it "was unable to state that [Dr. Gill's] opinion in this regard is incorrect", there was no basis to conclude that they were "a deliberate attempt to mislead or misinform the public."

[15] The Committee found the Lockdown Tweet to be "inappropriate and unprofessional" for the following reasons:

> The Committee accepts that there is a range of views about the effectiveness of using provincial lockdown as a means of controlling the spread of COVID-19. The Committee has no interest in shutting down free speech or in preventing physicians from expressing criticism of public health policy. It is valid to point out that there are drawbacks to lockdown. It is also valid to question whether the benefits outweigh the negative aspects or whether the measure is working as expected in Ontario.
>
> [Dr. Gill] did not raise these points in her tweet, however. She stated unequivocally and without providing any evidence that there is no medical or scientific reason for the lockdown. Her statement does not align with the information coming from public health, and moreover, it is not accurate. The lockdowns in China and South

> Korea provide evidence that lockdowns can and do work in reducing the spread of COVID-19. For [Dr. Gill] to state otherwise is misinformed and misleading and furthermore an irresponsible statement to make on social media during a pandemic.

[16] The ICRC also found that the Vaccine Tweet was inappropriate. It stated:

> Health Canada had tested vaccines in accordance with national standards and approved several vaccines for use in this country. In the current circumstances, a safe, tested vaccine is the ideal solution to protecting the population and bringing about the end of the pandemic with the lowest possible number of deaths.
>
> While it is possible for a return to "normal life" without vaccinating the public, this is a high-risk strategy and one that could potentially take years to achieve. In the absence of a vaccine, complete eradication of the virus from the human population as occurred with SARS (by now an unlikely outcome for the widespread COVID-19 pandemic) or herd immunity are the only non-medical defences against COVID-19. Pursuing a policy of building up herd immunity to COVID-19 would involve a significant death rate among vulnerable patient populations and put sustained and continuing pressure on the healthcare system for an unforeseen amount of time.
>
> [Dr. Gill] did not provide any evidence to support her statement indicating that a vaccine is not necessary. It would be expected and understandable if a certain proportion of the general public who read this statement decided to decline the vaccine with the assurance that they were acting on the guidance of a physician. For this reason, the Committee considers it irresponsible, and a potential risk to public health, for [Dr. Gill] to have made this statement in the middle of the pandemic.

[17] The ICRC rejected Dr. Gill's submission that her tweets were taken out of context, finding that "tweets by their very nature have minimal context." They are limited in length and can be retweeted "without having to look back through the poster's previous posts to understand the context of the poster's perspective on issues."

[18] The Committee also rejected Dr. Gill's submission that the tweets came from her personal account and had no affiliation with her practice. It found that Dr. Gill's Twitter biography made it very clear that she was a physician.

[19] Finally, the ICRC stated that it was not persuaded by the articles that Dr. Gill provided which she maintained supported her opinions. It found that some of the material was not "freely available for review" and that Dr. Gill "quoted some of the articles selectively."

[20] In light of these findings the ICRC decided to caution Dr. Gill. As described by the Committee:

> A caution in person arises when the Committee is concerned about an aspect of a physician's practice, and/or the physician's professionalism or conduct, and believes that the physician would benefit from direction provided in person about the issues raised. It is also intended to protect the public interest, and a summary of the decision will appear on the College's register.

[21] The HPARB confirmed the ICRC's decision in relation to this complaint. In doing so, it found that the ICRC conducted an adequate investigation. It considered Dr. Gill's submission that the ICRC did not have academic literature before it that she had submitted to HPARB. The HPARB noted the multiple opportunities Dr. Gill had to submit information to the ICRC, and that she had made numerous submissions to that Committee. It also found that it was not necessary for the ICRC to have the additional information before it, as it had enough to understand Dr. Gill's position. According to HPARB, there was nothing in the additional information that would reasonably have affected the ICRC's decision.

[22] In terms of the reasonableness of the ICRC decision, the HPARB found that the concerns expressed by the ICRC about the Lockdown Tweet and the Vaccine Tweet were "based upon the Committee's expertise and thus find the Committee's determinations to be reasonable." The HPARB also noted that the disposition chosen was repeatedly found by the Courts to be remedial as opposed to punitive.

The Bezanson Complaint

[23] As noted by the ICRC, this complaint "referred to [Dr. Gill's] Twitter feed generally and did not quote specific comments (tweets). She [the complainant] did however reference [Dr. Gill's] position with respect to the use of …[HCQ] as an effective treatment for COVID-19 and her view that vaccines are unnecessary."

[24] The ICRC found that the HCQ tweets could not be characterized as "outright misinformation", and that while Dr. Gill's position on vaccines did not "align with information coming from public health and government authorities", the concerns expressed in this complaint were not specific enough and had been addressed effectively through another investigation.

[25] Thus, the ICRC decided to take no further action with respect to this complaint.

[26] The HPARB confirmed the ICRC's decision. In doing so it found that the Committee had taken action in a parallel complaint to "remediate [Dr. Gill's] actions with respect to her social media postings", thus effectively addressing any concerns raised about her actions in the complaint before them.

[27] Dr. Gill made a request before the HPARB to remove the reference to a caution from this decision (and others) as it was found that no further action should be taken. The HPARB declined this request, finding that the caution issued in this, and other decisions "was a factor in the Committee's decision and reference to it cannot be removed."

The Sarai Complaint

[28] This complaint expressed concern about Dr. Gill's anti-vaccination social media posts and other posts that the complainant felt were "evidence-uninformed." The only specific tweet provided was the HCQ Tweet.

[29] For the reasons expressed in its other decisions, the ICRC found that the HCQ Tweet was not "verifiably false" at the time it was made. With respect to the other concerns raised, they were not specific enough. More specific examples were dealt with in other parallel investigations where the ICRC did decide to take action in the form of a caution.

[30] Given this, the ICRC decided to take no further action against Dr. Gill as a result of this complaint.

[31] The HPARB confirmed the ICRC's decision.

The Brown Complaint

[32] This complaint, brought by a doctor, concerned the Lockdown Tweet, the Vaccine Tweet and the Power, Politics, Greed and Fear Tweet. The complaint also referenced a tweet about HCQ posted in June of 2020 that implied that it could prevent, cure and treat early COVID-19, and that the Canadian government was withholding this treatment for "vague but sinister reasons."

[33] For the same reasons as it gave in its other decisions, the ICRC decided to take no action with respect to the Power, Politics, Greed and Fear Tweet and the tweet about HCQ, but did decide that Dr. Gill should be cautioned with respect to the Lockdown Tweet and the Vaccine Tweet.

[34] The HPARB confirmed the ICRC's decision and found that it was reasonable.

The Karrer Complaint

[35] This complainant expressed concern about Dr. Gill's posts on Twitter, but did not mention any specific tweets. Again, given this lack of specificity and the fact that the ICRC had already decided to caution Dr. Gill in parallel investigations, the ICRC decided to take no further action with respect to this complaint.

[36] The HPARB confirmed the ICRC's decision.

The Polevoy Complaint

[37] This complaint was brought by a doctor whose certificate of registration with the College had expired. He contacted the College to complain about Dr. Gill's tweets promoting HCQ and about a letter he had received from Dr. Gill's former lawyer threatening to sue him for libel and defamation.

[38] The ICRC declined to address the complaint regarding the threatened lawsuit, finding that the complaint fell outside its jurisdiction as it did "not relate directly to the practice of medicine in Ontario."

[39] Consistent with its other decisions, it declined to take any further action with respect to Dr. Gill's tweets concerning HCQ.

[40] In its decision, the ICRC mentioned that it had decided to caution Dr. Gill in another decision arising out of a parallel investigation into her posts on social media about COVID-19.

[41] The HPARB confirmed the ICRC's decision.

The Registrar's Decision

[42] The ICRC considered a large number of Dr. Gill's tweets on social media and found three that it had concerns about – the Lockdown Tweet, the Vaccine Tweet and a tweet that stated:

> Contact tracing, testing and isolation, is ineffective, naïve & counterproductive against COVID19, and by definition, against any pandemic" (the "Tracing, Testing Tweet").

[43] The ICRC gave the same reasons for finding that the Lockdown Tweet and the Vaccine Tweet were inappropriate as it did in its decision on the Hauschel complaint. With respect to the Tracing, Testing Tweet, the ICRC stated as follows:

> The Respondent indicated that she did not author this tweet but retweeted someone else's post. There is no difference between the two actions, as posting an original tweet and retweeting both indicate an endorsement of the information. The responsibility of physicians to use social media appropriately applies equally in either context. Testing, contact tracing and isolation are the core components of federal and provincial efforts to flatten the curve of infection and thereby reduce deaths from COVID-19. For these efforts to be successful, it is essential that members of the public recognize their own responsibility to protect themselves and others by adhering to public health restrictions and recommendations.

> The Respondent's retweeted message clearly does not align with the official public health message the public has been receiving with regard to contact tracing, testing and isolation. It is valid to debate and question whether these efforts have been sufficiently effective; however, for the Respondent to undermine the public health message by declaring without evidence that these measures are counter productive, which is to say that they have the opposite of the desired effect, seems indefensible to the Committee.
>
> The Respondent's Twitter account clearly identifies her as a physician. The Committee would expect a certain proportion of the non-medically trained public who read this post to subsequently decide not to follow government and public health rules and recommendations regarding contact tracing, testing and isolation. This could have significant negative consequences for public health. The Respondent's comments in this regard are irresponsible and careless in the current context and climate.

[44] As a result, the ICRC decided to caution Dr. Gill.

Issues Raised

[45] These judicial reviews raise the following issues:

1. Are the decisions where the ICRC and HPARB decided to take no further action reviewable?

2. Are the decisions where a caution was issued unreasonable because of a failure to engage in a proportionate balancing of Dr. Gill's *Charter* protected rights with the statutory objectives of the College?

3. Are the decisions at issue unreasonable because they failed to engage with the evidence that Dr. Gill provided to demonstrate that the impugned statements were not verifiably false or constituted misinformation?

4. Are the decisions at issue unreasonable because the decision-makers made findings of fact for which there was no foundation?

5. Did the ICRC breach Dr. Gill's right to procedural fairness by issuing multiple decisions on the same tweets, which were then released to institutions across the country?

Analysis

Is judicial review available for the "no action" decisions?

[46] In five of the impugned decisions, the ICRC decided to take no action against Dr. Gill (the Nataros complaint, the Bezanson complaint, the Sarai complaint, the Karrer complaint and the Polevoy complaint). The HPARB confirmed the ICRC's decisions with respect to these complaints. In spite of this, Dr. Gill is seeking to judicially review all but one of these decisions (the Nataros complaint) with a view to having them quashed. She does so because the reasons in the other four decisions contain a reference to the fact that Dr. Gill had been ordered to be cautioned in a parallel investigation. As noted above, she asked the HPARB to remove the references to a caution and the HPARB refused.

[47] Judicial review is an extraordinary remedy that is available with respect to a decision, not its reasons. An applicant for judicial review who does not seek a different outcome from the decision-maker below cannot seek judicial review of that decision on the basis that she disagrees with the extent of its reasons (see *GKO Engineering A. Partnership v. The Queen*, 2001 FCA 73, at paras. 2-3; *Rogerville v. Canada (Attorney General)*, 2001 FCA 142, at para. 28.

[48] Therefore, no judicial review is available in relation to the decisions where no action was taken.

Are the decisions where a caution was issued unreasonable because of a failure to engage in a proportionate balancing of Dr. Gill's Charter protected rights with the statutory objectives of the College?

[49] The ICRC issued cautions in three of the impugned decisions – the Hauschel complaint, the Brown complaint and the Registrar's Decision. Two of those decisions, the Hauschel complaint and the Brown complaint – were confirmed by the HPARB.

[50] Dr. Gill impugns the reasonableness of these decisions on the basis that they failed to address her protection under the *Charter* from unjustified state interference with her freedom of expression, conscience and belief. In making this submission, Dr. Gill relies on two key decisions from the Supreme Court of Canada – *Doré v. Barreau du Quebec*, 2012 SCC 12, [2012] 1 S.C.R. 395, and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. These decisions impose an obligation on administrative decision makers to recognize *Charter* rights and to engage in a proportionality analysis to ensure that those rights are impaired as little as possible while still achieving the objectives of the statute governing the decision maker's exercise of its mandate.

[51] Dr. Gill correctly notes that in the two HPARB decisions, HPARB noted her *Charter* submissions, but did not explicitly address them. In these decisions, the HPARB was clear that it examined the ICRC decisions to determine whether they were reasonable and justifiable. In doing so, the HPARB reproduced key extracts from those decisions, including those relating to the free speech balancing exercise that the ICRC engaged in when examining the tweets that it was concerned about. In addition to reproducing these

portions of the ICRC decisions under review, the HPARB noted that the ICRC had made a distinction between those tweets that were not verifiably false and those tweets that contained misinformation. It was only with respect to the latter that cautions were issued. The HPARB then focused on the fact that the remedy issued was remedial and not punitive. Taken together, the HPARB found that the results of the decisions and the reasoning process undertaken by the ICRC were reasonable. In doing so, it is clear that the HPARB was endorsing and adopting both the ICRC's conclusions and the reasoning by which it reached those conclusions. Thus, in order to assess whether the HPARB decisions engaged in the analysis required by *Doré* and *Loyola*, it is necessary to focus on the reasoning used in the decisions it was confirming and adopting – namely the ICRC decisions.

[52] In *Doré* a lawyer was reprimanded by his regulator for the content of a letter he wrote to a judge after a court proceeding. The court examined whether the discipline committee's decision to reprimand the lawyer was reasonable. In assessing the reasonableness of its decision, the Supreme Court confirmed that "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values" (para. 24). The Court then went on to clarify how this should be done.

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives…
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in terms of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objective…
>
> ….
>
> [58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objective, the decision will be found to be reasonable.

[53] If a decision does limit the protections under the *Charter*, a reviewing court must ask itself "whether, in assessing the impact of the relevant *Charter* protection, and given the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré,* at para. 39). This requires that "*Charter* protections are affected as little as reasonably possible in light of the state's particular objectives" (*Loyola*, at para. 40).

[54] The analysis must be "robust" and contextual (*Loyola*, at paras. 40-41). However, *Dorée* recognizes that "there may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable statutory objectives and mandate"

(*Loyola*, para. 41). Thus, as long as the measure chosen "falls within a range of possible, acceptable outcomes", deference is owed to the decision-maker (*Doré*, at para. 56).

[55] Dr. Gill asserts that the College failed to engage in a proportionate balancing, and failed to recognize that the speech which was affected was of a political nature – speech that criticized government and health policy. Doctors, like lawyers, should – to use the words of Abella J. in *Doré* – not be expected to behave like "verbal eunuchs." Political speech is essential to the functioning of a liberal democracy and thus is highly valued speech, particularly in the context of an unprecedented situation like the COVID-19 pandemic, where the stakes were high, and the answers were not clear.

[56] As put by Dr. Gill in her factum, "it was assumed by the College that it was in the 'public interest' for everyone to follow government policies during COVID-19, but for many people, and in many situations, those policies were against their interest and even harmful to them. For *those* members of the public, it was in their interest to have a physician who scrutinized and challenged the policies that upended their lives and caused damage in manifold ways."

[57] Dr. Gill also argues that the ICRC failed to sufficiently consider the "public good" that was served by impairing Dr. Gill's *Charter* right or, on the other hand, the negative impact that impairment had on her right. As put by her, the only consideration of the former was a "paternalistic concern that some members of the public might not follow public health measures if they listened to Dr. Gill". With respect to the latter, the ICRC failed to consider the punitive effect that multiple cautions and multiple decisions would have on Dr. Gill's reputation, particularly since cautions are made public and can be considered in subsequent disciplinary proceedings. In this case, the College not only placed the cautions on the public register, the College took measures to circulate the decisions to organizations outside the College "including all Ontario hospitals, Canadian medical regulatory authorities, the Federation of State Medical Boards, and other regulatory authorities." Further, according to Dr. Gill, the College's actions negatively impacted not only her, but the public at large, who were deprived of her opinions. It also had a chilling effect on the profession, who may choose to stay silent rather than run the risk of professional censure for expressing their opinions on an important medical crisis.

[58] Dr. Gill correctly points out that a reasonableness review must focus not only on the outcome, but on the reasoning process. In the case of the balancing exercise required under *Doré*, that process must be robust. According to Dr. Gill, the College's reasons failed to meet this threshold. They did not even mention the *Charter* and only paid "lip service" to her free speech rights.

[59] In assessing the "robustness" of the ICRC's reasons on this issue, it is important to keep in mind two principles that emerge from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 about assessing the reasoning process of an administrative decision-maker. First, reasons "must not be assessed against a standard of perfection" and they should not "always be expected to deploy the same array of legal techniques that might be expected of a lawyer or a judge." As put by the Court in *Vavilov*,

"'Administrative justice' will not always look like 'judicial justice' and reviewing courts must remain acutely aware of the fact" (*Vavilov,* at paras. 91-92).

[60] Second, the degree of justification found in the reasons must consider what is at stake in the decision. As put by the Court at para. 133 of *Vavilov*:

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

[61] In this case, the impact of the impugned decisions on Dr. Gill was the imposition of a caution by the ICRC. The ICRC is a screening committee. It does not make findings of professional misconduct. Rather, it investigates complaints and determines if they merit a referral to discipline or can be dealt with in a less intrusive manner, such as a caution. Cautions are educational and remedial in nature and do not reflect a finding of professional misconduct. As put by the Divisional Court in *Longman v. Ontario College of Pharmacists*, 2021 ONSC 1610, at para. 44:

> Cautions and educational directives are remedial in nature and not sanctions or penalties. They are meant to improve the Member's practice and benefit the public they serve by avoiding future concerns.

[62] Further, the Divisional Court has repeatedly rejected the argument Dr. Gill has advanced before us – that the public nature of a caution has fundamentally altered the remedial nature of the remedy (see for example *Dr. Rajav Maini v. HPARB et. al*, 2022 ONSC 3326 (Div. Ct.)).

[63] Thus, in assessing the reasoning of the College, I find that the impact on Dr. Gill's rights is minimal. Her suggestion that it will threaten her reputation, and thus her livelihood, amounts to no more than mere speculation.

[64] Having said this, I also agree that free speech is an important right, and that political speech is particularly important. Thus, the decisions at issue must be examined with a view to determining if the ICRC appreciated and weighed the importance of this right.

[65] As outlined above, the ICRC began its discussion of the Lockdown Tweet in both the Hauschel complaint and the Registrar's decision with the following statement:

> The Committee accepts that there is a range of views about the effectiveness of using provincial lockdown as a means of controlling

> the spread of COVID-19. The Committee has no interest in shutting down free speech or in preventing physicians from expressing criticism of public health policy.

[66] This statement exhibits a clear appreciation of the importance of political speech in the context in which the tweets were being assessed. Further, it went on to give an example of the kind of speech that it saw no problem with:

> It is valid to point out that there are drawbacks to lockdown. It is also valid to question whether the benefits outweigh the negative aspects or whether the measure is working as expected in Ontario.

[67] Its concern with the Lockdown Tweet was that it contained misinformation – namely that there was no medical or scientific basis for imposing a lockdown. According to the ICRC, this was not true. Dr. Gill challenged the decision on the basis that this finding of fact by the ICRC was not a reasonable one. I will deal with this argument later in these reasons. For the purpose of assessing the reasonableness of the balancing exercise the College engaged in, what is important to note is that the College was not trying to stop its members from criticizing the government's policies with respect to the lockdown; it was drawing the line at using misinformation to do so.

[68] The same is true with the Vaccine Tweet. The ICRC found the tweet to be irresponsible because it took the position that a vaccine was unnecessary. As found by the ICRC, while it might be possible for the population to develop a herd immunity to COVID-19 (without vaccinations), doing so was a high-risk exercise that could result in a significant death rate among vulnerable populations. Again, the concern with the Vaccine Tweet was not that it criticized the government's policy on vaccinations, but that it did so by falsely claiming that vaccinations were unnecessary.

[69] The same is true with respect to the Tracing, Testing Tweet. The ICRC's finding on this point is reproduced again below:

> The Respondent's retweeted message clearly does not align with the official public health message the public has been receiving with regard to contact tracing, testing and isolation. It is valid to debate and question whether these efforts have been sufficiently effective; however, for the Respondent to undermine the public health message by declaring without evidence that these measures are counter productive, which is to say that they have the opposite of the desired effect, seems indefensible to the Committee.

[70] The ICRC found that it was fair for a physician to question the effectiveness of the government's policies with respect to contact tracing, testing and isolation. What was not fair was to claim, without any evidence, that these policies were "counter-productive."

[71] In assessing whether the ICRC appreciated the importance of political speech, in the sense of speech that criticizes a government's policy on a particular issue, it is also necessary to consider the tweets that the ICRC did not find to be problematic. The first is the HCQ Tweet, in which Dr. Gill promoted a treatment for COVID-19 that was not part of those being endorsed by the government (including the public health authorities). The ICRC found that this tweet, while not in keeping with government policy, was not verifiably false. Therefore, it did not constitute misinformation.

[72] The second is the tweet that stated: "Current Status of #COVID-19 99.9% Politics, Power, Greed & Fear 0.1% Science & Medicine."

[73] The third is a tweet that states: "If at this point, you're an MD or scientist perpetuating the lie that only antibodies equate immunity to #SARSCoV2, you desperately need a crash course in Basic immunology 101. And if you know better & are still silent, you're complicit in the lie & harm it is causing to #humanity" (the "Antibodies Tweet").

[74] In both the above, Dr. Gill used very strong language to express her disagreement with government policy. Yet, as previously noted, the ICRC found that this was Dr. Gill's way of "stating her opinion that there may be other possible approaches to the pandemic that are not being openly discussed or pursued." Since it "was unable to state that [Dr. Gill's] opinion in this regard is incorrect", there was no basis to conclude that they were "a deliberate attempt to mislead or misinform the public." Again, this makes it clear that the ICRC was endorsing Dr. Gill's right to express her political opinions disagreeing with the government and public health authorities, even if she did so in strong terms. What it could not endorse was her right to engage in speech that contained misinformation.

[75] Balanced against Dr. Gill's free speech rights was the College's mandate to regulate the medical profession, which includes ensuring that physicians conduct themselves in a manner aligned with professional ethics. This is made explicit in s. 3(1)5 of the *Code*, which stipulates that one of the College's objectives is to "[t]o develop, establish and maintain standards of professional ethics for its members". In keeping with this object, the College passed its guidance with respect to how physicians should conduct themselves on social media generally, and more specifically, during the COVID-19 pandemic. For ease of reference these policies are reproduced again.

[76] The College's Statement on Social Media directs that physicians "[p]rotect their own reputation, the reputation of the professions, and the public trust by no posting content that could be viewed as unprofessional."

[77] The College's guidance to physicians about how they should be engaging on social media about issues relating to the pandemic reads:

> Physicians are reminded to be aware of how their actions on social media or other forms of communication could be viewed by others, especially during a pandemic. Your comments or actions can lead to patient/public harm if you are providing an opinion that does not

> align with information coming from public health or government. It is essential that the public receive a clear and consistent message. The College's statement on Social Media – Appropriate Use by Physicians outlines general recommendations for physicians including acting in a manner that upholds their reputation, the reputation of the profession and maintains public trust.

[78] These policies are specifically referenced in the College's decisions in which a caution was issued.

[79] In carrying out its objectives, the College must uphold its overriding duty to serve and protect the public interest (*Gore v. College of Physicians and Surgeons of Ontario*, 2009 ONCA 546, 96 O.R. (3d) 241, at para. 12). The Supreme Court of Canada has repeatedly emphasized the importance of this role and the responsibility it entails. As the Supreme Court put it in *Pharmascience v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513, at para. 36:

> The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them.

[80] In this case, the College's caution decisions found that in the context of a pandemic or public health emergency, misleading or false information about public health interventions could be dangerous to the public. This is because members of the public may give significant weight to doctors' opinions, which in turn could cause them to ignore public health directives. This could put the public at risk. There is nothing unreasonable about this concern, and is one that has been recognized by courts across the country, including the Supreme Court of Canada. It is not, as Dr. Gill asserts, a "paternalistic" concern based on mere speculation.

[81] Thus, when the College chose to draw the line at those tweets which it found contained misinformation, it did so in a way which reasonably balanced Dr. Gill's free speech rights with her professional responsibilities. Further, as discussed above, it did so in a manner that offered some protection to the public, but was minimally intrusive to Dr. Gill. In other words, its response was proportionate.

Are the factual findings in the decisions unreasonable?

[82] Dr. Gill makes two arguments in which she essentially challenges the College's factual findings. First, she alleges that the decisions are unreasonable because they failed to engage with the evidence that she provided to demonstrate that the impugned statements were not verifiably false or misinformation. Second, she submits that the decision-makers made findings of fact for which there was no foundation.

[83] In *Vavilov*, the Supreme Court said the following about the role of a court that is judicially reviewing an administrative tribunal's factual findings:

> [93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail. [Citations omitted].
>
> …
>
> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker." […]
> [126] […] The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it…

[84] Dr. Gill's submissions on this point are fundamentally an invitation to do exactly the opposite of what *Vavilov* directs us to do. First, she urges us to reweigh the evidence before the College and come to a different conclusion on that evidence. Further she did so without demonstrating that the College had "fundamentally misapprehended evidence or failed to account for relevant evidence."

[85] Second, she was asking us to ignore the fact that the ICRC panel members consisted of three physicians with highly relevant expertise that they were able to bring to bear when assessing the scientific and medical information before them, expertise that this court does not have.

Did the ICRC breach Dr. Gill's right to procedural fairness by issuing multiple decisions on the same tweets, which were then released to institutions across the country?

[86] Dr. Gill asserts that issuing multiple decisions relating to the same tweets and disseminating them across the country also raised a concern about procedural fairness. In doing so she relies on a recent decision of this Court – *Mirza et. al v. Law Society of Ontario*, 2023 ONSC 6727.

[87] In *Mirza*, the Law Society found that a number of students had cheated on their online licensing examinations. After receiving written submissions, but without a hearing, it

voided their examinations. This was found to be reasonable by the Court. In addition, the Law Society voided their registration and circulated their decision to all the regulators across the country. The Court found these sanctions substantially impacted the students to the point of being punitive and that it was a denial of procedural fairness to impose that level of sanction without holding a hearing. The *Mirza* decision has no application to the case at bar since, as found earlier in these reasons, the sanction imposed was not punitive, but remedial.

[88] The complaint and investigation process is dictated by the College's governing legislation. The College has no discretion to not investigate a complaint simply because the subject matter is covered by another complaint or a Registrar's investigation. Provided that a complaint meets the statutory definition, the ICRC is required to consider it and release a decision (*Code*, ss. 25(1)(4), 26(1), 27(1)).

[89] The initiation of a Registrar's investigation where a complaint addresses similar conduct, is likewise contemplated by the legislation, which provides the Registrar with broad authority to do what they did here (i.e., initiate an investigation which took a broad view of Dr. Gill's conduct). The Code does not provide for the consolidation of multiple complaint files or of complaint files with a Registrar's investigation.

[90] In this case, the College did take the step of listing all the matters before the same ICRC and HPARB panels. It is clear from the decisions that those panels were able to take into account all of the circumstances in rendering their decisions. The fact that the result of the process was the issuing of multiple decisions in relation to the same conduct is due to the statutory scheme and did not undermine the fairness of the proceedings.

Conclusion

[91] For these reasons, the applications for judicial review are dismissed. As agreed by the parties, Dr. Gill shall pay the College its costs fixed in the amount of $6000.00, all inclusive.

_____

H. Sachs J.

I agree _____

Myers J.

I agree _____

Shore J.

Released: May 7, 2024

CITATION: Gill v. Health Professions Appeal and Review Board, 2024 ONSC 2588
DIVISIONAL COURT FILE NO.: 243/23 and 221/21
DATE: 2024/05/07

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Myers and Shore JJ.

BETWEEN:

DR. KULVINDER KAUR GILL

Applicant

– and –

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, DR. ALEXANDER NATAROS, MICHAEL SARAI, MARIA HAUSCHEL and DR. TERRY POLEVOY

Respondents

– and –

BETWEEN:

DR. KULVINDER KAUR GILL

Applicant

– and –

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

Respondent

REASONS FOR JUDGMENT

H. SACHS J.

Released: May 7, 2024