ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Trozzi,* 2023 ONPSDT 22
Date: October 6, 2023
Tribunal File No.: 22-006

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Mark Raymond Trozzi

FINDING REASONS

Heard: June 13-16, 19, July 11, 12 and 17, 2023, by videoconference

Panel*:

Ms. Sherry Liang (chair)
Dr. Marie-Pierre Carpentier
Dr. Joanne Nicholson
Mr. Peter Pielsticker

*Mr. Shahab Khan was initially a member of the panel but was unable to complete the hearing. The remaining panel members completed the hearing and give the decision pursuant to s. 4.4 of the *Statutory Powers Procedure Act.*

Appearances:

Ms. Elisabeth Widner, Ms. Emily Graham and Ms. Sayran Sulevani for the College
Mr. Michael Alexander, for Dr. Trozzi

RESTRICTION ON PUBLICATION

The Tribunal ordered, pursuant to s. 45(3) of the Code, that there shall be a ban on publication or broadcasting of the names or any information that would identify patients referred to orally at the hearing or in the exhibits filed. There may be significant fines for breaching this restriction.

Introduction

[1] Dr. Trozzi practises medicine in northern Ontario. This hearing is about his conduct in response to the COVID-19 pandemic. The College alleges that he has made misleading, incorrect or inflammatory statements about vaccinations, treatments and public health measures for COVID-19 in social media postings, on his website and in interviews. It alleges that this constitutes disgraceful, dishonourable or unprofessional conduct and does not meet the standard of practice of the profession. The College also alleges that he failed to meet the standard of practice of the profession in his care of patients to whom he issued medical exemptions from COVID-19 vaccines. Further, it alleges that the member failed in his duty to cooperate with the College's investigations. Finally, it asks for a finding that he is incompetent.

[2] The member disputes the allegations. He relies on his right to freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. He denies that his communications and conduct in relation to vaccine exemptions fell below any standard of practice. He denies that he had a duty to cooperate with the College's investigations and submits that, in any event, his conduct in response to the investigations did not amount to misconduct.

[3] For the following reasons, the Tribunal finds that the member has engaged in professional misconduct. We are satisfied that the finding of professional misconduct proportionately balances the College's statutory objectives with the member's expressive rights. Further, we find the member incompetent in his understanding of the principles of informed consent.

Structure of reasons

[4] Our reasons are structured as follows:

a. Examples of the member's communications about COVID-19

b. Reasons for the rulings on expert witnesses

c. Professional misconduct - the member's COVID-19 communications

    i. Defining disgraceful, dishonourable or unprofessional conduct

    ii. Defining failing to maintain the standard of practice of the profession

iii. Application of the *Charter* to the panel's analysis of professional misconduct

1. The *Doré* analysis
2. The statutory objectives
3. The right to freedom of expression
4. The public benefits of a finding of professional misconduct
5. Impact of a finding of professional misconduct on *Charter* rights
6. Conclusion: the infringement on *Charter* rights is proportionate to the public benefit

iv. Section 7 of the *Charter*

d. Professional misconduct - the member's conduct in relation to vaccine exemptions

e. Professional misconduct - duty to cooperate with the College's investigations

f. Incompetence

g. Conclusion

Examples of the member's communications about COVID-19

[5] In setting out the reasons for our decision, we find it important to convey the tenor and content of the member's communications about COVID-19, in his own words. During its investigation, the College captured communications the member posted on his publicly accessible website between January 2021 and January 2023. It also preserved and transcribed various online audio and video interviews and statements given by the member. Below are some of the statements the member has made, organized into themes broadly based on those in the College's Compendium of Evidence. All typographical errors are in the original.

- The member is an ethical physician making enormous sacrifices to provide authoritative, unbiased information about COVID-19:

- “Dr. Mark Trozzi is a 25-year veteran emergency physician and 10-year Critical Care Resuscitation Instructor. His website is a rich and extremely well-referenced resource for objective, accurate, and scientific information, and much more.”

- “I have done my job as a scientist and doctor, disregarding the money and sacrificing everything personal, to tell you the truth about the scamdemic, the PCR tests, the face muzzles, the suppressed safe treatments for covid, and the deadly injections which are not vaccines.”

- “I am proud to be among the tiny percent of scientists and doctors around the world, who are standing against the criminal covid enterprise (CCE). Perversely, these experts currently pay heavy prices, for their efforts to save lives, explaining the true science and exposing the real dangers of the forced injections.”

- The pandemic is a scam, the result of a premeditated global conspiracy perpetrated by special interests to pursue eugenics and genocide:

    - “Covid-19 Is a Deceptive Criminal Campaign.”

    - “The criminal covid enterprise spent years creating and patenting biologic weapons, infiltrating governments, quietly changing rules and definitions, and preparing their covid schemes. They prepared extensively, before launching their deceptive assault on us in late 2019.”

    - “The covid ‘pandemic’ was an excuse for a global state of emergency, which was the excuse for: a global dictatorship; lock-downs and other human rights abuses; and the authorization of the forced ‘experimental’ covid injections which have killed millions of people (so far), injured many more, and made record profits for the murderous criminals running the scam, including Bill Gates who has profited more than 200 billion dollars.”

    - “Fauci’s NIAID, UNC Chapel Hill, and Moderna were making deals creating, dealing, and exchanging bio-engineered coronaviruses and mRNA vaccines, before the so-called pandemic began. This is solid evidence of the pre-planning of the covid crimes against humanity.”

    - “The agenda is locking down societies, destroying economies, basically creating a global government using the World Health Organization, really a criminal organization, to hack into the control with a fake pandemic that didn’t exist.”

- “The pandemic, PCR tests lockdowns, masking and forced injections are all rooted in deception and corruption.”

- “There is a profoundly corrupt relationship between central banks, big pharma, Bill Gates, Anthony Fauci, the World Health Organization, and many meat puppets installed in governments and institutions around the world.”

- “If the criminal covid enterprise completes their agenda, we enter a very dark age. The covid criminals’ plans involve most of us dying and the rest being modified, microchipped and enslaved.”

- Promoters of public health measures are criminals:

    - “The administrators of the covid agenda, are violent criminals who must not be trusted.”

    - “SARS CoV2, an extensively patented virus and its related products, have been used to create a super-high profit industry and authoritarian takeover of much of world. Now the Criminal Covid Enterprise’s minions in government are forcing a dangerous injection which is not a vaccine, is not safe, and is not effective at preventing the spread of this infamous, patented, low mortality, high profit virus.”

    - “Vaccine passports represent the final descent by governments from any decency, into unbridled evil.”

    - “Very few places in the world can compete with Canada for institutionalized covid-crimes-against-humanity.”

- The “Covid criminals” should be tried, imprisoned, hung, shot:

    - “When will Gates, Fauci, other covid predators and their many minions stop lying? When, as required by international law for violating the International Covenant of Civil and Political Rights established in 1966, they are hung.”

    - “WHO director Tedros and others are extreme criminals. Justice should see them arrested or lawfully shot.”

    - “Here are two of the many covid criminal enterprise’s media puppets trying to cover their tracks. It’s CNN’s Don Lemon, and Dr Sanjay Gupta. Gupta claims that there is no evidence that ivermectin works. In our opinion, like many culprits, these two should lawfully hang for their crimes.”

- “This is war. We must end the denial, stop the injections, and lawfully and properly restrain the mass murderers into jails or graves.”

- Medical regulators are part of the COVID-19 conspiracy and the CPSO is a criminal organization:

  - “The Colleges of Physicians and Surgeons in all our Provinces have devotedly served the covid agenda and been ring leaders in crimes against humanity.”

  - “Officials are guilty of crimes causing mass death and suffering […] The same holds for the leadership in the medical regulatory bodies such as Colleges of Physicians and Surgeons in Canada…”

  - The CPSO had an “assigned role in the lying and killing, and the punishments dished out to doctors who do not go along with it.”

- COVID-19 vaccines are akin to genocidal medical experimentation on humans by the Nazis:

  - “Also, much of what is being done, including the experimental viral genetic injections, seem to violate the Nuremberg code regarding medical experimentation with full informed consent by the participants.”

- COVID-19 vaccines contain secret and sinister technology. They cause and are intended to cause serious disease and death:

  - *“*These shots are not vaccines; they are dangerous genetic injections with additional undisclosed mystery ingredients. By strict definition they qualify as ‘bio-weapons.’”

  - “The nanoparticles in the covid injections are suspected by some to facilitate the ability to use 5G to influence or control the subjects. It is at least interesting that in many places, while the citizens were imprisoned in their homes during the initial lockdowns, 5G towers were being installed on their streets.”

  - “I do not think this was a coincidence: stringing up the 5G network while corralling people into strange misrepresented injections.”

  - “Dangerous by Design – C19 mRNA ‘Vaccines’ Were Designed to Hurt Us. Not by accident; but with criminal intent. […] The FDA’s approval of COVID-19 mRNA vaccines is not only fraudulent, it is

conspiracy to commit premeditated battery and murder of Americans with a biological weapon."

- "The covid injections do no good; they only cause disease and death. The people who designed this bio-weapon think it is beautiful, because it is doing what they intended it to do."

- "SARS COV2 and the so-called 'vaccines' are engineered, synergistic bio-weapons."

- COVID-19 vaccines are particularly deadly to children:

  - "Children are among the murder victims: Especially tragic is the killing of young people with these criminally administered injections. Young people have a statistical zero risk of serious disease or death from covid, but they sure are being killed with these injections that are forced and coerced upon them."

  - "Children are up to 100 times more likely to die within 8 months after one injection, than they would be without the injection. This is not by mistake. This is a mass crime against humanity; mass murder and assault; founded on fraud, so there is no indemnity for the perpetrators."

- Alternative effective treatments for COVID-19 are deliberately suppressed:

  - "While many governments are committing genocide, look what can be done if they honestly ''followed the science'' […] This safe, cheap, effective medicine [ivermectin] that cures and prevents covid, has literally been suppressed by so many criminals in the covid enterprise network. They are guilty of the killing of all the fragile people that died from covid who could have been saved with this cheap safe medicine."

  - "This affordable therapeutic medication [Hydroxychloroquine] can help those rare people who actually get very sick with Covid; but it was suppressed. This maintained the path for much more expensive new drug patents and experimental injections. Meanwhile, patients around the world were denied this safe therapeutic, and preventative medicine. […] The conspiring to suppress this cheap medicine being available to save countless lives, is a story of great evil and deception."

Reasons for rulings on expert evidence

[6] The parties sought to rely on expert opinion evidence from five witnesses: three for the College and two for the member. They had the opportunity to cross-examine each other's witnesses and, in all cases, submitted that the panel should not qualify the

experts proposed by the opposing party. The member submitted that, in any event, all the expert evidence is irrelevant as this case hinges on issues of freedom of expression and the member's right to express his views regardless of any empirical evidence on "COVID-19 science."

[7] Witnesses usually testify about facts and are not permitted to give their opinions about those facts. Expert evidence is an exception. For the Tribunal to allow an expert to give opinion evidence, the party that wants to call the evidence must show that it is relevant, necessary, that it is not inadmissible because of another rule of evidence and that it comes from a properly qualified expert: *R. v. Mohan*, 1994 CanLII 80 (SCC). A threshold requirement is also that the expert be able and willing to carry out their duty to the Tribunal to give evidence that is impartial, independent and unbiased (*White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 at para. 46).

[8] Even if the above criteria are met, the Tribunal engages in a second discretionary gatekeeping step in which it balances the potential risks and benefits of admitting the evidence and decides whether the potential benefits justify the risks (*White Burgess* at para. 24). Finally, where the evidence is admitted, the Tribunal can also consider an expert's lack of independence and impartiality in assessing the weight to be given to the evidence (*White Burgess* at para. 45).

Dr. Aaron Orkin

[9] The College called Dr. Orkin as an expert witness to give opinion evidence on epidemiology, public health, preventative medicine and family medicine, including indications and contraindications for vaccination. Dr. Orkin has been a physician in independent practice since 2009, with certifications in Family Medicine and Emergency Medicine from the College of Family Physicians of Canada and in Public Health and Preventive Medicine from the Royal College of Physicians and Surgeons of Canada. He has a doctorate in Clinical Epidemiology. Dr. Orkin is an Associate Professor in the Department of Family and Community Medicine at the University of Toronto, practices emergency medicine at St. Joseph's Health Centre, Toronto and is the Director of Population Health for Inner City Health Associates, Toronto.

[10] The member did not dispute that Dr. Orkin is an expert in his field but submitted that he is not independent because the retainer letter the College sent him referred to a duty to the Inquiries, Complaints and Reports Committee (ICRC), in addition to this

Tribunal. We did not accept this submission. In the overall context, including Dr. Orkin's completion of the Tribunal's Acknowledgement of Duty form required of expert witnesses, this alone did not establish that he was unable or unwilling to give impartial, independent and unbiased evidence.

[11] We also rejected the member's submission that the panel should not hear Dr. Orkin's evidence because he would be testifying about whether the member's care of patients met the standard of practice of the profession, a question that only the Tribunal is entitled to answer. No rule of evidence bars such evidence which can, to the contrary, be both helpful and necessary: *Hanif v. College of Veterinarians of Ontario*, 2017 ONSC 497 at paras. 87-90.

[12] Applying the second stage of the test for admitting expert evidence, we saw no prejudice from the potential evidence that outweighed its probative value. Therefore, we qualified Dr. Orkin as an expert on the matters described above. The panel was satisfied that the proposed evidence of Dr. Orkin was relevant and necessary and that no rule of evidence barred his testimony. We found that, based on his specialized training and experience, Dr. Orkin was qualified to give opinion evidence in those areas, to the extent they are relevant to the issues in this proceeding.

[13] That does not mean that his opinion determines the issue of the standard of practice in relation to medical exemptions from COVID-19 vaccines and whether the member maintained the standard of practice. In giving our ruling at the hearing, we emphasized that we are the ultimate decision-maker and would decide at the end of the day whether to accept all, part or none of Dr. Orkin's evidence and what weight to give it.

<u>Dr. Michael Gardam</u>

[14] The College called Dr. Gardam as an expert witness to give opinion evidence on infectious diseases, infection prevention and control in health care and community settings and communications in respect of those areas. Dr. Gardam has been a practising infectious diseases specialist in Ontario for 22 years, with a subspecialization in the treatment of tuberculosis and infection prevention and control in both healthcare and community settings. In the field of infection prevention and control, he has advised numerous organizations in Canada and internationally on influenza control and pandemic planning. He was the founding director of infectious diseases prevention and control at the Ontario Agency of Health Protection and Promotion (now Public Health Ontario) from

2008 to 2010 and was heavily involved in Ontario's response to the 2009 H1N1 influenza pandemic. Through his roles, he has gained considerable experience in communicating to the public and risk communication.

[15] The member did not challenge Dr. Gardam's qualifications but objected to his proposed evidence on the basis that he should not give evidence on the standard of practice of the profession, nor whether the member met the standard. For the same reasons we gave in relation to Dr. Orkin, we did not accept this objection.

[16] The panel was satisfied that the proposed evidence of Dr. Gardam was relevant and necessary and that no rule of evidence barred his testimony. We were satisfied that, based on his specialized training and experience, Dr. Gardam was qualified to give opinion evidence on the issue of the standard of practice of the profession in relation to communications to the public during an infectious disease outbreak and whether the member maintained the standard of practice. In exercising our discretion as gatekeepers of expert evidence, we saw no prejudice from this potential evidence that outweighed its probative value. In giving our ruling, the panel emphasized that we are the ultimate decision-maker and would decide at the end of the day whether we accept all, part or none of Dr. Gardam's evidence on the issues and what weight to give it.

Dr. Noni MacDonald

[17] The College called Dr. MacDonald as an expert witness to give opinion evidence on vaccinology and the public health impact of misinformation. Dr. MacDonald is a pediatrician with a subspeciality in infectious diseases, a fellow of the Royal College of Physicians and Surgeons of Canada and an elected fellow of the Canadian Academy of Health Sciences and the Royal Society of Canada. She is a recognized expert on vaccine hesitancy and vaccine acceptance, as a past member of the World Health Organization (WHO) Strategic Advisory Group of Experts on Immunization, a member of the WHO Strategic Advisory Group of Experts Working Group on Vaccine Hesitancy and Chair of the Royal Society of Canada Working Group on Covid Vaccine Acceptance. She has published over 500 peer-reviewed research papers, commentaries and editorials with over half in the area of vaccinology with the majority of these in the area of vaccine acceptance.

[18] The member did not challenge Dr. MacDonald's qualifications as an expert but objected to her proposed evidence on the basis that it was irrelevant. In the member's

submission, the allegations against him do not encompass the spread of misinformation. We did not uphold this objection. Schedule “A” to the Notice of Hearing alleges that the member has engaged in professional misconduct and/or failed to maintain the standard of practice of the profession by making “misleading, incorrect or inflammatory statements about vaccinations, treatments and public health measures for COVID-19.” Dr. Macdonald’s proposed evidence on the public health impact of misinformation is relevant to the potential harm from the alleged misconduct.

[19] Since the member relies on his right to freedom of expression, this evidence is also relevant to a balancing of the right to freedom of expression and the harmful effects on the public of the spread of misinformation. The panel was satisfied that the proposed evidence of Dr. Macdonald was relevant and necessary and that no rule of evidence barred her testimony. We saw no prejudice from the potential evidence that outweighs its probative value. The panel found that Dr. MacDonald was qualified to give opinion evidence in the areas of vaccinology and the public health impact of misinformation.

Deanna McLeod

[20] The member proposed to call Deanna McLeod as an expert witness to give opinion evidence demonstrating that Pfizer's six-month clinical trial failed to prove that the Pfizer vaccine was safe and effective. The College objected on the basis that Ms. McLeod did not have the expertise required to give opinion evidence on this question, the evidence is irrelevant, its prejudicial effect outweighs its probative value and she is not impartial.

[21] The panel ruled that Ms. McLeod was not qualified to give the opinion evidence proposed. We stated that for expert evidence to be admissible, the party who wants to call that evidence must show that it is relevant, necessary, that it is not inadmissible because of another rule of evidence and that it comes from a properly qualified expert. The requirement to be qualified as an expert means that the individual must have specialized training or experience. Further, they must have expertise in the specific area in which they are being asked to give an opinion. We were not satisfied, on the balance of probabilities, that Ms. McLeod’s training or experience qualifies her to give expert opinion evidence at the hearing on whether the Pfizer vaccine six-month clinical trial proved that it was safe and effective. We also stated that, in any event, in performing our gatekeeping role, we were not satisfied that the probative value of her proposed

evidence outweighed its prejudicial effect. We stated that we would provide more detailed reasons for our ruling in these reasons.

Expertise in evaluating validity of Pfizer vaccine clinical trial

[22] In *R. v. Scott*, 2018 BCSC 1739, submitted by the member, the court cites a list of non-exhaustive factors, taken from *R. v. Pham*, 2013 ONSC 4903, which are helpful in assessing a witness' expertise. The list, at para. 31 of *Pham*, includes:

- the manner in which the witness acquired the special skill and knowledge upon which the application is based;
- the witness' formal education (i.e. degrees or certificates);
- the witness' professional qualifications (i.e. a member of the College of Physicians and Surgeons);
- the witness' membership and participation in professional associations related to his or her proposed evidence;
- whether the witness has attended additional courses or seminars related to the areas of evidence in dispute;
- the witness' experience in the proposed area(s);
- whether the witness has taught or written in the proposed area(s);
- whether, after achieving a level of expertise, the witness has kept up with the literature in the field;
- whether the witness has previously been qualified to give evidence in the proposed area(s), including the number of times and whether the previous evidence was contested;
- whether the witness has not been qualified to give evidence in the proposed area(s) and if so, the reason(s) why; and
- whether previous caselaw or legal texts have identified the contested area as a proper area for expert evidence and if so, who might give the evidence.

[23] Applying these factors, we are not convinced that Ms. McLeod has the requisite expertise to give opinion evidence on whether the Pfizer vaccine clinical trial proved that it was safe and effective.

[24] Ms. McLeod's formal education does not provide expertise in this area. She received a Bachelor of Science degree in 1991. Her curriculum vitae states that it was received from McMaster University's Department of Psychology, Neuroscience & Behaviour (PNB), in Immunology and Cognitive Psychology. Ms. McLeod did not elaborate on how her education gave her expertise to evaluate the Pfizer vaccine clinical trial.

[25] Ms. McLeod draws mainly on her work experience as the source of her relevant expertise. She worked for three pharmaceutical companies over seven years in the 1990s, predominantly in sales and marketing roles. However, none of these roles involved work in connection with vaccines or vaccine trials. None involved clinical trial design or assessment although she states that in her first year of work, when she was in a role assisting marketing and sales of a cardiac-related portfolio, she participated in monitoring a post-marketing trial of an unnamed company product. She testified that her work with pharmaceutical companies allowed her to understand how such companies minimize risk in promoting products, emphasizing some data and de-emphasizing other data.

[26] In 2000, Ms. McLeod founded a firm that supports clinicians in publishing articles on oncology-related topics. A testimonial on her firm's website describes the firm's services as like "providing an oncology research fellow." Her positions within the firm included Medical Writer, Managing Editor and Director of Publications and her current position is Principal, Lead Strategist. In 2021, within the same firm, Ms. McLeod started a secondary brand, titled "COVID Sense" whose purpose is "to equip the general public with the skills required to understand COVID evidence in everyday language."

[27] Although the firm has assisted in the publication or submission of 48 articles in peer-reviewed publications, none of those articles are about the Pfizer vaccine clinical trial, or any vaccine clinical trial. Ms. McLeod testified that part of the firm's work includes assessing the results of clinical trials, looking for flaws in their design that may affect outcomes. The firm uses researchers and writers on contract to support physicians in their review and analysis of scientific data. She states that, as the head of the firm,

she plays a large role in ensuring the quality of the articles the firm assists in getting published.

[28] We find that Ms. McLeod's work experience does not provide Ms. McLeod with the necessary expertise to give opinion evidence on whether the Pfizer vaccine clinical trial proved its safety and effectiveness. Clearly, Ms. McLeod has considerable experience in the world of medical publishing. However, we are not convinced that her role as the principal of the firm that oversees and manages this work provides her with the independent expertise to evaluate the validity of the Pfizer vaccine clinical trial.

[29] Ms. McLeod has not published any articles in peer-reviewed scientific journals on clinical trial design or vaccines. She did not refer to having taken any courses on these topics nor to having been qualified as an expert in this area in any other legal proceeding. Her only professional affiliation is as chair of the Strategic Advisory Committee for The Canadian COVID Care Alliance (CCCA), about which we will say more below. Her affiliation with this organization does not provide her with the necessary expertise to give opinion evidence as proposed and the member does not claim that her activities with this organization are a source of her expertise.

[30] The member relies on the Supreme Court of Canada decision in *R. v. Marquard*, 1993 CanLII 37 (SCC), in which the court stated at para. 35:

> The only requirement for the admission of expert opinion is that the "expert witness possesses special knowledge and experience going beyond that of the trier of fact": *R. v. Béland* [1987] 2 S.C.R. 398, at p. 415. Deficiencies in the expertise go to weight, not admissibility.

[31] The above quote must be considered in context. First, in *Marquard*, there was no question about the witnesses' expertise. The issue in that case was whether the witnesses testified at trial on matters beyond the scope of their established expertise. Second, courts have not applied the principle in *Marquard* as licence to water down the requirement that an expert witness be proven to have expertise. We referred above to the *Pham* decision, in which the Ontario Superior Court set out factors relevant to the assessment of a witness's expertise. As well, in *Scott*, the court found that witness did not have expertise to give the proposed evidence, stating at para. 80:

> The fact that Dr. Maté is widely viewed as an expert in addictions and childhood trauma issues in parts of the medical community and is constantly presenting on these topics to a variety of medical

> and legal organizations around the world does not ipso facto mean he is an expert witness capable of proffering expert opinion evidence in court.

[32] In that case, Dr. Maté was a retired physician with special knowledge and experience in addiction medicine. Despite his impressive achievements, the court found that he did not have the necessary expertise to give opinion evidence on the accused's addiction disorders, origins of addictions, psychological effect of addiction and relapse and how addictions related to other psychiatric conditions that a forensic psychiatrist and clinical psychiatrist had specifically addressed in their expert evidence. In arriving at its conclusion, the court noted, among other things, that the witness had not done original research in the area, his books were popular but not the subject of scientific peer review and the doctor had never been qualified to give expert evidence in a court.

[33] Similarly, Ms. McLeod is considered an expert by those in the CCCA and has, through her work with that organization, presented on matters covered by or related to her proposed evidence. We do not find this sufficient to establish that she is qualified to give expert opinion evidence at this hearing.

Bias

[34] The College submits that the panel should take account of Ms. McLeod's role and affiliation with the CCCA in determining whether she meets the threshold requirement of an expert witness to give evidence that is fair, objective and non-partisan. We find that the evidence does not clearly establish that she would be unable and/or unwilling to fulfill this duty.

[35] As stated above, Ms. McLeod is chair of the Strategic Advisory Committee for the CCCA. She is also a member of its scientific and medical advisory committee. She participated in an advocacy campaign by the CCCA called "Stop the Shots," whose purpose was to halt vaccination of children with COVID-19 vaccines. In connection with this campaign, Ms. McLeod gave presentations and was featured in interviews on the CCCA website, on topics such as how industry has co-opted the health care system, the fatal flaws in the studies on Omicron boosters and conflict of interest in the pharmaceutical industry. She also signed an open letter to health officials calling on them to stop the vaccination of children.

[36] The CCCA also has a campaign designed to support doctors, including this member, who are facing disciplinary investigations by the College. Its website contains some statements about these proceedings that are critical of the College and the Tribunal.

[37] The College submits that Ms. McLeod is involved in the leadership of the CCCA, an organization that advocates against public health measures. She personally identifies with the CCCA's mission. Further, the CCCA supports the member's position in this proceeding. Regardless of whether Ms. McLeod was aware of the postings about these proceedings, the level of connection between her and the organization is troubling.

[38] In *White Burgess* at para. 48, the court found that once the expert attests or testifies under oath recognizing and accepting their primary duty to the court, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. The Supreme Court stated that "[t]his threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it." (para. 49) The court emphasized that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.

[39] Ms. McLeod signed the Acknowledgment of Duty form required by the Tribunal's Rules of Procedure, accepting the duty to provide evidence that is fair, objective and non-partisan. She accepted that this duty prevailed over any obligation she may owe to the party engaging her. We have no evidence of any financial interest in this proceeding or a close familial relationship to a participant. She believes, as does the member, that COVID-19 vaccines are not safe but this commonality of beliefs does not lead us to conclude that she would assume the role of an advocate rather than a non-partisan witness at the hearing. Likewise, the fact that she has engaged in advocacy and is affiliated with an advocacy organization does not establish that she would be unable to fulfill her duty to this Tribunal.

Probative value of the evidence is outweighed by its potential prejudice

[40] Even if we had found Ms. McLeod to have the expertise to give evidence on the matters proposed, in exercising our discretion, we find that the probative value of her

evidence is outweighed by its potential prejudice. In *White Burgess*, the Supreme Court discussed how concerns about a witness's impartiality are relevant to both the qualification stage and the gatekeeping stage of the process for admitting expert evidence at para. 2:

> Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. *Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence*. [emphasis added]

[41] We were reluctant to disqualify Ms. McLeod for bias as a threshold issue, as urged by the College. However, in assessing the costs and benefits of receiving her evidence, given her activities outlined above, we were concerned about the potential for impartiality to influence her evidence, even unintentionally.

[42] In addition, the report that Ms. McLeod prepared for the hearing states that it is an "Expert report prepared by Deanna McLeod" but it is apparent, from both the report and her testimony, that it was a team effort by her firm. Her report states that "our team" conducted a critical review of the Pfizer vaccine trial and that "[m]y testimony reflects my firm's professional evaluation." In her evidence, she stated "I'm willing to represent the work…, and consider it as something that I've overseen, and therefore is [*sic*] my clinical opinion." Ms. McLeod testified that while she oversaw the work of the team and wrote the report, it was the "team" that "looked at the evidence and considered it and discussed and analyzed it."

[43] The members of the team are not identified, nor are their qualifications set out. If Ms. McLeod were permitted to testify about the report, the College would not be able to cross-examine the members of the team who performed the analysis and research on which it is based. This is not the same as an expert relying on secondary sources, which is permitted so long as the expert has the independent expertise to draw upon those sources: see *R. v. S.A.B.*, 2003 SCC 60; *Wilband v. The Queen,* 1966 CanLII 3 (SCC). In such a case, the expert can be cross-examined on whether they properly applied, interpreted or relied on those sources. Here, the issue is not that Ms. McLeod has drawn on secondary sources in giving her opinion; it is that the opinion was developed by an unidentified team. The risks of receiving such secondhand opinion evidence exist

regardless of the fact that Ms. McLeod has confidence in the work of the team and considers it her own opinion.

[44] Balanced against our reservations about the proposed evidence is its limited probative value. The evidence is relevant, in that the member is alleged to have misled the public about the safety of the COVID-19 vaccines. If, as Ms. McLeod proposed to testify, the Pfizer vaccine trial failed to prove its safety and effectiveness, this may affect a finding of misconduct. However, in the context of the whole of the allegations, this would have a limited impact. The alleged misconduct goes far beyond any communications about the safety and effectiveness of the vaccines, to assertions they are poisonous, criminally administered bioweapons, contain nanotechnology or surveillance technology and murder children, to cite a few of the member's statements. The College argues that statements like these are unprofessional, unbalanced, inflammatory, dangerous and uniformly opposed to public health measures.

[45] We conclude that, even if we had found Ms. McLeod's evidence to meet the four *Mohan* criteria, its probative value is outweighed by its prejudicial effect.

Dr. Peter McCullough

[46] The member proposed to call Dr. McCullough to give evidence in answer to specific questions about alternative treatments for COVID-19 and vaccine injuries in children and teens, set out in the member's retainer letter to Dr. McCullough. Dr. McCullough practices internal medicine and cardiology in McKinney, Texas. He has a Master's in Public Health in the area of General Epidemiology and has worked at hospitals in clinical and research roles in Texas, Michigan and Missouri. He has had editorial roles at peer-reviewed medical journals, is recognized for his work on the role of chronic kidney disease as a cardiovascular risk state, on which he has published numerous articles, and is current President of the Cardiorenal Society of America. Dr. McCullough has also published on COVID-19 and given testimony to various United States and state senate committees on COVID-19-related issues.

[47] The College objected to his evidence on the basis that Dr. McCullough is unwilling and unable to give evidence that is independent and impartial. It submits that his evidence therefore does not satisfy the threshold criteria in *Mohan*. In the alternative, it submits that the panel should exercise its gatekeeping function to exclude his evidence because its prejudicial effect outweighs its probative value.

[48] The panel ruled that we would hear Dr. McCullough's evidence. We stated that we were satisfied that Dr. McCullough is qualified to give opinion evidence on the questions in the letter. In assessing the costs and benefits of permitting this evidence, we exercised our discretion in favour of hearing it. We stated that we would allow Dr. McCullough to give his opinion in answer to those questions, to the extent they are addressed in his written report.

[49] In providing our ruling, we observed that most of Dr. McCullough's report deals with issues beyond those specific questions. Although we admitted the report into evidence, we indicated that we expected member's counsel to direct the witness to those portions of his report which address those questions. Ultimately, counsel's examination of the witness consisted simply of asking him the questions from his retainer letter (with one exception, on an issue not covered in his report).

Mohan criteria

[50] We found Dr. McCullough's proposed evidence to be relevant, necessary and not inadmissible because of another rule of evidence. It is relevant because some of the member's statements alleged to be misleading relate to the matters in the questions set out above. They are also matters addressed in Dr. Gardam's opinion evidence, which Dr. McCullough's evidence was intended to rebut. The evidence is necessary in the sense that it provides information which is likely to be outside the panel's experience and knowledge, due to its technical nature (see *Mohan*, citing *R. v. Abbey*, 1982 CanLII 25 (SCC)).

[51] As to Dr. McCullough's qualifications, the College did not dispute his expertise but submitted that he lacks the independence, objectivity and impartiality required of an expert. It submits that, by his evidence and conduct during the qualification process, he demonstrated that he does not come before the panel to provide impartial evidence but to be an advocate. Dr. McCullough, in the College's submission, is deeply critical of efforts to regulate physicians in the way the College is attempting in this proceeding. In his view, this proceeding amounts to an attempt to suppress the truth, for example, about alternative treatments for COVID-19.

[52] The College referred to an interview with Dr. McCullough in which he stated that doctors have a "call to duty to testify as expert witnesses in support of other doctors" who are facing regulatory prosecution, because this is a "fight for freedom" and "this is

war." It submits that if the panel decides not to exclude his evidence at the qualification stage, it should weigh the benefits of his evidence against its risks. In the College's submission, the panel would not be assisted by this witness, who refused to answer very straightforward questions, continually argued with counsel and refused to take direction from the panel.

[53] As with all the proposed experts, Dr. McCullough signed the Tribunal's Acknowledgment of Duty form accepting the duty to provide evidence that is fair, objective and non-partisan. He accepted that this duty prevailed over any obligation he may owe to the party engaging him. We have no evidence of any financial interest in this proceeding or a close familial relationship to a participant.

[54] He identifies with the member's views on issues related to COVID-19, advocates against public health measures and at times has used, in the College's word, "bellicose" language in his advocacy. Although these facts raise some legitimate concerns, on balance, we did not find they amounted to a "very clear case" establishing, as a threshold matter, that Dr. McCullough is unable or unwilling to give impartial evidence at the hearing.

[55] Weighing the costs and benefits of receiving his evidence, we also decided that the benefits outweigh the costs. The member proposed to call Dr. McCullough to give evidence on a narrow range of questions and our ruling restricted him to those areas. Our concerns about Dr. McCullough's impartiality can and ultimately did play a role in the weight we gave to his evidence, as we discuss below.

[56] We now turn to the allegations before us.

Professional misconduct – the member's COVID-19 communications

Defining disgraceful, dishonourable or unprofessional conduct

[57] Under s. 1(1)33 of O. Reg. 856/93 made under the *Medicine Act, 1991*, SO 1991, c. 30, an act of professional misconduct includes an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. In *College of Physicians and Surgeons of Ontario v. Kadri*, 2023 ONPSDT 10 at para. 29, the Tribunal defined this type of misconduct:

> As noted in *College of Physicians and Surgeons of Ontario v. Rabiu*, 2020 ONCPSD 15, disgraceful, dishonourable or unprofessional conduct is often referred to as a broad catch-all provision and is intended to capture any improper misconduct that is not caught by the wording of the specific definitions of professional misconduct. The conduct does not have to be dishonest or immoral to fall within the definition. A serious or persistent disregard for one's professional obligations is sufficient (p. 26).

[58] Among the College's objectives is the establishment of standards of professional ethics for its members (s. 3(1)5 of the Health Professions Procedural Code, Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c. 18). The College's *Practice Guide: Medical Professionalism and College Policies* sets out some of the core values of the profession, stating, among other things:

> Professionalism also underpins the social contract between the medical profession and the public: in return for a monopoly over the practice of medicine, professional autonomy and the privilege of self regulation, the profession has made a commitment to competence, integrity, altruism, and the promotion of the public good within its domain. This social contract is reflected in the ethical tenets of the profession, the legislation governing the profession, and the standards of practice for physicians.
> …
>
> Physicians have a responsibility to advocate on behalf of their patients to advance policies that promote the health and well-being of the public.
>
> Physicians have a duty to seek out new evidence and knowledge, to share this knowledge with others and to apply it in practice.
>
> Physicians are expected to keep abreast of current developments in their field, which includes maintaining an awareness of relevant practice guidelines and implementing them as appropriate.

[59] The College also relies on the *CanMEDS 2015 Physician Competency Framework* (the *Framework*) developed by the Royal College of Physicians and Surgeons of Canada, in the assessment and remediation of physicians. That Framework states, among other things, that physicians should be able to integrate the best available evidence into practice. With respect to professionalism, it states that society's expectations of physicians include clinical competence, a commitment to ongoing professional development, promotion of the public good, adherence to ethical standards,

and values such as integrity, honesty, altruism, humility, respect for diversity and transparency with respect to potential conflicts of interest.

[60] Other documents, policies and statements relevant to our finding include the College's policy on *Physician Behaviour in the Professional Environment*, which addresses the importance of professionalism when engaging in advocacy:

> Advocacy for patients, both individually and collectively, is an important component of the physician's role. While advocacy may sometimes lead to disagreement or conflict with colleagues or the administration of the institution within which they work, physicians must meet the expectation for professional behaviour even in these contexts.

[61] In addition, the College policy on *Public Health Emergencies* and companion resource, *Advice to the Profession: Public Health Emergencies* speak to the importance of staying informed during a public health emergency:

> Physicians are advised to be proactive and inform themselves of the information available which will assist them in being prepared for a public health emergency.
>
> During public health emergencies, physicians must make reasonable efforts to access relevant information and stay informed.

[62] The College's policy on *Social Media – Appropriate Use by Physicians* that was in effect at the time reminds members to "[p]rotect their own reputation, the reputation of the profession, and the public trust by not posting content that could be viewed as unprofessional." On April 30, 2021, the College posted the following statement on its website, relating to the pandemic:

> The College is aware and concerned about the increase of misinformation circulating on social media and other platforms regarding physicians who are publicly contradicting public health orders and recommendations. Physicians hold a unique position of trust with the public and have a professional responsibility to not communicate anti-vaccine, anti-masking, anti-distancing and anti-lockdown statements and/or promoting unsupported, unproven treatments for COVID-19. Physicians must not make comments or provide advice that encourages the public to act contrary to public health orders and recommendations. Physicians who put the public at risk may face an investigation by the CPSO and disciplinary action, when warranted. When offering opinions, physicians must be guided by the law, regulatory standards, and the code of ethics and professional conduct. The information shared must not be

> misleading or deceptive and must be supported by available evidence and science.

[63] In a subsequent email sent to all members on May 10, 2021, the College Registrar addressed the above statement, indicating, among things, that "[i]t is not intended to stifle physicians from engaging in a healthy public debate about other measures aimed at addressing public safety during the pandemic. [It] is intended to focus on professional behaviour and responsible communication. Our focus is on addressing those arguments that reject scientific evidence and seek to rouse emotions over reason at a time when the population's health is at risk."

[64] The above documents do not bind the Tribunal in our determination of what constitutes professional misconduct, but they do provide useful guidance in determining what conduct "would reasonably be regarded by members as disgraceful, dishonourable or unprofessional." Taken together, they establish that the profession's core values and expectations include behaving professionally while advocating for patients, in a manner that promotes the health and well-being of the public. Even when engaged in debate or conflict, members should be civil, collaborative and work towards the public good. Physicians are also expected to stay informed during a public health emergency and, in the context of the COVID-19 pandemic, should not undermine public health measures.

[65] Against this background, the College submits that the evidence in this case overwhelmingly supports the conclusion that the member engaged in disgraceful, dishonourable or unprofessional conduct. It argues that his communications far exceed any reasonable discussion or debate regarding COVID-19. In the context of the declared public health emergency and public efforts to manage the pandemic, and emanating from a physician, they are misleading, unbalanced, inflammatory, and dangerous.

<u>Defining a failure to maintain the standard of practice of the profession</u>

[66] Failing to maintain the standard of practice of the profession is also a category of professional misconduct listed in O. Reg. 856/93. The College submits that the facts supporting a finding of disgraceful, dishonourable or unprofessional conduct should also lead to a finding that the member's communications about COVID-19 failed to maintain the standard of practice of the profession.

[67] The standard of practice is “the standard which is reasonably expected of the ordinary, competent practitioner in the member’s field of practice” (*Kadri* at para. 111). It need not be set out in a regulation or a written code. It can be established by reference to evidence of a “common understanding within the profession as to expected behavior of a reasonable professional, or by deducing it from the profession’s fundamental values” (*Yazdanfar v. College of Physicians and Surgeons of Ontario*, 2013 ONSC 6420 at para. 36).

[68] College policies can provide guidance as to the standards against which the actions of physicians are assessed (*Khan v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 2096 at para. 60). In *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513, the Divisional Court dismissed an application for judicial review of a decision by the ICRC of the College of Nurses of Ontario (CNO) cautioning two members because of misleading and inflammatory statements about COVID-19. The court found that the CNO’s *Professional Standards and Ethics* documents as well as the webcast “Social Media: Reflect Before You Post” contain standards relevant to the members’ conduct. The court was satisfied that the ICRC decision setting out expectations of nurses when making public statements and identifying themselves as nurses was consistent with the CNO’s published statements.

[69] In this case, we rely on the College’s policies and statements, as well as the CanMEDS Framework, as evidence of a common understanding within the profession as to the expected behaviour of members with regards to communications during a pandemic. Dr. Gardam’s opinion also assists in determining the applicable standard of practice. As we will discuss in more detail below, we find that what is “reasonably expected of the ordinary, competent practitioner” is that they refrain from spreading misinformation and conspiracy theories intended to undermine public health measures during a pandemic.

Application of the *Charter* to the panel’s analysis of professional misconduct

[70] The member argues that the College's prosecution violates his right to freedom of expression, as guaranteed under section 2(b) of the *Charter*. While acknowledging that government can potentially place limits on an exercise of a s.2(b) right if the “good secured by the government's limiting measure outweighs the harm caused by the

limitation on the right and the ends it secures," he argues that he has an "unrestricted" right under the *Charter* to express his views concerning COVID-19, whether his views are shared by the majority, the minority or no one else at all. In this respect, he states that empirical evidence concerning COVID-19 science is irrelevant to the determination of his right to express his views. Further, he has a right to express his "political" views concerning COVID-19 science, public health policies and recommendations concerning COVID-19 and, in particular, to criticize the College. He submits that he has the right to express his views even if others find them offensive, inflammatory, unprofessional or dishonourable. They are protected under the *Charter* unless they threaten to cause immediate physical harm, which the College has not proved in this proceeding.

[71] The member also asserts that the College cannot justify limiting the member's freedom of expression in relation to COVID-19 because it cannot prove the harms it claims could result from a physician discouraging the public from following public health policies and recommendations designed to control the effects of a pandemic. He argues that the science is "not settled" on the existence of a pandemic and further, that the member is correct in stating that the injections have not been proven to be safe and effective.

The *Doré* analysis

[72] We accept, and the College does not disagree, that a finding of professional misconduct arising out of the member's communications will have an impact on the member's freedom of expression. Although the member's submissions on the impact of the *Charter* focus on the *College's* actions, we find that the impact on his rights arises at the point when this panel decides that the allegations have been proven and the member faces disciplinary consequences.

[73] As an administrative tribunal, our exercise of discretion must consider the member's *Charter* rights. As the court stated in *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425, at para. 140, "[i]t is axiomatic that '[a]ll law and law-makers that touch the people must conform to' the *Charter*. The *Charter* applies in assessing the constitutional validity of both laws and of decisions made by officials and statutory tribunals discharging statutory mandates, including the Hearing Panel".

[74] In paras. 55-56 of *Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada provided direction on the analysis that administrative decision-makers should adopt in cases like this. It stated:

> 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. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view 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 objectives.

[75] The Court subsequently stated in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 3 and 4, that the *Doré* proportionality analysis must be a "robust" one, in which "the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue." More recently, in *Lauzon*, at para. 148, the court answered the question "what does a robust proportionality analysis involve?" with the following:

> In my view, the analysis must advert to the proportionality analysis developed by the Supreme Court in *Oakes* for cases in which a government actor is seeking to limit a *Charter* right. The proportionality analysis from *Oakes* asks whether the limit on the right is proportionate in effect to the public benefit conferred by the limit. Two aspects must be carefully assessed: the negative effects on the individual whose rights are engaged, and the positive effects on the public good. Using the court's own words, this analysis is to take "full account of the 'severity of the deleterious effects of a measure on individuals or groups'",[78] that is, whether the "benefits of the impugned law are worth the cost of the rights limitation", or, more precisely, whether "the deleterious effects are out of proportion to the public good achieved by the infringing measure".

[76] Applying the above principles, we are satisfied that, in light of the statutory objectives, a finding of professional misconduct is a proportionate response relative to the impact on the member's freedom of expression.

The statutory objectives

[77] The College is entrusted with regulating the medical profession in the public interest. The Supreme Court of Canada discussed the importance of this responsibility in the context of the health field in *Pharmascience Inc. v. Binet*, 2006 SCC 48 at para. 36:

> The general public's lack of knowledge of the pharmaceutical field and high level of dependence on the advice of competent professionals means that pharmacists are another profession in which the public places great trust. I have no hesitation in applying the comments I wrote for this Court in *Finney*, at para. 16, generally to the health field to emphasize the importance of the obligations imposed by the state on the professional orders that are responsible for overseeing the competence and honesty of their members:
>
> The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public, as s. 23 of the *Professional Code* makes clear. . ..
>
> The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public. *Finney* confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so.

[78] In considering the statutory objectives and applying the proportionality analysis directed by *Doré*, we find it important to highlight the context in which the allegations of professional misconduct arise. This case is about a member's actions during a public health emergency caused by the COVID-19 global pandemic. Our discussion of the College's statutory objectives is thus grounded in that context. In upholding the College's overriding duty to regulate the profession in the public interest, a finding of professional misconduct based on the member's communications to the public about COVID-19 furthers at least two important statutory objectives:

- protecting the public interest in the context of the pandemic, by preventing the spread of harmful misinformation;

- maintaining the integrity and reputation of the profession and promoting trust in the profession by rejecting unprofessional and uncivil discourse.

Protecting the public interest during a pandemic by preventing the spread of harmful misinformation

[79] It is hard to imagine a more pressing statutory objective than protecting the public during a public health emergency. The pressing nature of this statutory objective is amply supported. The College's policies and statements set out the duties of members to act in ways that promote the health and well-being of the public. Courts have recognized the importance of the statutory objective of public protection in the regulation of health professions (*Binet* and *Pitter* at para. 14, among others).

[80] In a different legal context, also relating to COVID-19 misinformation, the court found that "[a] public health emergency in which informed, knowledgeable experts are stifled from commenting publicly to combat misinformation is a significant threat to the general public interest" (*Gill v. Maciver*, 2022 ONSC 1279 at para. 218). In the same vein, the College's efforts to combat COVID-19 misinformation is in the general public's interest.

[81] Apart from pandemic-related misinformation, promoting professionalism in communications and preventing irresponsible and misleading advertising have been found to be important statutory objectives for a health profession regulator; see *Rocket v. Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC). An important consideration in cases about professional communications is the inherent vulnerability of patients with respect to health professionals. We agree with the College's submission that members of the public are susceptible to "unverifiable claims" made by the member, whose communications are presented to the public as the opinions of an experienced and trustworthy physician. As the Ontario Divisional Court stated in *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034 at para. 49:

> [t]here is a power imbalance between health practitioners and patients that arises because of the superior knowledge of the former. The Supreme Court has suggested that "substantial latitude should be given to legislatures that act to protect a

> vulnerable group, or to mediate between competing groups, distinguishing this type of legislation from that in which the state appears as an antagonist to the individual (such as traditional criminal law)" (*Rocket* at p. 248, relying on *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 2 S.C.R. 927, 58 D.L.R. (4th) 577).

[82] While *Rocket* and *Berge* dealt with advertising, the objective of preventing the spread of misleading information is even more compelling when the misinformation is about public health measures during a pandemic and contributes to real harm to the public's health. As discussed below, a finding of professional misconduct furthers this objective in that 1) the member's communications spread misinformation about the pandemic, and 2) the misinformation causes harm to the public.

The Right to Freedom of Expression

[83] Our analysis must balance these objectives against the impact of a finding of misconduct on the member's freedom of expression, recognizing the importance of that right to a free and democratic society. We begin by recognizing the importance of freedom of expression and its broad scope. In *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), at p. 1336, the Supreme Court stated that "[i]t It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression." In *R. v. Zundel*, 1992 CanLII 75 (SCC) at p. 752, the Court described the purpose of this *Charter* right:

> The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy*, *supra*, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view.

[84] In *Irwin Toy* at p. 969, the Court cited with approval a decision of the European Court of Human Rights in which it stated that the right of freedom of expression applies even to ideas that offend, shock or disturb because "[s]uch are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"". Even the deliberate publication of falsehoods is protected by the s.2(b) right. The Court stated in *Zundel* at p. 758:

> Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) hitherto adhered to by this Court,

> I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s. 2(b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s. 1.

[85] The member's right to express his views on COVID-19 is thus protected by the *Charter*, however distasteful, wrong or hateful others may find those views. A finding of professional misconduct would affect his fundamental right to freedom of expression. It would also have a chilling effect on other members who might be deterred from giving expression to their own views. The impact on this fundamental right must be considered in deciding whether a finding of professional misconduct arising out of the member's expressive activity is justified.

[86] In balancing the impact on the member's freedom of expression with the College's statutory objectives, we also recognize that a decision with disciplinary consequences, including the potential revocation of a professional license, is a serious matter. It is a more substantial impingement on the member's *Charter* rights than the "remedial and educative responses" which the court in *Pitter* found amounted to a "minimal" impairment of the right to freedom of expression.

[87] One feature of our proportionality analysis is that even if we find the allegations of misconduct to be proven, we will determine the penalty at a second stage of these proceedings. Arguably, the impairment on the member's *Charter* rights resulting from a finding of misconduct may be at the lower end of the spectrum, depending on what penalty is imposed. We find that, in balancing the negative effects of a finding of misconduct with the public good achieved, the potential for the most serious penalties in itself creates a chilling effect on the exercise of freedom of expression.

Balancing in the Circumstances of this Case`

The member spreads misinformation

[88] It goes without saying that on many matters touching the medical profession, there can be reasonable differences of opinion, even on scientific questions. This is no less true during times of crisis. However, this case is about a physician denying well-established facts in a deliberately inflammatory manner to undermine public health

measures during a pandemic. Below, we focus on some of the most notable areas where the member spreads misinformation.

The pandemic is a hoax

[89] The existence of the pandemic is not a matter the College needed to prove for the purpose of this hearing (see, among others, *J.N. v. C.G*., 2023 ONCA 77)). We reject the member's submission that his expert evidence demonstrated that the science was not settled on this point. None of the member's evidence came close to dispelling this undeniable fact. The member's repeated claims about the pandemic being a scam or a hoax constitute the deliberate spread of misinformation. The member did not testify that he genuinely believed in the truth of these claims. We find it unlikely that a medical professional trained in science could, in the face of the well-established and well-documented fact of the pandemic, believe it to be a scam or a hoax.

COVID-19 vaccines are dangerous

[90] The member engaged in the spread of misinformation when he claimed that the COVID-19 vaccines are dangerous. This panel relies on Health Canada regulatory approval of the COVID-19 vaccines as evidence of their safety and effectiveness. As the Ontario Court of Appeal stated in *J.N.* at paras. 44-45:

> It is not the subject of dispute among reasonable people that Health Canada has, in the area of safety and efficacy of medical treatment, "special knowledge … going beyond that of the trier of fact": *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223, at p. 243. Requiring that opinion to be tendered *viva voce* in every case via live, human experts would be – especially in family court – unnecessarily burdensome.
>
> ….
>
> Stated otherwise, judicial notice should be taken of regulatory approval, and regulatory approval is a strong indicator of safety and effectiveness.

[91] In *J.N*, the court cited *O.M.S v. E.J.S*., 2023 SKCA 8, in which the Saskatchewan Court of Appeal, at para. 48, stated that "a court is not obliged to consider or decide, that an approved drug is safe or efficacious when used in accordance with and to the extent specified in the approval."

[92] In addition, we give weight to the online material in the parties' Joint Brief of Authentic Documents taken from the websites of organizations such as the Canadian Pediatric Society (CPS), the Canadian Cancer Society, the Society of Obstetricians and Gynaecologists of Canada, Thrombosis Canada, the Canadian Cardiovascular Society and the National Advisory Committee on Immunization. These organizations recognize the safety and effectiveness of the COVID-19 vaccines and universally recommend vaccination, including of individuals covered by their missions. As discussed at para. 30 of *J.N*, we have the discretion to rely on material such as this which comes from well-known organizations whose objectivity and sources can be readily and easily assessed and where the information contained in the documents is capable of verification.

[93] Against this evidence, the member called Dr. McCullough to give opinion evidence on specific questions, including whether some teens have suffered "vaccine injuries." Dr. McCullough testified that teenagers have suffered "vaccine injuries, disabilities and death" and that "multiple studies" have demonstrated this. In his report and oral testimony, Dr. McCullough gave examples of three teenagers whose deaths were attributed by certain authors to COVID-19 vaccines. He also referred to a statement from the American Centers for Disease Control (CDC) reporting a "likely association" between heart inflammation among young people and the mRNA COVID-19 vaccine.

[94] The CPS and NACI both considered and addressed this very issue. The CPS discussed the reported occurrences of heart inflammation in older male adolescents and young adults after receiving a second dose of the vaccine and concluded that "[t]he benefit of COVID-19 vaccination still outweighs the very rare risk of myocarditis." The NACI also considered these reported occurrences (which it described as "rare") and concluded that the vaccines "provide very good protection against symptomatic COVID-19 infection and have a favourable benefit versus risk profile in adolescents 12 years of age and older."

[95] Dr. McCullough's evidence on this point falls far short of casting doubt on the safety and effectiveness of COVID-19 vaccines. Unlike the CPS and NACI, his opinion on the risks of the vaccines for young people is based on reports of adverse events without consideration of the benefits of vaccination within the overall context of the pandemic. The examples Dr. McCullough gave in his oral testimony do not refute the scientific consensus on the safety and effectiveness of COVID-19 vaccines, even for

young persons. Further, for reasons we give below in our discussion of the next area of misinformation, we are in any event not inclined to give weight to Dr. McCullough's evidence.

[96] In his final submissions, the member relied on research by a named lawyer in asserting that the COVID-19 vaccines have not been proven to be safe and effective. We do not accept this attempt to supplement the evidence at the final hour. This would not be fair; it was not introduced through a properly qualified expert and the College had no opportunity to cross-examine on it or introduce reply evidence.

[97] In conclusion, we have no reason to doubt the overwhelming consensus from well-known, reputable and authoritative sources that the COVID-19 vaccines are safe and effective. In claiming they are "dangerous", "experimental", "designed" to cause disease and death and constitute "bio-weapons", among other things, the member spreads misinformation. Again, we find it unlikely that a medical professional could genuinely believe these extreme assertions, an observation we would also apply to many other of the member's statements.

Effective alternative treatments for COVID-19 have been deliberately suppressed

[98] We also find the member spread misinformation when he claimed that effective alternative treatments for COVID-19 have been deliberately suppressed. As with other themes in the member's communications, he combined scientifically unsound statements with patently baseless claims of wrongdoing, without a shred of support.

[99] We rely on Dr. Gardam's evidence that while there may have been initial enthusiasm for certain alternative treatments, ultimately, the scientific data supporting their use is weak. In his testimony, he described how randomized, controlled trials, which are the gold standard in determining whether a treatment works, demonstrated that hydroxychloroquine does not work for COVID-19. Clinical trials also demonstrated that ivermectin was not an effective treatment for COVID-19. Despite this scientific evidence, the member not only continued to promote the use of these drugs, he compounded the misinformation by comparing them favourably to the vaccines. He also made repeated claims about the deliberate suppression of these alternative treatments for profit and political motives.

[100] The member called Dr. McCullough as a witness to contradict some of Dr. Gardam's evidence on ivermectin and hydroxychloroquine. Generally, we are not inclined to give Dr. McCullough's evidence much weight. In *Pentalift Equipment Corporation v. 1371787 Ontario Inc.*, 2019 ONSC 4804 at para. 98, the court stated that, with regards to expert evidence, counsel must guard against:

> (i) selection bias (why the expert is chosen); ii. Association bias (whether the expert might demonstrate a desire to do something serviceable for his or her customer / employer); (iii) professional bias (whether an expert might be defending his or her research or own credibility); (iv) noble cause distortion (whether the expert might demonstrate a willingness to distort evidence, believing that he or she is on the side of good), and (v) dogmatism and rigidity. Any one or more of these flaws will render that expert's views unreliable and useless.

[101] The above is useful to this panel's assessment of Dr. McCullough's evidence. We agree with the College's submission that, during cross-examination, he "repeatedly ignored evidence that contradicted or undermined his conclusions, in texts cited in his own report as being authoritative, adopting those portions that supported his conclusions and dismissing out-of-hand those that did not." This occurred when he was taken to studies from the CDC and other scientific publications which he cited in his own report. Although he relied on them for certain opinions, when confronted with other aspects of the studies that did not support his own views he stated simply that he "didn't agree" with them and that his own conclusions from the data "[supersede]…the conclusions of any of the papers that we'll review." He also suggested that the CDC could not be trusted because it is one of the sponsors of the American vaccine program, contradicting his own reliance on some of its statements and resorting to a sweeping and unsubstantiated accusation of untrustworthiness. In our view, these displays of dogmatism and rigidity undermine the reliability of his evidence.

[102] Member counsel suggests that these exchanges during cross-examination are not indications of rigidity but, rather, a "testament to Dr. McCullough's intellectual nimbleness, agility and creativity, which frees him from the need to slavishly submit to conclusions simply because they are held out by others as authoritative." We do not agree. In our view, Dr. McCullough showed an unwillingness to fairly assess or acknowledge the validity of any opinions other than his own. This, combined with his characterization of support for doctors facing regulatory proceedings as a "fight for

freedom," which raises concerns about his impartiality, leads us to be skeptical of his evidence.

[103] In any event, Dr. McCullough's evidence does not address the scope of the member's misinformation, which go far beyond assertions about the effectiveness of alternative treatments for COVID-19, into making baseless accusations about their deliberate suppression by criminal actors.

The member's statements are harmful

[104] We find that dissemination of this misinformation about the COVID-19 pandemic and the public health measures aimed at combatting the pandemic results in real harm. On this, the Tribunal accepts the expert evidence of Dr. Noni MacDonald, whom we qualified as an expert to give her opinion on vaccinology and the public health impacts of misinformation. Dr. MacDonald was a member of the Expert Panel on the Socioeconomic Impacts of Science and Health Misinformation that authored the report, "Fault Lines" in 2023 (Expert Panel). The Expert Panel reviewed diverse sources of evidence, including peer-reviewed publications, publicly available government information and statistics, media reports, and grey literature related to the impacts of, as well as strategies to combat, science and health misinformation within Canada and internationally. The Expert Panel's evidence review was supplemented by original modelling work undertaken to estimate the health impacts and hospitalization costs associated with COVID-19 vaccine hesitancy in Canada, focusing on the contribution of misinformation to this hesitancy. Its work, in turn, was subjected to peer review by a group of named experts.

[105] Dr. MacDonald testified about the findings of the Fault Lines report, that included:

- Science and health misinformation contributes to a "decline in trust, including trust in scientific, government, and healthcare workers and institutions."
- It also leads to inaction or delayed public policy action.
- "Messaging is more influential if it is repetitive and simple, provides a clear and unambiguous explanation for some event or circumstance (such as a conspiracy theory), and appears to come from a trusted, credible source."
- There is robust evidence on the impact of science and health misinformation on vaccine hesitancy.

- “Misinformation contributes to a lack of adherence to public health measures and to vaccine hesitancy, which can result in vaccine-preventable disease outbreaks, increased healthcare costs, and elevated risk to the health and well-being of vulnerable populations.”

- “Misinformation - as estimated by the proportion of those who reported believing that COVID-19 is a hoax or exaggerated - contributed to vaccine hesitancy in over 2.3 million people in Canada between March 1 and November 30, 2021.” Eligible people went unvaccinated, increasing the number of cases of COVID-19, hospital admissions, intensive care visits, deaths and hospitalization costs.

[106] We accept that the consequences of the spread of misinformation about COVID-19 are real and significant. Further, the impact of misinformation is magnified when it comes from a physician (in the words of the report, a “trusted, credible source”). *Berge* highlighted the “power imbalance between health practitioners and patients that arises because of the superior knowledge of the former.” On this theme, the Tribunal recently stated in *College of Physicians and Surgeons of Ontario v. Rona*, 2022 ONPSDT 45 at para. 13:

> Since physicians hold a unique position of authority and public trust, their words and actions have the potential to significantly influence public perceptions and behaviour. Members of the public are more likely to perceive a physician’s Twitter feed as providing a balanced and reliable source of scientific information, and to give significant weight to health care information provided by physicians, given their profession.

[107] We conclude that by spreading misinformation about COVID-19, the member’s actions had the potential to contribute to the socioeconomic and health impacts discussed in Fault Lines. To the extent the member intended to dissuade members of the public from following public health advice, and whether it can be proven that he caused a specific case of COVID-19, hospitalization or death, his communications contributed to the overall environment of misinformation discussed in that report.

[108] Moreover, the evidence before us included instances when the member’s misinformation caused actual harm to specific individuals, arising out of an article the member published in a community newspaper in November 2022. The article, entitled “80 Canadian MDs VAXXED and Dead,” included colour photos of recently deceased physicians, their names, ages, practice locations, dates and causes of death (many described as “died unexpectedly”). The member described the physicians as “injected and lost” and asserted that 2022 had seen a dramatic increase in the death rate of

“young injected Canadian physicians.” The clear and groundless implication of the article was that these physicians died because of COVID-19 vaccines.

[109] Global News interviewed family members of some of the deceased physicians, who described the traumatic impact on them of the spread of this misinformation about their loved ones. The College’s investigators also interviewed family members who reported similar distress after seeing the article.

The member’s statements fail to maintain the standard of practice of the profession

[110] Above, we took account of College policies in determining what conduct would reasonably be viewed by members as disgraceful, dishonourable or unprofessional. These same documents also inform our conclusion about the standard of practice of the profession applicable to a member’s communications during a pandemic. We are assisted in our findings by Dr. Gardam’s evidence and report.

[111] In his report, Dr. Gardam reviews the College’s policy on use of social media, its statement of April 30, 2021 and the Registrar’s email of May 10, 2021 in setting the standards against which he assessed the member’s communications. These standards do not preclude heated debate or conflict. In Dr. Gardam’s opinion, robust debate is central to the scientific method. He states that “[h]istory is replete with examples of scientists and physicians who have run afoul of colleagues and institutions for espousing unpopular beliefs that were later found to be truths.” Dr. Gardam cites examples of some heated debates during the pandemic.

[112] In his view, however, physicians must adjust their views as more scientific knowledge becomes available. As well, descending into conspiracy theories is no longer debate, but rather unprofessional and irresponsible behaviour. Dr. Gardam reviewed the member’s public statements via social media platforms for “evidence of misinformation that runs counter to scientific evidence, i.e., has moved beyond the realm of reasonable scientific debate, and is meant to create an emotional negative response to public health control measures.”

[113] Dr. Gardam considered various communications by the member on topics such as the COVID-19 mRNA vaccine, alternative treatments, PCR tests and the impact of COVID-19 on mortality rates. He concludes that the member “does not meet the standard of his profession, in that many of his public statements are incorrect,

misleading, inflammatory, or suggest underlying conspiracies and are beyond what I would consider reasonable scientifically informed debate."

[114] The College also asked Dr. Gardam to give his opinion on whether the member's conduct displayed a lack of knowledge, skill or judgment. In his view, the member showed a lack of knowledge and judgment. Further, the member's behaviour could expose members of the public to harm or injury, in that it may encourage the public to disregard public health advice on measures meant to reduce their risk of infection and/or take unproven treatments in the belief they will protect them from COVID-19.

[115] The member submits standards of practice must be "pre-determined, fully articulated" statements. In his written submissions, the member asserts that "the standard of practice in this proceeding has not been defined" and that "it can only be established by means of a regulation that has been reviewed by the Minister of Health and approved by Cabinet, and the College has never utilized this process to set a standard in any area of medicine."

[116] In oral argument, the member submitted that Dr. Gardam did not articulate a clear standard of practice on which he based his opinion. Further, he argues that phrases like "professional communications" and "expectations of profession" are so vague that the College can define professionalism in any way it wishes during a proceeding, preventing a member from making full answer and defence.

[117] Consistent with the cases cited above, we find that the standard of practice applicable to this case does not need to be established through regulation. Nor does it need to be found in a "fully articulated" written statement. We are satisfied that the College's policies and statements, as well as the CanMEDS Framework, provide us with evidence of a common understanding within the profession as to the expected behaviour by members with regards to communications during a pandemic. Dr. Gardam provided a reasonable formulation of that standard when he stated in his report that he reviewed the member's communications for "evidence of misinformation that runs counter to scientific evidence, i.e., has moved beyond the realm of reasonable scientific debate, and is meant to create an emotional negative response to public health control measures."

[118] Put another way, what is "reasonably expected of the ordinary, competent practitioner" is that they refrain from spreading misinformation and conspiracy theories intended to undermine public health measures during a pandemic. This standard cannot

come as surprise to the member. We agree with Dr. Gardam's opinion that many of the member's communications on COVID-19 fail to maintain this standard.

Conclusion regarding the public benefits of a finding of professional misconduct

[119] In sum, the member promoted non-scientific and baseless conspiracy theories about COVID-19, cast doubt on the motives of public health officials around preventative measures and discouraged adherence with public health interventions. A finding that his conduct was disgraceful, dishonourable and unprofessional would protect the public interest in the context of the pandemic, where misinformation has been shown to cause actual harm to the public. The public is protected when it is not led into thinking that the pandemic is a hoax. It is protected when it is not misled into doubting the trustworthiness and motives of health authorities and ignoring public health measures to counteract the pandemic.

[120] Based on these same circumstances, a finding that the member's conduct failed to meet the standard of practice of the profession also advances the statutory objective of protecting the public from harmful misinformation during the pandemic.

Maintaining the integrity and reputation of the profession and promoting trust in the profession by rejecting unprofessional and uncivil discourse.

[121] The second statutory objective advanced by a finding of professional misconduct is maintaining the integrity of the profession and promoting trust in the profession by rejecting unprofessional and uncivil discourse. Canadian courts have recognized that professional regulators, including in the health professions, fulfill important statutory objectives when they set expectations of civility and professionalism with respect to their members' communications: *Doré*; *Rocket; Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112; *Zuk v Alberta Dental Association and College*, 2018 ABCA 270; *Groia v. Law Society of Upper Canada*, 2018 SCC 27. We have referred to the College's policies and statements which give expression to these expectations for the medical profession in Ontario. A finding of misconduct arising out of the member's COVID-19 communications furthers these objectives.

[122] Taken as a whole and especially in the context of a declared public health emergency and public efforts to manage the pandemic, the member's communications are the opposite of civil and professional. In promoting sweeping and far-fetched claims of conspiracies and criminal activity, at times targeting named individuals, they are

uncivil, unbalanced and inflammatory. We reference in particular the member's statements that are variations on the theme that the pandemic is a deliberately constructed sham, that promoters of public health measures are criminals who should be (lawfully) hung, shot or put in graves and that COVID-19 vaccines are dangerous bioweapons intended to cause serious disease and death. We also reference the member's assertions that effective treatments for COVID-19 have been deliberately suppressed. A finding that such communications constitute disgraceful, dishonourable or unprofessional conduct would support the objectives of maintaining the integrity of the profession and promoting trust in the profession, which we find particularly pressing during a public health emergency.

[123] Further, the Tribunal has found that publication of derisive remarks about other members damages the reputation of the profession and the public's trust in the College's members (see *College of Physicians and Surgeons of Ontario v. Maciver*, 2020 ONCPSD 10). In *College of Physicians and Surgeons of Ontario v. Tjandrawidjaja*, 2018 ONCPSD 39, finding professional misconduct arising out of emails from a physician to the then-President of the Ontario Medical Association, the Tribunal said the following about the harm from the physician's actions:

> There is no question that the issues related to the tPSA being debated were controversial and there were multiple beliefs that were passionately held by members of the medical profession. There is no question that Dr. Walley and the OMA staff were executing their duties, and were politely and reasonably expressing what they saw as the best course of action, given the situation they were facing. To debase the debate by *ad hominem*, bullying, juvenile and utterly disrespectful comments, not only brings Dr. Tjandrawidjaja into disrepute, but negatively impacts the respect the society has for the entire profession.

[124] The member's unprofessional communications are not restricted to public figures or health measures. In promoting a false narrative about 80 deceased doctors, he targeted private individuals, causing distress to their grieving families. A finding that this conduct amounts to disgraceful, dishonourable or unprofessional conduct also serves to maintain the integrity and reputation of the profession and promote trust in the profession.

Impact of a finding of professional misconduct on Charter rights

The speech has low expressive value

[125] In conducting our proportionality analysis, we consider whether the member's communications are the type of speech which should be given strong *Charter* protection. Although the guarantee of freedom of expression has been interpreted so broadly as to include the right to spread misinformation, this right is not unrestricted. In cases such as *Zundel*, the Court considered whether statutory restrictions on speech were the type of reasonable limits permitted by s. 1 of the *Charter*. Here, we determine whether a finding of professional misconduct achieves a proportionate balancing of the member's Charter right. In making that determination, we have regard to the nature and content of the member's communications.

[126] In the context of professional regulation, the Supreme Court of Canada has recognized that not all forms of expression are equally protected. In *Groia*, a case involving a lawyer's verbal attacks on opposing counsel, the court stated at para. 119 that:

> [a]llegations impugning opposing counsel's integrity that lack a reasonable basis lie far from the core values underpinning lawyers' expressive rights. Reasonable criticism advances the interests of justice by holding other players accountable. Unreasonable attacks do quite the opposite. As I have explained at paras. 63-67, such attacks frustrate the interests of justice by undermining trial fairness and public confidence in the justice system. A decision finding a lawyer guilty of professional misconduct for launching unreasonable allegations would therefore be likely to represent a proportionate balancing of the Law Society's mandate and the lawyer's expressive rights.

[127] Likewise, the member's far-fetched conspiracy theories, unfounded accusations of criminal conduct and reckless rhetoric lie far from the core values underpinning members' expressive rights. Beyond their inflammatory and intemperate tone, they go beyond reasonable scientifically informed debate and use his position as a physician to attempt to dissuade the public from following authoritative public health recommendations during a pandemic. During what has been described as the "defining public health issue of our time" (*Gill* at para. 315), his communications contribute to real harm to the public good.

[128] The member suggests that his communications should be treated as high value political speech involving the criticism of public officials, including those serving at the College. He also submits that, in times of crisis, where government claims extraordinary powers for itself, the member plays a role in criticizing government with a view to preventing the abuse of power that jeopardizes the very rights that public health measures are designed to protect, including the right to personal security.

[129] We have some difficulty with these assertions. First, although some of his statements attack public health officials and the College, they cannot be separated from the overall theme of his communications which is to undermine the scientific basis for public health measures taken during the pandemic. The member speaks as a "scientist and doctor" providing "objective, accurate and scientific information" about the pandemic. Second, to the extent there exist areas of reasonable, scientifically informed debate about public health measures taken during the pandemic, the member's communications are not within that realm.

Conclusion: the infringement on Charter rights is proportionate to the public benefit

[130] We have identified the fundamental importance of expressive rights, the negative effects a finding of professional misconduct would have on the member's freedom of expression, and the potential for such a finding to create a chilling effect on the exercise of the *Charter* right by others. The positive benefits to the public good of a finding a finding of professional misconduct include the prevention of the spread of harmful misinformation intended to undermine public health measures during the pandemic. It would also promote confidence in the College's ability to regulate the profession in the public interest by showing that the College can take steps to protect the public during the pandemic. A finding of professional misconduct would serve to maintain the integrity and reputation of the profession and promote trust in the profession during a public health emergency.

[131] A finding of professional misconduct does not impair the member's freedom of expression more than is necessary to achieve the objectives of protecting the public interest in a global pandemic, maintaining the integrity and reputation of the profession and promoting trust in the profession. It does not impair his right to engage in debate, even heated debate, about public health measures during the pandemic and the science underlying those measures. It does impair his ability to engage in speech which is

misleading, inflammatory and contributes to harm to the public during a public health emergency, lending that speech credibility because of his medical training and profession.

[132] In light of the statutory objectives, a finding of professional misconduct is a proportionate response relative to the impact on the member's freedom of expression. We have considered whether there are other reasonable possibilities that would give effect to *Charter* protections more fully while still furthering those objectives and find none. The College would not be fulfilling its responsibility to regulate the profession in the public interest if it did not take action to investigate and deter such conduct. While recognizing that the impact of our finding on the member's *Charter* rights is significant, in our view, in these circumstances, the statutory objectives are paramount and the effect on expressive rights is no more than necessary.

Section 7 of the *Charter*

[133] The member also argues that the College's efforts to supress his freedom of expression violate the principle of informed consent, which is protected by s.7 of the *Charter* which states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[134] He submits that doctors have the right to use their clinical judgment in assessing and communicating the material risks, benefits and adverse effects of any treatment. In seeking to supress his right to provide advice that encourages the public to act contrary to public health orders and recommendations, the College has pre-empted his right and duty to provide information regarding the risks, benefits and adverse effects of treatments for COVID-19, which is a violation of s. 7. The College has also, he argues, defeated the patient's right to receive all the information that is relevant to his or her fundamental right to make treatment decisions.

[135] We find no merit in this argument. The member's right to life, liberty and security of the person is not engaged by this proceeding. His right to communicate his views is not covered by s. 7 but, rather, by s. 2(b), which we have discussed. Further, our finding of professional misconduct in no way conflicts with any patient's right, in consenting to proposed treatment, to receive the information required to make a decision about the

treatment. It does not restrict a doctor from providing appropriate information about the nature of the treatment, its expected benefits, material risks, material side effects, alternative courses of action and the likely consequences of not having the treatment, as required under the *Health Care Consent Act, 1996*, SO 1996, c. 2, Sched. A, s.11. It does restrict the dissemination of misinformation about COVID-19. Even if s. 7 applies in these circumstances, we see no basis for finding that this restriction violates a patient's right to life, liberty and security of the person under s. 7 of the *Charter*.

[136] We likewise dismiss the member's argument that restrictions on a physician's right to provide medical exemptions from COVID-19 vaccines violates s. 7. Our finding of professional misconduct does not affect the issuance of such exemptions in accordance with the standards of practice of the profession.

Professional misconduct - the member's conduct in relation to vaccine exemptions

[137] In investigating the member's practice of giving medical exemptions from COVID-19 vaccines, the College retained Dr. Orkin to review 27 charts of patients to whom the member provided such exemptions. Dr. Orkin reviewed the charts as well as the member's written responses to his questions. Dr. Orkin concluded that the member's conduct fell below the standard of practice in that he:

- failed to use established criteria for providing a medical exemption for COVID-19 vaccination;
- did not take a detailed enough patient history to determine if a patient met the eligibility criteria for an exemption;
- did not document any communication with patients about indications, risk, benefits or contraindications, even while many of the exemption letters state that the exemption is "due to the high risk-to-benefit ratio of each type [of vaccine], which makes both contraindicated"; it is thus unclear how that issue was assessed;
- did not document any risk reduction strategies or education offered to reduce the individual and community risks of COVID-19 among individuals who received medical exemptions from COVID-19 vaccination;
- applied a flawed approach to informed consent.

[138] In his evidence, Dr. Orkin stated that the criteria for exempting a patient from a vaccine are well-known and were no different for the COVID-19 vaccine. A competent physician would have been aware of the criteria for medical exemptions which are essentially two-fold: 1. an allergy to the vaccine or one of its components or 2. complications from a previous vaccine or pre-existing specific medical conditions raising the risk of complications. Ontario's Ministry of Health issued a guidance document in September 2021, using these criteria for exemption from COVID-19 vaccines.

[139] None of the charts Dr. Orkin reviewed contained a sufficiently detailed history allowing him to assess whether the patients met those established criteria. Most of the exemption letters (which are titled "Medical Exemption from Injectable COVID-19 Experimental Genetic Therapies commonly referred to as 'covid vaccines'") state that the patient is exempted from COVID-19 immunization "due to the high risk-to-benefit ratio of each type [of vaccine], which makes both contraindicated." However, the charts do not contain information about how the risks and benefits were assessed.

[140] Some charts cite an allergy to PEG (polyethylene glycol), a component of the vaccine; however, there was no further documentation or evidence of further information gathering to confirm the history, context or severity of the stated PEG allergy. The member's written answers to Dr. Orkin's questions indicated that "it was not necessary [to assess the nature of stated allergies] due to the intrinsic right of the patients to self-exempt based on their complaints about being coerced into taking the injections." None of the charts document any communication with the patient about indications, risks, benefits, or contraindications of COVID-19 vaccination, or risk reduction strategies/education offered to reduce the risk of COVID-19 among individuals who were medically exempt.

[141] With respect to the issue of informed consent, the member's medical exemption letters state that the patients are exempted on the basis that they are being forced to take the vaccine, or must not be forced to take the injection, which "constitutes treatment based on coercion, which is unlawful under the principle of informed consent." Some charts contain a "Medical Coercion Assessment Tool" in which the patient is asked to answer questions such as "[d]o you genuinely want to have one of the experimental COVID-19 genetic injectable therapies?"

[142] In his testimony, Dr. Orkin stated that understanding and being adept with the details of informed consent and what is required for informed consent are core parts of a clinically oriented medical speciality and indeed any physician's work. The key elements of informed consent are that consent related to treatment be informed, given voluntarily and not obtained through misrepresentation or fraud. If a patient chooses not to receive medical intervention, it is their choice. However, as a matter of the practice of medicine, a patient's choice is not a reason for a medical exemption. In other words, using exemption letters as tools for advocacy falls below the standard of practice.

[143] Dr. Orkin also testified that, in his opinion, the member mischaracterizes public health measures as coercion that bears on informed consent. He gave, as an example, seatbelt laws. It would not be normal practice for a physician to view those laws as coercive and exempt a patient from seatbelt requirements for medical reasons. In his report, he states that the member's care:

> …displays a lack of knowledge regarding the relationship between (a) the authority of public health agencies, mandates, and occupational health regulations at the population level, and (b) principles of individual informed consent, including voluntariness and coercion, at the individual level. This results in a substantial professional misrepresentation of public health agencies and occupation health regulations as an impediment to or contravention of the principles of individual informed consent.

[144] The member's cross-examination focused on establishing that the MOH vaccine exemption criteria were guidelines without binding force. In his final submissions, he argued that as they do not have the force of law, they are no substitute for a doctor's advice. He also argued that the College has no right to regulate medical exemptions.

[145] The MOH criteria do not need to be binding. Those guidelines, in conjunction with Dr. Orkin's evidence, establish the standard of practice in granting a medical exemption for COVID-19 vaccines. The criteria for granting such exemptions is well-known and consistent with those applicable to any vaccine. We agree with and rely on Dr. Orkin's opinion that the member's care in relation to granting medical exemptions from COVID-19 vaccines did not meet the standard of practice. The basis on which he granted the exemptions was not justified based on established criteria, his clinical notes were inadequate and he improperly relied on a patient's unwillingness to receive a vaccine as a reason for medical exemption.

[146] In this proceeding, the College is not seeking to "regulate" medical exemptions from vaccines. It is fulfilling its statutory duty to regulate the profession in the public interest by ensuring that its members practise medicine in a manner consistent with the standards of practice of the profession.

Professional misconduct - duty to cooperate with the College's investigations

[147] The investigative powers granted to the College under s. 75 of the Code are key elements of its regulatory function and are how an investigator gathers relevant material in an investigation. Supporting these powers are ss. 76(3) and (3.1), which place obligations on the College's members with respect to such investigations:

> (3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation.
>
> (3.1) A member shall co-operate fully with an investigator.

[148] In addition, para. 1(1)30 of O. Reg. 856/93 provides that it is an act of misconduct to fail to respond appropriately or within a reasonable time to a written inquiry from the College.

[149] Thus, every member of the profession is obliged to cooperate with the College in its investigations and to respond appropriately and within a reasonable time to College inquiries when requested to do so. This is part of the responsibility of practising a regulated profession. The credibility of the medical profession, and the College as its regulator, depends on the College being able to investigate complaints or other issue of potential concern and to take appropriate action in a timely way (see *College of Physicians and Surgeons of Ontario v. Hanmiah*, 2022 ONPSDT 9 at para. 11).

[150] The courts have confirmed the mandatory nature of the member's duty under s. 76(3.1) of the Code. In fact, in a decision involving this very member, the court granted the College's application seeking an order directing the respondents' compliance with its investigation requests (*College of Physicians and Surgeons of Ontario v. O'Connor*, 2022 ONSC 195). The court found Dr. Trozzi and two other physicians in breach of their duties to cooperate with the College's investigations. Among other things, the court directed the member to cooperate fully with the College's investigation at issue, including providing it with "medical charts and patient information as requested."

[151] In a decision about the Law Society of Ontario's regulation of the legal profession, *Law Society of Ontario v. Diamond,* 2021 ONCA 255 at para. 50, the Court of Appeal clarified the test to be applied when evaluating a regulated professional's lack of cooperation:

> (a) all of the circumstances must be taken into account in determining whether a licensee has acted responsibly and in good faith to respond promptly and completely to the Law Society's inquiries; (b) good faith requires the licensee to be honest, open, and helpful to the Law Society; (c) good faith is more than an absence of bad faith; and (d) a licensee's uninformed ignorance of their record-keeping obligations cannot constitute a "good faith explanation" of the basis for the delay.

The College's investigations and requests for documents

[152] The facts on this issue are undisputed. They establish that the member failed to promptly and completely provide information requested by the College in connection with an investigation and ICRC order.

[153] We find it unnecessary to track every exchange of correspondence between the College and the member. On September 29, 2021, the College's Registrar initiated an investigation into whether the member's practice and conduct, "including in relation to COVID-19 and his completion of medical exemptions for COVID-19 vaccinations, has engaged in professional misconduct or is incompetent." In connection with this investigation, a College investigator wrote to the member in October 2021 requesting that he provide, among other things, a list of patients to whom he had provided certain exemptions and treatments and copies of medical records for those patients. The member refused to provide the complete set of documents or information despite repeated requests. In correspondence through counsel, he stated that he "declined" to provide documents, the investigation was unlawful and the request a "fishing expedition."

[154] At one point, member counsel suggested that the College postpone its request for patient files pending the court's disposition of the application in *O'Connor*. Counsel indicated that the member would abide by the court's decision. Following that decision, in January 2022, counsel confirmed to a College investigator the member's willingness to provide the requested records. However, he subsequently clarified that he intended to fulfill only part of the request, relating to patients to whom he issued vaccine exemptions, describing the investigation as "patently overreaching." After several more requests, the

member provided the rest of the information, relating to other exemptions and COVID-19 treatments, in October 2022.

[155] On October 15, 2021, the ICRC imposed terms, conditions, and limitations on the member's certificate of registration under s. 25.4(1) of the Code. The ICRC's order included terms to facilitate the monitoring of the member's compliance with the order, including that the member notify the College of his practice locations and provide consent for the College to make appropriate inquiries of OHIP. The member did not disclose his practice locations nor give the OHIP consent in response to the order and the College's related requests. He claimed to be on sabbatical although he issued almost all the vaccine exemption letters discussed above during the relevant time. In December 2022, he advised the College that he was ending his sabbatical and provided a practice location. To date, he has not given the OHIP consent.

[156] We find that the member did not comply with his duty to respond promptly and completely to the College's requests for documents and information. The member submits that he had no duty to cooperate because the College did not have the lawful authority to conduct an investigation due to defects in its investigation orders and its lack of authority to regulate medical exemptions and communications regarding COVID-19. The Tribunal and the courts have ruled that the duty to cooperate applies despite a member's legal challenges to the College's investigations (*College of Physicians and Surgeons of Ontario v. Luchkiw*, 2023 ONPSDT 14 at para. 20). The member was obliged to respond to the College's requests for documents and information regardless of his contention that the investigation orders were defective. Ultimately, those orders were found valid, twice, by this Tribunal (*College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 2; *College of Physicians and Surgeons of Ontario v. Phillips*, 2023 ONPSDT 7).

[157] He also states that he did not willfully refuse to cooperate, but rather delayed cooperating based on the advice of legal counsel. We find no merit in this argument. First, although the member makes this assertion, he did not testify to this effect. Second, we have been provided with no authority suggesting that the member is not responsible for a failure to cooperate with the College when he acts on the advice of counsel or corresponds with the College through counsel. In *College of Physicians and Surgeons of Ontario v. Khan*, 2022 ONPSDT 5, at para. 1250, the Tribunal found that "the mere fact a physician is acting on legal advice does not render his decision reasonable, particularly

in a case such as this one in which there was no legal basis for him to withhold his cooperation."

[158] Finally, the member submits that he informed College counsel he would provide the patient files relating to his provision of medical exemptions prior to the hearing in which an order was sought for their production, and thereafter provided them. We are not satisfied that this fulfilled his duties to the College. This covered only some of the documents and information sought and he did not provide the rest for many months.

[159] As stated in *Diamond* at para. 50, the member's obligation is to be "honest, open, and helpful" and encompasses more than simply an absence of bad faith. The member's piecemeal, prolonged and ultimately incomplete approach to providing documents and information to the College was less than "honest, open and helpful."

[160] We thus conclude that the member's actions amount to professional misconduct within the meaning of s. 1(1)30 of O. Reg. 856/93. It is also conduct that members of the profession would reasonably regard as disgraceful, dishonourable or unprofessional.

Incompetence

[161] The Code defines incompetence as follows:

> 52 (1) A panel shall find a member to be incompetent if the member's professional care of a patient displayed a lack of knowledge, skill or judgment of a nature or to an extent that demonstrates that the member is unfit to continue to practise or that the member's practice should be restricted.

[162] Incompetence is assessed based on the member's care of patients in the past, but the panel must be satisfied that the member is presently incompetent in order to make a finding of incompetence (*Kadri* at para. 112-13). Relying on all the evidence, as well as Dr. Orkin's opinion on the member's practice in relation to vaccine exemptions, which the member did not challenge, we find that the member is presently incompetent to such an extent that he is either unfit to practise or that his practice should be restricted.

[163] Dr. Orkin's opinion that the member's care of patients displayed a lack of knowledge regarding informed consent, which is a concept fundamental to the practice of medicine, supports a finding of incompetence. In his opinion, the member exhibited a misunderstanding about the relationship between public health and occupational health

mandates and the principles of informed consent, viewing those societal mandates as amounting to coercion at the level of individual consent to treatment. Considering the totality of the member's COVID-19 communications, we find it equally likely that the member's approach to informed consent was due to a lack of judgement rather than knowledge. The member may have misunderstood the principles of informed consent or, alternatively, he may have understood them but chose to twist them to his own purposes. Either supports a finding of incompetence.

[164] We also accept and rely on Dr. Orkin's opinion that the member's care of patients displayed a lack of judgement in his communications regarding coercion, force and unlawfulness, and the risks and benefits of COVID-19 immunization.

[165] Not only must this panel find that the member was incompetent in his past care of patients, but that he is presently incompetent. The nature of the deficits here are not related to a limited area of practice or suggest a momentary lapse. They relate to matters which are core to the practice of medicine. The member's lack of knowledge and judgement on those matters leads us to find that his practice should, at the very least, be restricted.

Conclusion

[166] We find that the College has proven the allegations against the member. He has engaged in conduct that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, has failed to maintain the standard of practice of the profession and failed to respond appropriately or within a reasonable time to a written inquiry from the College. We also find the member incompetent as defined by subsection 52(1) of the Code.

[167] The Tribunal will schedule a hearing on penalty and costs.