Court File No. 294/22

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N: [redacted]

- and -

Applicant

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO and [redacted] AND JOHN AND JANE DOE (CO-APPLICANT PATIENTS OF APPLICANT) and JOHN AND JANE DOE #2 (NON-APPLICANT PATIENTS OF THE APPLICANT)

Respondents

Court File No. 297/22

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

[redacted], (BY THEIR LITIGATION GUARDIANS, [redacted] JOHNS AND JANES DOE (PATIENTS OF [redacted]

Applicants

- and -

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO (CPSO), [redacted]

Respondents

Court File No. 365/22

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

[redacted]

Applicant

- and -

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO and [redacted] AND JOHN AND JANE DOE (CO-APPLICANT PATIENTS OF APPLICANT)and JOHN AND JANE DOE #2 (NON-APPLICANT PATIENTS OF THE APPLICANT)

Respondents

FACTUM OF [redacted] PATIENTS
(Re: the Patients' Response to the CPSO's Standing Motion and The Patients' Request for an Anonymity Order)

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PART I – FACTS

1. The facts are as set out in the Affidavit of [redacted], dated January 27th, 2023, the affidavit of [redacted], dated January 30th, 2023, and affidavit of [redacted] dated January 23rd, 2023, contained in the motion record, and underlying Application record of the named Applicants and Johns and Janes Doe Patients.

PART II- ISSUES

2. The issues on this Motion are:

   (a) With respect to the Patients' Response to the CPSO's Standing Motion:

      i. Whether the CPSO's Motion to Quash is premature and ought to be determined following completion, argument and deliberation of the judicial review proper, as dictated by the Supreme Court of Canada in ***British Columbia (Attorney General) v. Council of Canadians with Disabilities, 2022 SCC 27 (CanLII),*** as well as the Federal Court of Appeal in ***Apotex Inc. v. Canada (Governor in Council), 2007 FCA 374 (CanLII)?;***

      ii. Whether the Johns and Janes Doe have private or public interest "standing"?

   (b) With respect to the patients' Anonymity, whether the patients should be granted an Anonymity order?

PART III- LAW

A/ Standing – Responding to the CPSO Motion to Quash

- **The Patients' Right to Judicial Review**

3. It is submitted that the patients have a right to seek judicial review of CPSO decisions and ICRC orders as they are directly affected by the Respondent's exercise of a statutory power in rendering those decisions, to wit, to compel, against the patients' consent, their

private information, medical information and medical records in the control and possession of the Applicant, [redacted], which engages their rights under sections 7 and 8 of the ***Charter of Rights and Freedoms.*** The relief the Applicants seek is in their (amended) Notice of Application for Judicial Review.

- ***Charter*** **Rights with Respect to Medical Treatment/Records**

4. At common law, the Supreme Court of Canada, with respect to control and ownership over medical records, put it, and ruled, as follows:

> When a patient approaches a physician for health care, he or she discloses sensitive information concerning personal aspects of his or her life. The patient may also bring into the relationship information relating to work done by other medical professionals. The policy statement of the Canadian Medical Association cited earlier indicates that **a physician cannot obtain access to this information without the patient's consent or a court order.** Thus, at least in part, medical records contain information about the patient revealed by the patient, and information that is acquired and recorded on behalf of the patient**. Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient**. As counsel for the respondent put it in oral argument: "[The respondent] wanted access to information on her body, the body of Mrs. MacDonald." In R. v. Dyment, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 429, **I noted that such information remains in a fundamental sense one's own, for the individual to communicate or retain as he or she sees fit.** Support for this view can be found in Halls v. Mitchell, 1928 CanLII 1 (SCC), [1928] S.C.R. 125, at p. 136. There Duff J. held that professional secrets acquired from a patient by a physician in the course of his or her practice are the patient's secrets and, normally, are under the patient's control. **In sum, an individual may decide to make personal information available to others to obtain certain benefits such as medical advice and treatment.** Nevertheless, as stated in the report of the Task Force on Privacy and Computers (1972), at p. 14, **he or she has a "basic and continuing interest in what happens to this information, and in controlling access to it".**
>
> - ***McInerney v. MacDonald, 1992 CanLII 57 (SCC), [1992] 2 SCR 138***

5. With respect to the right to records containing private information, the Supreme Court of Canada has long established the s.7 and 8 ***Charter*** right(s) to medical records in ***R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411.*** Wherein the Supreme Court of

Canada ruled:

> [119] …
>
> In the same way that our constitution generally requires that a search be premised upon a pre-authorization which is of a nature and manner that is proportionate to the reasonable expectation of privacy at issue (*Hunter*, *supra*; *Thomson Newspapers*, *supra*), s.7 of the *Charter* requires a reasonable system of "pre-authorization" to justify court-sanctioned intrusions into the private records of witnesses in legal proceedings. **Although it may appear trite to say so, I underline that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.**
>
> -***R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411.***

6. Under s.7 of the ***Charter***, the Supreme Court of Canada, with respect to medical treatment/nor-treatment, constitutionalized this Right in ***Carter*** when it ruled:

> [67] **The law has long protected patient autonomy in medical decision-making.** In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). **This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person** (para. 100; see also R. v. Parker (2000), 49 O.R. (3d) 481 (C.A.)). As noted in Fleming v. Reid (1991), 4 O.R. (3d) 74 (C.A.), **the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's de**cision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., Ciarlariello v. Schacter, [1993] 2 S.C.R. 119; Malette v. Shulman (1990), 72 O.R. (2d) 417 (C.A.); and Nancy B. v. H.tel-Dieu de Qu.bec (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).
>
> - ***Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII),*** at para 67

7. The substantive content and nature of the records demanded in this case is with respect to

medical treatment, and the constitutionalized choice and authority over that treatment by the patient, recognized and protected under s. 7 of the ***Charter.***

8. Furthermore, with respect to records, the law has been constant, as summarized by the Ontario Court of Appeal, setting out the saturated jurisprudence from the Supreme Court of Canada in ruling, with respect to cell phones, that:

> [19] The trial judge relied heavily upon R. v. Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608. He recognized that **protection under s. 8 of the Charter is only available if an accused person is able to establish a reasonable expectation of privacy in the subject matter of the search. This involves (1) a subjective expectation that is (2) objectively reasonable:** at para. 36. As ***Marakah,*** at paras. 10-11, and earlier cases teach, the determination of whether a person has a reasonable expectation of privacy requires a consideration of "the totality of the circumstances" involving the four following lines of inquiry:
>
> 1. What was the subject matter of the alleged search?
> 2. Did the claimant have a direct interest in the subject matter?
> 3. Did the claimant have a subjective expectation of privacy in the subject matter?
> 4. If so, was the claimant's subjective expectation of privacy objectively reasonable?
>
> - ***R. v. Campbell, 2022 ONCA 666 (CanLII)*** at paragraph 19

9. It is submitted, and in evidence, that the Patient Applicants had, and continue to have, a reasonable expectation of privacy to their medical records, which expectation is both reasonable and recognized in the jurisprudence. The Patients meet the test set out by the Supreme Court of Canada in ***R. v. Marakah, 2017 SCC 59 (CanLII), [2017] 2 SCR 608.*** Moreover, the records sought, without a patient complaint, deal with the patients' right to medical treatment/non-treatment, again recognized by the Supreme Court of Canada in ***Carter.*** Their asserted right against seizure of their records equally applies as against the Regulator and not just the physician and world at large. They have standing to argue for their constitutional rights. In fact, the Regulator, being a state actor, is where standing lies

under constitutional scrutiny and review.

10. It is thus submitted that, in the context of the fact that the Supreme Court of Canada has recognized ***Charter*** rights and interests attached to records, from:

    (a) Tax Records (***Baron v. Canada, [1993] 1 S.C.R. 416*****;**

    (b) To Office Media Records (***Hunter et al. v. Southam Inc., [1984] 2 SCR 145***);

    (c) To Utility Records (***R. v. Plant, 1993 CanLII 70 (SCC), [1993] 3 SCR 281***);

    (d) To Therapeutic Records (***R. v. O'Connor, , [1995] 4 SCR 411);***

    (e) To Cellphone Records (***R. v. Ahmad, 2020 SCC 11 (CanLII)*****; R. v. Campbell, 2022 ONCA 666 (CanLII)).**

    it is respectfully submitted that to assert and/or conclude that there is no ss.7-8 ***Charter*** rights/interests of a patient's medical record(s), in the hands of his or her doctor, under non-consensual compulsion by state actors, is an Alice in Wonderland assertion on a Flat Earth.

11. It is further submitted that, to then further assert that those patients lack private, or public, interest standing for judicial review, or respond, to such state action, is lilting beyond the pale, particularly in the context of advancing those ***Charter*** rights, with a constitutional challenge to statutory provision(s) also advanced, and further in light of the Supreme Court of Canada jurisprudence on standing:

    - ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 (CanLII), [2012] 2 SCR 524***
    - ***British Columbia (Attorney General) v. Council of Canadians with Disabilities, 2022 SCC 27 (CanLII)***

    and the required test cited therein, on leaving the standing issue to a full deliberation on the underlying merits of the underlying Application, and not a motion to quash.

12. In a recent decision, dated January 25th, 2023, on point with the within application, a U.S. Federal Court decision out of California, ruled that the patient of a doctor had standing in a case dealing with the doctor's free speech rights, in the context of COVID-19 legislation, let alone the more protected right(s) of personal physical and psychological rights covered by patient records, wherein the Court ruled:

> Although plaintiff Khatibi is a physician licensed by the Medical Board, **she asserts standing as a patient, on the basis that AB 2098 interferes with her right to receive information from her doctors**.
> **…**
> **Thus, where a statute interferes with a plaintiff's First Amendment right to receive information, she has standing to challenge the law, even if it does not apply to her.**

-Høeg, et al. v. Newsom, et al., 2:22-cv-01980 WBS AC

[redacted] patients assert that where the Regulator is seeking to interfere with their s.7 and 8 ***Charter*** rights, the same right to standing applies.

13. Furthermore, the nature and timing of the application dictates that standing be granted for the reasons set out in the Supreme Court of Canada decision in ***O'Connor.***

- R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411,@ paragraph 119

- **Constitutional Duty of Courts to Review**

14. The CPSO's decision was made pursuant to section 75(l)(a) of the ***Health Professions Procedural Code*** and the Courts not only have jurisdiction to review this decision, but the duty to ensure that the exercise of this provision complies with the Constitution. Furthermore, the interim order to produce the records to the CPSO was inseparable from ss. 75 and 76 of the ***Code***, which provision is also being challenged under the ***Charter.***

15. The Supreme Court of Canada has unequivocally ruled that:

(a) The Courts are under ***a duty*** to review legislation for constitutional compliance;

-R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30

(b) The Courts are under ***a duty*** to review executive action for constitutional compliance:

- ***Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1SCR441***
- ***Air Canada v. British Columbia, 1989 CanLII 95 (SCC), [1989] 1 SCR 1161***
- ***Canada (Prime Minister) v. Khadr, 2010 SCC 3 (CanLII), [2010] 1SCR44***

(c) The Courts are under ***a duty*** to review even the common law of the Courts for constitutional compliance:

(i) Both in the criminal context;

- ***R. v. Salituro, 1991 CanLII 17 (SCC), [1991] 3 SCR 654***

(ii) As well as the civil context.

-RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2SCR 573

16. The CPSO' s out of tune mantra that judicial review is "discretionary" applies, where it may apply, to judicial review solely based on **Administrative Law and common law grounds in the absence of constitutional issues. There is NO such discretion from a constitutional violation.**

17. The law is intricately tied to the jurisprudence from the Supreme Court of Canada with respect to "no right without a remedy": The Supreme Court of Canada has consistently held, ***post-Charter,*** the ancient maximum that there is no right without a remedy, wherein the Supreme Court of Canada, in ***Mills,*** ruled:

> ... In *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, at p. 136, Holt C.J. instructs us that "it is a vain thing to imagine a right without remedy". ... The notion that the remedy must fail or be ineffective for lack of a competent court within the confines of the ordinary procedures for the administration of criminal justice ***can no more be imagined than can the notion of a right without a remedy.***

- ***R. v. Mills*** [1986] 1 SCR 863 @p. 971 - 2

and further endorsed it in ***Nelles*** *v.* ***Ontario:***

> ... The question arises then, whether s. 24(1) of the *Charter* confers a right to an individual to seek a remedy from a competent court. **In my view it does. When a person can demonstrate that one of his *Charter* rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong**. To create a right without a remedy is antithetical to one of the purposes of the *Charter* which surely is to allow courts to fashion remedies when constitutional infringements occur ...

- ***Nelles*** *v.* ***Ontario*** [1989] 2 S.C.R. 170 (Lamer,CJ)

further in ***Doucet-Boudreau*** *v.* NS:

> **55** … A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. ***An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just*** (see *Dunedin, supra*, at para. 20, McLachlin C.J. citing *Mills, supra*, at p. *882,per* Lamer J. (as he was then)).

-***Doucet-Boudreau v. NS*** [2003] SCJ 63 @paragraph 5

18. Since 1701, and the ***Act of Settlement (1701)*** and constitutional right to the Independence of the judiciary, in ***Entick v. Carrington (1765) 19 St. Tr. 1030*** the right to judicial review was recognized.

19. This right was re-iterated and endorsed, ***post-Charter,*** by the Supreme Court of Canada, in ***Dunsmuir*** wherein the Court stated:

> [31] … ***In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits.***

> -***Dunsmuir v. New Brunswick, 2008 SCC 9*** ***(CanLII), /2008] 1 SCR 190, at para 27-31***

20. Hence there is, as confirmed in ***Dunsmuir v. New Brunswick, para 132***, a "clear and stable constitutional foundation of the system of judicial review in Canada". The submissions of the moving party CPSO, completely overlook and fail to address any ***Charter***-based grounds for seeking judicial review.

- **Motion to Quash (Strike) the Application of Johns and Janes Doe Patients, Premature**

21. To the extent that the CPSO's motion to quash with respect to **standing** is a disguised motion to strike, and that this is NOT an action, but a judicial review, the application for judicial review by the Johns and Janes Doe, as tied to standing, the Patients submit that the caselaw, on motions to strike **applications**, is clearly more stringent than an action and is against the Respondents in that:

> Thus, the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and **argue at the hearing of the motion itself.** This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike.
>
> -***Pharmacia Inc*** v. ***Minister of National Health*** & ***Welfare*** (1994) C.P.R. (3D) 209 (FCA) pp.214-215.

22. The above jurisprudence equally stands with respect to **standing** in the context of a judicial review. Thus, the Federal Court of Appeal, clearly ruled that even on the issue of the standing of a party on the application, this is not a matter that should be decided at a preliminary motion, but best left to the applications judge hearing the application on the merits, on a fully perfected record wherein the Court ruled:

> [13] It **is not always appropriate for motions to strike to be the context to make a binding decision on a question of standing, especially when the motion is to strike out an application for judicial review. Rather, a judge should exercise her discretion as to whether it would be appropriate in the circumstances to render a decision on standing, or whether a final**

disposition of the question should be heard with the merits of the case.
…

-Apotex Inc. v. Canada (Governor in Council), 2007 FCA 374 (CanLII)

- **Justiciability and Constitutionality of Legislation and Regulatory Provisions**

23. Insofar as the CPSO's standing challenge is a (disguised) justiciability argument, the Supreme Court of Canada has made it clear, more than once, that all legislation is subject to constitutional justiciability, even when tied to standing, wherein the Court ruled, in ***Thorson***, that:

> **The question of the constitutionality of legislation has in this country always been a justiciable question.** Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied: Electrical Development Co. of Ontario v. Attorney General of Ontario ((1919] A.C. 687],B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd. [[1962] S.C.R. 642]. Should they then foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned?
>
> -***Thorson v. Canada (AG),*** No. 2 [1975] 1 S.C.R. 138

24. ***Thorson*** was again explicitly endorsed, post -***Charter*** by the Supreme Court of Canada in ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14(CanLII):***

> [134] … **The constitutionality of legislation has always been a justiciable question: *Thorson v. Attorney General of Canada,* 1974 CanLII 6 (SCC), [1975) 1 S.C.R. 138, at p. 151. The "right of the citizenry to *constitutional* behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is *ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006BCSC 1342 , 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 1981 CanLII 761 *(BC*), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff d (1982), 19
>
> 2an Li -l10(BCC), 142 D.L.R. (3d) 177 (B.C.C.A.),leave to appeal refused,

[1982] 2 S.C.R. vii (sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell).

-Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013SCC 14(CanLII), /2013/ 1 SCR 623

25. It is clear that the test for justiciability is whether there is a "sufficient legal component to warrant the intervention of the judicial branch".

- Cape Breton (Regional Municipality) v. Nova Scotia (AttorneyGeneral), 2008 NSSC 111 (CanLII)

26. The Patients raise issues which are clearly justiciable, and standing must be recognized and/or granted:

> [100] "Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim" *(Downtown Eastside*, at para. 56).

- Council of Canadians with Disabilities, supra, at para 100.

27. The Patients submit the Registrar acted *ultra vires* under s. 75(1)(a) and under s. 76 and there is no authority in the ***Health Professions Procedural Code*** to immunize the actions of the Registrar and the CPSO/ICRC from judicial scrutiny, especially as those decisions were rooted in self-generated policies, guidelines and directives. Thus, the Supreme Court of Canada ruled, with respect to health care, as follows:

> The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. ***But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them.*** The judicial branch plays a role that is not played by the legislative branch.
>
> - ***Chaoulli c. Quebec (Procureur general),*** [2005] 1 S.C.R. 791 @para 89

and further:

> There is nothing in our constitutional arrangement to exclude "political questions" from judicial review where the Constitution itself is alleged to be

violated...

In the present case, the appellants are challenging the legality of Quebec's prohibition against private health insurance. While the issue raises "political questions" of a high order, the alleged Canadian *Charte*r violation framed by the appellants is in its nature justiciable,and the Court should deal with it

- ***Chaoulli** c. **Quebec (Procureur general), supra*** @para 183, 185

and further, with the highest order of "Crown Prerogative", national defence:

[b]ecause the effect of the appellant's action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself.
However, I think this would be to miss the point. ***The question before us is not whether the government's defence policy is soundbut whether or not it violates the appellant's rights under s.*** 7 ***of the Canadian Charter of Rights and Freedoms. This** is **a totally different question.** I **do not think there can be any doubt that this** is **aquestion for the courts.***

- ***Operation Dismantle v. The Queen [1985] 1 S.C.R. 441 at p 472.***

- **Private and Public Interest Standing**

28. The Patients submit that the Registrar's opinion and actions under section 75 (1) (a) and 76 of the ***Health Professions Procedural Code***, directly impacts their ***Charter*** rights. The decision interferes with both the patients' choice of medical treatment and their doctor-patient relationship, protected under s. 7 of the ***Charter***, and it infringes the Patients' privacy rights against unreasonable search and seizure of their personal and medical information and records. The decisions of the ICRC and the demand that [redacted] release all of her patients' medical records and patients' identifying information, wholesale, without limitation, similarly impacts their sections 7 and 8 ***Charter*** rights in that the decisions are not in accordance with the principles of fundamental justice and/or an abuse of process and ***ultra vires.***

29. It is inescapable, and has been held, that ss.7 and 8 of the ***Charter*** protect the personal information and medical records of an individual as it is inseparable from

the privacy rights protected by ss.7 and 8 of the ***Charter,*** as well as the physical and psychological rights protected by s.7 of the ***Charter,*** as well as the s.7 procedural rights to determine those substantive rights. This is an issue to be addressed in the underlying judicial review and not at this preliminary stage. It is therefore directly tied to their standing, both private and public interest.

-R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 41;
-Morgentaler, supra; Carter, supra; Chaouilli, supra; McInerney, supra.

30. The Patients further submit that the statutory parameters of s. 75 (l)(a), in the face of ss.7 and 8 of the ***Charter*** are also in issue for determination by the Court.

31. It is submitted that the Patients have private interest in:

(a) The statutory purpose of the impugned decisions, as it is intended to protect ***the member's patients;***

(b) Their interest in the subject matter includes *ultra vires* and unconstitutional conduct under the pretext of s. 75(1)(a), 76 and 25.4 ***Health Professions Procedural Code****;*

(c) Their interest in the subject is two-fold: to protect their privacy interests in the medical records and the sanctity of the doctor-patient relationship from unlawful, unreasonable and unconstitutional interference, both protected by ss. 7 and 8 of the ***Charter;***

(d) The effect of the decision(s) on their interest incudes, ***in limine****,* the release of their information without justification and loss of physician; and

(e) The parameters of the CPSO's conduct, purportedly under s. 75(1)(a), 76, and 25.4 of the ***Code,*** and in turn, the parameters of the constitutionality of

s. 75(1)(a) in the face of the patients' s. 7 and 8 ***Charter*** rights;

32. In alleging the abuse of the role of CPSO as "protectors of the members patients and the public" it is not necessary for the Patients to plead facts related to specific individuals:

> [83] Whether facts relative to specific individuals are or are not pleaded *may* be a relevant factor, but it is not, in itself, the point to be decided, nor is it determinative.
>
> - ***Attorney General (B.C.) v. Council of Canadians with Disabilities,*** *2022 SCC 21, @ paragraph 83*

33. The Supreme Court of Canada recently and unanimously confirmed:

> [78]…Courts may grant public interest standing in the exercise of their inherent jurisdiction whenever it is just to do so *(Morgentaler v. New Brunswick,* 2009 NBCA 26,344 N.B.R. (2d) 39, at para. 51).
>
> - ***Attorney General (B.C.)*** *v.* ***Council of Canadians with Disabilities, 2022, SCC27***

34. And that is not necessary to lead facts specific to individuals:

> [90]....But public interest standing has never depended on whether the plaintiff represents the interests of all, or even a majority of, directly affected individuals. What matters is whether there is a serious justiciable issue, whether the plaintiff has *a* genuine interest, and whether the suit is *a* reasonable and effective means of litigating the issue.
>
> [100]. ... This argument misses the point: a plaintiff seeking public interest standing has never been required to show that its interests are precisely as narrow as the litigation it seeks to bring. Instead, it must demonstrate a "link with the claim" and an "interest in th issues" *(Downtown Eastside,* at para. 43 (emphasis added)).
>
> -***Attorney General (B.C.) v. Council of Canadians with Disabilities 2022 SCC27***

35. Furthermore, it is not an abuse of process to file pleadings as "Jane Doe and John Doe", especially in litigation engaging privacy rights and interests. It is absurd to require the Patients to identify themselves when it is their identity they seek to

protect. The pseudonym "Jane Doe and John Doe" are routinely used in legal proceedings, including judicial review of administrative action and decisions, concerning privacy and where the applicant does not wish to be identified.

-John Doe v. Ontario (Finance) 2014, S.C.C 36; John Doe v. Canada (Attorney General), 2004 FC 451 (CanLII); John Doe v. Ontario (Information and Privacy Commissioner) [1991/-0.J. No. 2334; Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (Div. Ct.), 1990 CanLII 6611 (ON SC)

36. The John Doe and Jane Doe patients have made it abundantly clear to the CPSO, through counsel, that they are more than willing to identify themselves, to the Court, should the Court have any concerns, to the exclusion of the CPSO, ***ex parte*** and ***in camera***, with a sealing order and publication ban on their names.

37. The doctor-patient relationship is based on trust, in turn based on ss. 7 and 8 privacy and physical and psychological integrity protected rights. Patients must feel confidence and secure in divulging deeply personal and intimate details for the relationship to be meaningful and beneficial, not just to the individual patient for therapeutic purposes, but for the purposes of protecting public health and safety.

-Mcinerney v. MacDonald, 1992 CanLII 57 (SCC)
- Fleming v. Reid, 1991 CanLII 2728 (ON CA)

37. The societal objective is undermined if there is any threat or perceived threat to the sanctity of that trust by state actors acting on anonymous and/or third party or vexatious "tips" or "complaints" from disgruntled lay-members of society unrelated to the patient, or, vested in the protection of the patients' interests. A breach of privacy undermines a patient's ability to confide in their physicians for fear that one day their personal and private information will be disclosed and released to a third party without their knowledge or consent, or that the doctor is potentially withholding

information for fear of losing their medical licence on choice of treatment. This violates the rule against arbitrariness in administrative decision-making impacting ***Charter*** protected rights.

38. The Supreme Court of Canada further ruled that the hallmark of s.7 ***Charter*** breaches, or denials, is arbitrariness.

    -***Rodriguez*** *v.* ***British Columbia (A.G.),*** [1993] 3 S.C.R. 519,@paragraph 203.

which ***Chaoulli*** endorsed and elaborated.

    -***Chaoulli*** *v.* ***Quebec (A.G.)*** [2005] 1 S.C.R. 791, @paragraphs 126-133.

39. Patients in general, who have not complained and are not vulnerable, or part of a Quality Assurance review by the CPSO, are directly impacted by the Registrar's mis-interpretation and mis-application of section 75 (l)(a) *HHPC* in so far as to what it purports to authorize. The lack of reasonable and probable grounds for the Registrar's opinion is a subject matter that directly impacts the patients.

40. The manner in which the Registrar's decision, and the ICRC orders, were made also breach the Applicant Patient's procedural rights to participate in proceedings/decisions compelling the production of records in which they have a reasonable expectation of privacy and is not in accordance with fundamental justice.

41. It is trite law, that the scope of s. 7 is both procedural and substantive.

    -***Re B.C. Motor Vehicle Act,*** [1985] 2 S.C.R. 486
    -***R.*** *v.* ***Pearson*** [1992] S.C.J. No.99
    -***R.*** *v.* ***Morgentaler,*** [1988] 30, @ paragraph 36

42. The Supreme Court of Canada has made it clear, in ***Rodriguez*** that there is a two-part analysis under s.7, that is, first to determine whether there is a s. 7 **right,** ***or interest,*** engaged and denied, and if so, whether that **right** or interest is being denied in

accordance with the tenets of fundamental justice:

> -***Rodriguez*** *v.* ***British Columbia (A.G.),*** [1993] 3 S.C.R. 519,@ paragraphs 127-128

wherein the Court ruled that personal autonomy is protected by s.7 of the ***Charter.***

> ***-Rodriguez v. British Columbia (A.G.),[1993] 3 S.C.R. 519, @paragraph 136***

43. The Patients therefore have a personal, and public, interest in standing to challenge the decision of theCPSO on the subject matter of whether section 75 (l)(a), s.76, and s.25.4 authorizes the search and seizure of their medical records on the basis of an opinion formed on a Directive that is not legally binding but that has the effect of creating **de facto** mandatory medical treatment by directing all Ontario physicians to compel their patients to obtain the Covid-19 vaccines.

44. Thus, the patients' security of the person is engaged by the CPSO action, and legislation, as set out by the Supreme Court of Canada in ***Chaoulli.***

> - ***Chaoulli*** *v.* ***Quebec (A.G.)*** [2005] 1 S.C.R. 791, @paragraphs 116-119

45. The Patient Applicants submit that section 75(l)(c) of the **HPPA** does not authorize the appointment of investigators in the circumstances of this case and the proceedings against [redacted] are an abuse of the process under the *HPPC,* and in particular the misuse and misapplication of section of the 25.4 interim restriction, which is intended to prevent ***patient*** "harm or injury".

- **The *Kilian* Case was Incorrectly Decided and Distinguishable.**

46. The CPSO heavily relies on ***Kilian v College of Physicians and Surgeons of Ontario, 2022 ONSC 5931***. The ***Kilian*** decision does **not** apply to the [redacted] patients' application, and is distinguishable in that:

(a) there was no constitutional challenge to s.76 of the ***Code*** in Kilian;

(b) and the Ontario Court of Appeal, in ***Sazant v. College of Physicians and Surgeons of Ontario, 2012 ONCA 727 (CanLII),*** ruled that the power in s.76 is inseparable and stems from a s.75(a) investigation.

47. To the extent that the ***Kilian*** decision does apply, with respect to ss.7 and 8 ***Charter*** rights, and standing with respect to a patients' medical records and, moreover, information, the decision is:

(a) embarrassing and egregiously dismissive of clear and binding jurisprudence from the Supreme Court of Canada and **de facto**, overturns Supreme Court of Canada jurisprudence, contrary to the admonishment by the Supreme Court of Canada, of the Federal Court of Appeal, for doing so in ***Craig,*** wherein the Court stated:

> [21] But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather **than purporting to overrule it.**
>
> [22] The Federal Court of Appeal, on the basis of its prior decision in *Miller* v. *Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, in which that court reaffirmed the rule that it would normally be bound by its own previous decisions, followed *Gunn*, and not *Moldowan.* The application of *Miller* and the question of whether the Federal Court of Appeal should have followed *Gunn* simply **did not arise, in view of the *Moldowan* Supreme Court precedent.**
> …
>
> [27] T**he vertical convention of precedent is not at issue with respect to the decision as to whether the Supreme Court should overrule one of its own precedents.** Rather, in making this decision the Supreme Court engages in a balancing exercise between the two important values of correctness and certainty. The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error. Indeed, because judicial discretion is being exercised, the courts have set down, and academics have

> suggested, a plethora of criteria for courts to consider in deciding between upholding precedent and correcting error. (See *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 850-61; *Chaulk*, at p. 1353; *Henry*, at paras. 45-46.)
>
> - ***Canada v Craig, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras 18-27***

(b) Violates the crucial doctrine of ***stare decisis*** and invites the administration of justice into dispute, as a blatant violation and ignoring of the Rule of Law and Constitutionalism; and

(c) manifests a palpable bias, and reasonable apprehension of bias, by the Court in the ***Kilian,*** and other decisions, with respect to, and in favour of, the CPSO versus doctors within the COVID-19 context and issue(s), to the detriment of nullifying recognized constitutional rights.

48. The decision in ***Kilian*** is currently being appealed to the Court of Appeal.

49. The Patients in this current application submit that that the ***Kilian*** case was decided wrongly. However, in addition to the issues decided wrongly, several key issues were either ignored or not present in the ***Kilian*** case that are essential in this case. While the present Patients continue to assert that they are necessary parties and that their consent is required in this matter, they also make the following submissions with respect to the ***Kilian*** case, as set out below.

50. The Court in ***Kilian***, at paragraph 39 of the decision, quoting the ***Sazant*** case, identified a policy concern underlying the CPSO's statutory scheme, as:

> "the policy concern that underlies this regulator regime is the conduct of physicians, with the goal of ensuring that the advice they provide is appropriate medical advice that responds to medical concerns".

And the Court goes on to assert, in at paragraph 40 and 41 that "consideration of patient files is "obviously a key element of [investigations of misconduct or incompetence of members]" and that physicians' records and patient files are "routinely" considered in carrying out the CPSO's "duty to protect the public".

51. However, in making these observations and findings, despite relying on the ***Sazant*** case, the Court failed to consider, the actual impact of the quotation from ***Sazant*** they were relying on, at paragraph 154, and the the Court of Appeal's direction in ***Sazant*** that:

> [126] In addition, an investigator's power to summons under s. 76(1) is not unbridled. **It is restricted to evidence that is both relevant to the inquiry he or she is conducting and that would not be inadmissible because of any privilege under the law of evidence. A requirement that the evidence be relevant to the subject matter of the inquiry also parallels the preconditions for a reasonable search set out in Hunter and Thomson.**
>
> ….
>
> [154] Contrary to this assertion, in my opinion, a proper interpretation of the relevant statutory provisions demonstrates that, when used by investigators appointed under s. 75(1)(a) of the Code, the s. 76(1) summons power is a reasonable power, **properly constrained by the requirement that it be used solely to obtain information that is relevant to a duly authorized investigation into specified professional misconduct, and further restricted by the requirement that the information sought cannot be privileged.**
>
> ….
>
> [160] In my view, it follows from these conclusions concerning **the proper interpretation of s. 75(1)(a) and s. 76(1) that, when appointing investigators under s. 75(1)(a), the registrar should provide a brief description of the act(s) of professional misconduct he or she believes on reasonable and probable grounds were committed.** [See Note 4 below] Such a requirement serves two important purposes. [page450]
>
> [161] First, it ensures that the necessary prerequisite to the appointment of investigators -- namely, the formation of reasonable and probable grounds to believe that the member has committed an act of professional misconduct or incompetence -- has been satisfied.

> [162] Second, **it ensures that the scope of the investigation authorized under s. 75(1)(a) is clearly defined and that the corollary summons power under s. 76(1) can be exercised only to obtain information relevant to the authorized investigation.**
>
> ***-Sazant v. College of Physicians and Surgeons of Ontario, 2012 ONCA 727 (CanLII)***

52. Another key issue that the [redacted] Patients are arguing, beyond the issues of party status and consent, is that the investigators' use of their s.76 powers is too broad and not appropriately narrowed in scope, as directed in ***Sazant.*** Instead of seeking limited and targeted review of specific patient files, appropriately connected to the initiating allegations, the investigators have authorized an investigation into **all** the patient files. The patients have asked for private or public interest standing in order to address this overly-broad investigation that inappropriately encompasses all of their medical files and personal identifying information.

53. While it is not apparent on the face of the evidence provided by the CPSO, many of these "routine" reviews are not in the discipline but rather in the quality assurance proceedings, where for example, the CPSO is auditing a member's book-keeping requirements.

54. Just because the CPSO has "routinely" done something, does not make it correct if it is illegal, wrong in law, or unconstitutional.

55. Nothing about the ***Kilian*** decision explains why [redacted] has **not been allowed to redact her patients' medical records in order to protect the identity of her patients' names and identifying information**. Such redactions would not circumvent the investigators use of their powers, once their powers are properly authorized, limited, and circumscribed. This is another decision and use of the investigators' powers that the

Patients' are challenging, and which exercise of powers unduly directly and personally impacts the patients, for which the patients should have recognized standing.

56. With respect to private interest standing, at paragraph 44 of the ***Kilian*** Decision, the Court stated that the patients do not have a personal legal interest in the ICRC's decisions to authorize an investigation of [redacted] conduct. However, the patients are not challenging the investigation, but rather seeking judicial review of the decision to summon/demand their records, wholesale, with no limitation, in which records the patients have a private interest (direct and personal interest). With respect to judicial review of s.76, the court, at paragraph 49, erroneously stated:

> The patients' main concern is the exercise of the investigators' powers under s.76, **an issue that does not arise in the review of the impugned ICRC decision**".

However, the finding that the patients cannot review the exercise of s.76 powers in the review of the s.75 proceeding, leaves the patients with no remedy and no forum with which to assert their claim prior to the power being exercised, as discussed in greater detail above. **This is contrary to all the Supreme Court of Canada jurisprudence on the *in limine* nature of protecting confidential information and no right without a remedy.** The s.76 power is only authorized as a result of a proper investigation of an investigation under s.75, and properly challenged along with a challenge of the s.75 proceeding. The CPSO and the Court cannot artificially separate s.76 from s. 75. This finding by the Court also flies in the face of the body of case law doing just that, reviewing the exercise of a s.76 power, which caselaw the Court in ***Kilian*** **relied on** elsewhere in their decision (***Sazant v. College of Physicians and Surgeons of Ontario, 2012 ONCA 727 (CanLII)***; ***Gore v College of Physicians and Surgeons of Ontario, 2009 ONCA 546, 96 O.R. (3d) 241***, among others).

- **The CPSO's floodgates Argument/ Arguments that Granting Standing would Substantially Disrupt Professional Regulation**

57. The CPSO rely on the fact that patient files are "routinely" provided in order for investigators to assess physicians' competency and misconduct, however the CPSO, in providing two affidavits supporting this statement, which affidavit's purpose is to depose about the "routine" nature of the CPSO's request for patient files, the evidence provided by the CPSO is unhelpful and misleading in these specific facts and circumstances.

58. In the Affidavit of [redacted], dated December 15th, 2022, she states that it is the "typical practice for an investigator to obtain patient records if the investigation involves clinical issues" and that it is the standard of practice to obtain patient records relevant to the clinical issues under investigation and then obtain an expert medical assessor to provide an opinion regarding whether the care provided by the member meets the standard of practice"

-CPSO Motion Record, Affidavit of [redacted], at paragraph 2

but [redacted] does not indicate:

(a) What these investigations were about (for example: sexual assault allegations? Narcotics allegations? Etc.);

(b) What the s.75 investigation's scope was, and how this scope was applied to the files;

(c) Whether any patients objected to the release of their files;

(d) Whether any physician objected, in any capacity, to the release of these files.

59. [redacted] deposes about the number of investigations against physician members, but she is not able to depose anything specific about the number of patients' records obtained by the College, or the basis they are obtained by the College. She states:

> [4] While the College maintains records about the number of files in which patient records are obtained, information about the total number of unique patients to whom this data relates, or the number of individual patient records received, is not available;
>
> [5] Similarly, the College maintains records about the number of files in which OHIP data is obtained, but information about the number of unique patients to whom the OHIP data relates is not available.
>
> ***-CPSO Motion Materials, Affidavit of [redacted], dated December 15th, 2022, at paras 4-5.***

60. [redacted] states that patient records were received in 53 Registrar investigations in 2021, but she fails to set out the subject matter and scope of these investigations, or if any patient ever objected to the release of their information in the context of these investigations. Therefore, [redacted]'s affidavit equally fails to set out what the affidavit of [redacted] failed to set out.

61. The College seeks to infer that, in granting the patients standing, investigation proceedings would be disrupted or the floodgates of litigation would open up. However, the College states, at paragraph 43 of their factum, that they have never been able to identify a single case where a non-party has been granted standing in a judicial review of a decision to investigate, **but this is because this case, and the *Kilian* case, were novel cases, and there is no previous caselaw where a patient sought standing in a s.75 ever.** The affidavit fails to set out that no patients have sought standing before now. This very fact mitigates the CPSO's flood gates concerns. Patients do not generally intervene, but if they do, they should not be denied standing to do so if they meet the

test for standing, which the patients have in these circumstances. There is no evidence, anywhere, that in granting these specific patients standing that this would open the doors to any floodgates of litigation. Moreover, the "floodgate" argument has never been accepted by the Appellate Courts.

62. Furthermore, Federal Court of Appeal, with respect to "floodgates", had this to say:

> ..There is also the additional factor referred to by respondent's counsel which can be characterized as somewhat of a "floodgate" argument. Counsel was concerned about the precedential effect the granting of a stay in this case might have on the multitude of deportation orders being issued by the various adjudicators across Canada. **My response to this submission is that the precedential value of a stay being granted in one case is minimal since such a stay is granted only after careful consideration of all the circumstances of that case. It is not to be considered as a precedent for the granting of a stay in other cases and in different circumstances. …**
>
> ***-Toth v. Canada (Minister of Employment and Immigration), 1988 CanLII 1420 (FCA)***

It is submitted that the same ruling applies to the within application and types of applications before this Court. Standing does not trample on any resolution on the merits. Moreover, the Supreme Court of Canada shot down the same argument, deeming it an " utilitarian consideration" argument in requiring, under s7 of the ***Charter***, that all refugee claimants be given an oral hearing rather than a paper review:

> [68] … He further argued that the Immigration Appeal Board **was already subjected to a considerable strain in terms of the volume of cases which it was required to hear and that a requirement of an oral hearing in every case where an application for** redetermination of a refugee claim has been made **would constitute an unreasonable burden on the Board's resources.**
>
> …
>
> [70] Seen in this light **I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the *Charter*.** Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of

> natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals.
>
> ***-Singh v. Minister of Employment and Immigration, 1985 CanLII 65 (SCC), [1985] 1 SCR 177, @ paragraph 68-70.***

63. Moreover, this argument orbits absurdity in the face of the fact that:

    (a) Since COVID there have been only eleven (11) applications for judicial review stemming out of contested CPSO investigative proceedings in the Divisional Court;

    (b) Of those, nine (9) have been by doctors (some consolidated with more than one doctor as applicant, meaning there have been less than nine(9)), and two (2) have been by patients ([redacted] and [redacted]).

        -[redacted] Patients' Motion Record, Affidavit of [redacted], at paragraph 3 and at Exhibit A.

B/ Anonymity Order

- **Patients' Use of Pseudonyms**

64. The jurisdiction for the use of pseudonyms in the style of cause originated in Rules 14.06(1) and 2.03 of the ***Rules of Civil Procedure.***

65. Courts have used a three-part test, similar to the test for an injunction. A person seeking to use a pseudonym must first establish there is a serious issue to be tried; second, that absent a pseudonym he or she is likely to suffer irreparable harm; and third, that the balance of convenience favours the use of a pseudonym. The courts have also found that where confidentiality is the very right at issue, then a pseudonym may be used because

requiring disclosure of the very subject matter that the Applicant seeks to protect would be to "subvert the ends of justice".

-***A.B. v. Stubbs, 1999 CanLII 14801 (ON SC)***

66. As found by the Superior Court in the case *A.B v Stubbs:*

> An appropriate test is to ask if the refusal to grant the anonymity order would lead to an absurd result. Public access can be denied when the ends of justice would be subverted by public disclosure. For example, in an action for theft of a trade secret or confidential information the essence of the plaintiffs case is that the plaintiff wants to protect his property. **The very subject-matter sought to be protected through the court action would be destroyed if confidentiality were not ordered in respect of the information inherent to the trade secret.**
>
> ***- A.B. v. Stubbs, 1999 CanLII 14801 (ON SC)***

67. As found by the Superior Court in the case, ***A.J. v Canada Life Insurance:***

> While this exception has traditionally been limited to trade secrecy cases, the underlying principle appears to be broader, so that **confidentiality may be warranted where confidentiality is precisely what is at stake.**
>
> ***- A. (J.) v. Canada Life Assurance Co. (H.C.J.), 1989 CanLII 4273 (ON SC)***

68. The Patients are seeking an Anonymity Order in order to protect their privacy rights and confidentiality rights with respect to their identities and highly confidential medical records, which privacy and confidentiality would otherwise be destroyed if anonymity were not ordered.

- **The Court has Already Redacted and Sealed the Record with respect to Patients' Identity Information at the College's Request, and as consented to by the Parties.**

69. At the outset of these proceedings, the College sought an Order redacting all of [redacted] patients' names and health information from the record of proceedings.

70. On November 23, 2022, the Court ordered the following:

> 1. THIS COURT ORDERS that any information in the Record of Proceedings, or in any other court material to be filed, that could **identify the patient,** or that

> relates to certain **patient private health information** as set out in Schedule "A" (the "Confidential Patient Information"), **shall be sealed**.
>
> **- [redacted] Patients Motion Record, Tab 2, Order(s) of Justice Corbett, dated November 23, 2022**

To thus oppose an anonymity order with respect to the same patients, on the style of - Cause, in the context of this judicial review, would constitute an abuse of process and be nonsensical.

71. The test to obtain a sealing order, was set out by the Supreme Court of Canada in ***Sherman Estates***, as follows:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). … Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show.
>
> (1) court openness poses a serious risk to an important public interest;
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, **or a redaction order** — properly be ordered...
>
> **- *Sherman Estate v. Donovan, 2021 SCC 25 (CanLII)***

72. By granting the sealing Order requested by the CPSO, and consented to by the other parties, this Court has already acknowledged that patient identities and patient health information meet the strict and strident test as set out in ***Sherman Estates,*** for the purposes of these regulatory judicial reviews.

73. Therefore, practically speaking, the only "new" relief that the Patients seek in bringing a motion for an anonymity Order, beyond what has already been provided by the Court,

is that their identities, as participants in the judicial review, will be concealed as from the CPSO, and only be disclosed to the Court on an ***ex-parte*** basis.

74. The patients are making this request, because it is the CPSO who are seeking to breach their confidentiality and privacy interests, and it is the CPSO who is seeking their identities and their personal health records, which the [redacted] Patients maintain to remain private and confidential from the CPSO, and others. The Supreme Court of Canada indicated, in ***O'Connor***, that privacy must be protected at the point of disclosure, and that the Court cannot wait to vindicate privacy after it has been violated, as follows:

> [119] The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure. As La Forest J. observed in *Dyment*, *supra*, at p. 430:
>
> ...if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. [Emphasis in last sentence added.]
>
> In the same way that our constitution generally requires that a search be premised upon a pre-authorization which is of a nature and manner that is proportionate to the reasonable expectation of privacy at issue (*Hunter*, *supra*; *Thomson Newspapers*, *supra*), s.7 of the *Charter* requires a reasonable system of "pre-authorization" to justify court-sanctioned intrusions into the private records of witnesses in legal proceedings. Although it may appear trite to say so, I underline that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.
>
> ***- R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411***

75. There is no prejudice to the CPSO should the Court grant an anonymity Order.

PART IV - ORDER SOUGHT

76. The Janes and Johns Doe Patients of [redacted] respectfully request an Order, as follows:

(a) An Order authorizing the Johns and Janes Doe Patients of [redacted] to file their court documents under pseudonyms, where they will be known collectively as "Johns and Janes Doe Patients of [redacted]", and where individual patients who provide evidence will identify themselves by their initials.

(b) An order that the Janes and Johns Doe Patients of [redacted] may file a complete unredacted list of their names, with the court, and that this document shall remain under seal, for the Judges' eyes only, pursuant to rule 30.11 of the *Rules of Civil Procedure*.

(c) An order Dismissing the CPSO's motion to quash.

(d) Costs of the within , in any event of the cause.

(e) Such further and other relief as counsel may advise and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

January 30th, 2023

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Lawyer for [redacted] Patients

SCHEDULE A - AUTHORITIES TO BE CITED

Authorities

1. ***Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11**

2. ***Regulated Health Professions Act, 1991, S.O. 1991, c. 18***

3. ***The Health Professions Procedural Code,* which is Schedule 2 of the *Regulated Health Professions Act, 1991, S.O. 1991, c. 18***

Jurisprudence

4. ***A.B. v. Stubbs, 1999 CanLII 14801 (ON SC)***

5. ***Air Canada v. British Columbia, 1989 CanLII 95 (SCC), [1989] 1 SCR 1161***

6. **A(J.) v. Canada Life Assurance Co. (H.C.J.), 1989 CanLII 4273 (ON SC)**

7. ***Apotex Inc. v. Canada (Governor in Council), 2007 FCA 374 (CanLII)***

8. ***Baron v. Canada, [1993] 1 S.C.R. 416***

9. ***British Columbia (Attorney General) v. Council of Canadians with Disabilities, 2022 SCC 27 (CanLII)***

10. ***Canada v Craig, 2012 SCC 43, [2012] 2 S.C.R. 489***

11. ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 (CanLII), [2012] 2 SCR 524***

12. ***Cape Breton (Regional Municipality) v. Nova Scotia (AttorneyGeneral), 2008 NSSC 111 (CanLII)***

13. ***Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII*)**

14. ***Chaoulli c. Quebec (Procureur general),* [2005] 1 S.C.R. 791**

15. ***Doucet-Boudreau v. NS* [2003] SCJ 63**

16. ***Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII),***

17. ***Fleming v. Reid, 1991 CanLII 2728 (ON CA)***

18. ***Høeg, et al. v. Newsom, et al., 2:22-cv-01980 WBS AC***

19. ***John Doe v. Canada (Attorney General), 2004 FC 451 (CanLII)***

20. ***John Doe v. Ontario (Finance) 2014, S.C.C 36***

21. ***John Doe v. Ontario (Information and Privacy Commissioner) [1991/-0.J. No. 2334***

22. ***Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (Div. Ct.), 1990 CanLII 6611 (ON SC)***

23. ***Kilian v College of Physicians and Surgeons of Ontario, 2022 ONSC 5931***

24. ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14(CanLII*)**

25. ***Mcinerney v. MacDonald, 1992 CanLII 57 (SCC)***

26. ***Nelles v. Ontario* [1989] 2 S.C.R. 170**

27. ***Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1SCR441***

28. ***Pharmacia Inc* v. *Minister of National Health & Welfare* (1994) C.P.R. (3D) 209 (FCA) pp.214-215**

29. ***R. v. Ahmad, 2020 SCC 11 (CanLII)***

30. ***R. v. Campbell, 2022 ONCA 666 (CanLII*)**

31. ***R. v. Marakah, 2017 SCC 59 (CanLII), [2017] 2 SCR 608***

32. ***R. v. Mills* [1986] 1 SCR 863**

33. ***R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30***

34. ***R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 SCR 411.***

35. ***R. v. Pearson* [1992] S.C.J. No.99**

36. ***R. v. Plant, 1993 CanLII 70 (SCC), [1993] 3 SCR 281***

37. ***Sazant v. College of Physicians and Surgeons of Ontario, 2012 ONCA 727 (CanLII)***

38. ***R. v. Salituro, 1991 CanLII 17 (SCC), [1991] 3 SCR 654***

39. ***Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486**

40. ***Rodriguez v. British Columbia (A.G.),* [1993] 3 S.C.R. 519,**

41. ***RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2SCR 573***

42. ***Sherman Estate v. Donovan, 2021 SCC 25 (CanLII)***

43. ***Thorson v. Canada (AG),* No. 2 [1975] 1 S.C.R. 138**

44. ***Toth v. Canada (Minister of Employment and Immigration), 1988 CanLII 1420 (FCA)***

45. ***Singh v. Minister of Employment and Immigration, 1985 CanLII 65 (SCC), [1985] 1 SCR 177***

SCHEDULE B - RELEVANT LEGISLATIVE PROVISIONS

Rules of Civil Procedure, RRO 1990, Reg 194

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

….

14.06(1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

The Health Professions Procedural Code, which is Schedule 2 of the *Regulated Health Professions Act, 1991, S.O. 1991, c. 18*

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

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

(b) the Inquiries, Complaints and Reports Committee has received information about a member from the Quality Assurance Committee under paragraph 4 of subsection 80.2 (1) and has requested the Registrar to conduct an investigation; or

(c) the Inquiries, Complaints and Reports Committee has received a written complaint about the member and has requested the Registrar to conduct an investigation. 2007, c. 10, Sched. M, s. 53.

Emergencies

(2) The Registrar may appoint an investigator if,

(a) the Registrar believes on reasonable and probable grounds that the conduct of the member exposes or is likely to expose his or her patients to harm or injury, and that the investigator should be appointed immediately; and

(b) there is not time to seek approval from the Inquiries, Complaints and Reports Committee. 2007, c. 10, Sched. M, s. 53.

Report

(3) Where an investigator has been appointed under subsection (2), the Registrar shall report the appointment of the investigator to the Inquiries, Complaints and Reports Committee within five days. 2007, c. 10, Sched. M, s. 53.

Section Amendments with date in force (d/m/y)

Application of Public Inquiries Act, 2009

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

Reasonable inquiries

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

Idem

(2) An investigator may, on the production of his or her appointment, enter at any reasonable time the place of practice of the member and may examine anything found there that is relevant to the investigation. 1991, c. 18, Sched. 2, s. 76 (2); 2007, c. 10, Sched. M, s. 54.

Obstruction prohibited

(3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation. 1991, c. 18, Sched. 2, s. 76 (3).

Member to co-operate

(3.1) A member shall co-operate fully with an investigator. 2009, c. 6, s. 1.

Conflicts

(4) This section applies despite any provision in any Act relating to the confidentiality of health records. 1991, c. 18, Sched. 2, s. 76 (4).

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

…

Legal Rights

Life, liberty and security of person

7 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.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

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[redacted] et al -and- THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Applicants Respondent

ONTARIO SUPERIOR COURT OF JUSTICE

(DIVISIONAL COURT)

(PROCEEDING COMMENCED AT TORONTO)

FACTUM OF [redacted] PATIENTS
(Re: Standing and Anonymity)

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