Court File No. 714/22

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

JORDAN PETERSON

Applicant

and

COLLEGE OF PSYCHOLOGISTS OF ONTARIO

Respondent

EGALE CANADA AND JUSTICETRANS, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN CONSTITUTION FOUNDATION, ASSOCIATION OF AGGRIEVED REGULATED PROFESSIONALS OF ONTARIO

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PART I – OVERVIEW

1. Individuals are not required to check their *Charter* rights to freedom of expression at the door upon entry into regulated professions. A professional regulator that seeks to limit the speech of its members must meet a high threshold of demonstrating first, that the expressive activity falls within its core mandate to regulate professional practice, and second, that any limitations are proportionate to any harms to the public interest.

2. Professional regulators do not have unlimited authority to police members' speech. They have a limited statutory mandate to regulate professional services in the public interest. The public interest in the context of professional regulation is not the public interest writ large—it is limited to the public interest as it relates to the particular professional practice. A professional regulator seeking to discipline members for expressive activity must first demonstrate that the speech falls within its core mandate to regulate the professional services. Expressive activity that is outside the scope of professional practice, concerning matters unrelated to the regulated services, falls beyond this core regulatory function and is not subject to regulatory oversight.

3. Where it is established that the speech falls within the core regulatory function and is subject to regulatory authority, the professional regulator must still meet the requirement of proportionality to justify any limitations on freedom of expression under the *Charter*. The professional regulator must clearly articulate the harm to the public interest and how any sanction limits the member's expression no more than required. Critique and disagreement on matters related to the profession must be tolerated to uphold the constitutional commitment to freedom of expression in a free and democratic society. This commitment cannot waver when the expressive activity is unpopular, offensive or even repugnant. Indeed, it is with respect to such speech that the commitment is most needed.

PART II – STATEMENT OF ISSUES, LAW, AND ARGUMENT

4. The CCLA makes submissions on the principles that apply when a professional regulator seeks to discipline a member for expressive activity, as follows:

(a) Professionals retain their right to free expression under s. 2(b) of the *Charter*;

(b) Professional regulators only have authority over members' speech where it relates to their core function of regulating professional services in the public interest based on a clear connection to professional practice or the regulated services; and

(c) Within their regulatory authority, professional regulators must ensure that any limits on speech are justified and proportionate to the impact on the public interest.

A. Regulated professionals retain their right to freedom of expression under the *Charter*

5. Government action that has the purpose or effect of interfering with speech is an infringement of s. 2(b) of the *Charter*.[1] This guarantee applies equally to individuals in regulated professions.[2] To be constitutionally valid, any infringements of a professional's freedom of expression must be reasonable and demonstrably justified.

6. Violations of free speech "must be subjected to the most careful scrutiny."[3] Efforts to restrict speech on the basis that its content is objectionable strike at the heart of the reason that speech is protected—a conviction that the free flow of ideas is "the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent

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[1] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 971-972.
[2] *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 112; *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 63.
[3] *R. v. Sharpe*, 2001 SCC 2 at para. 22; *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 73-74; see also *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336.

and conflicting beliefs."[4] The broad scope of the s. 2(b) right reflects this conviction and rejects the notion of content moderation as a tool of mediating between conflicting ideas in society.

7. For this reason, upholding our commitment to freedom of expression may be challenging, but is never more needed than with respect to speech that is offensive or repugnant, particularly on political matters. As was observed by McLachlin C.J. in *Zundel*, freedom of expression "serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event."[5] Section 2(b) protects and even embraces diversity of ideas and expression as central to individual self-fulfilment, truth, and the political discourse fundamental to democracy.[6]

B. Professional regulators only have authority over members' speech that clearly relates to their core function of regulating professional services in the public interest

8. A professional regulator seeking to discipline members for expressive activity must first demonstrate that the speech clearly falls within their core mandate to regulate professional services. Speech that has no connection to the regulated professional services is *ultra vires* the professional regulator and cannot form the basis of a disciplinary decision.

1. Professional regulators only have regulatory authority over speech that is clearly connected to professional practice

9. Professional regulators do not have unlimited authority over members' speech. The exercise of such authority must be grounded in their core regulatory function. As with any other administrative body, a professional regulator is limited to its delegated powers—in this context,

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[4] *R. v. Sharpe*, 2001 SCC 2 at para. 21; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 1; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para. 60.
[5] *R. v. Zundel*, [1992] 2 SCR 731 at 753; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at paras. 59-60.
[6] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at 976.

powers to regulate professional practice, including by enforcing professional standards. But this authority to regulate professional practice does not empower regulators to scrutinize or restrict professionals' speech simply by virtue of their membership in a regulated profession.

10. In the context of regulating speech, the scope of regulatory authority must remain focused on the core mandate of the professional regulator—professional practice. An expansive approach which accepts that speech outside of this scope may become relevant because it has an impact on the public's perception of the profession as a whole should be rejected.

11. First, an approach focused on professional practice is consistent with the powers and constraints imposed on professional regulators. It recognizes that the obligation to regulate in the public interest—the lodestar of professional regulation—is a *constraint* on the purposes for which statutory power may be exercised, not an independent grant of regulatory authority.

12. The obligation to regulate professions in the public interest derives from the vulnerable position of patients and clients in the professional relationship, as well as the high degree of trust the public places on the advice of professionals and society's dependence on the competent delivery of professional services.[7] It is imposed as a condition on the privilege of self-regulation, to ensure that regulatory powers are not exercised to advance the interests of regulated professionals at the expense of the public.

13. But a professional regulator does not get to regulate everything that may affect the public writ large. Although the public interest guides the exercise of regulatory authority, the scope of that authority remains bounded by reference to the professional services for which it was created.

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[7] *Pharmascience Inc. v. Binet*, 2006 SCC 48 at para. 36.

Reference to the public interest writ large cannot be used to bootstrap a regulator's mandate into matters over which it has no authority. To fall within the core regulatory mandate, the speech must have clear connection to the regulated services.

14. Second, focusing on a connection to the professional services ensures that professional regulators' authority over speech is consistent with robust *Charter* protection for members' freedom of expression under s. 2(b) and appropriate limits on the regulatory authority of professional regulators. Professional regulators are not empowered to censor members' speech that has no connection to regulated services on the basis that they are concerned it might impact the public's perception of the profession as a whole—to do so would amount to regulatory overreach beyond their statutory mandate and into the private lives and expressive activities of professionals.

15. A professional regulator is not empowered to control the ideological inclinations of its membership, and cannot use its disciplinary powers to distance itself from speech that it considers distasteful or misaligned with its own institutional values. Outside of professional practice, regulated professionals are entitled to maintain their private lives, engage in public discourse on controversial subjects, and express views that are unpopular and even offensive, subject to the same standards of speech that apply to everyone else. Professional regulators must not be permitted to become the arbiters of expressive activity outside of their core regulatory function—that is the job of criminal prosecutors, human rights tribunals and the civil justice system.

2. Speech that falls within the core regulatory function exists on a spectrum

16. When asserting authority over a member's speech, the onus should be on the professional regulator to demonstrate that the impugned speech falls within the core regulatory function. This onus is consistent with the burden of justification for infringements under the *Charter*. There must

be a clear connection between the expressive activity and professional practice. This will necessarily be a contextual exercise, but it is possible to provide overarching guidance.

17. On one end of the spectrum is expressive activity that is a direct part of professional practice, which will generally fall within the regulator's authority. A professional regulator has an interest in ensuring that members provide competent advice, comply with ethical standards in their communications with patients, clients and colleagues, and honour professional obligations directly connected to practice, such as confidentiality. For example, there is a clear connection between professional practice and a lawyer's zealous advocacy in the courtroom,[8] or interactions with participants in the justice system,[9] which grounds regulatory authority over these matters.

18. On the other end of the spectrum is expressive activity that occurs outside of the professional relationship, involving matters that are unrelated to professional practice or the specialized knowledge of the profession. A professional regulator has no regulatory authority to police a professional's expressive activity on topics that have no connection to the profession, whether it be expressing an opinion privately, engaging in public advocacy or large-scale political organizing. Nor can such authority be created on the basis that speech is controversial, offensive, or even repugnant. For example, there is no regulatory interest in a professional's participation in a political protest in their free time on matters that are not connected to professional practice.[10]

19. Between these two extremes lie those cases where expressive activity does not fall squarely within professional practice but may still ground a regulatory interest if there is a clear connection

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[8] *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 114.
[9] *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 61.
[10] *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6 at paras. 67-68.

to the regulated services. Such a connection may be demonstrated where a professional's expressive activity is bolstered by their professional credentials and relates directly to specialized professional knowledge[11] or is aimed at the profession itself.[12] To be clear, limits on such expression must still be shown to be proportionate under the *Charter*. But as a preliminary matter, the assertion of regulatory authority over this speech must be based on a clear connection to professional services, and borderline cases should be resolved in favour of broader freedoms.

C. Limits on expression must be proportionate to the harm to the public interest

20. Only if it is established that the speech falls within the core regulatory function will the professional regulator have the authority to exercise oversight, which engages the requirement of proportionality. Any limits to the right to freedom of expression under the *Charter* must be justified and proportionate to any harm to the public interest caused by the speech.

1. *Doré* and *Oakes* require an equally robust form of proportionality

21. A professional regulator's application of discretionary authority to an individual is subject to the *Doré* framework. Courts have emphasized that the *Doré* framework is equally robust in its requirement for proportionality, not a "weak or watered-down" version of the *Oakes* test.[13] Both *Doré* and *Oakes* are used to assess the reasonableness of restrictions on fundamental rights, and both must be guided by similar considerations: a rational connection to the objective of protecting the public interest, minimal impairment, and proportionality between benefits and effects.[14]

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[11] See e.g. *Pitter v. College of Nurses of Ontario*, 2022 ONSC 5513 at paras. 1, 12 and 29.
[12] See e.g. *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112.
[13] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at para. 60; *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 at para. 75; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 80; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 38; *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 5 and 57.
[14] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 81-82. Although the jurisprudence is now clear that both *Doré* and *Oakes* require similarly robust forms of proportionality, the CCLA

22. Notably, the *Doré* framework has the additional requirement to not just reach a proportionate outcome, but to *demonstrate* balancing. This requirement is consistent with the direction in *Vavilov* to ensure a rational chain of reasoning that exhibits the goals of "justification, transparency and intelligibility".[15] Under *Doré*, the professional regulator must clearly identify the harm to the competent delivery of services or public confidence in the profession and articulate how the remedy will rectify that harm in a way that restricts expression no more than necessary.

2. Public regulators must tolerate criticism and disagreement in relation to the regulated services

23. In regulating speech, professional regulators must ensure that the right to freedom of expression under s. 2(b) of the *Charter* is infringed no more than necessary to uphold the public interest. In circumstances where the regulatory interest is strongest—enforcing standards of competence and ethical practice within the professional relationship—broader restrictions will be justified based on the need to protect the public. For example, limits on a professional's ability to give incorrect advice are clearly justified by the professional regulator's public interest mandate to protect patients and clients who rely on professional services.

24. In circumstances where speech outside of the professional relationship has a clear connection to professional practice, s. 2(b) of the *Charter* requires robust protection for critique and alternative viewpoints. The expression of opinions that offend or are inconsistent with the profession's values are part and parcel of our commitment to free expression in a democratic society. A professional who provides competent, ethical and non-discriminatory services in their

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remains concerned about whether an approach which defers to an administrative decision-maker on constitutional questions and places no clear burden on the government entity to justify infringements is consistent with the guarantees under the *Charter*.

[15] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 81 and 86-87.

practice should be permitted to engage in vigorous advocacy, to challenge orthodoxy and express opinions on matters related to their profession. As noted in *Doré*, respect for expressive freedom requires disciplinary bodies to tolerate "a degree of discordant criticism."[16]

25. Such was the case in *Strom*, where the Saskatchewan Court of Appeal affirmed a registered nurse's right to criticize the palliative care her grandfather received.[17] Disciplining such expression would have a chilling effect on the speech that the *Charter* seeks to protect and preclude registered nurses "from using their unique knowledge and professional credibility to publicly advance important issues."[18] This strikes at the heart of the reason why the *Charter* protects expression—the free exchange of ideas and pursuit of truth. Regulated professions are entrusted with specialized knowledge and skills.[19] It is in the public interest to encourage the refinement of this knowledge and the improvement of public institutions, including through vigorous criticism.[20]

26. Limits might be justified where speech related to the profession veers outside the "range of rational public debate" and into the realm of misinformation.[21] The Court in *Pitter* found that this occurred where registered nurses made public comments that amounted to harmful misinformation about the COVID-19 pandemic.[22] But this standard must be applied strictly. Disagreement and critique are not misinformation.[23] There is a distinction between the expression of an opinion related to the profession and a factual representation of specialized knowledge.[24]

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[16] *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 65.
[17] *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at para. 159.
[18] *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at paras. 164-165.
[19] *Pharmascience Inc. v. Binet*, 2006 SCC 48 at para. 36.
[20] *R. v. Kopyto*, 1987 CanLII 176 (ON CA).
[21] *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513 at para. 27.
[22] *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513 at para. 14.
[23] *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154 at para. 73.
[24] *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 at para. 81.

27. Limits on speech are only justified where "there are serious reasons to fear harm that is sufficiently specific and cannot be prevented by the discernment and critical judgment of the audience."[25] The same principles must also guide choice of remedy, which should be aimed at conduct, not conscience. An educational remedy aimed at modifying the professional's point of view, rather than their conduct in meeting standards of competent and ethical practice, will not be justifiable as minimally impairing or proportionate to the public interest.

PART IV - CONCLUSION

28. Embracing a diversity of views is consistent with both the *Charter* and the public interest. Regulated professionals have a wealth of knowledge and skills to contribute not only to practice within their specialized professions, but to society more generally. This practice would be chilled if professional regulators were empowered to police their speech for ideological alignment. That is not to say that all speech is for the betterment of our collective knowledge and the improvement of society. But mediating between good and bad speech is not up to professional regulators—or anyone else. Freedom of expression protects all ideas and expression, for professionals and non-professionals alike. That is the guarantee under s. 2(b) of the *Charter*.

PART V – ORDER REQUESTED

29. The CCLA takes no position on the outcome of this appeal. It does not seek costs and asks that no costs be awarded against it.

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[25] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para. 61; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at paras. 129-135.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of April, 2023.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927
2. *Groia v. Law Society of Upper Canada*, 2018 SCC 27
3. *Doré v. Barreau du Québec*, 2012 SCC 12
4. *R. v. Sharpe*, 2001 SCC 2
5. *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395
6. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326
7. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22
8. *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43
9. *R. v. Zundel*, [1992] 2 SCR 731
10. *Pharmascience Inc. v. Binet*, 2006 SCC 48
11. *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6
12. *Pitter v. College of Nurses of Ontario and Alviano v. College of Nurses of Ontario*, 2022 ONSC 5513
13. *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112
14. *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393
15. *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134
16. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32
17. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
18. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
19. *R. v. Kopyto*, 1987 CanLII 176 (ON CA)
20. *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154
21. *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43
22. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11**

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.

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PROCEEDING COMMENCED AT TORONTO

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