

Ontario Tribunal Decision Could Define Limit on Doctors' Freedoms Nationwide

Three Ontario doctors are at risk of losing their licences because they criticized COVID-19 public health recommendations

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Three Ontario doctors are fighting to keep their licences, and the results of that fight could have wide-reaching implications.

The doctors are under fire for allegedly not following some COVID-19 public health recommendations and for speaking publicly against those recommendations. They are among hundreds of doctors nationwide facing similar investigations by their respective provincial colleges of physicians and surgeons.

Attorney Michael Alexander told The Epoch Times that the colleges jointly imposed three main restrictions on doctors amid the pandemic: Doctors were not to speak publicly against official health recommendations, they were not to issue vaccine exemptions except in extreme cases, and they were not to prescribe alternative medications for treating COVID-19.

While these are “recommendations,” Alexander said, the colleges have been treating them as criteria to judge “professional misconduct”—a specific legal violation—and to prosecute doctors accordingly.

“These are just people who choose not to follow ‘recommendations,’” Alexander said of his three Ontario clients, Dr. Crystal Luchkiw, Dr. Patrick Phillips, and Dr. Mark Trozzi. “There is no violation of rules of professional misconduct.”

The College of Physicians and Surgeons of Ontario (CPSO), on the other hand, has argued that it has a legal right to determine whether doctors are putting people in peril thus requiring the college to take disciplinary action.

“The College has an obligation under the law to protect the public and we will continue to act with care and reason in carrying out that mandate,” said spokesperson Shae Greenfield in an email to The Epoch Times.

Potential Impacts Nationwide

At a CPSO tribunal hearing on Nov. 23—which drew more than 17,000 viewers online—Alexander raised the issue of ignoring “recommendations” versus “professional misconduct.” As a constitutional lawyer, he also argued that the prosecution of his clients would violate the Canadian Charter of Rights and Freedoms. For example, preventing doctors from speaking publicly on health-related mandates would be a violation of free speech.

“If the tribunal were to decide that the college can’t prosecute people because they have acted contrary to ‘suggestions and recommendations,’ that would invalidate all the investigation orders they have written for all the doctors who are currently being investigated or prosecuted around COVID-19,” Alexander said. “All of those would come to an end.”

Because the colleges in all provinces have worked together to form the recommendations, the decision in Ontario could also affect how doctors nationwide are prosecuted for not following them, Alexander says.

“The colleges are essentially running health policy on COVID-19 for the governments,” Alexander said. “The colleges are regulating how 38 million

people in our country are receiving medicine. This isn't just about a few hundred doctors—it's putting restrictions on how 38 million people in this country can access health care.”

The tribunal does not have a deadline for making its decision, but it is expected to do so in the next few weeks. If the tribunal decides Alexander's arguments are valid, the case will be dropped and the doctors will have their licences reinstated. If it dismisses Alexander's arguments, the doctors will face a full-blown investigation and trial to rule on misconduct allegations.

A misconduct trial for Luchkiw, Phillips, and Trozzi would be less significant on a broad scale than this pre-trial to determine if they should even be prosecuted. That's because the pre-trial decision could affect the amount of power the Ontario college has to limit doctors' freedom of speech and practice—and perhaps that of all other colleges nationwide—whereas a trial of the specific instances of alleged misconduct would certainly affect the three doctors significantly but would not have such broad implications.

Ontario Court Ruling

The case is unusual in several regards. Firstly, it is part of a new process in the CPSO for disciplinary action against doctors.

The college had [reformed its tribunal](#) in September 2021. Before that time the tribunal consisted of only college representatives, whereas now it is made up of independent adjudicators. The reformation of the disciplinary system, Alexander said, also created the option of these pre-trials to determine if a case should actually go to trial—a chance for the tribunal to explore the limitations of the college's right to disciplinary prosecution of doctors.

Alexander said he took advantage of this option but also made an unusual move to bring the case to the Ontario Superior Court during the pre-trial stage. Usually,

he said, a college disciplinary case could only be heard by a court if its hearings and decision on the matter had already concluded.

The court agreed to hear the case, which showed it had some merit, Alexander said. “Just getting in to be heard by the court at the investigative stage ... [is] a very rare event,” he said.

Yet the [court ruled Oct. 12](#) to uphold the college’s decision to prosecute the doctors.

It found “sufficient reasonable and probable grounds for believing Dr. Luchkiw had committed an act of professional misconduct or is incompetent,” with similar findings for the other two doctors.

The court further found that “guidelines, such as those established by NACI [National Advisory Committee on Immunization] and the MOH [Ministry of Health], inform the standard of practice and may be considered by the [College].” This suggests the college could use the guidelines as standards of medical practice, strengthening their power above and beyond being “recommendations.”

Though the court ruled as such, the tribunal is being asked to make a more definitive decision.

The court’s decisions on college matters are limited, explained both Alexander and the CPSO’s Greenfield. The court defers in many ways to the professional expertise of the college, to its ability to make better decisions for the medical profession than the court system could. The tribunal must now decide, from a position within that professional expertise, if this is how the college will handle COVID-19-related misconduct cases.

Freedom of Speech

The complaints against the three doctors include that they, on podcasts and their social media pages, were critical of COVID-19 public health recommendations.

The CPSO had previously [argued](#) in evaluating this case that the college can limit freedom of expression to a certain extent in following its mandate to regulate the health profession and protect the public. It referenced a precedent, [Groia v. Law Society of Upper Canada](#), which allowed for a “proportionate balancing of the Charter protections at play with the decision maker’s statutory mandate.”

Alexander said his response to this argument is that “the Supreme Court has given priority protection to freedom of expression. ... Freedom of expression is the right upon which the protection of all our other rights depend, so it’s very unlikely the government can ever show that there’s a situation where it could regulate freedom of speech.”

As a constitutional lawyer, he said, he has reviewed all major cases related to freedom of expression for the past 70 years. The only instances in which freedom of expression can be limited is when it relates to child pornography or hate speech—particularly speech that will cause immediate violence or physical harm, he said.

“The word ‘immediate’ is important,” he said. He doesn’t believe these instances can be applied to his clients’ cases.

The Epoch Times asked the CPSO’s counsel, Elisabeth Widner, and its spokesperson to comment on the limitations of free speech for the doctors but didn’t receive a response to that question specifically.

Alexander cites a different precedent, that of [Strom v. Saskatchewan Registered Nurses’ Association](#), in which a nurse was censured for making public comments against COVID-19 public health recommendations.

Justice Barrington-Foote, the Saskatchewan Court of Appeal judge in the case, ruled in her favour, saying, “Such criticism, even by those delivering those services, does not necessarily undermine public confidence in healthcare workers or the healthcare system.

“Indeed, it can enhance confidence by demonstrating that those with the greatest knowledge of this massive and opaque system, and who have the ability to effect change, are both prepared and permitted to speak and pursue positive change.”

At the Nov. 23 hearing, Alexander said history has shown that doctors and scientists can be certain they knew the facts but to later find they were wrong. This is why critical discussion is important, he said. “The college is not infallible. No one is. No one can corner the market on truth.”

He also argues that the CPSO’s two other restrictions—on issuing vaccine exemptions and prescribing medications—violate the charter.

“[They] violate the principle of informed consent, which is the right of the doctor and patient to reach their own decisions about health care and what is in the patient’s best interest.”

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