Court of Queen's Bench of Alberta

Citation: Al-Naami v College of Physicians and Surgeons of Alberta, 2021 ABQB 549

Date: 20210716
Docket: 2003 09129
Registry: Edmonton

Between:

Dr. Ghassan Al-Naami

Applicant

- and -

College of Physicians and Surgeons of Alberta

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice W.N. Renke

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[1] Dr. Ghassan Al-Naami has applied for judicial review of decisions of the Complaints Director (the Director) of the College of Physicians and Surgeons of Alberta (the College).

[2] In August 2019, Dr. Al-Naami was charged with two child pornography offences. A complaint under the *Health Professions Act* was opened against Dr. Al-Naami (the First Complaint). Following discussions with the Director, Dr. Al-Naami provided an undertaking to withdraw from practice and the College stayed its investigation pending resolution of the criminal charges. Dr. Al-Naami subsequently sought to return to practice under conditions. The Director required Dr. Al-Naami's consent to communicate with the Crown prosecutor respecting

Crown disclosure for the charges. Dr. Al-Naami has not provided that consent. The Director has not authorized Dr. Al-Naami to return to practice on conditions.

[3] In September 2019, another complaint against Dr. Al-Naami was opened based on concerns raised by a parent concerning the mode of examination of her two children (the Second Complaint). Information was gathered from the complainant and Dr. Al-Naami respecting this complaint but the investigation has gone no farther. No decisions made in relation to the Second Complaint are challenged.

[4] The decisions challenged are the Director's refusal to accept Dr. Al-Naami's revocation of his undertaking, the Director's requirement that Dr. Al-Naami provide his consent for the College to receive information about Crown disclosure from the Crown prosecutor, and the Director's refusal to allow Dr. Al-Naami to return to practice on conditions.

[5] Before turning to the review of the Director's decisions, I will address the anonymization of this decision, the admissibility of an affidavit proffered by Dr. Al-Naami, whether this application should be dismissed without consideration of its merits, the standard of review, and the facts. I note that I decided the admissibility, prematurity, and standard of review issues in the hearing.

[6] I clarified at the outset of the hearing that the application was for judicial review not for a stay under s. 65(2) of the *Health Professions Act*. The application was framed as an application for judicial review, with only some intimations to the contrary. The College responded to an application for judicial review and the argument proceeded on the basis that the application was for judicial review.

[7] As I mentioned in the hearing, this application proceeded with an acknowledgement of the seriousness of child pornography offences, as recently confirmed in ***R v Friesen***, 2020 SCC 9 at paras 44 fn 2 and 51.

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I. Anonymization

[8] Dr. Al-Naami's trial is set for January 2022 in Provincial Court. At the hearing, I inquired whether I should anonymize this decision because Dr. Al-Naami has not yet gone to trial. Counsel for the College submitted that were anonymization contemplated an application should have been made on notice to the media. No such application has been made.

[9] There was no suggestion that the criminal trial will be proceeding by jury.

[10] This decision will not identify any children. The Alberta Law Enforcement Response Team has already publicized Dr. Al-Naami's charges. There was no argument that identifying the parties to this judicial review would imperil Dr. Al-Naami's rights in his criminal trial to be presumed innocent or to a fair trial. In the circumstances, I do not have grounds to restrict the open courts principle and to anonymize this decision and I decline to do so: ***AB v Bragg Communications Inc***, 2012 SCC 46, Abella J at paras 11, 13; ***AG (Nova Scotia) v MacIntyre***, [1982] 1 SCR 175, Dickson J, as he then was, at 185-187.

II. The Record

[11] An unusual feature of this judicial review application is that the decisions under review are not set out in the formal reasons for decision of an administrative tribunal. Rather, the decisions were made by the Director, a front-line statutorily-recognized administrator of a statutorily-recognized governing body of a profession: see *Health Professions Act*, ss. 1(1)(e), (i), (l), 2, 5, and 14. The decisions were made in the course of informal, pre-investigation and pre-hearing processes. The Certified Record of Proceedings (CRP), then, largely comprised correspondence between the Director and counsel for Dr. Al-Naami (Applicant's Counsel) and ancillary documents.

[12] Dr. Al-Naami sought to introduce an affidavit to supplement the record, sworn by Dr. Al-Naami on May 26, 2020. The affidavit, for the most part, duplicated material already on the record.

[13] I declined to admit the affidavit for two reasons.

[14] First, the general rule in judicial review applications is that the evidence is confined to the record. This makes sense, since usually what is at issue is the propriety of the decision-maker's determination on the evidence and argument before that decision-maker. Rule 3.22 provides as follows:

> 3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
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> > (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
> >
> > (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
> >
> > (c) anything permitted by any other rule or by an enactment;
> >
> > (d) any other evidence permitted by the Court.

[15] In ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904, Justice Slatter, as he then was, confirmed at paras 40 and 42 that the general rule is that judicial review is based on the record before the tribunal and affidavits are admitted only in exceptional circumstances. None of the exceptional circumstances identified by Justice Slatter in para 41 are engaged in this case. See also ***Alberta College of Pharmacists v Sobeys West Inc***,

2017 ABCA 306 at para 67, leave to appeal to SCC refused 37864 (August 9, 2018); ***JK v Gowrishankar***, 2019 ABCA 316 at para 60; ***British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia***, 2020 SCC 20 at para 52.

[16] Second, except when commenting about the direct personal adverse impacts of his practice suspension, Dr. Al-Naami swore to matters on information and belief not to matters within his personal knowledge. The affidavit was mostly hearsay. In my opinion, a judicial review application is a type of "final" proceeding, since if successful the challenged decision will be nullified. Under rule 13.18(3),

> (3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

An applicant's affidavit based on information and belief is not an appropriate evidential foundation for final relief. See ***Murphy v Cahill***, 2012 ABQB 793, Veit J at para 25.

[17] I also observe that the affidavit mostly concerned communications between Applicant's Counsel and the Director. Hence the mostly hearsay nature of the affidavit. There may be circumstances in which this type of affidavit is practically unavoidable, harmless, or otherwise countenanced. Typically, though, an affiant should not simply relay information received from a lawyer, thereby insulating the lawyer from examination on the affidavit. See ***Calf Robe v Canada***, 2006 ABQB 652, McMahon J at para 11; ***Paquin v Lucki***, 2017 ABCA 79 at para 9; ***Canada (Attorney General) v Andronyk***, 2017 ABCA 139 at paras 20-21.

III. Preliminary Objections

A. Prematurity

[18] Counsel for the College argued that I should dismiss Dr. Al-Naami's application on the grounds of prematurity (or, put in other ways, on the grounds that the application violated the principle of exhaustion or the principle against fragmentation of proceedings).

[19] The general rule is that statutory review processes and procedures for the decision-maker should be completed before turning to the courts for judicial review. In ***Canada (Border Services Agency) v CB Powell Ltd***, 2010 FCA 61, Justice Stratas described the "principle of judicial non-interference with ongoing administrative processes" in this way at paras 30 - 33:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point ....
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> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative

> process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
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> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway .... Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience .... Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge ....
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> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception .... Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high .... [emphasis added]

See also ***Litchfield v College of Physicians and Surgeons of Alberta***, 2005 ABQB 962, Hillier J, at paras 31-35.

[20] In this case, the investigation of the First Complaint has not been completed. Indeed, the investigation was suspended not long after the complaint was opened. The investigation of the Second Complaint is not complete. There has been no hearing, no internal appeal, and no appeal to the Court of Appeal respecting either complaint.

[21] Nonetheless, I decided that the application was not premature and I declined to dismiss it.

[22] The preliminary nature of the process left Dr. Al-Naami without other remedy, and he would be left without remedy for months to come. The decision was by the Director, not a higher-level tribunal attracting a statutory right of appeal, and not by the higher-level tribunal that will ultimately decide Dr. Al-Naami's professional fate. Dr. Al-Naami's practice suspension was by way of undertaking. The Director did not suspend Dr. Al-Naami's practice permit. Hence, Dr. Al-Naami could not apply for a stay under s. 65(2) of the

> 65(1) On the recommendation of the complaints director or the hearing tribunal, a person or committee designated by the council may at any time after a complaint is made until a hearing tribunal makes an order under section 82
>
> > (a) impose conditions on an investigated person's practice permit generally or with respect to any area of the practice of that

> regulated profession, including the condition that the investigated person
>
> (i) practise under supervision, or
>
> (ii) practise with one or more other regulated members,
>
> or
>
> (b) suspend the practice permit of an investigated person,
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> until the completion of proceedings under this Part.
>
> (2) An investigated person may apply to the Court of Queen's Bench for an order staying a decision by a person or committee under subsection (1) …. [emphasis added]

Counsel for the College did not argue that s. 65 applied and that a stay application was available.

[23] Dr. Al-Naami's inability to practice medicine is operating now and has real-time effects. Dr. Al-Naami removed himself from practice in August 2019. I did not need his affidavit to infer that he and his family have been suffering a serious adverse financial impact and his practice too would have been adversely affected. Hardship was established.

[24] This application would not cause delay since the College's investigation of the First Complaint has been suspended pending completion of the criminal trial, which is months away. The results of this application will not affect the time-line of the administrative process.

[25] Further, in the following cases judicial reviews of interim dispositions by physicians' professional regulatory bodies were permitted: ***Fingerote v The College of Physicians and Surgeons of Ontario***, 2018 ONSC 5131 (Div Ct), Myers J; ***Morzaria v College of Physicians and Surgeons of Ontario***, 2017 ONSC 1940, Gilmore J; ***Rohringer v Royal College of Dental Surgeons of Ontario***, 2017 ONSC 6656, Spies J; ***Huerto v College of Physicians and Surgeons of Saskatchewan***, 2004 SKQB 423, Foley J.

[26] The existence of statutory review provisions such as s. 65(2) of the *Health Professions Act* speaks to the need for review of interim decisions with potentially severe impacts on professionals. It would be inconsistent and unfair to Dr. Al-Naami to deny review on the technical ground that the decision to make the undertaking was his and not the Director's. Dr. Al-Naami is suffering the same adverse effects as if the Director had suspended him. In effect, the College is blocking Dr. Al-Naami's return to practice as if Dr. Al-Naami had been suspended.

B. Section 41 Review

[27] Counsel for the College raised, for the first time at the hearing, the prospect of Dr. Al-Naami applying for a practice permit under s. 40 of the *Health Professions Act*. If a practice permit were issued subject to conditions, suspended or refused, a review is available under s. 41. That is, a statutory process was available to Dr. Al-Naami that would have permitted a statutory review. The implication is that Dr. Al-Naami has not exhausted his statutory options so judicial review should not be available to him.

[28] I found that ss. 40 and 41 did not enhance the College's prematurity argument. Dr. Al-Naami could not apply under s. 40 without encountering the issue of whether he could unilaterally rescind his undertaking to withdraw from practice. The College's position is that Dr. Al-Naami is bound by his undertaking not to practice. For him to apply for a practice permit would be to violate his undertaking. The same issues to be decided in the present application would require determination before the s. 40 process could be engaged.

[29] In any event, and I need not decide this matter, it is not clear that the s. 40 process applies in disciplinary or complaints circumstances. That is, it is not clear that interim conditions or a suspension to be imposed on an investigated member (assuming those to be the result of a s. 40 application by Dr. Al-Naami) should be imposed through s. 40 or by the Director. Section 40 falls within Part 2 of the Act concerning Registration, not Part 4 of the Act concerning Professional Conduct and complaints. That suggests that the s. 40 process would not have been an appropriate vehicle for Dr. Al-Naami's pursuit of relief.

C. Purely Administrative Decision

[30] An issue complementing the "prematurity" issue was *not* raised in argument, and properly so. For the sake of completeness, I will confirm that the Director's decisions were not immune from judicial review as being "purely administrative in nature:" see, e.g., ***A Lawyer v The Law Society of British Columbia***, 2021 BCSC 914 at paras 95-96. The Director's decisions affected Dr. Al-Naami's rights, interests, property, privileges, or liberties (of a professional nature) and so are subject to judicial review, notwithstanding the front-line status of the Director or the informal, pre-investigation and pre-hearing context of the decisions: ***Martineau v Matsqui Institution***, [1980] 1 SCR 602, Dickson J, as he then was, at 622-623; ***Mission Institution v Khela***, 2014 SCC 24, LeBel J at para 31.

IV. Standard of Review

A. Presumption of Reasonableness

[31] ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 established that the presumptive standard of review when a court reviews administrative decisions - other than for a breach of natural justice or the duty of procedural fairness - is reasonableness: at paras 16, 23.

[32] At paras 88-89, ***Vavilov*** confirmed that this standard of review applies across the spectrum of administrative decision-makers:

> [88] .... The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering ....
>
> [89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide

> in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59 ....

B. Exception to Reasonableness Review – General Question of Law

[33] The presumption of reasonableness review does not apply if the standard of review is legislated or if the review is by statutory appeal: ***Vavilov*** at para 69.

[34] The presumption of reasonableness review is rebutted when the "rule of law" demands a correctness standard of review. The correctness standard of review applies respecting issues such as constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies: ***Vavilov*** at paras 53, 69. These are all questions that "[respect] the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58:" ***Vavilov*** at para 53; see paras 62 and 59 (the need for "uniform and consistent answers").

[35] Dr. Al-Naami argued that correctness review was required respecting whether "it is defensible to require that Dr. Al-Naami provide his consent to the Crown Prosecutor to give the Crown Disclosure to the CPSA so that the CPSA may assess Dr. Al-Naami's safety to practice," because the Director's decision raised a "general question of law of central importance to the legal system as a whole:" Applicant's Brief at para 36; see also para 39.

[36] I disagreed and ruled that reasonableness review applied.

[37] This application did not raise an issue like solicitor-client privilege, a doctrine integral to the proper functioning of the rule of law. In ***Vavilov*** the Supreme Court reminded us of the limited scope of the "general questions of law" exception to reasonableness review. This exception has only been successfully invoked respecting *res judicata* and abuse of process, the State's duty of religious neutrality, limits on solicitor-client privilege, and the scope of parliamentary privilege: ***Vavilov*** at para 60.

[38] The outcome of the application was, I acknowledged, important to Dr. Al-Naami. There was a possibility that the central problem raised by the application – potential access by a regulatory body to Crown disclosure or information derived from Crown disclosure at the pre-investigation, pre-hearing stage – could affect many professionals in many professions. But the mere fact that a dispute is of "wide public concern" or "touches on an important issue" is not sufficient to attract the correctness standard: ***Vavilov*** at para 61. In any event, this application, like many others, turned on its own particular facts.

[39] In particular, this application did not involve a review or recasting of ***P(D) v Wagg***, 2004 CanLII 39048, 71 OR (3d) 229 (CA), although some reference will be made to ***Wagg***. The issues are not (e.g.)

- the proper parties to a regulator's application for production of Crown disclosure
- whether the regulator has a "right" to access Crown disclosure in the course of a professional misconduct investigation

- whether the Crown has a "right" to refuse access to Crown disclosure to a regulator
- the redaction authority of the Crown if disclosure is provided to a regulator
- the nature of terms on access that may be imposed if disclosure is provided to a regulator
- the impact of an accused's fair trial interests on whether, when, how, and on what terms Crown disclosure may be provided to a regulator
- the scope of public interest immunity in limiting regulator access to Crown disclosure
- the protection of privacy of third parties (particularly individual complainants, witnesses, or co-accuseds) and rights of participation of third parties in determinations of whether Crown disclosure should be provided to a regulator.

The Director has not applied for production of Crown disclosure. A sticking point has been – and this will be addressed below – that the Director has sought Dr. Al-Naami's consent to *communicate with* the Crown prosecutor about the case against Dr. Al-Naami. The Director does not propose any further investigation at this point. Dr. Al-Naami is not being asked to hand over Crown disclosure to the College.

[40] The reasonableness standard of review was not dislodged.

C. Features of Reasonableness Review

[41] I will identify some general features of reasonableness review, leaving more detailed discussion to my assessment of the Director's decisions.

[42] Reasonableness review focuses on both the decision-maker's reasoning process, the decision-maker's rationale, and the outcome, decision, or conclusion. The focus is *not* on the conclusion alone: ***Vavilov*** at paras 83, 86. A principled approach to reasonableness review "puts reasons first:" at para 84. The reviewing court is to pay "respectful attention" to the reasons and to seek to understand the reasoning process that led to the conclusion: at para 84. The reasons must justify the decision: at para 86. At para 87 we read that

> [87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than

> demonstrate respect toward, the institutional role of the administrative decision maker.

[43] Reasonableness requires justification, transparency, and intelligibility in the reasoning process: ***Vavilov*** at paras 86, 99, 100.

[44] A reviewing court should not supply its own reasons to support a conclusion that was not supported by reasons discernable on the record. Paragraph 96 of ***Vavilov*** reads as follows:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision ….

[45] What is reasonable in a given situation will depend on the "constraints" imposed by the "legal and factual context of the particular decision under review:" ***Vavilov*** at para 90. "These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt:" at para 90.

[46] ***Vavilov*** identified two types of "fundamental flaws," grounds for a finding of unreasonableness. "The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it:" at para 100.

[47] With respect to internal rationality, a reasonable decision is based on coherent reasoning. It cannot be the product of logical fallacies. The conclusion must follow from the reasons. The reasoning must be intelligible and rational. Reasons must lead from the evidence and law to the conclusions: ***Vavilov*** at paras 102-104.

[48] With respect to contextual consistency (one might say "external" rationality), a reasonable decision is justified in light of its legal and factual constraints. ***Vavilov*** identified some of these constraints, without providing a full catalogue, at para 106:

- the governing statutory scheme
- other relevant statutory or common law
- principles of statutory interpretation
- the evidence before the decision-maker

- the submissions of the parties
- past practices and decisions of the decision maker
- the potential impact of the decision on the individual to whom it applies.

I will return below to constraints of particular salience to this application.

D. Not the Legal Test for a Stay

[49] Applicant's Counsel suggested that since Dr. Al-Naami was denied an application for a stay under s. 65 because the Director did not suspend his privileges (relying instead on Dr. Al-Naami's undertaking), the legal test for a stay rather than the reasonableness standard of review should apply to the assessment of the Director's decisions: Applicant's Brief at para 81. See, by way of illustration, ***Kumar v College of Physicians and Surgeons of Alberta***, 2019 ABQB 514, Eidsvik J at paras 25-27. However, as indicated, this application was not for a stay but for judicial review. Judicial review is available, in part, because an application for a stay was not available. I am bound to apply the standard of review directed by ***Vavilov***. Moreover, Applicant's Counsel's argument presupposes that the Director somehow improperly kept Dr. Al-Naami from reaching s. 65. But whether the Director made legally significant missteps is what is at issue. Applying the standard that would have applied if the Director had not "erred" would beg the question.

[50] Having addressed the foregoing issues, I may now turn to the merits of the application.

V. Facts

[51] Dr. Al-Naami is a pediatrician who has been licensed to practice medicine in Alberta. He managed a clinic in Edmonton.

[52] Dr. Al-Naami was arrested on August 11, 2019 and charged with the possession and transmission of child pornography under ss. 163.1(4) and (3) of the *Criminal Code*, respecting events alleged to have occurred on April 7, 2019: CRP 2, 40, 69.

[53] Dr. Al-Naami was released on a Recognizance. Two conditions of the Recognizance are material. First, condition 4 of the Recognizance prohibited him from communicating with any person known to be under age 16 unless in the immediate presence of a parent, guardian, or responsible adult "of the child." Second, condition 5 prohibited Dr. Al-Naami from seeking, obtaining, or continuing any employment, whether or not remunerated, or becoming a volunteer in a capacity that involves being in a position of trust or authority toward any person under age 16: CRP 11-12, 21, 30, 40. Dr. Al-Naami's trial in Provincial Court was originally scheduled for September 2020 but was adjourned to January 2022.

[54] On August 12, 2019, Cpl. Knight, a member of the RCMP, informed the College of Dr. Al-Naami's charges: CRP 40, 69.

[55] On August 13, 2019, the College opened the First Complaint, concerning the conduct of Dr. Al-Naami reflected in the charges: CRP 22, 25-28. The Director wrote to Dr. Al-Naami as follows:

> … this complaint brings forward serious allegations about your conduct – the concern is only accentuated by the fact that you are a pediatrician …. I am sure you recognize it is the duty of the CPSA to be seen to protect the public as well as recognize the need to maintain confidence in medical practice and the regulation of the profession. In circumstances such as this, I believe it is essential that until the complaint investigation is completed and this matter adjudicated, you withdraw from the active practice of medicine. I will stress that this may also require completion of the criminal matters that we have become aware of: CRP 22.

[56] The Director requested Dr. Al-Naami to "provide an undertaking to withdraw from practice:" CRP 22, 23, 27, 40. (For a similar approach, see ***Kumar*** at para 5.)

[57] On August 14, 2019, the Alberta Law Enforcement Response Team issued a news release respecting Dr. Al-Naami. The news release included the following (CRP 31):

> Alnaami (*sic*) is a pediatrician in Edmonton, but currently [the Internet Child Exploitation team] has no information to suggest any offences were committed against children under his care. The Alberta College of Physicians and Surgeons has been advised.
>
> The allegations against Alnaami stem from an incident in April 2019 when child pornography was allegedly uploaded to the Internet. RCMP's National Child Exploitation Coordination Centre notified ICE of the offence in July 2019 and a complete investigation was launched.

[58] On August 15 and 16, 2019, there were discussions between the Director and Applicant's Counsel respecting the language of the undertaking and a stay of the College's investigation of Dr. Al-Naami pending conclusion of criminal proceedings: CRP 37, 36, 35, 40.

[59] On August 16, 2019 Dr. Al-Naami provided an undertaking to withdraw from practice (the Undertaking): CRP 33, 41. The Director agreed to stay the investigation.

[60] The Undertaking provides as follows (CRP 33-34):

> I understand that the CPSA has directed an investigation into the Complaint.
>
> I recognize that the CPSA has a duty to protect the public and must investigate the circumstances surrounding the allegations against me, and I am willing to give this Undertaking to the CPSA.
>
> Effective the signed date of this Undertaking, I undertake to the following:
>
> 1. I will withdraw from medical practice in Alberta while it remains a condition of my recognizance that I am "prohibited from seeking, obtaining or continuing any employment, whether or not the employment is remunerated or becoming a volunteer in a capacity that involves being in a position of trust or authority toward any person under the age of 16 years." I will provide a minimum of 72 hours' notice to the CPSA's Complaints Director of my intention to return to practice should I decide to do so upon the foregoing condition of my recognizance being amended so as to permit me to return to work as a pediatrician ….

> 3. If I fail to fulfill the terms of Section 1 of this Undertaking, that failure to do so may constitute unprofessional conduct under the *Health Professions Act* (Alberta) ….
>
> 6. Any return to practice as per (1) above by Dr. Al-Naami shall require a separate agreement confirming a practice permit condition of chaperone attendance with patients.
>
> These conditions shall remain in place until complaint file number 190468.1.1 is fully adjudicated or until after the notice period provided by Dr. Al-Naami pursuant to (1) above has terminated.

The Undertaking was signed by Dr. Al-Naami and the Director.

[61] On September 5, 2019, the College received a complaint about Dr. Al-Naami from the mother of two children, alleging that he had inappropriately conducted genital examinations of the children (age 6 and 2) in appointments in May and June 2018: CRP 79-80. The College opened the Second Complaint investigation on October 23, 2019: CRP 41, 83-85. An investigator was appointed. Dr. Al-Naami responded to the investigator by correspondence of November 18, 2019, asserting that he has never examined a child's genitals except for medical reasons and when medically indicated: CRP 86-87. The investigator interviewed the complainant and Dr. Al-Naami: CRP 110-116. The investigation report was completed on November 18, 2020: CRP 117-148. The report concluded that there was a conflict of evidence between the complainant and Dr. Al-Naami and no independent witness: CRP 148. The next stage of the investigation would be to obtain an expert opinion as to whether the conduct of Dr. Al-Naami was medically appropriate. The record disclosed no follow up. Dr. Al-Naami did not request that the Second Complaint investigation be stayed pending completion of the criminal matter or the First Complaint: CRP 41.

[62] On September 13, 2019, Cpl. Knight "called [the Director] to identify other concerns that have arisen with Dr. Al-Naami since he was charged:" CRP 69. Cpl. Knight advised that "electronic devices were seized as part of the investigation and laying of charges. On one device, a number of pictures were found of Dr. Al-Naami … in the nude in an office setting at a desk …. The setting is not of his home office in Edmonton … but there is no clarity as to whether it represents photos taken at his practice location in Edmonton or possibly his earlier practice location in Fort McMurray:" CRP 70-71. Cpl. Knight advised that "several parents have identified concerns to law enforcement following the release of information regarding criminal charges against Dr. Al-Naami." Cpl. Knight reported that "an image of female prepubescent genitalia was pulled from a hard drive device controlled by Dr. Al-Naami – there is a gloved finger in the photo … where the labia are apparently being spread open. The image had been deleted previously. Photographic data indicates that it was taken on a cell phone or similar device, and in the area of or within a medical office:" CRP 72. Cpl. Knight also advised the Director that several parents had identified concerns to law enforcement regarding Dr. Al-Naami. However, on the record to date, no further reports have been provided by the RCMP or other policing agencies and no further charges have been laid against Dr. Al-Naami: CRP 75.

[63] In October 2019, Applicant's Counsel contacted the Director requesting that Dr. Al-Naami be permitted to return to work with restrictions: CRP 39. Applicant's Counsel proposed that Dr. Al-Naami be restricted to seeing only 16 and 17-year old patients: CRP 41.

[64] On December 9, 2019, the Director wrote to Counsel: CRP 40-42. The Director commented that in providing the Undertaking, "Dr. Al-Naami is seen as adherent to his responsibilities under the *Standard of Practice* Self Reporting to the CPSA and the Code of Ethics and Professionalism." The Director continued that "I see any attempt at a return to practice as incongruent with the CPSA mandate to protect the public."

[65] The Director stated that "[a]t this time, the CPSA has no information (by virtue of our agreement to stay investigation with Dr. Al-Naami's withdrawal from practice) that can otherwise satisfy the CPSA/Complaints Director that Dr. Al-Naami is safe to practice and interact with patients." The Director then stated the following:

> To ensure "due diligence" on the part of the CPSA, a judgment as to Dr. Al-Naami's safety to practice would require the gathering of additional information in advance of any return to practice. I would propose that Dr. Al-Naami should provide his explicit and written consent allowing the CPSA to request any required evidence from the office of the Crown to allow for an informed assessment, on an evidentiary basis, of Dr. Al-Naami's potential risk to the public. The CPSA would not attempt to interview witnesses or other individuals with knowledge of this matter – it is anticipated that the CPSA would seek the provision of a summary of evidence (at a minimum) from the Crown. I acknowledge that this may be seen as requiring the CPSA to rescind its stay of investigation – however at this time my proposal would include the limitation of our work at this time to receiving information from the Crown for the purposes of determining whether Dr. Al-Naami may return to practice prior to the completion of both criminal and CPSA processes.

The Director asked counsel to review this proposal with Dr. Al-Naami.

[66] Dr. Al-Naami did not provide the written consent requested by the Director.

[67] On December 10, 2019, by way of a Consent Bail Variation Order, Justice Clackson varied the terms of condition 4 of Dr. Al-Naami's Recognizance to permit contact with a person under age 16 additionally as follows: "or in the direct presence of a chaperone authorized by the College of Physicians and Surgeons of Alberta:" CRP 14, 15-17, 43-44, 53-54. Condition 5, the prohibition on employment or volunteering in any capacity that involves being in a position of trust or authority towards a person under age 16, was not varied. The College was not consulted respecting the variation of the Recognizance: CRP 59. The College has had no contact with Crown Counsel.

[68] On February 13, 2020, Applicant's Counsel met with the Director respecting the request to speak to Crown Counsel: CRP 73. Applicant's Counsel stated "I relayed to you what the Crown Prosecutor is likely to advise you about the information in the disclosure … I intended to relay to you that the Crown Prosecutor would likely advise you that they have found one child pornographic video … on a laptop owned by Dr. Al-Naami to which his entire family (i.e. wife, two teenagers, and two children under twelve) has access:" CRP 55, 73-74.

[69] Also on February 13, 2020, Dr. Al-Naami proposed through counsel that he could limit his practice to older children or he could practice at AHS's Learning and Development Centre

where he would not do physical examinations: CRP 45. On February 20, 2020, Applicant's Counsel brought to the Director's attention that Dr. Al-Naami is licenced to perform echocardiographs, as a potential area for a return to practice: CRP 46.

[70] Dr. Al-Naami conveyed that he and his family were in financial distress: CRP 74.

[71] On February 20, 2020, the Director acknowledged that Dr. Al-Naami's "point [has] been made" but the "hurdle remains that of being able to have any contact with patients – full stop:" CRP 46.

[72] On February 26, 2020, the Director advised Applicant's Counsel that he had met with the College Registrar and reviewed Dr. Al-Naami's request for return to practice. The Director stated that the Registrar "remains of the opinion that Dr. Al-Naami should remain withdrawn, as the disclosure from the Crown (if as you have described) would not otherwise suggest to him that Dr. Al-Naami is appropriately safe to reenter practice:" CRP 47, 75-76. The Director concluded this letter by stating that "the outcome of the criminal matter will be required to reevaluate Dr. Al-Naami's practice condition."

[73] On February 26, 2020, the Director recorded that "[i]t was not the intent that the CPSA would … have a conversation with the Crown, but rather Dr. Al-Naami would make the request of the Crown. The Crown will agree or disagree as it sees fit, and the CPSA would only enter into a discussion with the Crown if [the] prosecution approached us for clarification:" CRP 77 (the date typed for this entry is March 24, 2020 which may be the date the entry was made, referring to an earlier matter. Nothing turns on the precise date of this comment).

[74] On March 9, 2020 Dr. Al-Naami wrote to the Director, under cover of correspondence from Applicant's Counsel, stating as follows: "Please accept this letter as commencing 72 hours' notice of my intention to return to practice and to revoke the Undertaking I gave the CPSA on August 16, 2019:" CRP 48-50. Dr. Al-Naami referred to his financial and emotional struggles. He stated that the Undertaking has injured his reputation, "as, although the allegations against me are unproven, my continued withdrawal from practice lends credence to the claims against me to which I have pleaded not guilty and will be vehemently defending against at trial:" CRP 49.

[75] The letter acknowledged that the Recognizance condition linked to the 72-hours notice was not varied although condition 4 was varied. Dr. Al-Naami stated that it was his understanding that the negotiated variation was "to enable me to return to pediatric practice." In his view, the Recognizance "clearly allows me to attend with patients who are 16 years of age and older."

[76] Dr. Al-Naami enclosed a draft alternative undertaking that imposed restrictions on his practice, protecting the public and promoting the College mandate while allowing him to practice medicine (Alternative Undertaking 1). Alternative Undertaking 1 is found at CRP 51-52, 57-58. The crucial conditions are as follows:

> 1. Dr. Al-Naami undertakes to have a chaperone, approved in writing by the CPSA, present for all attendances with patients under the age of eighteen in all locations where he provides clinical services. Dr. Al-Naami will maintain a daily

> list of all patients on which attendances occurred and will report to the CPSA upon request.
>
> 2. Dr. Al-Naami undertakes to post a notice about the chaperone requirement, set out in #1 above, in any clinic in which he provides medical services. Such notices will be posted in the clinic waiting area and in each exam room.

[77] On March 10, 2020 the Director responded to Dr. Al-Naami's March 9 correspondence: CRP 59-60. He referred to the request for Dr. Al-Naami's written consent to Crown Counsel "to permit the disclosure of records to the CPSA from the criminal disclosure package given to Dr. Al-Naami." The Director stated that "[t]his would allow the CPSA to have a more complete understanding of the evidence behind the charges against Dr. Al-Naami." That consent had not been provided.

[78] The Director considered the proposed chaperone requirement to be "grossly insufficient" as all of Dr. Al-Naami's patients are minors. Further, the Director stated that "[i]t is unacceptable that Dr. Al-Naami seeks to withdraw from his Undertaking to the CPSA and impede the CPSA receiving and considering relevant evidence:" CRP 59.

[79] The Director stated that Dr. Al-Naami has not provided "any information that is required to assist in setting the terms of any agreement for the reissuance of a practice permit:" CRP 60. And "[p]aragraph 6 of the Undertaking expressly recognizes that Dr. Al-Naami cannot unilaterally demand the issuance of a practice permit."

[80] The Director continued that Alternative Undertaking 1 failed to address "several significant issues," including

- the notification to be given to patients in advance of booking
- what information is to be provided to patients/guardians to provide informed consent as to whether they wish to be seen by Dr. Al-Naami.

The Director added that "[t]here are additional provisions in your form of undertaking that are unacceptable."

[81] The Director confirmed that Dr. Al-Naami "remains withdrawn from practice until such time that the previously requested information is available to the CPSA for an appropriate assessment of his risk." The Director stated that "[t]he CPSA cannot fulfill its duty to protect the public interest by negotiating terms for return to practice without the evidence from the Crown disclosure package being available for consideration."

[82] The Director warned that if Dr. Al-Naami were to return to seeing patients, he would not have a current practice permit. He would be exposed to further proceedings under the *Health Professions Act*.

[83] On March 12, 2020 Applicant's Counsel advised the Director by correspondence that her "understanding of the disclosure has evolved," and she was advised that the Crown "would also likely advise the CPSA that the disclosure contains a thumbnail to the aforementioned video, and 2 unique images which the Crown argues meet the test for child pornography:" CRP 55.

Applicant's Counsel referred to the Director's correspondence of February 26, 2020 and stated the following:

> As it appears that the CPSA has already concluded that the outcome of the criminal matter is necessary to trigger the reevaluation of Dr. Al-Naami's suspension from practice, Dr. Al-Naami was unable to see any purpose in permitting the CPSA to review the disclosure for his criminal matter with the Crown Prosecutor: CRP 56.

Counsel stated that allowing the CPSA to speak to the Crown Prosecutor compromises his "right to a fair trial given the risk of prejudice to Dr. Al-Naami's criminal proceedings that this action brings."

[84] Counsel stated that Dr. Al-Naami's "complete removal from the practice of medicine" is not the "least restrictive means to ensure public safety:" CRP 56. Counsel wrote that

> there are cases in which physicians with criminal charges, or even more, criminal convictions, have safely returned to practice with conditions on their practices. For example, Dr. Ramneek Kumar, who was charged with two counts of sexual interference and one count of sexual assault of a minor on March 27, 2019 continued to practice medicine safely in Alberta with a chaperone requirement on his licence.

[85] Counsel confirmed that Dr. Al-Naami will no longer voluntarily withdraw from practice and invited the CPSA to take proceedings under Part 4 of the *Health Professions Act*: CRP 56.

[86] Attached to Counsel's correspondence was a Revised Alternative Undertaking, that added the following as a new clause 3 (CRP 57):

> Dr. Al-Naami shall ensure that all staff advise patients or their guardians at the time of booking (for booked appointments) or at the time of registration (for walk-in appointments) about the chaperone requirement.

[87] On March 13, 2020 the Director reiterated that the CPSA position is that Dr. Al-Naami has been asked to provide his consent for the release of the criminal disclosure package from the Crown: CRP 64. The information "would help inform whatever practice permit conditions may be seen as appropriate if he were deemed suitable to practice." Without that information, the College "cannot ascertain the risk to any patient or member of the public who may attend him." Further, the College "would not know the nature of notifications to provide to other parties under s. 119 of the Act." Section 119 provides as follows:

> 119(1) If under Part 2 or Part 4 a regulated member's practice permit is suspended or cancelled ..., the registrar
>
> > (a) must enter the conditions imposed, if any, on the regulated member's practice permit,
> >
> > (b) must provide the information
> >
> > > (i) to a person who employs the regulated member to provide professional services on a full-time or

> part-time basis as a paid or unpaid employee, consultant, contractor or volunteer, and
>
> (ii) to a hospital if the regulated member is a member of the hospital's medical staff or professional staff, as defined in the Hospitals Act,
>
> (c) must provide the information to any Minister who, or an organization specified in the regulations that, administers the payment of fees for the professional services that the regulated member provides, ...
>
> (f) subject to the bylaws, may publish or distribute the information referred to in this subsection and information respecting any order made by a hearing tribunal or council under Part 4 ....
>
> (4) If a member of the public, during regular business hours, requests from a college information referred to in this section, section 33(3) or 85(3) or any information published on the college's website, or information as to whether a hearing is scheduled to be held or has been held under Part 4 with respect to a named regulated member, the college must provide the information with respect to that regulated member subject to the payment of costs referred to in section 85(3) and the period of time provided for in the regulations ....

In my opinion, the reference to s. 119 adds nothing of substance to position of the Director relating to practice permit conditions and I will not refer to it further in this decision.

[88] The Director commented that Applicant's Counsel's most recent communication "may be interpreted as suggesting that there may be more yet contained within the criminal disclosure file." Again, this information would be relevant to Dr. Al-Naami's "return to practice and the CPSA's requirement to ensure patient/public safety."

[89] On March 16, 2020, Applicant's Counsel maintained that Dr. Al-Naami is able to unilaterally withdraw from his Undertaking and therefore considers himself withdrawn from his Undertaking. However, because of COVID-19 considerations, he would not immediately return to work. Forty-eight hours notice of intention to return to practice would be provided: CRP 65.

[90] On March 18, 2020, the Director responded with correspondence to Applicant's Counsel: CRP 66-67. The Director confirmed that Dr. Al-Naami does not hold an active practice permit and seeing patients would create a new issue for investigation: CRP 68, 78. The Director stated that Dr. Al-Naami has a duty to cooperate with the investigation. The Director confirmed that the College would not require Dr. Al-Naami to provide a written response or to be interviewed. He is being asked to provide consent to the College to allow access to evidence already in the possession of the Crown. His right to a fair trial is not jeopardized. The College has no plan to pursue disciplinary proceedings against Dr. Al-Naami before the criminal proceedings are concluded. According to the Director, Dr. Al-Naami is "effectively preventing" the College from considering relevant evidence dealing with the degree of risk his return to practice may pose. The Director stated that "[i]t is not for Dr. Al-Naami to restrict the CPSA's access to relevant evidence and to dictate the conditions for his return to practice. If I may, that has the appearance of 'the tail wagging the dog.'" The Director stated that "[i]t is unfortunate that Dr. Al-Naami

continues to refuse to cooperate by providing the consent to the Crown to allow the CPSA access to the Crown disclosure records." The College requires access to the evidence to assess whether the Alternative Undertaking "might be adequate:" CRP 67.

[91] The Director denied that the College has already concluded that Dr. Al-Naami is guilty.

[92] Dr. Al-Naami has not provided the written consent requested by the Director. As of the hearing date, he has not attempted to return to practice.

VI. Issues

[93] Three main questions must be addressed:

- was Dr. Al-Naami entitled to rescind his Undertaking unilaterally?
- was Dr. Al-Naami entitled to request the College to reconsider its position?
- was the Director's reconsideration of Dr. Al-Naami's Undertaking reasonable?

[94] The responses to these questions require some delineation of the "limits and contours" of the College's decision space. Some more specific aspects of these "limits and contours" will be addressed when responding to particular issues.

VII. The College's Decision Space

[95] The general aspects of these "limits and contours" of the College's decision space are as follows.

A. Statutory Scheme

[96] The Supreme Court commented in ***Vavilov*** at para 108 that

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision ….

1. The Public Interest

[97] The foundation of the College's decision space regarding the merits of disciplinary matters is its statutory obligation to promote and serve the public interest. Under s. 3(1)(a) of the *Health Professions Act*, "[a] college … must carry out its activities and govern its regulated members in a manner that protects and serves the public interest." In the present context, the focus of the "public interest" is on protecting patients from risks of criminal conduct. More precisely, since Dr. Al-Naami is a pediatrician and he is charged with child pornography offences, the focus of the public interest is on protecting young patients from the risks of sexual offending represented by Dr. Al-Naami. See ***Moll v College of Alberta Psychologists***, 2011 ABCA 110 at para 24; ***Pharmascience Inc v Binet***, 2006 SCC 48, Lebel J at para 36.

2. Procedural Context

[98] Procedurally, the Director's decisions are situated in a pre-hearing context. This pre-hearing landscape is not comprehensively regulated. Section 65 was quoted above.

[99] As regards the First Complaint, the investigation has been stayed or suspended by the College. As discussed above, the "suspension" of Dr. Al-Naami's practice is by way of his Undertaking not by the Director's suspension of his practice. As regards the Second Complaint, essentially the investigation reached only the point of gathering evidence from the complainant and Dr. Al-Naami.

[100] Since the decisions respecting Dr. Al-Naami are pre-hearing, interim decisions, the decisions are necessarily based on incomplete information.

B. The College and its Members

[101] The canopy that defines the College's decision space is formed not only by the public interest but by the College's relationship with its members.

1. Duty to Cooperate

[102] One aspect of this relationship is that members have a duty to cooperate with the College in investigations. See (with due regard for the distinct legislative context) ***Sazant v College of Physicians and Surgeons of Ontario***, 2012 ONCA 727 at para 180; ***Ontario (College of Physicians and Surgeons of Ontario) v Botros***, 2015 ONCPSD 42; ***Artinian v College of Physicians and Surgeons of Ontario***, 1990 CanLII 6860, 73 OR (2d) 704 (SC Div Ct) at 6 (CanLII pdf: "Fundamentally, every professional has an obligation to co-operate with his self-governing body"). This duty is statutorily-recognized at the stage of investigation in s. 1(1)(pp)(vii)(B) of the *Health Professions Act*:

> 1(1) (pp) "unprofessional conduct" means one or more of the following, whether or not it is disgraceful or dishonourable: …
>
> (vii) failure or refusal …
>
> (B) to comply with a request of or co-operate with an investigator ….

Under s. 1(1)(u), "investigator" means "the complaints director or other person who conducts an investigation under Part 4."

2. Impact of the Decision on the Affected Individual

[103] Further aspects of the relationship between the College and members that contribute to the College's decision space are the College's obligations towards its members in disciplinary matters.

[104] While the primary responsibility of the College is to protect the public, it must also treat its members fairly when establishing public protection measures: ***Moll*** at para 24.

[105] The requirement that the College take proper account of the interests of its members in disciplinary processes affects the application of the standard of review. We read the following at para 133 of ***Vavilov***:

> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant

> personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood. [emphasis added]

C. Respect for *Charter* Values

[106] The College's decision space may also be shaped by *Charter* values. If a decision affects interests protected by the *Charter*, the College must ensure that the decision limits *Charter* protections reasonably or proportionately, so the limitations are no more than necessary given the statutory objective pursued: see ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12, paras 3-4, 37; ***Doré v Barreau du Québec***, 2012 SCC 12.

VIII. Assessment

A. Was Dr. Al-Naami entitled to rescind his Undertaking unilaterally?

[107] Dr. Al-Naami contended that he was entitled to rescind his Undertaking unilaterally. He could, on his own, declare it to be terminated. Were this expedient available to Dr. Al-Naami, matters would be simplified. He could declare his Undertaking at an end. At that moment, nothing would prevent Dr. Al-Naami from practicing. The College, then, should it oppose his re-entering practice, would suspend him. Dr. Al-Naami could thereafter make an application for a stay under s. 65.

[108] Dr. Al-Naami could act in a manner contrary to the commitments in the Undertaking. That, however, would not rescind or terminate the Undertaking. By way of analogy, a breach of contract does not (or need not) end a contract. Further, conduct contrary to the Undertaking would be regarded by the College as unprofessional conduct. Section 3 of the Undertaking provided that if Dr. Al-Naami failed to fulfill the withdrawal from practice terms of section 1, "that failure … may constitute unprofessional conduct." The Director warned Dr. Al-Naami that if he took steps to return to practice, he would be subject to disciplinary proceedings: CRP 60. See the definition of "unprofessional conduct" in s. 1(1)(pp) of the *Health Professions Act*. Dr. Al-Naami has chosen not to take steps to return to practice. If Dr. Al-Naami disregarded his Undertaking and if the Director took the view that his Undertaking was thereupon terminated, Dr. Al-Naami would face the challenge of being permitted to return to practice not only given his criminal charges and other information gathered to date, but given a further disciplinary violation.

[109] But did the Undertaking actually impose obligations on Dr. Al-Naami to follow its terms? If it did not establish obligations, not only would my contractual obligation analogy be misplaced but conduct contrary to the Undertaking might not be regarded as the proper subject of discipline since Dr. Al-Naami would not have done what he was obliged not to do. He would have done what he was free to do.

[110] Applicant's Counsel argued that the Undertaking did not impose a contractual obligation on Dr. Al-Naami. The Undertaking amounted to a bare or gratuitous promise. One might respond that the consideration for his withdrawal from practice was the College's forbearance from continuing the investigation. There was a *quid pro quo*. But since the College might have been legally required to stay its investigation because of potential prejudice to the criminal matter, the forbearance might not have been good consideration: see J.D. McCamus, *The Law of Contracts, 2nd ed* (Toronto: Irwin Law, 2012) 243 *et seq.* I will not explore these complexities. In my view, nothing turns on whether the Undertaking may be characterized as a contractual obligation in a private law sense. The issue is one of public law, concerning the relationship of a regulated member to his regulatory body, rather than an issue of private law.

[111] I accept Applicant's Counsel's observations that the Undertaking was not a lawyer's undertaking, made (e.g.) to the Court in the course of litigation. Neither was the Undertaking a statutorily-regulated undertaking, such as an undertaking respecting pre-trial release under the *Criminal Code*. The *Health Professions Act* does not address undertakings.

[112] The Undertaking took its meaning, significance, and force from its role in the disciplinary process for a regulated profession. Although undertakings are not legislatively regulated, I can infer on the materials before me that undertakings are commonly used for negotiated interim resolutions in disciplinary processes in Alberta and other provinces. See ***Kumar*** at para 6; ***Morzaria*** at paras 8-11, 14; ***Sazant*** at paras 19, 34; ***Huerto*** at para 29 (although judicially directed). The use of undertakings is part of the "common law" of dispute resolution developed in the disciplinary process for physicians.

[113] To assist in interim resolutions of disputes, undertakings must have stability. The usefulness of this tool would be subverted if a physician could simply declare that he or she were no longer bound by an undertaking freely made. If unilateral rescission were permitted, undertakings would serve no purpose.

[114] Moreover, a physician is a member of a learned profession, granted the privilege of carrying on that profession and having the status that follows. That privilege is endorsed and supported by the physician's regulatory body. The privilege of practice does not belong to the physician alone and is not achieved by the physician alone, but only subsists so long as the privilege is extended by the College. While further analysis is necessary to draw out the implications of this relationship, it would appear that one implication is that in dealings with the College, a physician's word must be his or her bond. One might observe that this should be so regardless of membership in a profession. Promises are to be kept. That is why they are "promises."

[115] And further, the Undertaking itself contained language precluding unilateral revocation. Section 3 provided that if Dr. Al-Naami failed to fulfill the terms of Section 1 of the Undertaking, including withdrawal from practice, "that failure may constitute unprofessional conduct under the *Health Professions Act*." Section 6 of the Undertaking stated that "Any return to practice as per (1) above by Dr. Al-Naami shall require a separate agreement confirming a practice permit condition of chaperone attendance with patients." Section 1 of the Undertaking set out a specific set of circumstances that would have permitted Dr. Al-Naami to provide notice of an intention to return to practice. Those circumstances have not occurred.

[116] In my opinion, Dr. Al-Naami was not entitled to rescind his Undertaking unilaterally.

B. Was Dr. Al-Naami entitled to request the College to reconsider its position?

[117] Is the result that undertakings are permanent, unchangeable? Does an undertaking trap a physician? Were this so, physicians might well be reluctant to enter into undertakings.

[118] After entering an undertaking, circumstances may change significantly, whether what has changed are the circumstances of the physician or the state of the evidence. Even if circumstances have not changed significantly, a physician who entered into an undertaking may have re-evaluated the appropriateness of its terms. An undertaking may have been made without the physician having thought things through, or perhaps only the passage of time has allowed the physician to think things through.

[119] In my opinion, a physician should be entitled to request reconsideration of the terms of an undertaking and the College should be obligated to reassess whether the terms of the undertaking remain appropriate. None of this is a guarantee that reconsideration will result in change.

[120] I take into account the following.

[121] An undertaking is a type of promise. But while promises should be kept, a person who has promised may ask to be relieved of his or her obligations ("I know I said I'd do it, but …."). An undertaking is made in more formal circumstances than a promise, though.

[122] Reconsideration of administrative decisions may be provided for by statute. Neither undertakings nor the reconsideration of undertakings are regulated by the *Health Professions Act*. Just as the use of undertakings is not precluded by the lack of explicit regulation, so reconsideration is not precluded by the lack of regulation. Nothing statutorily prevents reconsideration.

[123] As I suggested, reconsideration complements the use of undertakings. In my opinion, an entitlement to request reconsideration in light of changed circumstances is a reasonable adjunct to the undertaking procedure. The possibility of reconsideration based on changed circumstances or the changed appreciation of circumstances prevents an undertaking from becoming a "trap" and avoids deterring physicians from entering undertakings for fear of being trapped. Just as it makes practical sense from a disciplinary process perspective for physicians to accept interim resolutions by way of undertaking, so it makes sense for the College to reconsider interim resolutions. Without reconsideration, physicians would be better off to invite suspension or the imposition of conditions and to seek relief in the courts through a stay application.

[124] In my view, upon Dr. Al-Naami requesting return to practice under conditions, the parties in fact considered themselves to be in a reconsideration process. See, for example (emphasis added),

- CRP 36 - e-mail from Applicant's Counsel to the Director, August 16, 2019:

> "I would like to ensure that Dr. Al-Naami's suspension will terminate and <u>will need to be reconsidered should his recognizance conditions change so as to allow him to return to practice</u>. We

> know that this would only change if it were decided that preventing him from working as a pediatrician is not required for the protection of the public. Accordingly, at that time, I do not want his voluntary suspension preventing his return to work, as there should be less restrictive means that would protect the public interest while permitting him to work."

- CRP 39 - e-mail from Applicant's Counsel to the Director, November 5, 2019

> "I am wondering if you had the chance to give any consideration to allowing him to return to work with restrictions?"

- CRP 40 – correspondence from the Director to Applicant's Counsel – December 9, 2019

> Thank you for both yours and Dr. Al-Naami's patience as the CPSA considers Dr. Al-Naami's request for a return to practice in advance of his criminal trial.

- CRP 41 – correspondence from the Director to Applicant's Counsel - December 9, 2019

> I have considered again the Undertaking given by Dr. Al-Naami to the CPSA on August 16, 2019, providing his commitment to withdraw from practice until such time that the matters identified to the CPSA had been fully investigated and adjudicated.

[125] Again, the reconsideration process does not obligate the College to amend its original position or to accept an alternative undertaking. What is owed to a physician is not the desired disposition but a *reasonable* reconsideration.

C. Was the Director's reconsideration of Dr. Al-Naami's Undertaking reasonable?

[126] Answering the question of whether the Director's reconsideration of Dr. Al-Naami's Undertaking was reasonable requires responses to four sub-questions.

- what was the Director required to decide?
- what did the Director decide?
- was the decision to require Dr. Al-Naami's consent to access information about Crown disclosure reasonable?
- was the Director's response to Dr. Al-Naami's request for reconsideration reasonable?

1. What was the Director required to decide?

[127] The Director's task was hardly unique. That did not make his task less difficult or make the description of his task less difficult.

[128] Fundamentally, the Director was required to balance the obligation to promote the public interest, specifically the need to protect young patients, and fairness to Dr. Al-Naami.

[129] This task required execution in conditions of informational uncertainty or incomplete information. As regards the First Complaint, the main complaint, the procedural context was pre-hearing, pre-investigation. The Director had to work with untested allegations, some conflicting.

[130] In my opinion, the Director had to address three questions: First, is the complaint supported by credible evidence or by a *prima facie* case? Second, do the circumstances of the complaint show that the physician represents a risk to the public? Third, given the risk of harm, what interim restrictions or conditions would be required to abate, manage, or mitigate that risk?

[131] I add that in my opinion, the Director should address the same three questions in approaching resolution by way of undertaking, in a reconsideration decision, or in a decision to suspend or impose conditions on a physician. The overall issues are the same (whether, in light of the evidence of risk, the physician may continue to practice and, if so, on what terms) and nothing justifies differing approaches.

(a) *Prima Facie* Case Supporting the Complaint

[132] Respecting the first question, the Director's task is not to resolve the uncertainty, to decide the merits, or assess the strength of competing allegations. That will occur at a later procedural stage: ***Scott v College of Massage Therapists of British Columbia***, 2016 BCCA 180 at para 73. At this point there are only two matters to be decided. On the one hand, if the allegations against the physician were found to be true, would the complaint would be made out? On the other hand, are the allegations, the case against the physician, not frivolous, not manifestly incredible? See ***Fingerote*** at paras 27-28; ***Scott*** at paras 55, 56. Only a limited weighing can occur at this point. Chief Justice Bauman did caution in ***Scott*** at para 56 against rejecting or discounting information as incredible or implausible at an early pre-hearing procedural stage.

(b) Evidence of Risk

[133] Respecting the second question, the evidence must support an inference that the physician poses a risk to the public, specifically to present or future patients: ***Fingerote*** at paras 29-30. It does not necessarily follow from a finding that a complaint is supported by a *prima facie* case that the physician poses a risk to any other patients. At this point two matters must be decided: What is the nature of the harm that is risked to current or future patients? and Is there a reasonable likelihood of the harm being caused if no restrictions or conditions were imposed? (alternatively, is there a risk of probable harm?) Both the magnitude of risk and the degree of likelihood of actualization of the risk should be considered. See ***Fingerote*** at paras 6-7.

(c) Response to the Risk

[134] Respecting the third question, the College's response to the risk must be proportional. Automatically suspending every physician who is the subject of a complaint giving rise to a risk of harm to patients would doubtless be effective, but this response would be overbroad, disproportional, and unreasonable. The administrative measures taken must be proportional to the particular risk in the particular circumstances.

[135] Because the administrative measures are interim, the allegations are untested and unproven, and the College is obliged to treat its members fairly, the principle that must be

respected is that the restrictions or conditions should be "necessary" or the least restrictive that can reasonably protect the public: ***Fingerote*** at paras 7 and fn1, 24; ***Morzaria***, Nordheimer J, as he then was, dissenting but not on this point, at para 45; ***Rohringer*** at para 69; ***Kumar*** at para 24; ***Scott*** at para 55.

[136] The least restrictive measures principle may be regarded as a means of respecting *Charter* values in interim determinations. A physician who has been accused of committing criminal offences, like Dr. Al-Naami, is presumed innocent in criminal proceedings. That does not block the College from protecting the patients from the risks the physician represents, but measures taken to protect the public should nonetheless be proportional, minimizing restrictions on an individual who has not been found guilty of any offence. Interim measures should not be a pre-punishment.

(d) Standard of Review

[137] The standard of review applicable to the Director's decisions concerning all of these issues is reasonableness.

2. What did the Director decide?

[138] The Director's response to Dr. Al-Naami had two main elements.

[139] First, on the information the Director had received, the College had no information that satisfied the Director that Dr. Al-Naami was safe to practice and interact with patients: CRP 41 (correspondence of December 9, 2019); CRP 47 (correspondence of February 26, 2020); CRP 60 (correspondence of March 10, 2020).

[140] Second, the Director required additional information to assess whether Dr. Al-Naami could return to practice on conditions. The information was required so the College could perform its "due diligence." The means of acquiring additional information proposed by the Director was for Dr. Al-Naami to "provide his explicit and written consent allowing the CPSA to request any required evidence from the office of the Crown:" CRP 41. The Director sought Dr. Al-Naami's consent to have the Crown provide information about Crown disclosure to the College. The Director might or could be provided with a "summary" of Crown disclosure: CRP 41. The Crown would "agree or disagree [to provide information] as it sees fit:" CRP 77. Later the Director wrote that "The CPSA cannot fulfill its duty to protect the public interest by negotiating terms for return to practice without the evidence from the Crown disclosure package being available for consideration:" CRP 60.

[141] I'll consider the reasonableness of seeking the consent respecting disclosure, then turn to the reasonableness of the Director's finding that on the information received Dr. Al-Naami could not return to practice on conditions.

3. Was the decision to require Dr. Al-Naami's consent respecting Crown disclosure reasonable?

[142] I'll begin with some clarifications.

[143] First, the Director did not ask Dr. Al-Naami to provide a copy of the Crown disclosure in his possession.

[144] Second, the Director was not pursing an application for production of Crown disclosure. The application would rely on s. 63(3) of the *Health Professions Act*. The application would be made in the course of the investigation (which had been suspended), on notice to at least the Crown or Attorney General. Disclosure materials may contain information about third parties, information protected by public interest privilege, information subject to privilege that may be asserted by the Crown, or information that, in the public interest, should not be disclosed even to the College: see ***P(D) v Wagg***, 2002 CanLII 23611, 61 OR (3d) 746 (ON SCDC), Blair RSJ at para 23 (affirmed by the Court of Appeal's decision in ***Wagg***). The Crown, as proxy for affected interests, would be responsible for limiting production: ***College of Physicians and Surgeons of Ontario v Peel Regional Police***, 2009 CanLII 55315 (ON SCDC) at para 63. The Court, ultimately, would decide what is and is not producible. Alternatively, the Crown and the College might work out production by consent: ***Feuerhelm v Alberta (Justice and Attorney General)***, 2017 ABQB 709, Eamon J at para 109. I accept the College's counsel's submission that it would be likely that the College would be successful in receiving production of some of the Crown disclosure: ***College of Physicians and Surgeons of Ontario v Peel Regional Police***, 2009 CanLII 28202 (ON SCDC), Lederman J at para 20; College's Brief at para 96.

[145] Third, the Director recognized that Dr. Al-Naami's consent would not have guaranteed access to information about disclosure. Dr. Al-Naami would only be communicating to the Crown that he would not object to the College receiving information about disclosure. "The Crown will agree or disagree as it sees fit:" CRP 77. I accept the College's counsel's point that Dr. Al-Naami's consent would remove an obstacle to production, so his consent would have at least that much value: College's Brief at para 94.

[146] The Director, in effect, refused to consider the variation of the practice conditions for Dr. Al-Naami unless Dr. Al-Naami provided consent to permit the College to access Crown disclosure. Was requiring that consent reasonable?

[147] In my opinion, the Director's insistence on Dr. Al-Naami providing his consent permitting the College to access Crown disclosure was not reasonable.

(a) Procedural Prematurity and Unfairness

[148] The procedural context was critical. Dr. Al-Naami provided his Undertaking. The investigation was stayed or suspended.

[149] The College, more specifically the complaints director, could apply for access to the disclosure information under s. 63(3) once the investigation had resumed.

[150] In my view, what the Director pursued, the consent he sought, would create some significant distortions of process, relating both to the nature of the additional information sought and to the introduction of this additional information.

(i) Effects of Receipt of Summary of Information

[151] The Director anticipated receiving not production of Crown disclosure but a "summary of information." Suppose that summary were received.

[152] I accept the College's point that the receipt of Crown disclosure information by the College would not, by itself, imperil Dr. Al-Naami's fair trial rights: CRP 66. The Crown already had the information. Providing the information to the College would not create new information that might work prejudice to Dr. Al-Naami in his criminal trial.

[153] However, the Director could not rely on the untested allegations in the summary without hearing from Dr. Al-Naami so that he could provide his comments about the summary. Even at a preliminary pre-investigation stage, the College should not act solely on representations by others without entertaining some response from Dr. Al-Naami. It could be, for example, that some of the information in the disclosure was wholly unreliable, the product of *Charter* violations, or its prejudicial effect would exceed its probative value. The Crown's notion of what constituted a "summary" could be problematic to Dr. Al-Naami in terms of what was included, what was excluded, and how information was characterized. It could not be assumed that there was a non-controversial overview of events, at least an overview that would provide more information than the College already had. Dr. Al-Naami might not wish his professional status to be jeopardized by the information conveyed by the Crown. He could be, in effect, forced to respond to the use of this information by the College, before the criminal trial had even begun.

[154] Since this was not addressed in argument, I will not pursue the issues of whether Dr. Al-Naami would have "use immunity" and "derivative use immunity" protections available to prevent his responses being used in the criminal trial or whether the practical necessity of responding to the additional investigation elements would jeopardize Dr. Al-Naami's right to remain silent: see ***Cockeram v College of Physicians and Surgeons (NB)***, 2013 NBQB 197, Walsh J at paras 61-72.

[155] Nonetheless, the introduction of the "summary" information bears the reasonable prospect of transforming the pre-hearing, pre-investigation *status quo* into an investigation before the actual investigation.

[156] This prospect is inconsistent with the reasonable position of the College to stay its investigation pending completion of the criminal trial.

[157] In my view, the Director did not address the complexities attending access to Crown disclosure information. The Director did not advert to the issue of seeking information before the College was entitled to obtain the information and before a procedural step was reached when that information could be properly processed. This shows the unreasonableness of the Director's request.

(ii) Introducing Additional Information

[158] Dr. Al-Naami was withdrawn from practice. Information had been provided to the Director. Dr. Al-Naami requested reconsideration. The Director then sought Dr. Al-Naami's consent to permit access to further information from the Crown.

[159] It was clear from the Director's comments that on the information he already had, he was opposed to Dr. Al-Naami returning to practice. Dr. Al-Naami sought a reconsideration of that position, not a position based on the Director's assessment of new information. The Director was, in effect, seeking to change the informational foundation for his position without having reconsidered his original position respecting Dr. Al-Naami's suitability for return to practice.

[160] This proposed shifting of the informational foundation for the Undertaking and the Director's position was not responsive to Dr. Al-Naami's request for reconsideration and was unreasonable on that basis.

(b) The Value of the Information

[161] In the hearing, the College took the position that without access to Crown disclosure information the College was at an informational disadvantage. For example, para 44 of the College's Brief stated that "an evidential vacuum exists around the nature and extent of Dr. Al-Naami's conduct that is relevant to his fitness and safety to practice as a pediatrician." This claim was consistent with the Director's claim that the College could not fulfil its duty to protect the public interest without access to Crown disclosure information: CRP 60. It was also consistent with the Director's claims that Dr. Al-Naami was "preventing" the College "from receiving and considering relevant evidence" and that Dr. Al-Naami was "restricting" the College's access to relevant evidence: CRP 67.

[162] This claim has two aspects. First, that the Director did not have sufficient evidence to make the appropriate decision and second, that the Crown disclosure contained the information that the College needed.

(i) Available Information

[163] As for the "insufficient evidence" claim, the College already had ample information about Dr. Al-Naami's offences. It had far more information than in ***Kumar*** for example (see paras 20-21).

[164] The College was aware of the charges. It was aware of the ALERT Bulletin. Corporal Knight spoke to the College. He had taken the initiative to contact the College, so presumably he would have conveyed what was appropriate to be conveyed to a professional governing body about one of its members. The College had commenced the Second Investigation, but not pursued it beyond gathering statements from the complainant and Dr. Al-Naami. The College also had the information about disclosure provided by Applicant's Counsel.

[165] I confess to some ambivalence about Applicant's Counsel serving as the medium of transmission of information about disclosure. I understand the College preferring to get information directly from the Crown as opposed to getting information through the filter of a physician's lawyer. However, counsel may make admissions on behalf of a client and what was conveyed to the College could be regarded as information of that nature. The information was not exonerating. Further, providing the information through counsel could and should be regarded as Dr. Al-Naami providing information voluntarily, by consent, as a means of cooperating with the Director and of providing the Director with the type of information that he

wanted. In any event, the College had received at least some information about Crown disclosure.

[166] What further information could be reasonably anticipated to be recovered from a Crown's "summary" of disclosure information?

(ii) Existence of Significant Additional Information

[167] The Director appeared to believe that the Crown disclosure would contain information additional to what had already been provided to the College. This belief was reflected in the College's Brief at para 101: "it would be unreasonable to order Dr. Al-Naami [to] be permitted to return to practice in light of the evidence currently before the Complaints Director, and the knowledge that more relevant and significant evidence is contained in Crown records." See also para 87.

[168] The belief, however, was speculation. The Crown disclosure may have contained just what had been passed on to the College, additional insignificant information, or additional significant information. There was no basis for drawing conclusions one way or another relating to the contents of the Crown disclosure.

[169] Added to this uncertainty was that there was no evidence on the record that the Crown would have disclosed any information to the College without court order even with Dr. Al-Naami's consent. And further, the Crown might have deferred any production to the College until after the criminal trial was concluded.

[170] The Director's insistence on access to the disclosure information was unreasonable for two reasons.

(iii) Distorting Effect

[171] First, the Director tethered reconsideration to information of uncertain worth, information that the College should not have accessed at the pre-investigation stage of procedure. The repeated request for access to this information distracted and distorted the reconsideration assessment that should have occurred. Reconsideration was pulled into a blind alley.

(iv) No Necessity

[172] Second, as Applicant's Counsel argued, the Director did not need the disclosure information to make his decision. It was not merely that the Director already had ample information, as indicated. I return to my earlier concern about the Director seeking to introduce new information when reconsideration was requested. The Director had in fact decided not to reconsider based on the information he had. In December 2019, the Director stated that the "CPSA has no information … that can otherwise satisfy the CPSA/Complaints Director that Dr. Al-Naami is safe to practice and interact with patients:" CRP 41. That is to say, on the information the College had, Dr. Al-Naami could not safely return to practice. The Director's February 26, 2020 communication stated that the Registrar remained of the opinion that Dr. Al-Naami should remain withdrawn, "as the disclosure from the Crown (if as you have described) would not otherwise suggest to him that Dr. Al-Naami is appropriately safe to reenter practice," and the outcome of the criminal matter would be required to reevaluate Dr. Al-Naami's practice

condition:" CRP 47. On March 10, 2020, the Director stated that Dr. Al-Naami "has not provided any information that is required to assist in setting the terms of any agreement for reissuance of a practice permit:" CRP 60.

[173] The Director, one might observe, had already come to conclusion in August 2019 that Dr. Al-Naami should not be permitted to practice, before receiving additional information. *That* was the position that Dr. Al-Naami wished to have reconsidered.

[174] The actual situation was this: The Director had arrived at the conclusion based on the information already received that Dr. Al-Naami could not safely return to practice. In the Director's view, to dislodge that conclusion, Dr. Al-Naami would have to provide additional information, particularly through permitting access to Crown disclosure. In effect, it was up to Dr. Al-Naami to provide additional information that would provide a foundation for the Director to re-think his conclusion. The additional information would be provided "for the purposes of determining whether Dr. Al-Naami may return to practice prior to the completion of both criminal and CPSA processes:" CRP 62. (In my view, the "burden" on Dr. Al-Naami was tactical only – the Director was saying that if Dr. Al-Naami sought a different conclusion additional information would have to be provided since the Director had drawn his conclusion on the information that he already had. There was no suggestion in argument that any burden of proof (should that notion have any grip in an informal pre-investigation stage of a disciplinary procedure) had been "shifted" to Dr. Al-Naami.)

[175] Again, the access to Crown disclosure matter was a distraction. The fundamental issues concerned the reasonableness of the Directors' determination in the first place that Dr. Al-Naami was not safe to return to practice, or more precisely, the reasonableness of the Director's determination that his conclusion need not be reconsidered without additional evidence.

4. Was the Director's response to Dr. Al-Naami's request for reconsideration reasonable?

[176] I'll consider the approach to the Director's decisions, the information received by the Director, whether the complaints were supported by a *prima facie* case, whether the information received supported an inference of risk to present or future patients, and whether the Director's reasons show that the measures relied on to deal with the risk took into account the relevant considerations.

(a) Aspects of the Decisions and Standard of Review

[177] The standard of review of the Director's reasons is reasonableness. Paragraph 133 of ***Vavilov*** bears repeating:

> [133] .... Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

I must also confirm that the reasons must justify the decision: ***Vavilov*** at para 86. The reasons must stand on their own, in context and on the record. It is not for me to "fashion [my] own reasons to buttress the administrative decision:" ***Vavilov*** at para 96. The reasons must be responsive to the submissions of the parties: ***Vavilov*** at para 106. The requirement of responsiveness to submissions was elaborated at paras 127 and 128 of ***Vavilov***:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> See also para 91.

[178] With respect to para 128 of ***Vavilov***, I acknowledge that the Director was a front-line administrator. He did not issue formal reasons and could not be expected to have written the equivalent of formal reasons. The Director was under no requirement to provide lengthy or detailed reasons. He did, however, provide more than oral and informal responses to Dr. Al-Naami and Applicant's Counsel. His responses included letters and e-mails. The Director's reasoning may be discerned from these sources. All that could be expected would be that the Director would lay out, in short compass, the relevant issues and steps supporting his conclusions, showing that Dr. Al-Naami's arguments had been considered and demonstrating that the Director's decision was made fairly and not arbitrarily: ***Vavilov*** at para 79.

(b) Information Received by the Director

[179] On August 12, 2019, the College was advised by Cpl. Knight of Dr. Al-Naami's child pornography charges. The ALERT press release was issued on August 14.

[180] On September 5, 2019, the College received the information that led to the Second Complaint about Dr. Al-Naami. That complaint has been contested by Dr. Al-Naami.

[181] On September 13, 2019, the RCMP advised the College that electronic devices had been seized from Dr. Al-Naami and a device contained images of a sexual nature (the office images and the deleted image), and that several parents had identified concerns about Dr. Al-Naami.

[182] In February 2020, Applicant's Counsel advised the Director that the Crown prosecutor would likely advise the College that one child pornography video was found on a laptop owned by Dr. Al-Naami (to which his family had access). On March 12, 2020, Applicant's Counsel advised that the Crown would also likely advise the College that the disclosure contained a thumbnail to the video and two unique images that the Crown could argue met the test for child pornography.

(c) The Complaints

[183] There was no suggestion that the First Complaint, relating to the criminal charges based on the police investigation, was not supported by a *prima facie* case. The Second Complaint was supported by the complainant mother's account. There was no argument that her complaint should have been dismissed on the basis of being frivolous or manifestly incredible.

(d) Risk to the Public

[184] The College must protect and serve the public interest. That includes protecting patients from risk of harm caused by physicians. Did the information conveyed to the Director support an inference that Dr. Al-Naami posed a risk to young patients? I found above that two matters must be addressed: What is the nature of the harm that is risked? and Is there a reasonable likelihood of the harm being caused if no restrictions or conditions were imposed? (alternatively, is there a risk of probable harm?)

[185] Dr. Al-Naami faces child pornography charges. He is a pediatrician. In that capacity, he would have access to children. The Director moved immediately to the conclusion of risk and to his conclusion that it was essential that Dr. Al-Naami withdraw from practice until the complaint investigation is completed and the "matter is adjudicated:" August 13, 2019 correspondence, CRP 22. In his December 9, 2019 correspondence, the Director stated that any attempt to return to practice is "incongruent with the CPSA mandate to protect the public," and stated that "this is especially sensitive given the allegation of criminal behaviour involving children and Dr. Al-Naami's position as a community-based pediatrician:" CRP 41. The Registrar was of the view that Dr. Al-Naami should remain withdrawn from practice "as the disclosure from the Crown (if as you have described) would not otherwise suggest to him that Dr. Al-Naami is appropriately safe to reenter practice:" CRP 47.

[186] The nature of the risk and the degree of risk were not explicitly discussed, perhaps on the grounds that these matters were obvious.

[187] Setting aside distinctions and gradations within the realm of the morally indefensible, the best approach to this aspect of the Director's analysis is to confirm that Dr. Al-Naami and Applicant's Counsel accepted that he posed a measure of risk to young patients arising from the information relating to the First Complaint. That acceptance was reflected by Dr. Al-Naami's Undertaking and by Dr. Al-Naami's efforts to return to practice only on conditions. Given Dr. Al-Naami's implicit concessions, the information can be taken as supporting a likely risk to

young patients of harm if Dr. Al-Naami were to have access to them without conditions or restrictions.

[188] What of the Second Complaint?

[189] The Director mentioned in the Second Complaint in his December 9, 2019 correspondence but did not draw any link between it and the First Complaint: CRP 41. The Second Complaint was not mentioned in the Director's report of the Registrar's views on February 26, 2020 or in the Director's March 10, 2020 correspondence.

[190] The College's Brief stated at para 100 that "[i]t was reasonable for the Complaints Director to conclude that the similarities between the two complaints elevates the concern of risk to the public" and referred to the Second Complaint as a factor distinguishing Dr. Al-Naami's circumstances from the circumstances in (e.g.) ***Kumar*** and ***Rohringer***. There are three responses to these points by counsel. First, the link was not made by the Director on the record. Second, besides both complaints relating to minors, the "similarities" (or differences, for that matter) between the circumstances of the First Complaint and the Second Complaint were not elaborated on the record. Third, the Second Complaint approaches a category of complaint identified in ***Fingerote*** at para 32:

> [32] …. However here, where the facts are contested, the conclusions are based on a person's perception of another's intention, and where there is a clinically appropriate explanation put forward with no evidence to the contrary in the record, the Committee needs to point to some evidence to support its inference or opinion that the doctor exposes or is likely to expose his patients to harm or injury.

In this instance, the opinion by an independent physician respecting the clinical appropriateness of Dr. Al-Naami's conduct has not yet been provided. If the Second Complaint stood on its own, as evidence of a single incident, there would be an absence of evidence of probable exposure of patients to harm: see ***Kumar*** at para 28; ***Fingerote*** at paras 5-7, 32. In my opinion, the Director did not make the unreasonable inference that the Second Complaint added any weight to the inference of risk supported by the information bearing on the First Complaint.

(e) Addressing the Risk

[191] The College was required to protect the public and young patients. Dr. Al-Naami represented risk. But did the Director consider or reconsider whether any interim restrictions or conditions were available that could abate, manage, or mitigate that risk, aside from withdrawal from practice?

[192] Again, I have found that the Director was not entitled to defer or refuse this assessment until the consent to access Crown disclosure was in hand. The question is whether, on the information the Director had, the Director reasonably considered or reconsidered whether alternatives to no practice at all were available. In ***Morzaria*** at para 62, Justice Nordheimer J (dissenting) confirmed that "the fact that the ICRC may be justified in making some form of interim order does not grant it *carte blanche* to make any order it wishes."

[193] The Director's response to Dr. Al-Naami's bid for reconsideration left Dr. Al-Naami effectively suspended. The courts have recognized that this measure is potentially devastating: ***Scott*** at para 50. The deployment of suspension as an interim measure should require extraordinary circumstances and be resorted to sparingly: ***Kumar*** at para 21 ("one of the most serious sanctions possible"); ***Scott*** at para 50; ***Huerto*** at para 22 ("Total suspension is a matter of last resort"). Dr. Al-Naami and Applicant's Counsel conveyed the financial and reputational damage the withdrawal was causing. The Director's response was that Dr. Al-Naami's "point [has] been made" but the "hurdle remains that of being able to have any contact with patients – full stop:" CRP 46.

[194] Reasonableness required that the Director's reasons show not only that he had considered the risk represented by Dr. Al-Naami but also the impact of his decision on Dr. Al-Naami's interests and on whether the decision not to permit practice on conditions was appropriate. The Divisional Court properly anticipated ***Vavilov*** in ***Aris v College of Teachers***, 2011 ONSC 1202 at para 27:

> 27 In our view, fairness requires that an individual who loses his qualification to practice his profession through a suspension by his professional college, even on an interim basis, is entitled to an explanation for that decision ….

The need for such an explanation extends to the decision opposing a return to practice in a reconsideration context.

[195] In my opinion, the Director's response to Dr. Al-Naami's return to practice request was deficient and unreasonable in two ways.

(i) No Meaningful Assessment of Proposed Practice Conditions

[196] First, the Director provided no meaningful evaluation of Dr. Al-Naami's proposed practice conditions.

[197] The Director stated that a proposed chaperone condition was "grossly insufficient as all of Dr. Al-Naami's patients are minors." The "as … minors" clause did not function as an explanation. Dr. Al-Naami is a pediatrician so it follows that his patients would be minors. This conclusory comment is disconcerting since the Undertaking itself provided in para 6 that "[a]ny return to practice … shall require a separate agreement confirming a practice permit condition of chaperone attendance with patients." On the effectiveness of the chaperone requirement, see ***Kumar*** at para 22.

[198] Respecting Alternative Undertaking 1, the Director stated that it failed to address "several significant issues," including

- the notification to be given to patients in advance of booking
- what information is to be provided to patients/guardians to provide informed consent as to whether they wish to be seen by Dr. Al-Naami.

The Director pointed to problems but did not identify the standards that needed to be met in Dr. Al-Naami's conditions.

[199] In my opinion, the College, through the Director, was responsible for identifying the types of conditions that might manage Dr. Al-Naami's risk or provide reasons why the type of conditions proposed or any reasonably feasible conditions could not manage his risk. On the assumption that Dr. Al-Naami's proposals were indeed inadequate or insufficient or lacking detail, Dr. Al-Naami required more guidance than that what was proposed was not good enough. Dr. Al-Naami was left to make proposals, followed by rejection without clear direction or explanation for why his proposals did not meet what was required to manage risk. Dr. Al-Naami was not given standards to aim at or was not told why, in his circumstances, a return to practice on conditions could not preserve patient safety. Dr. Al-Naami was left guessing. There is a rule of law, "fair notice," and limit to discretion aspect of this responsibility of the Director. The standards applied by the Director remained opaque, unarticulated.

(ii) Least Restrictive Measures

[200] ***Vavilov*** required the Director to respond to the central concerns raised by Applicant's Counsel. These included, in particular, the proposals for conditions for return to practice which I have just addressed, and the "least restrictive measures" principle.

[201] The "least restrictive measures" principle was a key element in Applicant's Counsel's submissions in favour of a return to practice on conditions. See, for example, CRP 56 (Applicant's Counsel's correspondence of March 12, 2020):

> … Dr. Al-Naami disagrees that the least restrictive means to ensure public safety is his complete removal from the practice of medicine, as suggested by the CPSA. Indeed, there are cases in which physicians with criminal charges, or even more, criminal convictions [,] have safely returned to practice with conditions on their practices. For example, Dr. Ramneek Kumar, who was charged with two counts of sexual interference and one count of sexual assault of a minor … continued to practice medicine safely in Alberta with a chaperone requirement on his licence.

[202] As indicated above, the "least restrictive measures" principle is supported by the cases: ***Kumar*** at para 24 ("what is made clear in these cases is that the regulatory body should be imposing the least restrictive means to protect the public interest in interim situations and unproven allegations"); ***Fingerote*** at para 24 and fn1; ***Scott*** at para 55; ***Rohringer*** at para 69; ***Morzaria***, Nordheimer J (dissenting) at para 46 ("an interim order, of the type made here, ought to be the least restrictive order possible to protect the public"). These cases, for the most part, concerned stays of conditions imposed during investigations, but the approach would apply, *a fortiori*, in pre-investigation circumstances as well. The complaints were founded on allegations that have not yet been established. Investigation had not even begun respecting the First Complaint. But Dr. Al-Naami was blocked outside s. 65 by his Undertaking, precluding resort to the stay application. The practical effect on his professional career of the Undertaking was the same as a suspension of a practice permit by "a person … designated by council … after a complaint is made." The purely formal distinction between a suspension imposed by an Undertaking and a suspension imposed by (e.g.) a "designated person" did not eliminate the issue of whether the Director should consider the appropriateness of practice on conditions. These cases and the principle, then, form part of the constraints on the Director's decision space that should have been respected.

[203] The circumstances of this case are not identical to any of the just-cited cases. Those cases, though, provide illustrations of circumstances in which return to practice on conditions was judicially countenanced: see ***Kumar*** (pediatrician charged with sexual assault and sexual interference (with a minor)); ***Morzaria*** (physician charged with sexual assault, sexual interference, two counts of invitation to sexual touching with a 13-year old patient); ***Rohringer*** (dentist charged with indecent exposure, two counts, involving teenaged girls).

[204] What the Director should have provided were reasons why Dr. Al-Naami's return to practice on conditions was not feasible, was not sufficiently safe for young patients. Instead, Dr. Al-Naami was met with a conclusion asserted without reasons that a return to practice was not possible and with the request for the consent to access Crown disclosure – information that I found the Director should not have insisted on at this stage of proceedings. The Director did not properly respond to Dr. Al-Naami's request for reconsideration of his Undertaking.

(f) Conclusion

[205] The Director's failures to assess the effectiveness of Dr. Al-Naami's proposed conditions, to describe the standards that conditions would have to meet, and to consider means of addressing the risk represented by Dr. Al-Naami falling short of full suspension made the Director's decisions about Dr. Al-Naami's request for reconsideration unreasonable. The Director's reasons were not responsive to the submissions of Applicant's Counsel, specifically the proposed practice conditions and the least restrictive measures principle. The Director's reasons did not reflect the case-law constraints on his decision space. The Director did not identify the facts that demonstrated the need for Dr. Al-Naami to remain withdrawn from practice, the most severe and damaging pre-hearing, pre-investigation disposition. The Director's reasons for his decisions did not satisfy the requirements for "justification, transparency, and intelligibility."

[206] I find that the Director failed to reconsider Dr. Al-Naami's Undertaking reasonably.

IX. Remedy

[207] ***Vavilov*** provided guidance respecting the usual remedial consequence on a finding that a decision-maker's decisions were unreasonable at paras 140-141:

> [140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.
>
> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it

> will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[208] Dr. Al-Naami sought an order permitting his to return to pediatric practice on specified conditions. I will not order that Dr. Al-Naami be permitted to return to practice. Determination of the appropriate practice conditions – or even of whether any there are any reasonably available practice conditions – goes beyond unaided judicial expertise. For example, in the course of submissions, there was discussion about who might qualify as a chaperone or "practice monitor," since a person without medical training might not know what types of examinations were medically appropriate. If a person with medical training were required to serve as a chaperone, the issue of compensation would arise. Because this was an application for judicial review, I did not have submissions or evidence that dealt comprehensively with practice conditions.

[209] I declare that Dr. Al-Naami does not have, at the present state of proceedings, any obligation to the College to provide his consent to the production of Crown disclosure information to the College. I declare that the College does not have, at the present state of proceedings, any entitlement to receive information about Crown disclosure relating to Dr. Al-Naami. By "present state of proceedings" I mean the state of proceedings now in place between Dr. Al-Naami and the College, with Dr. Al-Naami having provided an Undertaking and the College having stayed or suspended the investigation relating to the First Complaint – that is, a pre-investigation state of proceedings.

[210] The Director unreasonably insisted on provision of the consent to provide Crown disclosure information to the College. On the record, the Director failed to consider the possibility of Dr. Al-Naami's return to practice on conditions at all or properly, failed to respond to the issues raised by Applicant's Counsel, and failed to consider the "least restrictive measures" principle and relevant case law. These omissions rendered his reconsideration of the Undertaking unreasonable.

[211] The Director's reconsideration of Dr. Al-Naami's undertaking must therefore be quashed.

[212] I order the College to reconsider whether, on the information currently available to the College, Dr. Al-Naami could be permitted to return to practice on conditions that would appropriately protect young patients. I am *not* directing that Dr. Al-Naami *be* permitted to return to practice. Rather, I am directing that the College consider whether there *are* any conditions that could be imposed on Dr. Al-Naami's return to practice that would reasonably protect young patients from becoming victims of criminal offences. If the College considers that such conditions are available, I direct the College to consider whether Dr. Al-Naami's Undertaking may be suitably amended to permit his return to practice. I direct the College to provide an explanation to Dr. Al-Naami as to why his Undertaking may or may not be amended to permit his return to practice on conditions.

X. Costs

[213] Dr. Al-Naami was not successful on the issues of the admissibility of his affidavit, the standard of review, or aspects of the remedy sought. Dr. Al-Naami was successful on the main issues in the litigation.

[214] The parties, though, did not speak to costs before me. If an agreement on costs cannot be reached, the parties may provide written submissions on costs by August 31, 2021 and I will respond in writing.

Heard on the 23rd day of April, 2021 at the City of Edmonton, Alberta.
Dated at the City of Edmonton, Alberta this 16th day of July, 2021.

W.N. Renke
J.C.Q.B.A.

Appearances:

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