

KEEPING CURRENT

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Balancing Freedom of Expression with the Standards of a Regulated Profession (*Peterson v. College of Psychologists of Ontario*)

By Isabel Yoo

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Isabel Yoo
Associate
416.865.6655
iyoo@grllp.com

In its highly anticipated [decision](#), the Divisional Court has dismissed Dr. Jordan Peterson's application for judicial review of the November 2022 decision of the Inquiries, Complaints and Reports Committee ("the ICRC") of the College of Psychologists of Ontario.

In November of 2022, the ICRC released its decision ordering Peterson to undergo a coaching program (called a specified continuing education or remedial program or "SCERP") with individuals who would assist him in reviewing, reflecting on, and ameliorating his professionalism in public statements. A failure to comply with the program could result in an allegation of professional misconduct.

The decision came after the College received complaints that some of his public statements on Twitter and social media were perceived to be transphobic, racist, sexist, and overall controversial. As a member of the College, Peterson was bound by the College's *Standard of Professional Conduct* and the *Canadian Code of Ethics for Psychologists*. The ICRC expressed concern that

his statements were not meeting the standards and ethical expectations of a regulated health professional. These statements could undermine public trust in the profession of psychology and trust in the College's ability to regulate the profession in the public interest.

This matter boiled down to the balancing act between the competing interests of the College to regulate its members and maintain standards in the profession and Peterson's freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms*.

Peterson brought an application for judicial review on the grounds that the decision was unreasonable because:

- 1) The ICRC failed to conduct a balancing of his freedom of expression and the statutory objectives of the College as set out by the Supreme Court of Canada in [Doré v. Barreau du Québec, 2012 SCC 12](#); and
- 2) The decision failed to meet the standard of "justification, transparency and intelligibility"

required by the Supreme Court's decision of [*Canada \(Minister of Citizenship and Immigration\) v. Vavilov*, 2019 SCC 65](#).

The Divisional Court was required to review the ICRC's decision on a standard of reasonableness. In other words, the Divisional Court had to determine whether the decision made by the ICRC fell within a range of "possible, acceptable outcomes".

Balancing under the Doré Framework

The decision of *Doré* applies to the balancing of an individual's *Charter* rights and values with statutory objectives within a particular administrative context. An administrative decision-maker must first identify and consider the statutory objectives it is seeking to uphold, and then consider how the *Charter* value in question could be protected in light of these statutory objectives. On an application for judicial review, the role of the Court is to ensure that the administrative decision-maker proportionately balanced the impact on the *Charter* right with the statutory objectives and affected the *Charter* right as little as reasonably possible. A decision that has a disproportionate impact on *Charter* rights is not reasonable.

Here, the statutory objectives were the College's *Code of Ethics and Standards of Professional Conduct*, which required "respect for the dignity of persons", "non-discrimination", "equal moral consideration", and appreciation for the innate worth of human beings. The *Code* required that members not engage publicly in degrading comments about others and urged members to use language that conveyed respect for the dignity of persons and peoples as much as possible in all communication. The ICRC found that these principles were not met by Peterson.

In its decision, the ICRC acknowledged that Peterson's *Charter* right for freedom of expression was unrelated to his practice of

psychology and that he enjoyed a constitutional right to express himself. Peterson argued this was insufficient consideration of his *Charter* right under the *Doré* framework. The Divisional Court disagreed. It held that the ICRC continually acknowledged his *Charter* right while advising him of his duty to conduct himself in a way that was consistent with his professional obligations. The Court held that not providing a detailed discussion of the value of the freedom of expression does not mean it was not considered. By directing a SCERP, the ICRC struck a proportionate and reasonable balance between his *Charter* rights and the ICRC's objective of maintaining professional standards.

Justification, Transparency, and Intelligibility under Vavilov

Peterson also argued that the reasons of the ICRC did not meet the standard of reasoning as set out in *Vavilov*. The decision of *Vavilov* defined a "reasonable decision" as one that was based on an "internally coherent and rational chain of analysis", that was "justified in relation to the facts and the law" (*Vavilov*, at paras. 91-92). The principle of justification required that a decision-maker reflect the stakes of the decision, particularly where a decision threatens an individual's life, liberty, dignity, or livelihood.

The Divisional Court reviewed the ICRC's decision in the context of its role as a screening committee, noting that the stakes before the ICRC were not as high as they are before discipline panels, and also noting that "administrative justice" does not always look like "judicial justice". The reasons of the ICRC were not to be assessed on a standard of perfection. Nevertheless, the reasons were transparent, intelligible, justifiable and reasonable. The ICRC carefully considered its mandate, the statements made by Peterson, and the history and context of the matter before reaching its decision.

As such, the application for judicial review was dismissed.

Conclusion

One of Peterson's complaints was that the controversial comments were not made in his capacity as a clinical psychologist, but rather made "off duty". Thus, the College was operating at the "margins of its mandate" and attempting to limit his speech and discipline him for his political views. He argued his conduct should only be questioned if it affected his ability to practice as a psychologist. In other words, he argued that his speech was being censored.

The Divisional Court, however, rejected this argument. Peterson represented himself as a clinical psychologist when expressing these views. It added credibility to his statements because, as a regulated health professional, he held a position of trust, confidence and responsibility. He could not both speak as a member of a regulated profession without also taking responsibility for the risk of harm that flowed from him speaking in that capacity.

The courts have recognized that members of regulated professions can harm public trust and confidence through their statements and conduct. While every individual enjoys the freedom of expression, members of regulated professions are also held to particular professional standards and obligations by which they must abide. This is an important message for individuals in regulated professions to keep in mind.

Another key takeaway of this decision is that the Divisional Court held that the College's order is not disciplinary and does not prevent Dr. Peterson's ability to express himself. His *Charter* rights were minimally, if at all, impaired. He is not prevented from continuing to express himself on issues of interest to him and his audiences on social media. The ICRC's decision focused on his use of degrading or demeaning language and focused on remediating or preventing such comments in the future. Whether he completes the coaching and refrains such language remains to be seen.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [Isabel Yoo](mailto:iyoo@grllp.com), at 416.865.6655 or iyoo@grllp.com.

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