CITATION: ASP v. Health Professions Appeal and Review Board 2024 ONSC 4386
DIVISIONAL COURT FILE NO.: 483/23
DATE: 20240807

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Lococo and Leiper JJ.

BETWEEN:	
ASP and SD Applicants	*Sarah Beamish and Brenna Homeniuk,* lawyers for the Appellant
– **and** –	
HEALTH PROFESSIONS APPEAL AND REVIEW BOARD, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, and NICOLE NITTI Respondents	*David P. Jacobs and John Eglinski-Brown,* lawyers for the Respondent Board
– **and** –	*Ruth Ainsworth and Kathleen Farrell,* lawyers for the Respondent CPSO
JUSTICE FOR CHILDREN AND YOUTH Intervener	*Kara Smith and Keary Grace,* lawyers for the Respondent Dr. N. Nitti *Katherine Long, Mary Birdsell, Allison P. Williams,* lawyers for the Intervener, Justice for Children and Youth
	HEARD at Toronto: July 22, 2024

These proceedings are subject to an order of this Court that no person shall publish or broadcast the names or any information that would disclose the identity of the Applicants or the non-party, "J." described in these Reasons for Decision. A copy of the Court's order is appended to these reasons.

REASONS FOR DECISION

Leiper, J.

Overview

[1] The Applicants, who are the parents of an Indigenous girl, J., (the "Applicants" or "J.'s parents") seek judicial review of the July 21, 2023 decision of the Health Professions Appeal Review Board (the "Board.") The Board upheld a decision of the Inquiries, Complaints, and Reports Committee ("ICRC") of the College of Physicians and Surgeons of Ontario ("the CPSO" or "the College"). J.'s parents complained to the CPSO about the conduct of the emergency department physician, the Respondent, Dr. Nitti who examined J. for a complaint of painful urination. J. was seven years of age at the time of the clinical encounter.

[2] The ICRC decided that remedial measures, rather than a referral to discipline, was appropriate. J.'s parents sought a review before the Board, which found that the ICRC investigation was inadequate.

[3] The ICRC re-investigated and issued additional advice to Dr. Nitti based on that reinvestigation.

[4] The Applicants brought the second decision of the ICRC to the Board for review. The Board upheld the ICRC decision. The Board's second decision is the subject of this application for judicial review.

[5] On the judicial review application, J.'s parents submit that the Board erred in its analysis of their complaint that the physician conducted a non-consensual genital examination of J., despite her express and clear refusal of the examination.

[6] The intervener Justice for Children and Youth supports this position, arguing that the Board and the ICRC failed to address the issue of lawful consent to medical treatment as provided by the *Health Care Consent Act 1996*, SO 1996, c 2, Sched. A (the "*HCCA*") The intervener made additional submissions on the protections and rights that arise from Canada's obligations as a signatory to the United Nations *Convention on the Rights of the Child: United Nations, Can. T.S. 1992 No. 3*, and pursuant to the values in the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), c. 11.

[7] The Respondents CPSO and Dr. Nitti submit that as a screening committee, the ICRC carried out its function and the Board was reasonable in upholding the second decision. They submit that the Board and the ICRC reasons, read "holistically", were responsive to the consent issues raised by the Applicants.

[8] In the alternative, the Respondents submit that if the Court finds that the Board's reasons are not reasonable, it should decline to return the complaint for a third time for consideration.

[9] The respondent Board provided detailed submissions on the standard of review, and the basis for applying a reasonableness standard.

[10] For the reasons that follow, I would find that the Board's decision was unreasonable in failing to consider the ICRC's unresponsive treatment of the issue of consent raised by the Applicants' submissions. However, considering the remedial measures imposed by two differently constituted panels of the ICRC, the self-study and reflection carried out by Dr. Nitti including on issues of consent, and considering the positions of all parties that this is a disposition that is available, I would find it is not necessary nor in the public interest to remit the matter to the Board for reconsideration.

The Issue on the Application

[11] The sole issue for determination is whether the Board's decision was unreasonable by failing to respond adequately to the Applicants' concerns with how the ICRC treated the issue of consent.

Standard of Review

[12] The parties agree that the presumptive standard of review to decisions of the Board is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para 25.

[13] The Applicants made supplementary submissions that a standard of correctness ought to apply to the application of the *HCCA.* They analogize the consent issue raised on judicial review to the treatment of the legal issue of consent in appeals from decisions of the Consent and Capacity Board under the *HCCA.*

[14] I disagree. The legislature has not included an appeal procedure from a Board review of complaints made to the CPSO. The Supreme Court wrote in *Vavilov* that*:* "Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference": *Vavilov* at para. 24

[15] There is no reason to displace the presumptive standard of reasonableness to the decision of the Board that is the subject of review. I have applied that standard in this analysis.

Background Facts: Treatment of the Complaint by the CPSO and the Board

The Initial Complaint to the CPSO

[16] On June 4, 2018, the Applicants complained about Dr. Nitti's conduct and actions in providing care to their daughter on May 26, 2018. Those concerns were that the doctor:

1) did not acknowledge J.'s parents or introduce herself;

2) repeatedly questioned J. even after getting a straight answer;

3) conducted screening for issues of domestic violence and sexual abuse in a high traffic area;

4) ignored the parents' three requests to check J.'s urine for a urinary tract infection (UTI) before deciding on a vaginal examination;

5) did not respect J.'s dignity and failed to provide her with a gown or blanket before asking her to remove her clothing;

6) shut the door on J.'s father and raised her voice at both parents in front of J.;

7) chose the most intrusive examination first, that is to examine J.'s vagina, before checking urine for UTI;

8) ignored J.'s repeated refusal of consent by saying "no" (7 to 10 times) to a vaginal examination;

9) was not honest with J.'s mother as to the reason for the vaginal examination;

10) led the parents to believe that they were being racially profiled by screening in for domestic violence and sexual abuse early in the meeting, and;

11) conducted a vaginal examination without consent and while the patient was clearly giving verbal objections, therefore, sexually assaulting J. based on racial profiling.

[17] Dr. Nitti provided a written response to the complaint in which she summarized her professional background and the care and treatment she had provided to J. as well as her rationale for conducting a genital examination.

[18] Dr. Nitti stated that she believed she had "implied consent" to conduct the examination because J.'s mother had encouraged J. to permit the doctor to examine her. In her response, Dr. Nitti stated that she had learned that she should confirm and reconfirm that "I have express consent of the patient and if applicable, their guardian when conducting a physical exam of the genital area."

[19] J.'s parents provided further extensive comments on Dr. Nitti's response.

The First ICRC Decision (January 9, 2019)

[20] On January 9, 2019 the ICRC issued a decision in which it stated its expectations that physicians communicate sensitively with all patients and their families, including those from a culture other than the physician's. The ICRC accepted a remedial agreement from Dr. Nitti in which she acknowledged her need for education in reviewing guidelines for a paediatric genital examination, which would include gowning and to review the treatment of UTI in children, including necessary urine culture screening.

[21] Dr. Nitti completed a self-study report, dated April 14, 2019, which reflected on her practice around paediatric genital examinations and the changes she has made to her practice following the complaint. Dr. Nitti's self-study report was reviewed by Dr. J. Keith Hay, a physician and CPSO Medical Advisor. Dr. Hay opined that Dr. Nitti's essay was "scholarly, comprehensive

and reflective" and that she had satisfactorily completed the requirements of the remedial agreement. The CPSO closed their file.

[22] Dr. Nitti recognized in her report that: "[J] had every right to refuse", and that had J. "been an adult, I would have been more respectful of her wishes and taken a different approach." She acknowledged J.'s "hesitancy" to being examined, the fact that she was "rushed and impatient." and acknowledged her mistake. Dr. Nitti wrote that "I acknowledge my mistake in this and will use this experience to remember that children have as much of a right to consent as an adult."

First Request for Review (April 11, 2019)

[23] On April 11, 2019, J.'s parents asked the Board to review the ICRC's decision pursuant to s. 29(1) of the *Health Professions Procedural Code,* Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

[24] On the Board's first review, J.'s parents raised the issue of consent. They related the issue to the allegations of racial stereotyping and how their fears of unsubstantiated involvement of child protection or law enforcement authorities played a role in the encounter. The Board characterized those issues as:

> At the Review, the Applicants' Counsel contended that the thrust of the Applicants' complaint was that their child was subjected to a traumatic forced genital examination by the Respondent, at least in part because of the Respondent's unsubstantiated suspicions that the child was the victim of sexual abuse. The parents believe that racial stereotyping about Indigenous people was a factor in these suspicions. Counsel submitted that neither the child nor her parents consented to this genital examination, but the Applicants felt unable to assertively resist it because of their fear that the doctor would call Children's Aid or the police, and that their family would thereby be pulled into systems that are notoriously discriminatory against and catastrophically harmful to Indigenous people.

First Board Decision (September 18, 2020)

[25] On September 18, 2020, the Board returned the matter to the ICRC to reinvestigate.

[26] In its reasons, the Board concluded that the ICRC had mischaracterized some of the allegations of racial/cultural bias as "miscommunication" and failed to demonstrate that it was conscious of systemic bias in the health care sector, in referring only to the presence of systemic bias in the foster care system and with respect to incarceration.

[27] The Board described the "essence and substance" of the complaint as one of racial bias which permeated the entire episode, and which manifested itself in twelve separate instances of alleged misconduct. The Board wrote:

> Where the complaint is founded on allegations of racial/cultural bias, the Committee has an obligation to assess a member's conduct and actions through that lens and to obtain such further information as may be necessary to assist it in understanding how

> cultural/racial bias may affect a physician's conduct and actions, whether conscious or unconscious.

[28] The Board required the ICRC to "recognize the potential for racial/cultural bias at the outset and to analyze the Applicants' allegations with this lens; and if it considers it necessary, to obtain expert advice to assist it in understanding how cultural/racial bias may affect a physician's conduct and actions, whether conscious or unconscious."

[29] Because the Board sent back the complaint for reinvestigation, it did not address the reasonableness of the ICRC's first investigation.

Second ICRC decision (November 4, 2021)

[30] The ICRC re-investigated the complaint as directed by the Board. J.'s parents made additional submissions. In their detailed submissions of June 11, 2021, J.'s parents submitted that one of the "core issues" of their complaint, was their allegation that Dr. Nitti conducted a genital examination on J. without consent and using force, coercion, and misrepresentation. They submitted that Dr. Nitti's conduct violated the *HCCA*.

[31] J. submitted a letter to the ICRC describing the impact of the encounter. J. described her experience of the examination as an intimate violation of her body. She reported that she had suffered nightmares, emotional disturbances, anger, and anxiety about receiving medical treatment for at least two years following the event.

[32] The ICRC noted Dr. Nitti's letter dated November 10, 2020, which described her self-reflection on her interactions with J. and her mother. Dr. Nitti acknowledged that she had "underestimated the impact of the long-standing mistreatment of Indigenous people had on how they experienced my care. I was not sensitive to the cues being given to me that they were uncomfortable with my approach that should have led me to slow down and consider their perspective…I acknowledge that I could have gone about the encounter in a better way that would have been more comfortable for [J.] and her family."

[33] The ICRC decision grouped the allegation of lack of consent with eight other allegations of misconduct and considered these in twelve paragraphs of its decision. The ICRC wrote:

> - As previously noted by the Committee, the level of difficulty of the Patient's intimate examination and the information the Respondent conveyed to the Patient's mother about the rationale for it, is a matter of disagreement between the parties. The Respondent has recognized that given the circumstances and the overall context of poor experiences within the health care sector by Indigenous peoples, a more gentle and slower approach, with more awareness of the parents' engagement and any questions or issues they might have had at the time, could have helped alleviate possible fears or concerns in this case. The Committee notes that sometimes physicians may need to give consideration to abandoning an examination depending on the comfort level of the patient/family.

- Therefore, while the Committee accepts that the Respondent had clinical reasons she felt were indications for the examination in question, her approach could have been improved through a variety of means, including: a more careful preparation of the Patient (including gowning); a more thorough discussion with the family, to ensure a full understanding and agreement around what was happening and why, as it is clear from their concerns that they felt the examination was performed without adequate consent; and perhaps most importantly, greater acknowledgement of the cultural backdrop of the Indigenous experience in the health care system and how this might have been informing the experiences of this family.

- The possibility of unconscious bias cannot be ruled out in the Respondent's decision-making as well as the interactions between the parties on the day in question, leading to the family's serious concerns about what took place. We wish to acknowledge, as well, the Committee's own bias, based on its review of the paper record only. In short, we recognize that the lens of anti-Indigenous racism applies to the entirety of this matter, as it is within this wider context where the issues around communications and clinical decision making took place.

[34] The ICRC took into account Dr. Nitti's 20-year period of registration as a physician without prior complaint, her acknowledgement of the CPSO's concerns, her participation in remediation and her self-study on genital examinations of children.

[35] The ICRC did not reference the *HCCA* in its reasons. It did not recognize J.'s presumed capacity to consent. Further, despite submissions on the cultural context and the history of Indigenous people with child welfare authorities and forcible separation from their children, the ICRC did not acknowledge the possibility of coerced cooperation from J.'s mother, given that the genital examination occurred after Dr. Nitti had conducted sexual abuse screening questions in the hospital hallway.

[36] As a result of the reinvestigation, the ICRC issued further advice to Dr. Nitti as follows:

> i. [T]o approach clinical encounters with an awareness of the impact of unconscious bias and to apply a trauma-informed lens that recognizes the deep and wide-ranging experience and effect of anti-Indigenous racism within the health care system;
>
> ii. [T]o move a conversation with a patient's family to a more secure and private area once a discussion turns to concerns about possible abuse, recognizing this is particularly important for Indigenous families given the historical and ongoing inter-generational trauma in Indigenous communities related to separation of children from their families; and

> iii. [T]o always be aware of and follow the guidelines for paediatric genital examination, which would include proper gowning, and the treatment of urinary tract infections in children, including the need for urine culture screening.

Second Board Review (July 21, 2023)

[37] On February 11, 2022, the Applicants requested that the Board review the ICRC's second decision. The Board held a hearing on February 22, 2023 and released reasons for its decision upholding the ICRC's second decision on July 21, 2023.

[38] The Board understood that the question before it on this review was whether the ICRC's decision regarding consent was unreasonable.

[39] The Board found that the ICRC had addressed each of the complaints in detail. For each concern, it found that the ICRC had "described the Applicants' concern, summarized the information it considered and provided coherent reasons for its conclusions."

[40] On the issue of consent, the Board noted that counsel to J.'s parents had alleged that Dr. Nitti had failed to comply with the *HCCA*, and their position that conducting a genital examination on a child without consent amounts to professional misconduct." The Board cited Dr. Nitti's various responses on consent, which can be summarized as:

> -Dr. Nitti did not specifically ask J. for consent;
>
> -She felt that consent was implied because J.'s mother encouraged her to allow the examination and J.'s mother did not "express that she would prefer I not examine her daughter";
>
> -When J. resisted the examination, J.'s mother assisted the doctor;
>
> -The Doctor placed her hands on J.'s inner thighs to do the examination;
>
> -Dr. Nitti's practice was to examine the genital area of children with painful urination to check for irritation and signs of sexual abuse, thus she believed the examination was medically necessary.

[41] The Board found that the ICRC reasonably addressed the issue of consent in the paragraphs cited above in these reasons, at paragraph 27. It cited the portion of the ICRC's reasons which noted that it had "carefully considered this matter through the lens of discrimination". The ICRC accepted that Dr. Nitti's decision to perform the physical examination was clinically indicated and reasonable and was supported by the Family Practice Panel of the ICRC.

[42] The Board observed that while J.'s parents stated their belief that Dr. Nitti did not have consent to perform the examination, she had stated that she believed consent was implied by J.'s mother's cooperation. The Board noted the ICRC will only conduct a limited weighting of facts before it. Thus, the Board found that J.'s parents' concerns were considered through the lens of racial/cultural bias and determined to issue advice to Dr. Nitti. It found that the ICRC decision "demonstrates a coherent and rational connection between the relevant facts, the outcome and the

reasoning that led to that outcome." Accordingly, the Board found "as a whole" the decision of the ICRC was "transparent, intelligible and justified."

Legislative Framework

[43] Regulated health professionals, including physicians, are governed by the *Regulated Health Professions Act, 1991,* S.O. 1991, c. 18 (the "*RHPA"*).

[44] The College is mandated to serve and protect the public interest. The College is responsible for the regulation of the medical profession in Ontario. It does so pursuant to the provisions of the *RHPA*, the *Health Professions Procedural Code* (the "*Code*"*)*, the *Medicine Act, 1991*, S.O. 1991, c. 30, the regulations made under those Acts and the by-laws of the College.

[45] The College appoints members to the ICRC pursuant to section 10 of the *Code*. The ICRC is responsible for considering complaints from the public and determining the appropriate action to be taken in respect of each of those complaints.

[46] The ICRC's duties and powers are set out in ss. 25-28, 36, 58 and additional sections of the *Code*.

[47] Section 26(1) of the *Code* describes what the ICRC may do after investigating a complaint as follows:

> 26 (1) A panel, after investigating a complaint or considering a report, considering the submissions of the member and making reasonable efforts to consider all records and documents it considers relevant to the complaint or the report, may do any one or more of the following:
>
> 1. Refer a specified allegation of the member's professional misconduct or incompetence to the Discipline Committee if the allegation is related to the complaint or the report.
>
> 2. Refer the member to a panel of the Inquiries, Complaints and Reports Committee under section 58 for incapacity proceedings.
>
> 3. Require the member to appear before a panel of the Inquiries, Complaints and Reports Committee to be cautioned.
>
> 4. Take action it considers appropriate that is not inconsistent with the [*Health Professions Act,*] this *Code,* the regulations or by-laws.

[48] The ICRC is also mandated to consider any available prior decisions involving the member of the College: s. 26(2) *Code*.

[49] This Court has accorded substantial deference to the expertise of the ICRC acting in its screening capacity and in deciding the scope of education or remediation in response to complaints.

see: *Maini v. College of Physicians and Surgeons of Ontario,* 2022 ONSC 3326, (Div. Ct.) at para. 59; *Wilder v. Ng,* 2022 ONSC 4876,(Div. Ct.) at para. 81.

Health Professions Appeal and Review Board

[50] Sections 1 and 2 of the *Ministry of Health and Long-Term Care Appeal and Review Boards Act, 1998*, S.O. 1998, c. 18, Sched. H (the "*Act*"), establish the Board as an administrative tribunal and quasi-judicial adjudicative tribunal that conducts reviews and performs duties assigned to it under the *RHPA*.

[51] The Board is composed of members appointed by the Lieutenant Governor in Council on the recommendation of the Minister of Health and Long-Term Care: *Act*, ss. 3(1).

[52] The Board oversees the colleges of self-governing health professions under specifically identified health profession statutes. The health professions overseen by the Board include Medicine, Psychology, Nursing and Dentistry.

[53] The Board has jurisdiction to review complaint decisions of an Inquiries, Complaints and Reports Committee of a college of a regulated health profession: *Code*, s. 29(2).

[54] After a panel of an ICRC renders a decision in a complaint, the complainant or the member of the regulated health profession who was the subject of the complaint may seek review by the Board.

[55] Following a review of a decision of the ICRC, the Board may confirm all or part of the decision or make recommendations which it considers appropriate. It may require the ICRC to do anything it may do under the *RHPA* or the *Code*, except to request the Registrar to investigate: *Code*, s. 35(1).

[56] This leads to the question on judicial review.

Analysis of the Issue: Was the Board's decision unreasonable in upholding the ICRC's treatment of the issue of consent?

[57] The ICRC, and the Board on review, received detailed submissions on the consent issues posed by the clinical encounter.

[58] Section 10 of the *HCCA* requires that physicians obtain informed consent to treatment from a capable patient. Even where a treatment is clinically indicated, such treatment requires voluntary informed consent in accordance with the *HCCA.*

[59] Section 11(1) of the *HCCA* provides the necessary elements of consent to treatment:

1. The consent must relate to the treatment.

2. The consent must be informed.

3. The consent must be given voluntarily.

4. The consent must not be obtained through misrepresentation or fraud.

[60] A physician is not entitled to rely on the consent of a substitute decision maker without first satisfying themselves that the person is incapable with respect to treatment: *HCCA*, ss 4(2), 10(1)(b). The *HCCA* does not define capacity based on age: a child may be capable of consenting to treatment and before accepting substitute consent relative to a child, the physician must first satisfy themselves that the child is incapable of giving consent: *HCCA,* ss. 4(1),(2),(3) and 10(1)(b).

[61] The Board has not shied away from returning unreasonable findings relative to the law of consent by the ICRC. For example, In *EGJW v. MGC*, 2014 CanLII 49888 (ON HPARB), the Board found the ICRC issued an unreasonable decision by focussing on whether the physician's actions were clinically appropriate and consistent with hospital policies rather than on the question of whether the physician had consent. The Board stated in its reasons, at paras 42-43:

> 42. It is fundamental that law takes precedence over policy in the event of any inconsistency. However, in taking the view that the Respondents acted in compliance with SHSC policy and arguably with College policy, the Committee gave scant consideration to the requirements of the HCCA and the consent to treatment requirements it establishes.
>
> 43. Although the Board gives respectful consideration to the views of the Committee, it is incumbent on the Board to ensure that the Committee's decisions are made in accordance with any relevant legal requirements.

[62] The Board emphasized that the complaint's importance transcended the conduct of the Respondents. It wrote, "it is incumbent on the College to ensure that doctors understand their legal obligations under the *HCCA.* The public must have confidence that [decision making] processes required by Ontario law are understood and respected.": *E.G.J.W.*, at para. 59.

[63] To similar effect, in *W.M. v Z.M.M.*, 2017 CanLII 43879 (Ont. H.P.A.R.B.), the Board considered an ICRC decision that concluded the physician should have conducted a physical examination against a capable patient's wishes. The Board determined that this decision was unreasonable because it contradicted the provisions of the *HCCA*: see *W.M.*, at para. 39. The Board cited the report of an expert opinion tendered by Applicant counsel which stated, "It would only be the standard of care to examine, investigate and treat involuntarily, if a patient is first deemed to be incompetent by the Emergency Physician. To do otherwise may constitute assault. Physicians cannot examine competent patients who do not wish to be examined" (emphasis added): *W.M.*, at para. 44.

[64] The respondent, Dr. Nitti submitted that the Board reasonably upheld the ICRC's decision on the issue of consent. Dr. Nitti submits that the reasons of the ICRC, read holistically and contextually" show that its members turned their minds to the issues of consent. Further, the Board accurately described the perspectives of the parties and the submissions that were before the ICRC. Dr. Nitti submits that the Board's reasons did not need to cite every statutory provision in detail to be reasonable, given its function on review.

[65] This position was echoed by the College, who submitted that while the ICRC's reasons may not have been "perfect" they are not required to meet such a standard, especially where the duties owed to a complainant are attenuated.

[66] The Board found the ICRC addressed the issue of consent in its reasons of November 4, 2021. In its reasons, at para. 44, the Board noted that the ICRC had before it the following submissions from counsel for Dr. Nitti (referred to as the Respondent):

> At no point did [AD-S] object to [the Respondent]'s examination of [the patient]. To the contrary, she supported [the Respondent]'s request and assisted by taking down [the patient's] pants.
>
> When [the patient] continued to resist, [the Respondent] suggested that [AD-S] examine [the patient]'s perineum instead. [AD-S] continued to encourage [the patient] to cooperate.
>
> [The Respondent] did not touch [the patient]'s vulva or introitus; her hands were placed on her inner thighs.
>
> It is [the Respondent]'s practice to examine the genital area of children with complaints of painful urination to look for both irritation and signs of sexual abuse. In the circumstances, the examination was necessary and medically indicated.

[67] The Board, at para. 45 continued:

> 45. With respect to the examination, the Committee wrote:
>
> While, as discussed above, the Committee has carefully considered this matter through the lens of discrimination, we do accept that the Respondent's decision to perform a physical examination in this situation was clinically indicated and reasonable: an external/genital examination was not out of the range of what could be considered by a physician as providing potentially useful information in the clinical circumstance of a child with ongoing abdominal pain and painful urination.
>
> … Therefore, while the Committee accepts that the Respondent had clinical reasons she felt were indications for the examination in question, her approach could have been improved through a variety of means, including: a more careful preparation of the patient (including gowning); a more thorough discussion with the family, to ensure a full understanding and agreement around what was happening and why, as it is clear from their concerns that they felt the examination was performed without adequate consent; and perhaps most importantly, greater acknowledgement of the cultural backdrop of the Indigenous experience in the health care system and how this might have been informing the experiences of this family.
>
> The possibility of unconscious bias cannot be ruled out in the Respondent's decision-making as well as the interactions between the parties on the day in question, leading to the family's serious concerns about what took place. We wish to acknowledge, as well, the

> Committee's own bias, based on its review of the paper record only. In short, we recognize that the lens of anti-Indigenous racism applies to the entirety of this matter, as it is within this wider context where the issues around communications and clinical decision making took place.

[68] The Board found that these portions from the ICRC's decision adequately addressed J.'s parents' concerns about consent. It wrote:

> 46. The Board finds that the Committee addressed the issues surrounding the examination and consent in the above-noted paragraphs. The Family Practice Panel of the Committee, with three physicians, applied its knowledge and expertise in the standards of the profession to "accept that the Respondent's decision to perform a physical examination in this situation was clinically indicated and reasonable."
>
> 47. The Committee however felt that the Respondent's approach could have been improved including "a more thorough discussion with the family, to ensure a full understanding and agreement around what was happening and why, as it is clear from their concerns that they felt the examination was performed without adequate consent."

[69] There are three problems with the Board's analysis of the ICRC's treatment of the issue of consent. These can be summarized as

1. Unreasonably associating clinical indications for a treatment with the presence of consent,

2. Finding that an assertion of "implied consent" is a disputed fact which absolves the ICRC of considering consent issues in these circumstances, and

3. Finding that the ICRC's reasons had responded to the issue of consent.

[70] I will discuss each of these sub-issues in turn.

Clinical Indication that Treatment is Appropriate is not the same as Consent

[71] The Board upheld the ICRC decision, in part, based on the evidence before it that the examination was "clinically indicated." Given that the issue before the Board was the reasonableness of the ICRC decision vis-à-vis consent, a finding of clinical indication is simply not responsive to those concerns.

[72] The corollary to such reasoning would be that patients may only withdraw consent for treatment that is not clinically indicated. Clearly, that is not the law of consent under the *HCCA.*

[73] Whether or not a treatment is clinically indicated may play a role in the ICRC's determination of the appropriate remedial measures in a given case. However, this finding does not respond to issues of consent. Thus, to the extent that the Board upheld the ICRC's findings on consent based on the examination being clinically indicated, this is not a reasonable or rational finding.

An assertion of "implied consent" is not a disputed fact which absolves the ICRC of considering consent issues in these circumstances

[74] In its reasons, the Board cited Dr. Nitti's response to the complaint which referred to her belief that she had "implied consent" to carry out the physical examination because J.'s mother encouraged her to cooperate. The Board wrote that "the Applicants contend that the Respondent did not have consent to perform the examination, while the Respondent felt that consent was implied by [J.'s mother's] cooperation in the examination." It went on to discuss the limited role of the ICRC in weighing facts. The Board thus suggested that because there was a dispute as to whether there was consent, the ICRC was not in a position to resolve this factual dispute and did not need to go further in consider the detailed submissions about lack of consent.

[75] I disagree. While there were disputed facts about certain details of the clinical encounter, there was no dispute over J.'s clear expression, verbally and physically, that she did not consent to the examination. Dr. Nitti did not note or rely on a finding of J.'s lack of capacity to consent. Her submission that she believed she had "implied consent" was a rationale, but it was not a "fact" in dispute. J.'s mother's encouragement and assistance during the examination was also not disputed, but it did not and could not, amount to a legal displacement of J.'s rights because Dr. Nitti did not assess J.'s capacity nor rely on substituted consent. Further, J.'s mother's actions were informed by the clearly expressed fear by J.'s mother, of other potential serious jeopardy to the family by involvement of other authorities. All of this was in the written submissions to the ICRC. These were the unchallenged facts that put the issue of consent before the ICRC.

[76] Further, in her self-study report completed after the first ICRC review, Dr. Nitti recognized that "[J] had every right to refuse," and had J. "been an adult, I would have been more respectful of her wishes and taken a different approach." Dr. Nitti acknowledged "my mistake in this and will use this experience to remember that children have as much of a right to consent as an adult." This is a crucial statement.

[77] In *Guertin v. Long*, 2023 CanLII 219 ((Ont. H.P.A.R.B.), at paras. 42-46, the Board determined it was unreasonable for the ICRC to make a finding of "implied consent" in the face of a patient's express refusal of consent. The Board relied on the *HCCA* and CPSO policy in holding it was unreasonable for the ICRC to find there was implied consent where a patient had expressly refused to have a particular physician perform her surgery:

> The provisions of the [*HCCA]* provide that the Respondent must obtain consent before performing a procedure.
>
> The College policy also refers to obtaining consent before performing a procedure.
>
> In this case, the Applicant had expressly, in writing and verbally, to nursing staff refused consent to have the Respondent perform the procedure. To find that there was consent simply because the Applicant was physically present and prepped in the operating room ignores the fact that the Applicant was in a vulnerable position at that point and that she had clearly expressed her refusal to have the Respondent perform the procedure to several nursing staff.

> If the Respondent had reviewed the signed consent form, he would have seen that the Applicant had expressly indicated that she did not want him to perform the procedure.
>
> The Committee's finding that there was "a form of implied consent for the procedure to go ahead" is not coherent and rational and is not justified in relation to the relevant facts and the laws applicable to this complaint.

[78] Here, the ICRC and the Board implied that the physician's reliance on implied consent, meant it could not go farther on the issue of consent. On the record that was before both the ICRC and the Board, I conclude that was not a justified conclusion, for similar reasons as expressed by the Board in *Guertin v. Long*, that is the patient who was subjected to the procedure had expressly indicated lack of consent, which cannot be overridden by an assertion of "implied consent" for reasons unsupportable at law.

The Board Unreasonably Found that Consent had been Adequately Considered by the ICRC

[79] Overall, the ICRC and the Board in each set of reasons avoided direct discussion of the consent issue. The ICRC distanced itself from the concerns of J.'s parents by writing that "they felt the examination was performed without adequate consent" yet made no findings on that key issue. At no point in the ICRC reasons did it address the admitted failure of Dr. Nitti to obtain consent from J. or the related problem of the bind that J.'s mother faced by her legitimate fears of further involvement of child protection authorities if she did not involve herself in overriding J.'s resistance to the examination.

[80] Consent was not a collateral or minor issue. It was a significant concern raised by the Applicants from the beginning of the complaint process. At the second investigation, the Applicants through counsel made comprehensive submissions on this issue. While it was necessary to consider the entirety of the complaint through the lens of racial discrimination, it was also incumbent on the ICRC and for the Board to recognize that the substance of each separate ground of complaint was addressed.

[81] It is true that aspects of the ICRC's second set of remedial measures could indirectly address some of the concerns around consent posed by this encounter, including its advice on following guidelines for paediatric genital examination, which include questions of consent. However neither its advice, nor its reasons adverted to the core principles of consent, which were fully argued and put before the ICRC. On this record, J.'s parents had a legitimate expectation that the reasons of the Board would respond to their concerns around J.'s consent to a treatment which involved her privacy, dignity and well-being.

[82] The ICRC failed to address the clear issue of consent, on undisputed facts which bore directly on that issue. I conclude that the Board's findings that the reasons of the ICRC on this issue were "transparent, intelligible and justified" are unreasonable.

Remedy

[83] Having found the Board's decision upholding the ICRC's decision was unreasonable and considering all parties' submissions on the appropriate form of disposition, I would not remit the matter to the Board for a third reconsideration.

[84] I would decline to remit the matter for several reasons. Six years have passed since this complaint was made. The matter has been reviewed and considered twice by the Family Practice Panel of the ICRC. On both occasions, the ICRC determined that a remedial disposition, including advice, was appropriate. Dr. Nitti provided thoughtful responses to the complaint and was amenable to remediation. Significantly, Dr. Nitti addressed directly the question of J.'s right to consent and her need to respect those rights in child patients in the future. As said, this is a crucial recognition. The Applicants have had the benefit of a full hearing on review and the findings of this court restating the law of consent in Ontario.

[85] Thus, I conclude that it is not in the public interest to return the matter for further reconsideration.

The Amended Order of Non-Publication

[86] The Board had made an order of non-publication which prevented anyone from publishing information that could disclose the identity of J. or her parents. That order was continued in this court pending this hearing. In submissions to the panel on this issue, the Applicants seek a "carve-out" provision which would provide agency to J. together with her parents, to be able to speak to others about this experience without fear of being in breach of a court order.

[87] The Applicants, submit that it is "in J.'s interests for her (and to an appropriate extent, her parents) to be in control of how, when, and with whom her story and information are shared; for her [*Charter*] s. 2(b) rights to be given significant respect; for her to grow in autonomy, self-confidence, and responsibility as a young person; for her to be able to talk about her life without worrying that she is doing something wrong; for trusted people to be able to speak about her and on her behalf when that is beneficial to her."

[88] The Applicants' request was largely unopposed by the Respondents. The Board raised a concern about the form and wording of the proposed "authorization to publish" form. I would respond to those concerns by revising the format from a document apparently granting "authorization" to that of a form to indicate the consent of J. and/or her parents, as applicable. The Applicants agreed with this modification.

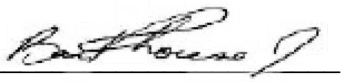
[89] Accordingly, I would grant the publication ban order with amendments sought by the Applicants and addressed by the parties in their submissions.

[90] A copy of the order is attached to these reasons as Appendix "A".

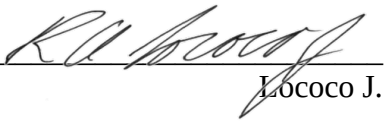
Disposition

[91] For the reasons above, I would grant the application for judicial review and set aside the Board's decision dated July 21, 2023 but would decline to remit the matter to the Board for further consideration. By agreement of the parties, there will be no order as to costs.

Leiper, J.

I agree 

Backhouse J.

I agree 

Lococo J.

Date: August 07, 2024

APPENDIX "A"

Court File No: 483/23

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

THE HONOURABLE	)	_____, THE _____DAY)
JUSTICES BACKHOUSE, LOCOCO	)	
And LEIPER	)	OF AUGUST, 2024
	)	

B E T W E E N:

ASP and SD

Applicants

- and -

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD,
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, and
NICOLE NITTI

Respondents

- and -

JUSTICE FOR CHILDREN AND YOUTH

Intervenor

AMENDED PUBLICATION BAN ORDER

THIS MOTION, made by the Applicants for an order amending the publication ban order issued by this Court on June 21, 2024, was heard July 23, 2024, at 130 Queen Street West, Toronto, Ontario.

ON READING the materials filed and hearing the submissions of the Applicants, the Respondent, Health Professions Appeal and Review Board, and the Intervenor,

1. THIS COURT ORDERS that no person shall publish or broadcast the names or any information that would disclose the identities of the Applicants and the patient who is not a party to this proceeding (identified in this proceeding as JDSP), except for:
    a. the patient and, with the patient's consent, the Applicants; or
    b. any person who has the express written consent of the patient and one parent (Applicant) if the patient is under the age of sixteen, or the patient alone if the patient has reached the age of sixteen, in the form attached to this order.
2. THIS COURT ORDERS that any document prepared by the parties themselves or any intervenor (or proposed intervenor) and filed after the date of this order shall not include any identifying information of the Applicants or the patient who is not a party in this matter and shall refer to the Applicants by way of initials, "ASP and SD".
3. THIS COURT ORDERS that this order is subject to further order of this Court.

_____

Backhouse, J.

_____

Lococo, J.

_____

Leiper, J.

CONSENT TO PUBLISH OR BROADCAST INFORMATION THAT IS SUBJECT TO PUBLICATION BAN

This consent is only valid if this form is fully completed and signed by the person(s) giving consent and the person receiving consent.

I, _____ [*enter name - JDSP*], and if JDSP is under sixteen,
I, _____ [*enter name - ASP or SD*] hereby authorize _____ [*enter name*] to publish or broadcast information that is subject to a publication ban because it would identify or tend to identify one or both of the Applicants (ASP and SD) in Court File No. 483/23, and/or that would identify or tend to identify JDSP as the minor patient whose treatment is at issue in that proceeding.
This consent is subject to the specific conditions set out below.

Information covered by this consent

Check one:

☐ This consent relates to any information that is subject to the publication ban

☐ This consent is limited to the following specific information:

_____
_____
_____

_____[*attach additional page if necessary*]

Authorized reasons for publication or broadcast

This consent only relates to the publication or broadcast of the information for the following purpose(s) or within the following circumstances:

_____
_____
_____

_____[*attach additional page if necessary*]

Term of consent

Check one:

☐ This consent will not expire until I expressly withdraw it in writing and bring this withdrawal to the attention of the person named in this form

☐ This consent will expire on the following date, unless I expressly withdraw it in writing and bring that withdrawal to the attention of the person named in this form before that date:

_____

Note: A withdrawal of consent does not affect any publication or broadcast that took place before the withdrawal was brought to the attention of the person named in this form.

_____ _____

Signature of JDSP **Date**

_____ _____

Signature of ASP or SD, if required **Date**

Check one: Signed by: ☐ ASP ☐ SD

Acknowledgement of person receiving consent to publish or broadcast information

I, _____ [*person receiving consent]* understand that:

- I am receiving consent to publish or broadcast information that is subject to a publication ban ordered by the Ontario Superior Court of Justice - Divisional Court at Toronto, a copy of which is attached to this consent form.
- This publication ban is in place to protect the interests of a child.
- Only those persons who have the express written consent of JDSP (if she is over sixteen) or JDSP and ASP or SD (if she is under sixteen) in this form may publish or broadcast this information.
- Any person who publishes or broadcasts the information without this express written consent is in violation of the publication ban and liable to penalties imposed by law.
- I may not publish or broadcast this information except in accordance with the conditions set out in this consent.

- When I publish or broadcast this information, I will expressly state that it is subject to a publication ban and is not for further publication or broadcast without the written consent of ASP, SD, and/or JDSP in the approved form.
- If I am uncertain whether this consent permits a particular broadcast or publication of information, it is my responsibility to clarify this with the person(s) who granted the consent before broadcasting or publishing the information.

_____ _____

Signature of person receiving consent **Date**

Full legal name:_____

Organization (if applicable): _____

Address for service of legal documents: _____

_____

Telephone number: _____

Email address: _____

Court File No.: 483/23

ASP AND SD
Applicants

-and-

HPARB, CPSO, AND NICOLE NITTI
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceeding commenced at Toronto

ORDER

BeamishLaw
197 Spadina Ave, Suite 402
Toronto,ON M5T2C8
Phone:(647)490-5219
Fax: (647)498-1649

SarahBeamish, LSO#70528B
Email:sarahbeamish@beamishlaw.com

Brenna Homeniuk, LSO#46490A
Email:brennahomeniuk@beamishlaw.com

Lawyers for the Applicants

CITATION: ASP v. Health Professions Appeal and Review Board 2024 ONSC 4386
DIVISIONAL COURT FILE NO.: 483/23
DATE: 20240807

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Lococo and Leiper JJ.

BETWEEN:

ASP and SD

Applicants

– **and** –

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD, COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, and NICOLE NITTI

Respondents

– **and** –

JUSTICE FOR CHILDREN AND YOUTH

Intervener

REASONS FOR DECISION

Leiper, J.

Date: August 07, 2024