

NEW CASE ON POWER TO ORDER INDEPENDENT MEDICAL EXAMINATIONS

— CLIENT ALERT

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The ICRC's Power to Order an Independent Medical Examination: The Ontario Divisional Court's Decision in *Iacovelli v. College of Nurses of Ontario*

The recent Divisional Court decision of *Iacovelli v. College of Nurses of Ontario*¹ discusses the significant power of the Inquiries, Complaints and Reports Committee (“**ICRC**”) of a health regulatory College to order an independent medical examination. The decision confirms that whether the ICRC can order an independent medical examination will depend on the “reasonable and probable grounds” before it, and does not require the ICRC to perform a separate *Charter*-based rights analysis. This is consistent with a health regulatory College’s overriding duty to protect the public interest – the requirement of “reasonable and probable grounds” takes the member’s interest into consideration and provides the proper balancing of these interests against those of the public.

Summary of *Iacovelli v. College of Nurses of Ontario*

In *Iacovelli v. College of Nurses of Ontario*, the Divisional Court considered an application for judicial review by a registered nurse, Iacovelli, of a decision of the ICRC of the College of Nurses of Ontario (the “**College**”) requiring him to undergo an independent medical examination to assess his capacity to practise as a nurse.

In April 2013, Iacovelli had a near-fatal overdose from opiates during the course of his employment. Following this incident, Iacovelli admitted to his employer that he had a drug addiction and that he had regularly been under the influence of opiates at work.

The College initiated an inquiry, through its ICRC, to determine whether the applicant was “incapacitated” within the meaning of s.1(1) of the *Health Professions Procedural Code*, Schedule 2 to the Regulated Health Professions Act (the “**RHPA**”). The ICRC notified Iacovelli of its inquiry and requested that he provide the College with his health records.

¹ *Iacovelli v. College of Nurses of Ontario*, 2014 ONSC 7267.

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Iacovelli's response to the ICRC, through counsel, included a medical report from his treating physician, Dr. Lisa Lefebvre, an addiction specialist. Dr. Lefebvre's report diagnosed Iacovelli as having an opioid dependence which had been in remission for a period of five months, and recommended that Iacovelli be allowed to continue practising with certain terms, conditions and limitations. In its accompanying letter to the ICRC, counsel for Iacovelli noted that Dr. Lefebvre's qualifications had been approved by the College and that she had previously been retained by the College as an independent expert, and therefore a further assessment by a different addiction specialist was not required.

In October 2013, the ICRC panel wrote to Iacovelli requiring him to undergo an independent medical examination. Iacovelli refused and subsequently brought an application for judicial review of the panel's decision to the Divisional Court.

Iacovelli argued before the Divisional Court that the ICRC was required to consider values arising from the *Canadian Charter of Rights and Freedoms* ("**Charter**"), and that in ordering him to undergo an independent medical examination when he had already undergone an examination by Dr. Lefebvre, the ICRC failed to consider those values and infringed on his fundamental rights to bodily and psychological integrity, medical privacy and equality. Iacovelli further argued that Dr. Lefebvre's report was an adequate alternative to the independent medical examination ordered by the ICRC.

In determining Iacovelli's appeal, the Divisional Court first considered the College's statutory and regulatory framework in detail and outlined the roles of the Registrar, the ICRC and the Fitness to Practise Committee ("**FTPC**") in determinations of incapacity. Most importantly, the Divisional Court found that, unlike the FTPC to which it may refer matters of incapacity, the ICRC is not an adjudicative body. Rather, it plays a gatekeeper function, collecting relevant information for the actual decision-maker, the FTPC.

With respect to Iacovelli's first argument – whether the ICRC was required to take into account *Charter* values and make an order that was “the least onerous and

least restrictive” to the individual's rights to equality, bodily integrity and privacy – the Divisional Court determined that this was not required by the ICRC's mandate under the *Health Professions Procedural Code*.

The *Health Professions Procedural Code* requires that there be “reasonable and probable grounds” before the ICRC can order that an individual submit to an independent medical examination. The Court held that this requirement of “reasonable and probable grounds” ensures that the individual's privacy and integrity rights are protected – no further “*Charter* values” analysis is required. The Court found that the ICRC is not required to consider whether its actions are the “least onerous and least restrictive” to the member. This standard, which is a criminal one, does not appear in the RHPA and is not suitable to the functions of a health profession College. Instead, the College's duty is to serve and protect the public interest, and a member's interest in practising without restrictions will take second place to this overriding duty.

The Court wholly rejected Iacovelli's second argument that Dr. Lefebvre's report was an adequate alternative to an independent medical examination. The Court endorsed the College's submissions that the roles of a treating physician and independent medical examiner are distinct, and that a treating physician may be in a conflict of interest in providing an independent opinion about his or her patient. In the circumstances of Dr. Lefebvre's report, the Court found that it was reasonable for the ICRC to require the objectivity of an independent health examiner.

Lessons Learned

The Divisional Court's decision in *Iacovelli* confirms the scope of the ICRC's duties as set out in the *Health Professions Procedural Code*.

First, the ICRC is not an adjudicative body – it performs an investigative role. It is the FTPC that makes determinations of incapacity, not the ICRC.

Secondly, the ICRC is not required to perform a *Charter* rights-based analysis in considering whether to order a member to submit to an independent medical

examination. Indeed, the ICRC, as an investigative rather than adjudicative body, is not equipped to make such an analysis. A consideration of whether the independent medical examination is “the least onerous and least restrictive” option available to the member is not applicable in the context of a health profession College. It is enough for the ICRC to consider where there are “reasonable and probable grounds” on which to make such an order, as the *Health Professions Procedural Code* requires. This standard provides the necessary balancing of the member’s interests against the overriding interest of the public.

Lastly, a report by a treating physician (whether or not such physician has previously been retained as an independent expert by the College) is not an adequate alternative to an independent medical examination. The ICRC is entitled to an objective analysis of the member’s capacity to practise in order to protect the public interest.

Cases in which members present challenges to a regulator’s requirements present a difficult balancing of *Charter*, *Human Rights Code* and privacy rights against the protection of the public interest. In this case, in its rejection of a stand alone “least onerous and least restrictive” test to supplement the ICRC’s “reasonable and probable grounds” requirement, the Divisional Court comes down strongly on the regulatory side. Indeed, the Court appears to assign a higher priority to public protection than to the member’s interest in practising without restrictions. This sort of language is reflected in the Court’s earlier decision in *Trozzi*² and the Court of Appeal’s decision in *Sazant*³. These principles will be useful in responding to future *Charter* and *Human Rights Code* complaints by members against their Colleges.

² *College of Nurses v. Trozzi*, 2011 ONSC 4614

³ *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, leave to appeal refused [2012] S.C.C.A. No. 549

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