

# Patient Harm and Ungovernability: The Evidentiary Burden for Interim Orders Case Comment on *Kilian v. College of Physicians and Surgeons of Ontario*, 2025 ONSC 2829

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By Amy Block and Mansi Narula, Summer Law Student

As the Supreme Court of Canada long ago recognized, regulators must be equipped with the tools required to fulfill their public protection mandate.<sup>[1]</sup> For health Colleges in Ontario, these tools include the power to impose interim orders where patient safety is at risk. Specifically, the *Regulated Health Professions Act* authorizes the Inquiries, Complaints and Reports Committee (the “ICRC”), to impose restrictions or suspend a registrant’s certificate of registration where there is some evidence that the registrant’s conduct exposes or is likely to expose patients to harm or injury.<sup>[2]</sup>

A recent decision of the Divisional Court recognized the importance of interim powers, adopting a broad and purposive approach to the threshold question of “likely patient harm or injury.”<sup>[3]</sup> In *Kilian v. College of Physicians and Surgeons*,<sup>[4]</sup> the Court confirmed that health professionals expose their patients to likely harm when they fail to cooperate with their regulator. In this case, the registrant’s conduct raised serious governability concerns as well as conduct that went to the core of medical ethics and professionalism. The Court unanimously concluded such conduct met the threshold of “probable harm” necessary to justify the imposition and continuation of an interim suspension.<sup>[5]</sup>

This is an important case for regulators managing uncooperative registrants whose conduct exposes patients to risk of harm. It builds on a long a line of cases that recognize a regulator’s powers must be interpreted broadly to ensure regulators have sufficiently effective means to regulate the profession in the public interest.<sup>[6]</sup>

## **Background**

In September 2021, the College of Physicians and Surgeons of Ontario (the “College”) received a series of complaints about Dr. Rochangé Kilian: employers reported that Dr. Kilian signed COVID-19 vaccine exemptions for their employees that contained no medical explanation supporting the exemption; and, the College received a complaint about Dr. Kilian’s public statements regarding the safety of the COVID-19 vaccines, COVID-19 policies and vaccine mandates.<sup>[7]</sup>

On October 15, 2021, shortly after the investigation commenced, the ICRC made an interim order, without notice, prohibiting Dr. Kilian from providing medical exemptions to patients for COVID-19 vaccines, masks, or testing.

In making the order, the ICRC determined that Dr. Kilian’s conduct exposed or was likely to expose patients to harm or injury, and that urgent intervention was required. The ICRC concluded that patients would rely on the exemptions granted by Dr. Kilian to gain access to higher risk settings without the protection provided by vaccines and that the exemptions exposed the general public to harm from an increased likelihood of contracting COVID-19. Further, the ICRC concluded that Dr. Kilian was providing exemptions for what appeared to be ideological rather than medical reasons. These individuals, who were not otherwise her patients, were charged a fee

that far exceeded reasonable fees for medical notes.”[\[8\]](#)

After the ICRC imposed restrictions prohibiting her from providing exemptions, the College discovered that Dr. Kilian had given further exemptions through an organization known as White Knight Medical. Dr. Kilian was provided opportunity to explain these exemptions before the matter was returned to the ICRC for further consideration, but no response was received. Based on the information before it, on October 27, 2021, the ICRC ordered, without notice, an interim suspension of Dr. Kilian’s certificate. This order replaced the earlier interim restriction.[\[9\]](#)

In imposing the suspension, the ICRC concluded that Dr. Kilian had intentionally disregarded the interim restriction.[\[10\]](#)

Two years later, Dr. Kilian sought to lift the suspension. On July 18, 2024, the ICRC considered her reconsideration request.[\[11\]](#) The ICRC declined to vary the suspension order.[\[12\]](#)

Dr. Kilian sought judicial review of this decision.

### ***Issues Before the Court***

On the application for judicial review, the central question before the court was whether the ICRC’s reconsideration of its suspension decision was reasonable.[\[13\]](#)

Notably, the ICRC suspension was imposed in 2021 at the height of the COVID-19 pandemic. The reconsideration decision under review was made in 2024, when the circumstances surrounding the imposition of the original order- the COVID-19 emergency- had abated significantly. Indeed, by the time this matter made its way to court, the state of emergency had long been lifted, and vaccine mandates were a thing of the past.[\[14\]](#)

On her application, Dr. Kilian argued, among other things, that a suspension was not available because there was no evidence that the probable harm of not being vaccinated outweighed the likelihood of harm from being vaccinated. She argued that policy recommendations are not evidence of probability of harm. Further, Dr. Kilian disputed the evidence of her non-compliance with the original interim order (stating that she had not authorized the issuance of the exemptions after the ICRC restricted her), and argued that practice restrictions would be sufficient to protect the public. In any event, Dr. Kilian contended that since there are no longer any vaccine mandates, there is no basis for a continued suspension.[\[15\]](#)

Finally, Dr. Kilian argued “that it was unreasonable for the ICRC to conclude that there was a risk of harm based on Dr. Kilian’s ungovernability, because she was not ungovernable.” Notwithstanding that she had sought to challenge the College’s authority to conduct the investigation in court in multiple proceedings, and was unsuccessful each time, she asserted that challenging the lawfulness of a regulator’s demand cannot itself constitute ungovernability.[\[16\]](#)

Notably, Dr. Kilian continued to refuse to cooperate with the College investigation even after the College successfully obtained an order under section 87 of the *Health Professions Procedural Code* requiring her to comply, which was upheld by the Court of Appeal. Leave to the Supreme Court was denied.[\[17\]](#)

### ***Standard of Evidence Required? – “Not an Onerous One”***

In considering whether to impose or sustain an interim order, the Court noted the ICRC must consider whether there is evidence of probable harm to patients.[\[18\]](#) Since the enactment of the *Regulated Health Professions Act* and the inception of its interim suspension powers, the Court has held that the ICRC need only be satisfied that there is “some evidence” before it to justify the order.[\[19\]](#) Interim orders cannot, however, be based on mere speculation.[\[20\]](#)

In 2017, the Legislature enhanced these powers, amending the *Regulated Health Professions Act* to permit the ICRC to impose interim orders *at any point* after an investigation has commenced, rather than only after specified allegations were referred to the Discipline Committee as had previously been the case.<sup>[21]</sup> These amendments signaled an intention to enhance the regulator's public protection powers by creating a regime where the ICRC could act quickly in issuing interim orders in appropriate cases without having to wait until an investigation was complete.<sup>[22]</sup>

In *Kilian*, the Court averred to the "protective purpose" of interim powers under s. 25.4 of the Code when considering the threshold evidence required to establish patient harm. It concluded the standard of evidence required to impose an order during an investigation is "not an onerous one." This is a marked shift from the Divisional Court's decision in *Rohringer* where the Court suggested the evidentiary burden may in fact be *greater* if an interim order is issued before an investigation is complete.<sup>[23]</sup>

Ultimately, the Court concluded that the ICRC provided ample reasons, based in evidence on the record, to justify their continued concern that public safety remained at risk in the circumstances of that case.

### ***Ungovernable Registrants Expose Patients to Harm***

The relevance of the Registrant's governability on an interim order is particularly noteworthy in this case.

In a 2022 decision, *Dr. Luchkiw v. College of Physicians and Surgeons of Ontario*, the Divisional Court upheld an interim order suspending a registrant who had been subject to restrictions and was refusing to cooperate with a College investigation into her COVID-19 related practice.<sup>[24]</sup> In that case, the Court concluded that the registrant's failure to co-operate, or to recognize the authority of the College, was a reasonable basis to conclude that she is ungovernable, and that this raised additional concerns with respect to patient safety justifying the interim suspension.<sup>[25]</sup> The Court found that the conclusion of the ICRC, that she was ungovernable and as a result her patients were exposed to harm and/or injury, was reasonable and supported by the evidence.<sup>[26]</sup>

In *Kilian*, the Court again affirmed that governability concerns may ground an interim suspension. In its reasons, the ICRC explained that Dr. Kilian's lack of cooperation with the College investigation, on its own, was directly related to patient safety and likely harm. The ICRC further explained that her non-cooperation prevented the College from investigating her care of patients. Without access to the patient information and records sought, the ICRC could not conclude that Dr. Kilian does not continue to pose a risk to patient safety. The Court agreed that the College's ability to regulate the profession in the public interest and protect the public is thwarted when concerns are identified about patient safety, but a physician refuses to cooperate.<sup>[27]</sup>

The Court did not accept Dr. Kilian's argument that there was no evidence of likely harm to patients because exemptions issued through White Knight Medical using her signature after the October 2021 practice restrictions were allegedly made without her knowledge. Dr. Kilian acknowledged that she provided her signature to White Knight Medical for the purposes of providing medical legal vaccine exemptions, and that the exemptions were to be issued without her assessing the patients. It was reasonable for the ICRC to conclude that that was very concerning. The exemptions were provided by a third-party using Dr. Kilian's signature and leveraged her status as a physician. There was no patient encounter between Dr. Kilian and the recipients of the exemption – nor was one contemplated. The Court concluded:

**..this was sufficient evidence of probable harm to patients. I agree with the College that the alleged conduct goes to the core of medical ethics and professionalism, and that the probable harm to patients continues despite the changing context of COVID-19.**<sup>[28]</sup>

The Court went on to conclude that it was also reasonable for the ICRC to find that Dr. Kilian's failure to cooperate with the College's investigation, including in the face of court orders directing her to cooperate, raised continuing concerns regarding Dr. Kilian's governability.<sup>[29]</sup>

Finally, it was reasonable for the ICRC to conclude that Dr. Kilian's failure to cooperate with the College's investigation was itself evidence of probable harm to patients:

The College has a duty to regulate physicians in the public interest and to protect patients. The College cannot effectively do so without physicians complying with their duty to cooperate. **When physicians fail to cooperate with the College, the safety of patients and the public is endangered.**[\[30\]](#)

### ***Rule of Law***

As the Court observed, Dr. Kilian refused to cooperate even after the College obtained a mandatory order from the Superior Court under section 87 of the *Health Professions Procedural Code*. It was particularly concerning to the Court that the registrant appeared to flout this court order. She did not seek a stay of the section 87 order pending her appeal to the Court of Appeal and her leave to appeal to the Supreme Court but, instead, maintained her refusal to provide the investigators with the requested patient information and records until the Supreme Court of Canada denied leave to appeal.[\[31\]](#) The courts' directions "could not have been clearer".[\[32\]](#)

The Court concluded:

Absent a stay of the Superior Court's s. 87 order, Dr. Kilian was required to comply with the order and cooperate with the investigation. The rule of law requires no less. Before this court, counsel for Dr. Kilian stated that she did not seek a stay because he is acting *pro bono* and that they focused their resources elsewhere. This is no answer. Court orders must be obeyed. [\[33\]](#)

### ***Suspensions May be Justified as Least Restrictive Orders where Registrants Refuse to Cooperate***

Given the extraordinary nature of these interim orders and given that orders are imposed in the absence of discipline findings, courts have held that ICRC should impose the least restrictive order to protect the public interest.[\[34\]](#) In the circumstances of this case, the least restrictive order continued to be suspension notwithstanding the changing circumstances regarding the pandemic.

Despite an order of the ICRC and a subsequent order of the Superior Court directing her compliance, Dr. Kilian failed to cooperate with the College and remained steadfast in her refusal to provide records necessary to conduct the investigation. Her efforts to quash the Superior Court order failed. As the Court observed, she did not seek to stay it.

The inherent harm that arises from a registrant's failure to recognize the authority of their regulator and continued failure to cooperate with an ongoing investigation in the face of court orders rendered a suspension the least restrictive option in the circumstances.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[\[1\]](#) *Pharmascience Inc. v. Binet*, [2006] [SCC 48](#) at para [36](#) [*Pharmascience*].

[\[2\]](#) *Regulated Health Professions Act*, SO 1991, c 18, s 25.4; *Fingerote v. The College of Physicians and Surgeons of Ontario*, [2018 ONSC 5131](#) at paras [4-6](#) [*Fingerote*].

[3] *Kilian v. College of Physicians and Surgeons of Ontario*, [2025 ONSC 2829](#) at para [82](#) [*Kilian*].

[4] *Kilian*, *supra* at para [94](#).

[5] *Kilian*, *supra* at para [85](#).

[6] *Fagbemigun v. College of Physicians and Surgeons of Ontario*, [2023 ONSC 2642](#) at para [37](#) [*Fagbemigun*]; *Pharmascience*, *supra* at paras. [36-37](#); *Gore v. College of Physicians and Surgeons of Ontario*, [2009 ONCA 546](#), at paras. [17](#) and [29](#); *Beitel v. The College of Physicians and Surgeons*, [2013 ONSC 4658](#), at para. [42](#); *College of Physicians and Surgeons of Ontario v. Sazant*, [2012 ONCA 727](#), at para. [99](#).

[7] *Kilian*, *supra* at paras [12-13](#).

[8] *Kilian*, *supra* at para [20](#).

[9] *Kilian*, *supra* at paras [23-25](#).

[10] *Kilian*, *supra* at para [26](#).

[11] *Kilian*, *supra* at paras [41-43](#).

[12] *Kilian*, *supra* at para [59](#).

[13] *Kilian*, *supra* at para [63](#).

[14] *Kilian*, *supra* at paras [84-85](#).

[15] *Kilian*, *supra* at para [77](#).

[16] *Kilian*, *supra* at para [78](#).

[17] *Kilian*, *supra* at para [84](#).

[18] *Kilian*, *supra* at para [81](#); *Fingerote* at paras [5-7](#); *Kadri v. College of Physicians and Surgeons of Ontario*, [2020 ONSC 5882](#) at para [48](#) [*Kadri*].

[19] *Kilian*, *supra* at para [82](#); *Thirlwell v. College of Physicians and Surgeons of Ontario*, [2022 ONSC 2654](#), at paras [23](#), 26-28 [*Thirlwell*]; *Dr. Luchkiw v. College of Physicians and Surgeons of Ontario*, [2022 ONSC 5738](#), at para [51](#) [*Luchkiw*].

[20] *Rohringer v. Royal College of Dental Surgeons of Ontario*, [2017 ONSC 6656](#) at para [43](#) [*Rohringer*].

[21] [Bill 87](#), *An Act to implement health measures and measures relating to seniors by enacting, amending or repealing various statutes*, 2017, S.O. 2017, c. 11 (declared in force 30 May 2017); [Protecting Patients Act](#), 2017, S.O. 2017, c. 11.

[22] WeirFoulds LLP, "Divisional Court Offers First Interpretation of New Interim Suspension Powers Under the RHPA" (4 December 2017), online:

<<https://www.weirfoulds.com/divisional-court-offers-first-interpretation-of-new-interim-suspension-powers-under-the-rhpa>>

[WeirFoulds LLP].

[23] [Rohringer](#), *supra* at para 43; [WeirFoulds LLP](#), *supra*.

[24] [Luchkiw](#), *supra*.

[25] [Luchkiw](#), *supra* at para 69.

[26] [Luchkiw](#), *supra* at para 85.

[27] [Kilian](#), *supra* at para 84-87.

[28] [Kilian](#), *supra* at para 85

[29] [Kilian](#), *supra* at paras 87-90

[30] [Kilian](#), *supra* at para 94

[31] [Kilian](#), *supra* at para 40

[32] [Kilian](#), *supra* at para 91

[33] [Kilian](#), *supra* at para 92

[34] [Fingerote](#), *supra* at para 7; *Morzaria v College of Physicians and Surgeons of Ontario*, [2017 ONSC 1940](#) at para 46.

For more information or inquiries:



## Amy Block

Toronto  
416.619.6285

Email:  
ablock@weirfoulds.com

Amy Block is a Partner in the Regulatory Practice Group at WeirFoulds LLP, with a practice focused on professional self regulation, administrative and public law, and civil litigation.

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

### Toronto Office

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110  
Fax: 416.365.1876

### Oakville Office

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110  
Fax: 905.829.2035

