A quiet revolution in college decisions

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In 2019, the Supreme Court of Canada decided *Canada v Vavilov,*[1] a ruling that simultaneously upheld the citizenship of 2 children born in Canada to Russian spies and also quietly overhauled the relationship between physicians and their medical regulatory authorities (referred to here as *colleges*). In one of the most important administrative law cases this decade, the Supreme Court reformed the way decisions made by certain governmental bodies such as the colleges are assessed on appeal. For the percentage of physicians (5% to 10%) who receive a complaint to a college annually,[2,3] the colleges must now meet a new standard in their decision making, and a select few of those decisions now have a path to a more meaningful appeal. The expectation is that this quiet revolution will result in increased consistency and transparency in our professional self-regulation.

Questions of law versus questions of fact

To understand what happened, one must understand a core legal concept: the difference between questions of law and questions of fact. In a murder case, the question of whether person A shot person B is a question of fact. The jury hears the evidence and decides whether something happened or did not happen. The question of whether shooting someone in self-defence gets you out of jail is a question of law. The rule does not apply specifically to this case; it is generalizable. In the medical setting, the question of whether, say, Dr X. sent out tweets advocating ivermectin for treatment of COVID-19 (coronavirus disease 2019) is a question of fact. The question of whether it is unprofessional for a physician to tweet COVID-19 misinformation is a question of law. As a general rule, before *Canada v Vavilov,* college decisions on questions of fact and law were technically appealable but almost always upheld.

For questions of fact, it is settled and unchanged that the best body to decide whether something happened is the one that heard the witnesses and reviewed the evidence. In other words, colleges have, and will continue to have, virtually the final say on whether a physician failed to meet a specified standard of care.

Questions of law, however, are a different story. Before this landmark case, the Supreme Court instructed appeals courts to defer to *expertise*. The idea was that physicians are experts in their own profession and nonmedically trained courts ought not to meddle in that regulation. Courts were instructed to ask only whether the decision fell "within a range of possible, acceptable outcomes which are defensible."[4] If it did, tenured judges were required to uphold college decisions *even if* they were based on a strained, or even inconsistent, interpretation of the law. Many decisions are, at some level, defensible. Unsurprisingly, successful appeals were rare.

Why was *Canada v Vavilov* important for physicians?

The ramifications of this Supreme Court decision were considerable for physicians. The past 20 years have seen a massive increase beyond traditional boundaries in the scope of what colleges have been willing to regulate. For example, distasteful political Facebook posts,[5] emergency medical service calls with disparaging information,[6] criminal cases where the physician has been acquitted[7] or discharged,[8] online gossiping,[9] and angry e-mails[10] have all been held by the College of Physicians and Surgeons of Ontario to be within its scope to regulate. Regardless of whether the profession believes these areas fall under the colleges' regulatory umbrella, the reality is that these authorities have had relatively unfettered discretion to set the bounds of their jurisdiction.

Furthermore, many physicians have watched their counsel argue complex questions of law before a panel of members of the public and physician colleagues, many of whom were unlikely to be legally trained. Questions such as whether a college investigation breached a physician's right under the Canadian Charter of Rights and Freedoms to be secure against unreasonable search and seizure,[11] whether a college must provide a bilingual discipline panel for a Francophone physician,[12] whether new evidence can be admitted,[13] and whether a physician has the right to silence before a college committee[14] were decided by the colleges' own panels.

Before *Canada v Vavilov,* even if better or more plausible interpretations of the law were available, so long as these decisions were reasonable, they would be upheld on appeal to a reviewing court. Now, however, in provinces whose statutes direct it and for certain important questions of law, a college's decision on a legal question can be appealed to the court for an answer on whether it decided *correctly* and not just reasonably. For physicians facing career-impacting discipline, knowing that the court can review certain parts of a college decision by asking if it was "correct" and not just "correct enough" will be a powerful inducer of faith in the fairness of the system.

The Supreme Court did not stop there. For questions where a college's decision need only be reasonable, the bar was raised on the requirements. Decisions must now be generally consistent, clearly justified, and take into account the issues raised by both sides. For a decision to be safely upheld, colleges should also demonstrate that they listened to both parties, interpreted their own

regulations with some uniformity, and considered the potential impact of their decisions.[1]

One possible effect of this is that nationwide the colleges will be spurred on to publish more complete decisions. For example, in Prince Edward Island and New Brunswick, the publicly available decisions are often sparse in their reasoning when compared with those of Alberta and Saskatchewan.[15,16] Often, key components of a decision, such as the physician's name, alleged facts, discipline justification, and references to past precedent, are unlisted or redacted.[17,18] This makes it challenging for the profession to use discipline decisions as teaching moments, as opposed to purely punitive measures. For many physicians in their first 5 years of practice, college decisions are an opportunity to learn about the profession's expectations in the gray zones not encountered in medical school or residency. Furthermore, decisions lacking in detail make it more challenging for colleges to demonstrate that they have discharged their duty to protect the public. Requiring more justification in published decisions will increase trust in self-regulation by both physicians and the public.

Increased transparency will also allow for standardization among provincial colleges on ethical principles and treatment of unprofessional conduct. This is particularly notable in the realm of sexual misconduct, which can lead to automatic revocation of medical licences in some provinces and relatively short suspensions in others, even in the face of repeated discipline. Standardization among colleges might help clarify outcomes, such as why the insemination of 5 women with sperm from an unintended biological father resulted in a 2-month suspension in one province,[19] while inappropriately hugging a patient resulted in a 3-month suspension in another province,[20] and the improper access of personal health information resulted in a 6-month suspension in a third province.[21] Consistency among decisions will, it is hoped, lower anxiety among physicians as clearer principles and expectations become delineated.

Conclusion

Few things cause as much stress in the early career of a physician as the fear of a college complaint. The expanding jurisdictional scope, unpredictability of decision making, and inconsistency in principles across the country have added to that anxiety. For the physicians who receive college complaints—as many as 10% of practising physicians each year[2,3]—most will be blissfully unaware of how the Vavilov decision is working behind the scenes in reforming colleges' approaches. At a minimum, one can hope it will increase the transparency, consistency, and justification that the colleges must provide in their decision making. In some provinces, for certain important legal questions, both physicians and patients will have a meaningful appeal heard before the courts. Finally, it might urge colleges with minimalist published decisions to provide more information to guide the profession. The full implications will become clearer in the coming years as appeals work their way through the individual provinces.

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Competing interests
None declared

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Can Fam Physician 2021;67:e312-3. DOI: 10.46747/cfp.6711e312
La traduction en français de cet article se trouve à **www.cfp.ca** dans la table des matières du numéro **de novembre 2021** à la **page e314**.

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