

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *College of Physicians and Surgeons of  
British Columbia v. Madryga,*  
2026 BCCA 100

Date: 20260306  
Docket: CA50626; CA50669

Docket: CA50626

Between:

**College of Physicians and Surgeons of British Columbia**

Appellant  
(Defendant)

And

**Rodney Madryga**

Respondent  
(Plaintiff)

And

**The Attorney General of British Columbia**

Respondent  
(Pursuant to the *Constitutional Question Act*)

- and -

Docket: CA50669

Between:

**The Attorney General of British Columbia**

Appellant  
(Pursuant to the *Constitutional Question Act*)

And

**Rodney Madryga**

Respondent  
(Plaintiff)

**College of Physicians and Surgeons of British Columbia**

Respondent  
(Defendant)

Before: The Honourable Justice Fleming  
The Honourable Justice Riley  
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2025 (*Madryga v. College of Physicians and Surgeons of British Columbia*, 2025 BCSC 728, Vancouver Docket S231056).

Counsel for the College of Physicians and Surgeons of British Columbia:

B.B. Olthuis, K.C.  
J. Hernaez  
F.A.M. Harland

Counsel for the Respondent,  
Rodney Madryga:

J.B. Gratl  
J. Mager

Counsel for the Attorney General of  
British Columbia:

J.T. Lovell

Place and Date of Hearing:

Vancouver, British Columbia  
September 22, 2025

Written Submissions Received:

October 6, 7, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
March 6, 2026

**Written Reasons by:**

The Honourable Justice MacNaughton

**Concurred in by:**

The Honourable Justice Fleming  
The Honourable Justice Riley

**Summary:**

*The appellants, the College of Physicians and Surgeons of British Columbia (the College) and the Attorney General of British Columbia, appeal a chambers judge's declaration that ss. 26.2 and 53 of the Healthcare Professions Act, R.S.B.C. 1996, c. 183 [HPA], which prohibits the disclosure of documents created or produced in respect of the College's Quality Assurance Programs, are unconstitutional. The order was made in the respondent's civil claim alleging that the College improperly interfered with the medical care he received from his treating physicians. The chambers judge found that the sections of the HPA violated s. 96 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, holding that they provide no avenue for review by a court to determine whether documents or information referred to in such sections should be produced in the context of litigation. The appellants submit the chambers judge erred in concluding that the sections of the HPA violated s. 96 and in not ordering the College to provide a better description of the privileged documents in its list of documents and/or viewing the documents to determine the validity of the College's privilege claims.*

*Held: Appeal allowed. The chambers judge erroneously concluded that ss. 26.2 and 53 of the HPA denied the respondent access to the court in breach of s. 96 of the Constitution Act. Nothing in the HPA overrides R. 7-1(20) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which allows a judge to review the documents to assess whether they should be produced in the context of litigation, or the judge's ability to make an order under R. 7-1(14)(b)(ii) requiring a further and better description of the documents over which privilege is claimed under R. 7-1(7).*

<b>Table of Contents</b>	<b>Paragraph Range</b>
<b>INTRODUCTION</b>	[1] - [19]
The <i>HPA</i> and the College	[6] - [19]
<b>DECISION UNDER REVIEW</b>	[20] - [24]
<b>ISSUES ON APPEAL</b>	[25]
<b>STANDARD OF REVIEW</b>	[26]
<b>DISCUSSION</b>	[27] - [42]
The College's Lists of Documents	[27] - [31]
The <i>HPA</i> Provisions in Issue	[32] - [34]
No Inconsistent Position on Appeal	[35] - [42]
<b>ANALYSIS</b>	[43] - [67]
Further and Better Description	[49] - [51]
Chambers Judge's Review of the Documents	[52] - [53]
Core Jurisdiction	[54] - [67]
<b>DISPOSITION</b>	[68]

**Reasons for Judgment of the Honourable Justice MacNaughton:**

**Introduction**

[1] This is an appeal from a declaration that sections 26.2 and 53 of the *Health Professions Act*, R.S.B.C. 1996, c. 183 [HPA] violate s. 96 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (the “Declaration”) and from an order requiring the College of Physicians and Surgeons of British Columbia (the “College”) to, as a result, produce certain documents and information (the “Production Order”).

[2] The Declaration and the Production Order were made in an action brought by the respondent, Mr. Madryga, against the appellant, the College. Mr. Madryga claims the College improperly interfered with the medical care he received from his treating physicians for chronic, debilitating, and ongoing pain arising from a 1997 workplace injury, and a failed surgical attempt to repair it.

[3] It is not disputed that the primary treatment for his pain has been high doses of opiate pain medications (“OPM”).

[4] Following Mr. Madryga’s injury and surgery, Dr. L, then his treating physician, prescribed a high dosage of OPM to allow him to continue with his daily living activities. After Dr. L ended his relationship with Mr. Madryga, Dr. M assumed his care. Dr. M continued Mr. Madryga’s high doses of OPM until he retired.

[5] Mr. Madryga is not currently being treated for his pain by a physician. Under an agreement between Mr. Madryga and the College, he continues to receive his OPM without the need for a prescription.

**The HPA and the College**

[6] The College regulates the practice of medicine in British Columbia under the HPA. Pursuant to s. 16 of the HPA, the College is under a statutory duty to serve and protect the public, and to exercise its powers and discharge its responsibilities in the public interest. The College’s duties and objects include, at s. 16(2)(e), to

establish and maintain a continuing competency program to promote high practice standards among registrants (physicians).

[7] In pursuit of the College's duties and objects, the *HPA* empowers the College to make bylaws to establish: (i) standards, limits or conditions for the practice of medicine by registrants; (ii) a quality assurance program ("QAP"); and (iii) various committees, including a quality assurance committee ("QAC") (s. 19(1)(k), (k.2), and (t)).

[8] Where a health profession college's bylaws provide for assessment of the professional performance of a registrant, as is the case in the College's bylaws, s. 26.1(2) of the *HPA* permits a college's QAC to perform the assessment and, in the course of doing so, inspect the registrant's records, including patient records, that are related to professional performance.

[9] Subsection 26.1(3) provides that the QAC's powers are generally limited to making recommendations directed towards: (a) further education or training; (b) clinical or other examinations; or (c) other remedial activities.

[10] The College has established a QAC made up of several panels, one of which is the Prescription Review Panel, which administers the College's Prescription Review Program ("PRP").

[11] According to the affidavit from David Unger, the Deputy Registrar of the College, the PRP is a QAP that assists registrants to safely prescribe medication that carry the risk of patient harm. It reviews registrants' use of, and rationale for, prescribing opioids, sedatives and other potentially addictive medications. The PRP reviews the prescribing practices of registrants to ensure that they align with the College's standards of care and published clinical practice guidelines, such as the *Safe Prescribing of Opioid and Sedatives* standard, the standard applicable here.

[12] Mr. Unger says that the PRP's main objective is patient safety. It is not intended to and does not seek to discourage the use of prescription drugs for legitimate medical reasons, or to deter physicians from prescribing appropriate drugs

in treatment of a patient. He says that the PRP cannot and does not tell registrants how to manage individual patients and does not intervene in individual patient care. Nor does it discipline registrants for what they prescribe.

[13] Instead, he says the PRP offers educational and remedial activities for registrants, guided by evidence-based best practices, to assist them in the task of prescribing opioids, sedatives and other potentially addictive medications.

[14] Mr. Madryga's claim alleges that since 2015, the College has, through its PRP, pressured his treating physicians to reduce his use of high-dose OPM to a level the PRP considers appropriate. In particular, Mr. Madryga alleges that the College attempted to interfere with his pain treatment and characterizes the interactions between the PRP and his physicians as "regulatory harassment" by the College. He seeks damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] for the College's actions that he says breached his s. 7 rights.

[15] Both Dr. L and Dr. M have assisted Mr. Madryga's counsel. Dr. L did so by producing his medical notes and Dr. M filed an affidavit in this proceeding. Both describe feeling pressured by the College to reduce Mr. Madryga's OPM.

[16] The action is at a relatively early stage. Pleadings have been exchanged. The parties are in the process of documentary disclosure pursuant to R. 7-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "*Rules*").

[17] In its list of documents, the College asserted that certain documents relating to the specific administration of the PRP in respect of Mr. Madryga's physicians could not be disclosed due to the confidentiality requirements set out in ss. 26.2 and 53 of the *HPA*.

[18] In the application giving rise to this appeal, Mr. Madryga challenged the College's listing of documents as privileged under ss. 26.2 and 53 of the *HPA* in its initial and amended list of documents. In the alternative, he sought an order

pursuant to R. 7-1(20) requiring the College to produce the documents in question for inspection by the court to determine the validity of the College's objection to production on the basis of the *HPA*.

[19] In the further alternative, Mr. Madryga sought a declaration that these sections of the *HPA* are invalid or do not apply to disclosure in his action because those provisions prevent him from establishing a violation of his rights under the *Charter*, thereby interfering with the essential jurisdiction of the courts under s. 96 of the *Constitution Act, 1867*, and denying him procedural guarantees afforded by s. 7 of the *Charter*.

### **Decision Under Review**

[20] In reasons cited at *Madryga v. College of Physicians and Surgeons of British Columbia*, 2025 BCSC 728 ("Reasons"), the chambers judge declared ss. 26.2 and 53 of the *HPA* unconstitutional because they impinged on the core jurisdiction of a provincial superior court, contrary to s. 96 of the *Constitution Act, 1867*.

[21] In particular, at paragraph 80 of the Reasons, the chambers judge held that ss. 26.2 and 53 were of "no force and effect to the extent that they provide no avenue for review by a court to determine whether documents or information referred to in such sections should be produced in the context of litigation".

[22] The chambers judge's decision rested on two conclusions: (1) the *HPA* provisions established a complete prohibition on the production of the otherwise relevant documents sought by Mr. Madryga; and (2) as a result of the prohibition, there was no basis for the court to examine the documents to determine if disclosure should be ordered "in accordance with the *HPA*" (para. 43).

[23] Both the College and the Attorney General of British Columbia ("AGBC"), a party to the application pursuant to a notice of constitutional question, appealed the chambers judge's order.

[24] The College applied for a sealing order in relation to certain material it intended to file on the appeal. That application was dismissed by this Court in reasons indexed at *College of Physicians and Surgeons of British Columbia v. Madryga*, 2025 BCCA 250.

**Issues on Appeal**

[25] The appellants submit the chambers judge erred in:

- a) reading ss. 26.2 and 53 of the *HPA* as effectively barring judicial review of the College’s actions;
- b) misapplying the “core jurisdiction” test relevant to s. 96 of the *Constitution Act, 1867*; and
- c) alternatively, in the remedies she ordered, and specifically in not:
  - i. ordering the College to provide a better description of the privileged documents in its list of documents; and/or
  - ii. viewing the documents, as she was entitled to do under R. 7-1(20), to determine the validity of the privilege claims.

**Standard of Review**

[26] The parties agree, and I accept, that the errors alleged by the appellants are errors of law, reviewable on the standard of correctness.

**Discussion**

**The College’s Lists of Documents**

[27] In its initial list of documents, dated December 22, 2023, the College listed in Part 4, under the heading: “documents for which privilege from production is claimed” and set out the following basis for its privilege claim:

Description of document

4.1 Any records that Dr. L may have provided to the College’s quality assurance committee, if any such documents exist.

Grounds on which privilege is claimed

By s. 26.2(1)(a) of the [HPA], the College's quality assurance committee or persons acting on its behalf are prohibited from disclosing records or information that a registrant provides to the committee or an assessor under a quality assurance program and, by s. 26.2(5) and 53 of the [HPA], such documents may not be received as evidence in a civil proceeding.

[28] Similar wording was used with respect to any records that Dr. M may have provided to the College's QAC (if they existed).

[29] The College also listed as privileged at 4.3 and 4.4 "[a]ny self assessment that Dr. L [and Dr. M] may have prepared for the purpose of a continuing competence program, if any such documents exist" and provided the following basis for the privilege claimed with respect to the self assessments:

By s. 26.2(1)(b) of the [HPA], the College's quality assurance committee or persons acting on its behalf are prohibited from disclosing a self assessment that a registrant prepares for the purposes of a continuing competence program and, by s. 26.2(5) and 53 of the [HPA], such documents may not be received as evidence in a civil proceeding.

[30] In its amended list of documents, dated March 19, 2024, the College listed the following documents for which it claimed privilege and the following basis for its privilege claim:

Description

4.5 Any documents prepared by the College that are based on or contain records of information that Dr. L or Dr. M prepared for the purposes of a quality assurance program or that are based on or contain a self-assessment prepared by Dr. L or Dr. M for the purposes of a continuing competence program, if any such documents exist.

Grounds on which privilege is claimed

By s. 26.2(1)(a) of the [HPA], the College's quality assurance committee or persons acting on its behalf are prohibited from disclosing records or information that a registrant provides to the quality assurance committee or an assessor under a quality assurance program and, by s. 26.2(5) and 53 of the [HPA], such documents may not be received as evidence in a civil proceeding.

Description

4.6 Any documents prepared by the College to administer a quality assurance program with respect to Dr. L and Dr. M, if any such documents exist.

Grounds on which privilege is claimed

By s. 53 of the [HPA], persons exercising a power or performing a duty under the [HPA] must preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising the power or performing the duty.

[31] Dissatisfied with the College's list of documents, Mr. Madryga applied for disclosure of the documents over which the College claimed privilege.

**The HPA Provisions in Issue**

[32] Section 26.2 of the HPA restricts the disclosure of records and self assessments prepared in the context of a QAP (as I have said, the PRP is a QAP).

It reads:

**Confidential information**

**26.2(1)** Subject to subsections (2) to (6), a quality assurance committee, an assessor appointed by that committee and a person acting on that committee's behalf must not disclose or provide to another committee or person

- (a) records or information that a registrant provides to the quality assurance committee or an assessor under the quality assurance program, or
  - (b) a self assessment prepared by a registrant for the purposes of a continuing competence program.
- (2) Despite subsection (1), a quality assurance committee, an assessor appointed by that committee or a person acting on behalf of that committee may disclose information described in that subsection
- (a) to show that the registrant knowingly gave false information to the quality assurance committee or assessor, or
  - (b) to the provincial health officer or a medical health officer within the meaning of the *Public Health Act* for the purpose of reporting a risk of significant harm to the health or safety of the public or a group of people.
- (3) If a quality assurance committee has reasonable grounds to believe that a registrant
- (a) has committed an act of professional misconduct,

- (b) has demonstrated professional incompetence,
- (c) has a condition described in section 33(4)(e), or
- (d) as a result of a failure to comply with a recommendation under section 26.1(3), poses a threat to the public,

the quality assurance committee must, if it considers the action necessary to protect the public, notify the inquiry committee which must treat the matter as if it were a complaint under section 32.

- (4) Records, information or a self assessment obtained through a breach of subsection (1) may not be used against a registrant except for the purposes of subsection (2).
- (5) **Subject to subsection (2), records, information or a self assessment prepared for the purposes of a quality assurance program or continuing competence program may not be received as evidence**
  - (a) in a proceeding under this Act, or
  - (b) in a civil proceeding.
- (6) Subsection (1) applies despite the *Freedom of Information and Protection of Privacy Act*, other than section 44(2) or (3) of that Act.

[Emphasis added.]

[33] Section 53 of the *HPA* further restricts disclosure of confidential information obtained under it:

**Confidential information**

- 53(1)** Subject to the *Ombudsperson Act*, a person **must preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising a power or performing a duty under this Act** unless the disclosure is
- (a) **necessary to exercise the power or to perform the duty**, or
  - (b) **authorized as being in the public interest by the board of the college** in relation to which the power or duty is exercised or performed.
- (2) Insofar as the laws of British Columbia apply, **a person must not give, or be compelled to give, evidence in a court or in proceedings of a judicial nature concerning knowledge gained in the exercise of a power or in the performance of a duty under Part 2.1 or Part 3 unless**
- (a) the **proceedings are under this Act**, or
  - (b) **disclosure of the knowledge is authorized under subsection (1)(b) or under the bylaws or regulations made under this Act.**

- (3) The records relating to the exercise of a power or the performance of a duty under Part 2.1 or Part 3 **are not compellable in a court or in proceedings of a judicial nature insofar as the laws of British Columbia apply unless**
  - (a) the **proceedings are under this Act**, or
  - (b) **disclosure of the knowledge is authorized under subsection (1)(b) or under the bylaws or regulations made under this Act.**

[Emphasis added.]

[34] I will first deal with the preliminary issue of whether the College changed its position on appeal.

### **No Inconsistent Position on Appeal**

[35] In the oral hearing of this appeal, the parties were asked whether the College had taken the position in the Supreme Court that the chambers judge lacked jurisdiction to review the documents at issue, as provided for in R. 7-1(20) of the *Rules* (“Inspection of document by court”) or otherwise. If it did, the College has adopted an inconsistent position on appeal because it submits to this Court that the chambers judge erred in not considering alternative remedies because she could have reviewed the documents under this *Rule*.

[36] Submissions were invited and received on this issue.

[37] Counsel for the College points out that it did not make a positive submission about the chambers judge’s jurisdiction under R. 7-1(20) in the court below. He says that the focus of the College’s submissions was about whether the impugned documents were properly listed as privileged with respect to the *HPA*. He says that on appeal, the College’s submissions have naturally shifted to focus on the chambers judge’s order, and the College’s silence on R. 7-1(20) was never a denial of the Court’s jurisdiction.

[38] Counsel for Mr. Madryga says that in the court below, the College opposed the order sought by Mr. Madryga that the chambers judge review the documents under R. 7-1(20) of the *Rules* (to determine the validity of the College’s claim for privilege) and so its current position constitutes a change of position on appeal.

[39] I disagree. It does not follow from the College’s opposition to the order sought by Mr. Madryga before the chambers judge that the College was asserting that the Court could not review the documents under R. 7-1(20).

[40] The jurisprudence in this area confirms this conclusion. Courts are generally reluctant to allow a party to adopt a position on appeal that is clearly inconsistent with a position expressly taken at trial: see, e.g., *672047 B.C. Ltd. v. Johal*, 2024 BCCA 427 at paras. 6, 11; *Deissner v. Boorsma*, 2023 BCCA 476 at paras. 19–22; *Pickwell v. Rajwan*, 2025 BCCA 32 at paras. 24–25, citing *Deissner*.

[41] In *Deissner*, for instance, the Court emphasized that taking a position that is entirely inconsistent with the position a party took at trial is not in the interests of justice and would amount to an abuse of process. The Court stated, “[a] party is not entitled to try one strategy at trial, and if it proves to be unsuccessful, to adopt a different strategy on appeal, effectively seeking a ‘do over’”: at para. 24.

[42] I would conclude that the College did not adopt an inconsistent position on appeal. I do not consider the College to be seeking a “do over”. The College’s lack of submissions on the issue of the court’s jurisdiction to review documents under R. 7-1(20) does not constitute an inconsistent position. I agree with the College that the focus of submissions may naturally change on appeal.

### **Analysis**

[43] I will now turn to the question of whether, in light of the trial judge’s conclusion that there was no way for courts to review the College’s claim of privilege, which might otherwise be described as a statutory bar to disclosure, the chambers judge’s declaration of invalidity was incorrect.

[44] In her Reasons, the chambers judge wrote:

[65] The Attorney General suggests that the court can review whether the College's documents are properly withheld under the sections, by reviewing its list of documents. The list of documents does not itemize each document held by the College. It simply sets out broad categories of documents. In fact, the response to civil claim filed by the College sets out more detail on the documents held by the College that its list of documents does. I do not agree that the list of documents produced by the College provides an avenue for review by the court.

...

[75] In the absence of any avenue contained in the language of the HPA which would allow a court to assess whether documents or information obtained through the PRP ought to be properly produced in litigation such as this, which challenges the jurisdiction of the College to take the actions it is alleged to have taken under the auspices of the PRP, I find ss. 26.2 and 53 of the HPA to violate s. 96 of the Constitution by impinging on the court's core jurisdiction and effectively barring judicial review of the College's actions.

...

[80] I find that ss. 26.2 and 53 of the HPA are unconstitutional and of no force and effect to the extent that they provide no avenue for review by a court to determine whether documents or information referred to in such sections should be produced in the context of litigation.

[Emphasis added.]

[45] For the reasons that follow, I conclude the chambers judge's interpretation of the HPA provisions as, in effect, barring the court from examining the records, constitutes an error in law, undermining her declaration of invalidity with respect to ss. 26.2 and 53.

[46] As the chambers judge observed, the modern rule of statutory interpretation required her to read the words of the HPA in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the HPA and the legislature's intent of legislature (*Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837). In my view, the chambers judge fell into error in applying that rule, by interpreting the absence of language permitting the court to assess the records, as prohibiting any form of review. I see the absence of such language, read along with the express restrictions on the admissibility and compellability of records and information in ss. 26.2 and 53, and the object and purpose of the HPA as discussed by the chambers judge, as not interfering with the

court's power under R. 7-1 to review the documents to decide whether the College properly asserted privilege.

[47] This interpretation also accords with the view of s. 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 [CEA] in *Babcock v. Canada (Attorney General)*, 2002 SCC 57. Section 39 expressly bars disclosure of any information properly certified by the Clerk of the Privy Council as a Cabinet confidence to any court, "without examination or hearing of the information" by the court. But, as the chambers judge observed, the Supreme Court found s. 39 did not exclude judicial review of the Clerk's determination that the information was a cabinet confidence or whether the certification was issued in bad faith.

[48] Under R. 7-1(14) the College may be ordered to provide a further and better description of the communications over which privilege was asserted, as required by R. 7-1(7), thereby allowing Mr. Madryga to better assess the scope and nature of the communications, and/or under R. 7-1(20), those communications may be reviewed for the purposes of determining the validity of the College's objection to producing the communications based on their content. Due to her interpretation of the *HPA* provisions, the chambers judge did not consider these avenues in concluding that the provisions were unconstitutional.

#### **Further and Better Description**

[49] First, it was open to the chambers judge to order the College to provide a further and better description of the communications between it and Dr. L and Dr. M under R. 7-1(14)(b)(ii).

[50] Rule 7-1(7) requires the nature of any document for which privilege from production is claimed to be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege.

[51] Rule 7-1(7) often requires privileged documents to be at least individually listed with a generic description: *Jiang v. Peoples Trust Company*, 2022 BCCA 40 (Justice Marchand, as he was then, in Chambers) at paras. 25–26. This would not appear to be one of those unusual situations in which a further and better description of the privileged information would itself violate the privilege. A better description under R. 7-1(7), requiring that the College set out, for instance, the dates of any documents over which privilege was claimed, a general description of the type of document, and the sender and recipient, would have satisfied some of the chambers judge’s concerns about the court’s ability to review documents under the *HPA*. An order for such a further and better description was open to the chambers judge to make, and she failed to consider this alternative in striking the provisions as unconstitutional.

### **Chambers Judge’s Review of the Documents**

[52] Second, the chambers judge could have reviewed the communications as she is permitted to under R. 7-1(20), to determine whether, and to what extent, the content of the documents fit within the scope of the statutory privilege set out in s. 26.2(1)(a) of the *HPA* or of confidential information set out in s. 53 of the *HPA*.

[53] Although R. 7-1(20) authorizes the court to review the documents in issue for the purpose of deciding the validity of the claim for privilege, this is generally only done, in a case such as this, where the asserting party cannot provide the necessary evidence without revealing the privileged information itself: *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 74–75, cited with approval in *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 at para. 82.

### **Core Jurisdiction**

[54] What may result from the court examining the documents that the College has listed as privileged will turn on the content of the documents and a specific interpretation of what the *HPA* provisions allow. In other words, assuming there are records that point to the College directing Mr. Madryga’s care as he alleges, the

court will need to determine whether the scope of the statutory privilege(s) would prevent or allow for their production.

[55] Regardless of the result of the review, I also conclude that the chambers judge erred in her application of the “core jurisdiction” test relevant to s. 96 of the *Constitution Act, 1867*.

[56] It is not disputed that Parliament and legislatures cannot oust the core jurisdiction of a superior court of general jurisdiction, including any powers that are essential to the administration of justice and maintenance of the rule of law: *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 38.

[57] What amounts to a s. 96 court’s “core jurisdiction” has been defined narrowly and extends only to critically important jurisdictions essential to the existence of a superior court’s inherent jurisdiction and the preservation of the court’s foundational role within the legal system: *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186 at para. 56.

[58] In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 [*Trial Lawyers*], the Supreme Court of Canada held that a court rule requiring payment of trial fees had the effect of barring access to the court by persons unable to pay fees, thereby infringing on the superior court’s principal jurisdiction of adjudicating disputes, contrary to s. 96. In reaching that conclusion, the majority reviewed earlier cases in which legislation was struck down under s. 96. In each case, the Court noted that the effect of the impugned legislation was to “deny” or “bar” access to the superior courts: at paras. 33–43.

[59] More recently, this Court queried whether the “premise” of an infringement of s. 96 recognizes an individual’s right to access to justice or whether it reflects a structural and institutional protection of the courts’ role in the *Constitution: British Columbia (Attorney General) v. Le*, 2023 BCCA 200 at para. 190.

[60] The majority described the narrow scope of what amounts to “core jurisdiction” (citing *Babcock v. Canada (Attorney General)*, 2002 SCC 57):

[186] This vision of a core jurisdiction does not lend support to the proposition that core jurisdiction or the protection of the judicial function prohibits legislative restrictions on what would otherwise be relevant and probative evidence necessary for a court to decide a case on its merits. ...

[61] The majority cited with approval the Ontario Court of Appeal’s decision in *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172 [*Poorkid*], stating:

[197] ... [I]t is our view that *Trial Lawyers* ... cannot be read so broadly so as to constitutionalize the principle that any legislation limiting access by affecting what evidence will be called will necessarily infringe the court’s core jurisdiction to hear and decide cases. Indeed, many constitutional rules prevent probative evidence from being called without interfering with s. 96. This includes, for instance, the rules on privileged information. ...

[62] To this extent, I agree with the Ontario Court of Appeal’s decision in *Poorkid*—that legislation limiting the admissibility of evidence is not an impermissible invasion by a legislature on the court’s core jurisdiction.

[63] The provision at issue in *Poorkid* imposed a requirement for leave of the court before proceeding with claims against the Crown for misfeasance in public office and also required that leave applications be brought before the defendant’s document disclosure or any examinations for discovery. The Court held that legislation that makes it more difficult to proceed with a claim does not prevent superior courts from exercising their core jurisdiction.

[64] Indeed, courts have consistently held that s. 96 does not preclude the legislature from enacting laws that place restrictions or limits on the use of certain categories of information as evidence in superior court proceedings. In *Babcock*, for instance, the Supreme Court held that the statutory privilege over certified Cabinet confidences contained in s. 39 of the *CEA* was not an impermissible interference with the court’s core jurisdiction because the privilege did not entirely preclude a

review of the certification of Cabinet confidence over records or the court's adjudicative function:

[60] ...The provision does not entirely exclude judicial review of the determination by the Clerk that the information is a Cabinet confidence. A court may review the certificate to determine whether it is a confidence within the meaning provided in s. 39(2) or analogous categories, or to determine if the certificate was issued in bad faith. Section 39 does not, in and of itself, impede a court's power to remedy abuses of process.

[65] As I have indicated, s. 39 of the *CEA* is arguably broader and more restrictive than the impugned sections of the *HPA* in this case. *Babcock* illustrates the high bar for a statutory privilege to be found to infringe on core jurisdiction.

[66] In my view, the same analysis is true with respect to the privilege and confidentiality created by ss. 26.2 and 53 of the *HPA*. There is no doubt that these sections create a privilege over documents and proceedings of the College's QAC. Where the documents are relevant to litigation, and are in the possession of a party, that party must comply with R. 7-1(7), and describe the documents in a way that enables other parties to assess the validity of the privilege claim. As I have explained, if the description is inadequate for that purpose, the court may order a better description under R. 7-1(14)(b)(ii) and, in exceptional circumstances, the court may view the documents *in camera* to determine the validity of the privilege claim under R. 7-1(20). In sum, while the provisions may limit a court's ability to adjudicate Mr. Madryga's claim, they do not oust it.

[67] I would conclude that ss. 26.2 and 53 of the *HPA* do not "bar access to the courts" in violation of s. 96. While the sections restrict the admissibility and compellability of evidence, as the jurisprudence emphasizes, restricting the admissibility of evidence is not barring access to the courts.

**Disposition**

[68] I would allow the appeal and set aside the order of the chambers judge.

“The Honourable Justice MacNaughton”

I AGREE:

“The Honourable Justice Fleming”

I AGREE:

“The Honourable Justice Riley”