COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *College of Physicians and Surgeons of British Columbia v. Madryga,* 2025 BCCA 250

Date: 20250625
Dockets: 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)

And

College of Physicians and Surgeons of British Columbia

Respondent
(Defendant)

Before: The Honourable Madam Justice Horsman
(In Chambers)

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).

Oral Reasons for Judgment

Counsel for the College of Physicians and Surgeons of British Columbia:	B.B. Olthuis, K.C. J. Hernaez
Counsel for the Respondent, Rodney Madryga:	J.B. Gratl
Place and Date of Hearing:	Vancouver, British Columbia June 18, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 25, 2025

Summary:

The appellant College of Physicians and Surgeons of British Columbia applies for a sealing order over certain material to be filed on this appeal on the basis that its disclosure may have been contrary to confidentiality provisions in the Health Professions Act. Held: Application dismissed. The applicant did not meet its burden of showing that court openness poses a serious risk to an important public interest in the unique circumstances of this case.

[1] **HORSMAN J.A.**: The applicant and appellant, College of Physicians and Surgeons of British Columbia (the "College"), applies for an order sealing certain material that the College proposes to include in the appeal record and appeal book to be filed on the underlying appeal. The respondent to the application, and to the appeal, Mr. Madryga, opposes the application. He says there is no compelling public interest that would justify a sealing order over the material.

Background

[2] The underlying proceeding involves a claim by Mr. Madryga against the College relating to its alleged interference with the medical care that Mr. Madryga received from his treating physicians. Mr. Madryga filed his notice of civil claim on February 13, 2023. In it he pleads that he suffers from chronic debilitating pain as a result of a motor vehicle accident in 1997, and has been prescribed high doses of opioids to manage his pain since that accident. The claim alleges that since 2015, the College has, through its Prescription Review Program (the "Program"), pressured Mr. Madryga's treating physicians to reduce his prescription dosage of opiates to a level the Program considers appropriate. The notice of civil claim includes a review of the interactions between the Program and Mr. Madryga's treating physicians, referred to as "Dr. L" and "Dr. M". The notice of civil claim characterizes these interactions as "regulatory harassment" by the College.

[3] On May 15, 2023, the College filed a response to civil claim. An amended response to civil claim was filed on October 3, 2023 (the "Amended Response"). These pleadings include a factual response to Mr. Madryga's allegations about the communications between the Program and Dr. L and Dr. M.

[4] In a letter dated December 22, 2023, then-counsel for Dr. M wrote to counsel for the College objecting to some of the material that had been included in the Amended Response. The letter alleged that the College had, in its Amended Response, contravened the confidentiality provisions in s. 26.2 of the *Health Professions Act*, R.S.B.C. 1996, c. 183. Section 26.2 protects the confidentiality of information provided to a quality assurance committee or program. It is common ground on this application that the Prescription Review Program is a quality assurance program.

[5] The College took steps to address Dr. M's concern, including filing an application in the Supreme Court for an order sealing the impugned portions of the Amended Response. That application has not yet been adjudicated. The College also advised Mr. Madryga that it would be amending its pleading, I presume to remove the portions of the Amended Response objected to by Dr. M.

[6] In the meantime, the judgment that gives rise to the present appeal was issued. The judgment arose from Mr. Madryga's application for the production of records held by the College. The College had maintained that the requested records could not be disclosed due to the confidentiality requirements in ss. 26.2 and 53 of the *Health Professions Act*. In her ruling on the application, Justice Baker declared that ss. 26.2 and 53 are unconstitutional because they impinge on the core jurisdiction of a provincial superior court, contrary to s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5: *Madryga v. College of Physicians and Surgeons of British Columbia*, 2025 BCSC 728. She held that the provisions 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": at para. 80.

[7] The College has appealed Justice Baker's decision. It is in the context of this appeal that the College applies for a sealing order in relation to material it intends to file on the appeal. Specifically, the College applies to seal any material containing:

(1) certain portions of the Amended Response; and (2) the letter from Dr. M's counsel objecting to some of the material included in the Amended Response.

[8] Before turning to the legal principles that govern this application, I note one further relevant background fact. Dr. M has more recently withdrawn his objection to the contents of the Amended Response, and is no longer represented by the counsel who wrote the letter of objection. Dr. M has advised the parties that he does not seek a sealing order over any of the material. Indeed, he now states in his correspondence that he is "absolutely opposed" to a sealing order.

Legal framework

[9] A justice has jurisdiction to order that a file be sealed in whole or in part, pursuant to s. 30 of the *Court of Appeal Act*, S.B.C. 2021, c. 6: *R. v. Klos*, 2022 BCCA 105 at para. 6, citing s. 10(2) of the former *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

[10] Court proceedings are presumptively open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 37. The party seeking a sealing order must show that:

> (1) court openness poses a serious risk to an important public interest;
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> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Sherman Estate at para. 38.

[11] In *Sherman Estate*, the Court provided the following guidance on the content of the first stage of the test:

> [42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether

> that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.
>
> [Emphasis added.]

[12] All three of the prerequisites identified in *Sherman Estate* must be met before a discretionary limit on openness is justified: *Sherman Estate* at para. 38.

Analysis

[13] The parties' submissions on this application focussed on the first criterion listed in *Sherman Estate*: does court openness pose a serious risk to an important public interest? This issue turns on whether compliance with the confidentiality provisions in the *Health Professions Act* is an important public interest and, if so, whether the refusal of a sealing order would pose a serious risk to that interest.

Is there an important public interest?

[14] Sections 26.2(1) and 53(1) of the *Health Professions Act* provide as follows:

> 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
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> (b) a self assessment prepared by a registrant for the purposes of a continuing competence program.
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> […]
>
> 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.

[15] Section 26.2(5) of the *Health Professions Act* also provides that "records, information or a self-assessment prepared for the purposes of a quality assurance program" may not be received in evidence in a civil proceeding. Section 53(3) provides that "records relating to the exercise of a power or the performance of a duty under Part 2.1 or Part 3" are generally not compellable in a court.

[16] These provisions protect confidentiality in different circumstances. Section 26.2 applies to quality assurance committees and programs, and protects the confidentiality of records or information provided by a "registrant"—in other words, a registered member of the College, per the definition in s. 1 of the *Health Professions Act*. Section 53(1) imposes a more general duty to 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".

[17] The College asserts that compliance with the confidentiality provisions of the *Health Professions Act* is an important public interest. I did not understand Mr. Madryga to dispute this assertion. He acknowledges that "[g]enerally, a breach of a legislative provision ought to be understood as being presumptively contrary to the public interest". Mr. Madryga's essential argument is that court openness does not pose any serious risk to the public interest on the facts of this case, particularly given that Dr. M has withdrawn his objection to a sealing order, and that any statutory breach was "purely technical".

[18] I have no difficulty in concluding that there is an important public interest in compliance with statutory confidentiality provisions, such as those contained in the *Health Professions Act*. I now turn to the more contentious issue of whether a sealing order is necessary to guard against a serious risk to this public interest.

Does court openness pose a serious risk to the public interest in compliance with the confidentiality provisions of the *Health Professions Act*?

[19] In order to assess the risk, it is necessary to consider the precise information that the College seeks to seal. The College's application narrowed over the course

of the hearing, as it became clear that certain information the College had sought to seal was already in the public domain through other avenues. The College now maintains its application for a sealing order only in respect of the following paragraphs of the Amended Response: 22–23, 28, and 30(b)–(f), (h)–(j), (l), and (m). The only other document that the College seeks to have sealed is the portion of the December 22, 2023, letter from Dr. M's counsel that described the content of the Amended Response that Dr. M objected to at that time. If the Amended Response is not sealed, there would be no basis to seal any portion of this letter.

[20] Paragraphs 22–23 of the Amended Response plead facts related to Dr. L in response to Mr. Madryga's allegation (in paragraph 13 of the notice of civil claim) that the College wrote to Dr. L to insist that he taper Mr. Madryga's opiate prescription. In response, the College pleads that the Program wrote to Dr. L about opening a file on him, but no one instructed him to reduce Mr. Madryga's dosage. The College also pleads that Program staff ran a practitioner prescription profile on Dr. L In paragraph 28 of the Amended Response, the College denies that the Program ever instituted a practice review in relation to Mr. Madryga, but rather its file concerning Dr. L was closed after Stage 2.

[21] During the hearing, the College withdrew its request for a sealing order in relation to paragraph 24 of the Amended Response.

[22] The College acknowledges that paragraphs 22–23 and 28 of the Amended Response do not disclose records and information provided by a registrant to a quality assurance committee or program, and therefore s. 26.2 of the *Health Professions Act* has no application. Rather, the College maintains it is "arguable" that the disclosure of the information contained in these paragraphs is contrary to the general confidentiality requirements in s. 53(1) of the *Health Professions Act*. Further, the College says the fact that it is arguable that it breached s. 53(1) in including this information in its Amended Response is sufficient to establish an important public interest that requires protection in the form of a sealing order.

[23] The remaining paragraph of the Amended Response that the College seeks to seal pertains to Dr. M. Paragraph 30 sets out a chronology of the Program's interactions with Dr. M regarding his prescription practices. Some (though not all) of the information that the College applies to seal does appear to fall within the scope of s. 26.2 of the *Health Professions Act*. For example, there are references to a Prescribing Practice Questionnaire completed by Dr. M and his communication with Program staff at various stages of the investigation. I note, because it is relevant to the question of risk to the public interest, that the College has withdrawn its application to seal the following portions of paragraph 30 of the Amended Response:

> (a) On 26 September 2018, the College's Manager, Drug Programs (the "program manager" wrote to Dr M regarding the opening of a PRP [prescription review program] file against him. The program manager not only emphasized that the College does not have authority to direct the care of individual patients, but also that the College has no desire to direct such care.
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> […]
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> (g) Dr. M's stage 5 interview was conducted on 18 November 2021. During this interview, it became clear from Dr M's responses that he relied heavily on mutual trust with his patients, rather than objective examination or testing, to determine patients' function and stability.
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> […]
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> (k) As a result of the file re-opening of Dr. M's PRP file, PRP staff ran a further PPP [practitioner prescription profile] from the period of 1 October 2022 to 31 December 2022. The PPP highlighted areas of concern, including Dr. M's prescribing of archaic medications, and large dispensing.
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> […]
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> (n) In June 2023, having reviewed the stage 7 interview and Dr. M's prescribing practices in the intervening months, the PR Panel [prescription review panel] again referred Dr. M's file to the Inquiry Committee for a practice investigation. At this time, Dr. M's PRP file was closed.

[24] I observe, as a starting point, that the public disclosure of the information that is the subject of the sealing order application would present no obvious risk to the personal interests of Dr. L and Dr. M. The content of the paragraphs in the Amended Response that concern Dr. L do not appear controversial. Rather, they simply deny Mr. Madryga's allegations that the College instructed Dr. L to taper his opioid

prescription, and subjected Dr. L to regulatory pressure. The portions of paragraph 30 that the College seeks to seal does contain more detailed information about Dr. M's involvement with the Program. However, Dr. M is not seeking a sealing order, and in fact advises that he is "absolutely opposed" to one. Further, the portions of paragraph 30 that the College no longer seeks to have sealed disclose the basic facts of the Program's review of Dr. M's prescription practices, including that he was twice referred to the Inquiry Committee for a practice investigation. It is difficult to see what interest would be served by sealing the remaining information contained in paragraph 30.

[25] I accept for the purposes of the present application that the confidentiality provisions of the *Health Professions Act* have a purpose beyond simply protecting individual physicians from civil claims and disciplinary proceedings. The provisions also promote the integrity of the College's quality assurance committees and programs by encouraging registrants to be candid, honest, and co-operative when they engage in such processes. For this reason, I also accept the College's submission that Dr. M's opposition to a sealing order is not determinative.

[26] However, I am also not persuaded that court openness presents a serious risk to the broader public interest identified by the College in ensuring the integrity of the quality assurance process in the circumstances of this case. The risk that registrants will lose confidence in the confidentiality of the quality assurance process arises from the action of the College in filing an Amended Response that included information arguably caught by the statutory confidentiality provisions. There will be a public record of that fact in the Court of Appeal regardless of whether a sealing order is issued, as will Dr. M's initial objection to the disclosure. There will also be a public record of the College's efforts to address Dr. M's initial concern by applying for a sealing order in the Supreme Court and the Court of Appeal. I cannot see how court openness presents any further risk to the integrity of the College's quality assurances processes in this context. This is particularly so where the affected former registrant opposes the issuance of a sealing order and much of the relevant

narrative concerning the interaction between Dr. M and the Program will remain unsealed regardless of my decision on this application.

[27] It goes without saying that this appeal and the underlying action raise complex issues about the application of the confidentiality provisions of s. 26.2 and s. 53 of the *Health Professions Act* in the context of a claim that challenges the actions of a quality assurance program. The fact that I am not prepared to seal the impugned paragraphs of the Amended Response, or the related correspondence from Dr. M's former counsel, should not be taken as an indication that I do not view the interests advanced by the College on this application as significant ones. I am simply not persuaded in the unique circumstances of the present case that an infringement of the open court principle is justified.

[28] For these reasons, I conclude that the College has not met its burden on this application of showing that court openness poses a serious risk to an important public interest. In light of that conclusion, it is unnecessary for me to address the remaining steps of the *Sherman Estate* test.

Disposition

[29] The College's application for a sealing order is dismissed.

"The Honourable Madam Justice Horsman"