CITATION: Dr. Elaine Ma v. Health Services Appeal and Review Board, 2025 ONSC 6698
DIVISIONAL COURT FILE NO.: 790/24
DATE: 20251216

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Varpio, Matheson and O'Brien JJ.

BETWEEN:	
DR. ELAINE MA Applicant	*Graham Ragan and Ariane Lefebvre*, for the Applicant
– and –	
HEALTH SERVICES APPEAL AND REVIEW BOARD and THE GENERAL MANAGER, THE ONTARIO HEALTH INSURANCE PLAN Respondents	*Ananthan Sinnadurai*, for the Respondent General Manager of the Ontario Health Insurance Plan *Alexi N. Wood, Saad Gaya and Alexandra Misterski*, for the Intervener Ontario Medical Association
	HEARD in Toronto: December 2, 2025

REASONS FOR DECISION

Matheson J.:

[1] The applicant Dr. Elaine Ma seeks judicial review of the decision of the Health Services Appeal and Review Board dated November 26, 2024 (the Decision). The Board ordered that the applicant reimburse OHIP for $600,962.16, plus interest, in relation to payments made for vaccinations administered at mass COVID-19 vaccination clinics that Dr. Ma organized and ran during the COVID-19 pandemic. Those clinics administered over 25,000 vaccinations in 2021 and early 2022 at locations including St. Lawrence College, LaSalle Secondary School and Richardson Stadium in Kingston, Ontario. At the clinics, the vaccinations were administered by physicians (including Dr. Ma), residents, medical assistants and medical students.

[2] The Board required reimbursement because the clinics and record-keeping did not meet the strict payment requirements of the Ontario Health Insurance Plan (OHIP) Schedule of Benefits. Among other things, the Board did not accept that Dr. Ma had complied with the OHIP

requirements for delegation. Further, despite acknowledging Dr. Ma's efforts and the results she achieved in facilitating COVID-19 vaccinations during the COVID-19 pandemic, the Board was not persuaded that there were extenuating circumstances permitting relief where there is not strict compliance with the billing requirements.

[3] This application for judicial review is granted for the reasons set out below.

Brief background

[4] There is no issue that the COVID-19 pandemic gave rise to a public health crisis.

[5] When COVID-19 vaccinations became available in Ontario, they were administered through hospitals and public health units and primarily given to higher-risk populations. In 2021, Ontario expanded vaccine eligibility to all adults and permitted physicians to administer COVID-19 vaccinations outside of the above publicly run clinics. Public officials made statements calling on physicians to get the vaccinations done.

[6] Dr. Ma is a family physician in the Kingston area and a professor at Queen's University. Beginning in May 2021, Dr. Ma organized and ran several COVID-19 vaccination clinics for the public in the Kingston area. She arranged locations for mass vaccinations. She arranged for the supply of COVID-19 vaccine and the other materials needed. Dr. Ma recruited physicians, residents (who are also physicians), medical assistants and medical students to administer the vaccinations. Dr. Ma paid the physicians and residents amounts totalling over $85,000. She was present at the clinics, administered some of the vaccinations, and, for the medical students, provided training and meals. Dr. Ma also recruited non-medical volunteers to help with the set up and operation of the clinics.

[7] Thousands of people were vaccinated at each clinic. A total of 27,250 vaccinations were administered to members of the public at the clinics that are at issue here.

[8] With respect to record-keeping, Dr. Ma was responsible for ensuring that all vaccinations that were administered were entered into COVaxON, the provincial online database for the collection of COVID-19 vaccination information. The vaccinations given at the mass clinics were entered into COVaxON. Through that process, records are available for each vaccination that was administered at the clinics, including the details regarding each recipient. However, that system did not permit entering the names of all the people who administered the vaccinations at the mass clinics.

[9] Before this Court, OHIP accepts and commends Dr. Ma's commitment and achievement in organizing these clinics and providing mass access to vaccinations during the COVID-19 pandemic.

[10] OHIP established fee codes for administering COVID-19 vaccinations. Dr. Ma submitted those codes for all of the vaccinations at her clinics and she received payment. That is the issue.

[11] The OHIP regime is structured on the basis that fees are paid first, and any overpayments are then recoverable afterward.

[12] Dr. Ma's clinics took place in July and December 2021 and January 2022. The applicable fee codes were submitted, and Dr. Ma was paid. The Ministry of Health began its review into Dr. Ma's claims for payment in May 2022. The review process permits OHIP to conduct a review based on a statistical sample of the services, rather than all of them. Here, OHIP reviewed a sample of 97 vaccinations, accepted as statistically significant.

[13] A dialogue ensued, beginning with a general inquiry about who administered the vaccinations and then with more detailed inquiries and responses about delegation and the clinic locations. Dr. Ma explained that she had other physicians, residents, medical assistants (with the necessary directives) and medical students giving the vaccinations. She viewed those people as employed by her for those services, as required under the permitted delegation provisions. She paid the physicians and residents by e-transfer and the students had the benefits of learning and meals. With respect to the location of the clinics, Dr. Ma explained that family doctors had previously extended their clinic space to include outdoor spaces to provide flu vaccinations. Dr. Ma provided documentation regarding the payments she made to physicians and residents and the arrangements she made for the locations, such as Queen's University Richardson Stadium.

[14] The General Manager of OHIP noted the absence of any tax and other deductions consistent with employment and the absence of monetary compensation for the medical students. The General Manager also found that the information provided did not amount to showing ownership of or a lease for the premises that were used for the mass clinics. On both issues, the General Manager relied on OHIP Bulletin 4215 – Delegated Procedures in Office from 2001. The General Manager also relied on the information in the available records for the statistical sample of 97 vaccinations.

[15] OHIP notified Dr. Ma that it had formed the opinion that she was required to reimburse OHIP with respect to the services rendered at the mass clinics. Dr. Ma disagreed. OHIP then requested that the Board hold a hearing and make an order requiring reimbursement.

[16] As set out in the request for a hearing, the General Manager was of the view that the "services were not rendered in accordance with the conditions and limitations set out in the [*Health Insurance Act* R.S.O. 1990, c. H.6] and regulations". The General Manager cited parts of the Schedule of Benefits regarding the delegation of services as well as record-keeping obligations in the *Health Insurance Act* (the *Act*). In response, Dr. Ma submitted that the arrangements satisfied the OHIP criteria, taking the position that the Ministry was applying a strict and unreasonable interpretation of the terms "employee" and "physician's office" in the delegation provisions in the Schedule of Benefits.

The Decision

[17] The Board hearing is a hearing *de novo*. The Board heard witness testimony and received documentary evidence and submissions. As put in the Decision, the Board has the power to make its own findings, reach its own conclusions, and make a new decision in the matter under consideration.

[18] As set out in s. 21 of the *Act*, following a hearing the Board may, by order, "direct the General Manager to take such action as the [Board] considers the General Manager should take in accordance with this *Act* and the regulations." Additional remedial jurisdiction is as set out in s. 6(1) of the Schedule 1 – Physician Payment Review Process – to the *Act*, including the determination of the proper amount to be paid. Here, the Board granted the requested order requiring reimbursement in full.

[19] In the reasons for the Decision, the Board outlined the governing legislative scheme, noting that insured services are set out in the Schedule of Benefits, which includes the requirements for delegation where the physician does not render the service personally.

[20] The Board accepted that delegated services are payable at the same rate as if performed by the physician provided that the requirements set out in the Schedule of Benefits were met. The main focus for delegation in this instance was whether the people administering the vaccinations were Dr. Ma's employees and whether the clinics formed part of Dr. Ma's office. As well, there was the related issue about whether the record-keeping obligations were met under s. 17.4 and, if not, whether there could still be payment under s. 17.5 of the *Act*. Section 17.5 allows for relief when there is non-compliance in extenuating circumstances.

[21] **Delegation:** The Board found that Dr. Ma had not met the requirements in the Schedule of Benefits for delegated services.

[22] The Board accepted that, as set out in the General Preamble of the Schedule of Benefits, a fee is payable to a physician when the physician's delegate rendered the service. However, the delegation must be authorized by the Schedule. The Board recounted the Schedule requirements, which include the following:

> 1) that the service be administered by the physician's employee in the physician's office and in these circumstances:
>
> a. the procedure must be one that is generally and historically accepted as a procedure that may be carried out by a nurse or other medical assistant in the employ of the physician; and,
>
> b. the physician must be physically present in the office or clinic at which the service is rendered and available to approve, modify or otherwise intervene in the procedure as required in the best interests of the patient.
>
> [Emphasis added.]

[23] Dr. Ma argued for a broad interpretation of "employee" bearing in mind the public health emergency. The Board found that with the possible exception of the medical assistants from Dr. Ma's office, the physicians, residents, medical students and other medical assistants were not her employees.

[24] The term "employee" is not defined in either the *Act* or the Schedule of Benefits. In interpreting "employee", the Board considered the principles of statutory interpretation, the

relevant text in the Schedule of Benefits and also cited from and relied on OHIP Bulletin 4215 from 2001. The Board was not persuaded that OHIP Bulletin 4215 was too old, or that the more recent publications put before the Board displaced its relevance.

[25] OHIP Bulletin 4215 said that whether a person is an employee is evidenced by payments made to the employee and the usual deductions for tax, CPP, and UI as dictated by (then) Revenue Canada. The Bulletin also said that procedures performed in the physician's office should be interpreted to mean an office "owned or leased by the physician."

[26] The Board considered the other, more recent materials before it, and distinguished those materials with one exception. An OMA Quick Reference Guide from November 2020 defined employment to mean "there is an employment contract between the physician and the individual and Canada Revenue Agency receives income statements for tax purposes."

[27] The Board acknowledged that OHIP Bulletin 4215 is not law but found it highly persuasive. The Board went on to note that regardless of whether tax deductions were made, some of the people (such as the medical students) did not receive any monetary compensation. With respect to the other physicians, Dr. Ma agreed in her testimony at the hearing that they were not her employees.

[28] The Board observed that even if it applied a more liberal interpretation, "employee" at least means a person who works for someone who pays for their services. The Board concluded that with the possible exception of her own staff, the individuals who administered the vaccinations were not employees. The Board was not persuaded that providing the medical students with training and meals was sufficient to make them employees rather than volunteers.

[29] Given the conclusion that most of the people administering the vaccinations were not employees, the Board found it unnecessary to go on and consider whether the clinic locations were within Dr. Ma's office.

[30] **Other grounds to permit payment**: Dr. Ma put forward other grounds to support her billings, which the Board addressed. I focus on those that are still at issue on this application.

[31] Dr. Ma relied on billing for the other physicians on the basis that they performed a component of a service. As noted in the Decision, the Commentary to the Schedule of Benefits provides that where more than one physician renders different components of a service, only one fee is payable and the physicians are responsible for apportioning payment among themselves. The Board was not persuaded that the administration of a vaccine involved different components. The Board observed that it was not analogous to the provision of medical care by a team of physicians, such as in surgical procedures and post-operative care. The record deficiency was also found relevant, since most of the records did not say who administered the vaccinations in any event.

[32] Dr. Ma further submitted that she was entitled to bill for services provided by undergraduate medical students at her clinics, separate from the delegation provisions, and should be permitted to do so here. Again, the Board relied on the lack of records indicating who administered each vaccination.

[33] **Record keeping and extenuating circumstances in s. 17.5 of the *Act***: The Board agreed with OHIP's submission that Dr. Ma had not met the record-keeping requirements in s. 17.4 of the *Act*. The Board concluded that Dr. Ma had not submitted records that demonstrated that she or a proper delegate had administered the vaccinations.

[34] The Board then went on to address s. 17.5 of the *Act* and extenuating circumstances.

[35] Section 17.5 permits payment in extenuating circumstances:

> 17.5 The General Manager shall refuse to pay for an insured service if the claim for payment for the service is not prepared in the required form, does not meet the prescribed requirements or is not submitted to the General Manager within the prescribed time. However, the General Manager may pay for the service if, in the General Manager's opinion, there are extenuating circumstances. [Emphasis added.]

[36] Dr. Ma submitted that her record-keeping was adequate in the circumstances, but to the extent that it was not, the Board should accept the claims under s. 17.5 of the *Act*. Dr. Ma submitted that the world-wide COVID-19 pandemic and the call by public officials to vaccinate as many people as possible gave rise to extenuating circumstances. Further, the COVaxON system prevented her from entering the names of the vaccinators who were not already in the system.

[37] The Board declined to proceed under s. 17.5, briefly holding that s. 17.5 was limited to insured services where payment had not yet been made and that although the vaccination clinics took place in the midst of a public health emergency, Dr. Ma still had time and the obligation to inform herself appropriately about billing matters.

[38] The Board concluded that it did not have the discretion to "ignore the requirements of the *Act* and the Regulation, including the Schedule of Benefits", finding that those requirements were not met.

Issues and Standard of Review

[39] Dr. Ma submits that the Decision is unreasonable. Dr. Ma focuses on three aspects of the Decision:

(i) delegation to the medical students;

(ii) billing for the other physicians who administered the vaccinations; and,

(iii) s. 17.4 and s. 17.5 of the *Act*.

[40] There is no issue that the standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653. The reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints

that bear on the decision: *Vavilov*, at para. 99. Further, the Board's expertise in OHIP billing should be borne in mind in assessing reasonableness.

[41] As discussed below, I would find the Decision reasonable on the first two issues, but unreasonable with respect to the refusal to find that s. 17.5 applies in this case given what were extenuating circumstances.

Delegation to Medical Students

[42] Dr. Ma advocates for a broader interpretation of "employee" that extends to the assistance of the medical students at the mass clinics. Dr. Ma submits that the Board's reliance on the 2001 OHIP Bulletin 4215 is unreasonable. She submits that a strict requirement that medical students receive a monetary payment, with all the tax and other deductions, is unreasonable. Dr. Ma relies on the evidence about her and another physician's current medical practice regarding students, as well as other more current bulletins and publications. Dr. Ma further submits that the purpose of the limitations on delegation includes avoiding double-billing and that is not an issue for her delegation.

[43] Dr. Ma has not demonstrated that the Decision is unreasonable. The Board provided a coherent and rational chain of analysis in interpreting the term "employee". The Board applied principles of statutory interpretation, having regard for the text of the delegation provisions, the ordinary and grammatical meaning of the text, and the broader context.

[44] With respect to OHIP Bulletin 4215, the Board expressly recognized that it was not law. The Board found it highly persuasive in referring to employees as people who are paid and for whom deductions are made. The Board considered Dr. Ma's submissions about the age of the Bulletin and considered the more recent documents. I do not agree that the reliance on the Bulletin was unreasonable because it was not a negotiated document, as submitted by the OMA. Further, the Board also relied on the 2020 OMA Quick Reference Guide. That Guide referred to an employment contact between the physician and the individual where the Canada Revenue Agency receives income statements for tax purposes.

[45] In this case there were many volunteers, and the Board considered whether the students were volunteers or employees. The students did not receive monetary payments. There were monetary payments to the physicians and residents, but not to the students, which was relevant context. Further, while it may not be necessary to show a full array of tax or other deductions to establish an employment relationship, that is not the issue before us. The issue is whether it was unreasonable to take into account the absence of tax and other deductions. It was not.

[46] Dr. Ma also submits that the students were forgoing wages in exchange for hours that would count toward their clinical education training. Yet, the record before the Board did not provide a foundation for this arrangement. Further, the evidence about Dr. Ma's practice with respect to students was anecdotal, coming from her and one other physician. It showed a good faith belief of Dr. Ma, but did not determine the interpretive issue.

[47] I agree, as submitted by the Minister, that the applicant is putting forward another interpretation of "employee" but has not demonstrated that the interpretation in the Decision is unreasonable.

Other Physicians

[48] Dr. Ma submits that the Schedule of Benefits, which incorporates the general rule that a fee is only payable to the physician rendering the service, also incorporates the concept that components of a service may be performed by different physicians. The Commentary to the Schedule of Benefits refers to the components of a service, indicating that the physicians are responsible for apportioning payment among themselves. Dr. Ma submits that she should be able to rely on this exception to the general rule that she must render the service herself.

[49] Dr. Ma submits that it was unreasonable for the Board to focus on surgery and post-surgical care in considering this exception, when it was just an example. Dr. Ma relies on the evidence of the Ministry's witness that COVID-19 vaccination clinics were quite labour intensive, with many steps in the administration of a COVID-19 vaccine.

[50] Again, the Decision on this issue is not unreasonable. The Board considered the relevant provision in the Schedule of Benefits, which refers to more than one physician rendering different components of a listed service. Medical services were within its expertise. The example referred to in the Decision, regarding surgery, comes directly from the Commentary to that section in the Schedule. It is reasonable for the Board to consider examples in the Commentary, which were expressly included for that purpose.

[51] For the provision to apply, there must be different components of a listed service. The Board considered the examples given in the Commentary and an example given by Dr. Ma in her testimony (obstetrical delivery, including delivery of the baby, delivery of the placenta and repair of the perineum). The Board found that the recordkeeping tasks performed by Dr. Ma were not analogous to the kind of services contemplated in the examples. Further, the Board found that there was no indication in the Schedule that different physicians may perform different components of the service of providing a vaccination.

[52] The applicant submits that the Board failed to take into account the $86,000 that she paid to the physicians. I conclude that this does not change the analysis of whether this exception to the general rule applies.

[53] The Board concluded that Dr. Ma's arrangements did not fall within this exception to the general rule that a physician cannot bill for services provided by other physicians. Dr. Ma has not shown this finding is unreasonable.

Record-keeping and Extenuating Circumstances

[54] Section 17.4 of the *Act* imposes these record-keeping obligations:

> 17.4 (1) For the purposes of this Act, every physician, practitioner and health facility shall maintain such records as may be necessary

> to establish whether they have provided an insured service to a person.
>
> (2) For the purposes of this Act, every physician, practitioner and health facility shall maintain such records as may be necessary to demonstrate that a service for which they prepare or submit a claim for payment is the service that they provided.
>
> (3) For the purposes of this Act, every physician and health facility shall maintain such records as may be necessary to establish whether a service they have provided is medically necessary.
>
> (4) For the purposes of this Act, every practitioner and health facility shall maintain such records as may be necessary to establish whether a service they have provided is therapeutically necessary. …
>
> [Emphasis added.]

[55] Dr. Ma submits that her record-keeping was sufficient, as follows:

(i) a record was submitted for each service claimed (the COVaxON records);

(ii) it is undisputed that the administration of the COVID-19 vaccines was an insured service that was medically and therapeutically necessary; and,

(iii) the identification of the non-physicians who performed the service is only required when the physician is not present and Dr. Ma was present throughout.

[56] Dr. Ma submits that the Board failed to address the record-keeping requirements, rendering its decision unreasonable. However, the Decision did address record keeping, which is referred in several places in the Decision. The Board concluded that Dr. Ma had not submitted records that demonstrated that she or a proper delegate had administered the vaccinations.

[57] There is then the issue of s. 17.5, which permits payment where there is non-compliance. That section, quoted above, expressly arises where a claim for payment "does not meet the prescribed requirements" and there are "extenuating circumstances."

[58] Unlike the other issues addressed in the Decision, the Board does not engage in a discussion about statutory interpretation, the relevant text of the section or the context relevant to s. 17.5. The Board simply rules out this relieving provision as follows:

(i) stating that there was nothing in the *Act* showing that s. 17.5 applied where payment had been made; and,

(ii) stating that, although the vaccination clinics took place in the midst of a public health emergency, Dr. Ma still had time and the obligation to inform herself appropriately about billing matters.

[59] Beginning with the timing issue, the plain words of s. 17.5 do not limit the relieving provision to claims where payments have not yet been made. The only limitation is the requirement that there be extenuating circumstances.

[60] Further, the context regarding how payments are made is inconsistent with the suggestion that s. 17.5 only applies when the payment has not yet been made. Subject only to standard computerized checks, physician fees are paid first and OHIP retains the authority to review them after payment and seek reimbursement. Given this context, limiting s. 17.5 to claims that have not yet been paid essentially rules out the relieving provision. No reason was put forward by the Board, nor in this Court, to justify such an extreme narrowing of the plain words of s. 17.5. This limitation on s. 17.5 is unreasonable.

[61] There is then the ruling that there were no extenuating circumstances under s. 17.5 of the *Act*, which I also find unreasonable. The Board simply noted that Dr. Ma "still had time and the obligation" to inform herself about billing matters for these clinics. This disregards the following relevant circumstances at the time of the mass vaccination clinics:

(i) Dr. Ma, a primary care physician, was practising within a public health emergency – the COVID-19 pandemic;

(ii) Dr. Ma was answering the government imperative that the top priority was getting the public vaccinated;

(iii) these were mass clinics, vaccinating over 25,000 Ontarians in the midst of this public health crisis;

(iv) both the Board and the Ministry have acknowledged Dr. Ma's efforts and the results she achieved in facilitating COVID-19 vaccinations during the pandemic;

(v) it is undisputed that the administration of the COVID-19 vaccine was an insured service for which an OHIP payment could be claimed;

(vi) this is not a case where someone else will be paid by OHIP for the vaccination services that were rendered at these clinics;

(vii) there is no issue that the vaccinations were medically and therapeutically necessary;

(viii) while her record-keeping fell short, Dr. Ma's record-keeping included COVaxON records for each vaccination given that specifically identify each recipient;

(ix) Dr. Ma paid over $86,000 to physicians and residents who assisted at the mass clinics – while this did not meet the technical requirements of delegation under the Schedule of Benefits, the payments were made;

(x) while Dr. Ma's understanding of who could administer the vaccinations at her clinics has turned out to be incorrect, she put forward good faith reasons and potential arguments that supported her arrangements to some degree – this is not a case of blatant disregard for physician obligations; and,

(xi) the OHIP requirements are technical – it is unsurprising that in the midst of the above public health crisis, there were missteps regarding billing.

[62] The above circumstances explain the non-compliance to a significant degree and substantially lessen the seriousness of the non-compliance. In other words, there were extenuating circumstances. To simply say this physician had time, during this public health crisis, to inform herself and comply, is unreasonable.

[63] Because of the unreasonable conclusion above, the Board did not go on to consider the appropriate order if s. 17.5 did apply.

[64] OHIP submits that because the available records do not say who administered most of the vaccinations, there is no adequate evidentiary basis to quantify the amount that Dr. Ma should be permitted to keep or reimburse. I disagree. Section 17.5 arises even when records are incomplete. In addition, relief under s. 17.5 is not limited to record-keeping deficiencies. It permits relief when the claims do not meet the prescribed requirements in the Schedule of Benefits, including with respect to delegation. The lack of detailed records may have an impact on the assessment of the amount, but it is not disqualifying. For example, there is evidence that Dr. Ma paid out at least $86,000. There is evidence about the steps she took and the number of vaccinations that were administered. There may be other evidence from the hearing. Section 17.5 does not have strict requirements once extenuating circumstances are shown. The amount should reflect the purpose of the section, which is to permit payment when the technical requirements are not met but there are extenuating circumstances.

[65] However, I agree with OHIP that the Board, not the Court, should determine the amount. The parties should have an opportunity to make submissions about the appropriate amount, in view of these reasons for decision, after which the Board will determine the amount.

Order

[66] I would therefore grant the application for judicial review on the limited issue of the amount under s. 17.5 of the *Act*. This matter is remitted back to the Board to determine the amount that Dr. Ma should reimburse after receiving written submissions on that issue.

[67] I would order costs paid by the respondent to the applicant in the agreed-on sum of $10,000, all inclusive.

_____
Matheson J.

I agree _____
Varpio J.

I agree _____
O'Brien J.

Released: December 16, 2025

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

DR. ELAINE MA

Applicant

– and –

HEALTH SERVICES APPEAL AND REVIEW BOARD and THE GENERAL MANAGER, THE ONTARIO HEALTH INSURANCE PLAN

Respondents

REASONS FOR DECISION

Matheson J.

Released: December 16, 2025