# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Society for Canadians Studying Medicine Abroad v. The College of Physicians and Surgeons of British Columbia*, 2024 BCSC 406

Date: 20240311
Docket: S1810320
Registry: Vancouver

Between:

**The Society for Canadians Studying Medicine Abroad, Oliver Kostanski, and Harris Falconer**

Petitioners

And

**The College of Physicians and Surgeons of British Columbia, The Minister of Health of British Columbia, The University of British Columbia, The Canadian Resident Matching Service, The Association of Faculties of Medicine of Canada, and The Health Professions Review Board**

Respondents

- and -

Docket: S222846
Registry: Vancouver

Between:

**The Society for Canadians Studying Medicine Abroad, Oliver Kostanski, and Harris Falconer**

Petitioners

And

**The Health Professions Review Board and The College of Physicians and Surgeons of British Columbia**

Respondents

Before: The Honourable Justice Kirchner

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners: | B.M. Samuels, K.C.<br>S. McHugh<br>A. Narod |
| Counsel for Respondent, The Health Professions Review Board: | A. Latimer, K.C.<br>D. Wheaton |
| Counsel for Respondent, The College of Physicians and Surgeons of British Columbia: | A.R. Westmacott, K.C.<br>A.K. Harlingten |
| Counsel for Respondent, The Minister of Health of British Columbia: | J. Penner |
| Counsel for Respondent, The University of British Columbia: | D. Penner |
| Counsel for Respondent, The Canadian Resident Matching Service: | M.J. Schalke |
| Counsel for Respondent, The Association of Faculties of Medicine of Canada: | D. Hwang |
| Place and Dates of Hearing: | Vancouver, B.C.<br>January 22-24, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>March 11, 2024 |

# Table of Contents

## Introduction

[1] Two of the respondents in this complex judicial review and *Charter* challenge apply to strike the proceedings against them. They say they have exercised no statutory or public decision-making authority and thus have not made any decision that is subject to judicial review. They further assert that their conduct is not subject to the *Canadian Charter of Rights and Freedoms*. For these reasons, they assert the petition as against them is bound to fail.

[2] The petitioners oppose the application, maintaining both applicants are proper and necessary parties to both the judicial review and the *Charter* challenge. The other respondents take no position on the applications. If the proceedings against the two applicants are struck, applications for judicial review and the *Charter* challenge will continue against the remaining respondents.

## The Proceedings

[3] In the underlying proceedings, the petitioners challenge the system by which medical school graduates are matched to available residency (i.e. postgraduate medical training) positions in British Columbia. The individual petitioners, Oliver Kostanski and Harris Falconer, are Canadian citizens and residents of Canada who have graduated from medical schools outside of Canada and the United States ("International Medical Schools"). The petitioner, the Society for Canadians Studying Medicine Abroad, is a non-profit society incorporated in 2010 whose purpose, as stated in the petition, is to "identify, document, and inform IMGs [International Medical Graduates] of non-transparent and unfair barriers they face in gaining access to residency training and hence licencing in the medical profession."

[4] The individual petitioners and those graduates whom the Society represents are Canadian citizens who have graduated from International Medical Schools that are approved by the respondent College of Physicians and Surgeons of British Columbia (the "College"). They have also passed the Medical Council of Canada Evaluation Examination which assesses their skills and knowledge to the standards required for a medical graduate seeking to begin a residency in B.C. In other words,

their education, knowledge, and skills satisfy the standards required to enter a residency program in British Columbia.

[5] Under the residency matching system that the petitioners challenge, graduates of Canadian or American medical schools ("Domestic Medical Schools") are placed in one stream for being matched with available residency positions (the "Domestic Stream") while graduates of medical schools outside of Canada or the United States, like the petitioners, are placed in a separate stream (the "International Stream"). There are far fewer residency opportunities in the International Stream than there are in the Domestic Stream and thus the success rate for matching to a residency is substantially higher in the Domestic Stream. The vast majority of graduates from International Medical Schools, like the individual petitioners, are unable to secure a residency position in British Columbia and are thus unable to enter the medical profession. The Domestic Stream also offers a much wider range of medical specialties than is available in the International Stream. The petitioners challenge this differential treatment on both administrative and constitutional grounds.

[6] Under the administrative grounds, the petitioners challenge the reasonableness and *vires* of ten or so decisions made separately by the respondents. Most of those decisions or purported decisions result from requests made by the petitioners to each of the respondents asking to be placed in the Domestic Stream for residency matching. In several cases, respondents replied stating they had no authority to grant that request. Two respondents did not reply to the request. These responses and the two non-responses are among the decisions or purported decisions that the petitioners challenge in the judicial review

[7] Under the constitutional challenge, the petitioners allege that the decisions to refuse them access to the Domestic Stream unjustifiably infringes the individual petitioners' rights under ss. 6 (mobility rights), 7 (life, liberty and security of the person), and 15 (equality) of the *Charter*.

[8] The petitioners also challenge a requirement for graduates of International Medical Schools to enter into a "Return of Service Contract" as a condition of access to a residency position. A Return of Service Contract essentially requires a physician, upon completing a residency, to work for a certain number of years in a location in British Columbia specified by the Minister of Health. This requirement is aimed at securing physicians for underserved parts of the province but it is imposed only on applicants to the International Stream and not on graduates of Domestic Medical Schools who enter the Domestic Stream. The petitioners challenge this requirement on administrative and constitutional grounds, including ss. 6, 7, 15, as well as 12 (cruel and unusual punishment) under the *Charter.*

[9] While the proceeding is structured as a challenge to the ten or so decisions made by the various respondents, at its core it is a challenge to the program that requires the petitioners to apply for a residency through the International Stream rather than the Domestic Stream. The individual decisions are the vehicles through which the petitioners seek to have the matter placed before the court.

[10] By consent, I ordered that the constitutional challenge be severed from the administrative law challenge. The constitutional challenge will proceed, if necessary, after judgment has been given in the administrative judicial review.

## The Present Applications

[11] Two of the respondents – the Canadian Residence Matching Program Service ("CaRMS") and the Association of Faculties of Medicine of Canada (the "AFMC") apply under Rule 9-5(1) of the *Supreme Court Civil Rules* to strike all claims against them. Rule 9-5(1) reads:

> 9-5 (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[12] On an application to strike a petition, the question is whether the petition sets out "a foundation for a type of proceeding authorized to be brought by petition": *E.B. v. Director of Child, Family and Community Services*, 2016 BCCA 66 at para. 42. It will only be struck if it is "plain and obvious" that it does not disclose the type of claim that may be brought by petition and has no reasonable prospect of success.

[13] To be clear, I am considering only whether the claims against CaRMS and AFMC have no reasonable prospect of success. The other respondents have not applied to strike the proceedings against them. Thus, I am not assessing whether the proceeding as a whole is bound to fail but only whether it is bound to fail against the two applicants.

[14] CaRMS is federally-incorporated not-for-profit company that provides residency matching services throughout Canada. Its "member organizations" include the AFMC. The AFMC is a federally-incorporated society under the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23. It is an association of 17 faculties of medicine of Canadian universities, including the respondent, University of British Columbia.

[15] In their submissions on this application, CaRMS and AFMC each argue they are not responsible for adopting the two-stream matching program and neither has any statutory or other power to either allow or prevent the petitioners' entry to the Domestic Stream. Nor, they say, can they grant or refuse any of the relief the petitioners are seeking. They say it is up to others to decide whether to maintain the two-stream system or to permit the petitioners to apply for a residency match in the Domestic Stream. They say there is nothing in the petition that pleads they have the lawful authority to give the petitioners entry to the Domestic Stream.

[16] Specifically, CaRMS submits it is nothing more than a service-provider that implements the matching program as directed by others.

[17] AFMC admits that it takes great interest in the matching program and that it advocated for a matching system that prefers graduates of Canadian Medical Schools, which make up its membership. In this sense, AFMC is clearly adverse in interest to the petitioners, but it maintains it has no statutory or legal authority over the two-stream system. It advocated for its adoption but the decision to adopt it was made by others. It says it has no authority to grant the petitioners access to the Domestic Stream and no authority to prevent others from granting them that access.

[18] Thus, both applicants say they are neither proper nor necessary parties to this proceeding.

[19] The petitioners argue that it is, at best, ambiguous whether CaRMS and AFMC played a necessary role in the adoption of the two-stream system. They argue it is also ambiguous as to whether other respondents can grant the petitioners' request to be admitted into the Domestic Stream without CaRMS' and AFMC's involvement. The petitioners further argue that at least AFMC exercised a public function in passing a resolution calling for preferential treatment of graduates of Domestic Medical Schools. Finally, they argue CaRMS' and AFMC's inclusion in the proceedings will provide for a more direct and effective remedy, should the petitioners succeed.

[20] Both CaRMS and AFMC have focused their applications to strike under Rule 9-5(1)(a), which requires the court to determine the issue without evidence and on the assumption that the facts alleged in the petition are true. However, CaRMS alternatively relies on subrules (b) and (c) in the event the Court does not strike the claim against them under subrule (a). As I must take the facts alleged in petition as true for the purposes of the applicants' primary arguments, I will set out the relevant portions of the Further Amended Petition, which I will refer to simply as the petition.

## The Petition

### The Orders Sought

[21] The petitioners allege that their exclusion from the Domestic Stream is *ultra vires* the *Health Professions Act*, R.S.B.C. 1996, c. 183. The petition asserts that the College is the "gatekeeper" for entry into the medical profession in British Columbia and it has the exclusive statutory power to set the conditions or requirements for admission to residency training and registration as a resident physician. It asserts that the College has a duty to direct that the petitioners and other qualified graduates of International Medical Schools be given access to the Domestic Stream so that they may compete for residency positions "on an equal footing" with Domestic Medical School graduates. It seeks a declaration to this effect.

[22] The petitioners also seek a declaration that decisions (or purported decisions) made by each of the respondents (other than the Health Professions Review Board) to exclude the individual petitioners from the Domestic Stream are "*ultra vires,* not authorized or otherwise should be quashed". It further seeks a declaration under s. 24(1) of the *Charter* that these decisions unjustifiably infringe their *Charter* rights. It seeks an order quashing the decisions.

[23] The petitioners further seek an order prohibiting the respondents from excluding all graduates of International Medical Schools from "competing on an equal basis" with graduates of Domestic Medical Schools in any future residency matching program and from requiring international graduates to enter into a Return of Service Contract as a condition of access to residency.

### Factual Basis

[24] The petition alleges that the University of British Columbia, CaRMS, AFMC, and the Minister of Health, or one or more of them, has established the conditions, requirements, and standards for eligibility to enter the residency matching program in British Columbia, including the two-stream system. It alleges that the two-stream system was created and implemented "through a collaboration of all of the Respondents." The following paragraphs from the petition speak specifically to the

role that the petitioners say CaRMS and AFMC, along with the Province (or the Minister of Health), played in the creation and implementation of the two-stream system. I have emphasized the words that describe the nature of the actions each is said to have taken:

> 35E. The Respondents achieve the foregoing purpose and implement the foregoing government objectives or policies through steps including:
>
> …
>
> b. The Minister determines, or the Minister and UBC determine; (i) that CMGs [Canadian Medical Graduates] and IMGs [International Medical Graduates] should be segregated into different streams even after IMGs have proven their knowledge and skills meet the standard expected of a graduate of a Canadian medical school; and (ii) the number of residency positions available in each stream for the purpose of controlling the number of CMGs versus IMGs that may enroll in postgraduate training in the Faculty of Medicine UBC,
>
> …
>
> d. AFMC has worked with the Minister, UBC or CaRMS, or more than one of them, to create a national Residency Matching Process that ensures that CMGs will have prioritized or assured access to Residency Positions in BC in relation to IMGs;
>
> e. AFMC has passed motions which confirm or direct that the Residency Matching Process will be designed or applied in a manner that ensures that CMGs have prioritized or assured access to a Residency Position in BC in relation to IMGs;
>
> f. The Minister informs, or the Minister and UBC inform, CaRMS of the basis on which CMGs and IMGs will be eligible for Residency Positions in UBC;
>
> g. CaRMS administers the Residency Matching Process for BC on the terms determined, confirmed or directed by the Minister, UBC or AFMC or more than one of them;
>
> …
>
> l. At the direction of the Minister, CaRMS attaches a Return of Service obligation to Residency Positions in the IMG Stream for BC;
>
> [Emphasis added]

[25] Paragraphs 42 and 43 of the petition speak to how CaRMS administers the residency matching program:

> 42. CaRMS administers the system of "matching" medical graduates to residency positions in BC and across Canada under a contract with the AFMC. CaRMS "member organizations" include, *inter alia*, the AFMC, the Federation of Medical Regulatory Authorities of Canada (FMRAC) which represents the provincial Colleges, and the Canadian Federation of Medical Students (CFMS) which represents students studying in Canadian medical schools. The College participates in the Residency Matching Process.
>
> 43. CaRMS receives eligibility requirements and rules set in each province to access postgraduate residency positions in that province. It receives information including what positions are available in each province and in what disciplines. It accepts applications from residency applicants. Each residency program sets up interviews of applicants which it is prepared to consider. The programs and applicants assess and rank each other. These rankings are sent to CaRMS which through an algorithm matches the rankings of the applicants and the programs. This concludes the first round of competition which is called the "first iteration". The positions not filled in the first iteration go into a second round of competition called the "second iteration."
>
> [Emphasis added]

[26] I pause to note that the description of CaRMS' actions in these paragraphs is consistent with how it describes its role in the residency matching program, namely a program administrator that takes its direction from others. The description of AFMC's role is pleaded to be more substantive, namely to "confirm" or "direct", by way of passing motions, that the matching process "be designed or applied in a manner that ensures" graduates of Domestic Medical Schools are prioritized.

[27] Continuing with the petition, paras. 48 and 49 describe the adoption of the two-stream system. It alleges that in 1993, the AFMC "passed a resolution to segregate and exclude [International Medical Graduates] from the first iteration" and "confine them to the second iteration." That was challenged in court, following which the two-stream system in its present form was implemented in 2007.

[28] In paras. 90 to 94, the petition alleges that each respondent has made statements about the residency matching program. Relevant to this application are statements said to be made by CaRMS, AFMC, and the Province.

[29] Statements attributed to CaRMS clearly assert it has no role in the adoption and continuation of the two-stream system. These include that CaRMS is not a decision-maker and does not create provincial or matching program requirements; that eligibility requirements for residency matching are set by "participating institutions and provincial regulatory authorities"; and UBC and the Ministry of Health "have agreed to" the policies for the first iteration match.

[30] The petition alleges that AFMC passed a resolution "which resulted in the two-stream system". This resolution is alleged to have said that eligibility for postgraduate training is determined by each Canadian medical school. The resolution itself states that "all graduates of Canadian medical schools be assured access to a residency position in Canada to complete training necessary to enter practice…"

[31] I pause again to note that AFMC argues that a resolution passed by the board of federally-incorporated society is not a reviewable decision. More importantly, AFMC concedes that this resolution is not binding in the sense that it did not implement the two-stream system but rather was a statement of AFMC's position that graduates of Canadian medical schools should have assured access to a residency position. It argues it was up to others to decide whether to act on this resolution but AFMC had no legal or statutory authority to compel them to do so.

[32] Statements attributed to the Province in the petition identify considerable uncertainty as to who specifically directed the adoption of the two-stream system. This uncertainty is a significant (but not the only) reason why the petitioners have cast a wide net in naming CaRMS and AFMC as respondents. On the one hand, it is suggested at para. 93(c) of the petition that the Province is responsible for instructing CaRMS to implement to two-stream system. This would suggest the Province alone decided to implement it. However, other statements attributed to the Province muddy the waters and suggest AFMC and CaRMS were also part of that decision.

[33] In particular, the petition alleges at paras. 93(a) and (b) that the Province has said that access to residencies for International Medical School graduates is developed through collaboration between AFMC and CaRMS and that "AFMC, CaRMS, and the province created a revised framework for the match." Most notably, in para. 93(d), the petition quotes a letter from the Ministry stating:

> …there is not one provincial body that makes this determination. It is a collective process through the AFMC, CaRMS, and provincial jurisdictions that determines the separate streams for residency matching.

In view of this last statement in particular, it is not surprising that the petitioners have named AFMC and CaRMS as respondents.

[34] While the substance of this application under Rule 9-5(1)(a) focuses only on the petition which I must assume to be true, it is notable that the Province's response to petition reinforces the ambiguity as to who made the decision to adopt the two-stream system. The Province pleads at paras. 42 and 65 of its response to petition:

> 42. The Parallel Streams approach to matching medical graduates to PGME [residency] positions was the result of a pan-Canadian decision-making process involving the provinces, medical schools, and the AFMC.
>
> …
>
> 65. Judicial review is a summary process by which the courts will supervise those who exercise statutory powers to ensure that they do not overstep legal authority. The Parallel Stream System is not the product of a single administrative decision. The Parallel Stream System is the product of numerous funding, policy, and administrative decisions made by the respondents including the Ministry, over many years.
>
> [Emphasis added]

[35] In short, the Province pleads that it, *along with other respondents*, made the decision to adopt the two-stream system.

## The Decisions Under Review

[36] The petition does not specify the 10 or so decisions that are challenged in the judicial review but the petitioners have since particularized those decisions, identifying each with copies of the relevant correspondence.

[37] In May 2018, the petitioners "applied" to the College and each other respondent, other than the Health Review Board, asking to be admitted into the Domestic Stream. The petition alleges that the College, UBC, and CaRMS denied the application and the Province and AFMC, did not respond. (I have used "applied" in quotation marks because several respondents assert that there was no "application" for the petitioners to be considered in the Domestic Stream. They say the petitioners merely made that request.)

**Application to CaRMS**

[38] The petitioners' application (or request) to CaRMS was in a letter dated May 14, 2018 which states in part:

> The purpose of this letter is to request that CaRMS allow Dr. Kostanski, Harris Falconer, and all CSAs to compete for the same positions, on the same conditions in the CMG Stream of the 2019 and future CaRMS Matches as Canadians who will or have graduated from Canadian and American medical schools…

The letter goes on to summarize the legal and constitutional bases asserted in support of this request and which are now advanced in the petition.

[39] CaRMS responded to this request in a brief email dated July 20, 2018 as follows:

> CaRMS does not set eligibility criteria; each respective provincial Ministry of Health, in consultation with the medical schools, sets the eligibility for each match iteration. Recommendations for general match eligibility are put forward to these groups by the AFMC…

[40] The petitioners assert that this is a decision that is subject to judicial review.

**Application to AFMC**

[41] The petitioners' application (or request) to AFMC is also in a letter dated May 14, 2018. It asks AFMC to stop "any attempt to impose measures to further restrict competition between" Domestic Medical School graduates and International Medical School graduates; withdraw a resolution dated May 2, 2006 relating to the two-stream system; and direct the 17 faculties of medicine in Canada to allow the

petitioners to apply for a residency match in the same stream as Domestic Medical School graduates.

[42] AFMC did not respond to this letter. The petitioners assert that the non-response constitutes a decision to refuse their request. AFMC maintains that since it did not respond, it has never made a decision. Regardless, it now takes the same position as CaRMS, namely that it has no legal authority to grant or refuse the petitioners' request.

[43] In my view, there is certainly an arguable case that a public authority's failure or refusal to respond to a specific request or application may reasonably be taken as a refusal of that request: *Haines and Haines v. Commissioner of the RCMP* (1979) 47 C.C.C. (2d) 548; [1979] N.S.J. No. 569 (C.A.) at paras.10-11 (QL). Thus, I will focus my analysis on whether AFMC had any decision-making authority to grant the petitioners' request and thus whether its (implied) decision is reviewable.

[44] In 2018, the petitioners applied for judicial review of these and other decisions of other respondents. I do not propose to set out the bases for petitioners' challenge to those decisions. This application concerns whether the decisions or purported decisions of CaRMS and AFMC are amenable to judicial review and whether CaRMS or AFMC have any decision-making authority to grant or refuse the relief the petitioners sought from them. These questions engage the nature and scope of judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

## The Judicial Review Procedure Act

[45] Judicial Review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character: *Highwood Congregation of Jehovah's Witnesses v. Wall*, 2018 SCC 26 at para. 14. Section 2(2) of the *Judicial Review Procedure Act* sets out the permitted scope of a judicial review in British Columbia:

> 2.(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[46] In *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia,* 2022 BCCA 247 at paras. 50-51, Justice Horsman, speaking for the Court of Appeal, noted that remedies in s. 2(2)(b) are only available where the public authority that made the impugned decision was operating pursuant to statutory powers. There is no suggestion that either CaRMS or AFMC have a statutory power of decision and thus s. 2(2)(b) has no application to this proceeding.

[47] Justice Horsman went on to note that remedies listed in s. 2(2)(a) – *certiorari,* prohibition, and *mandamus* – "comprise the core of the superior courts' inherent supervisory jurisdiction over inferior tribunals" and permit judicial review where the impugned decision of the public authority is "of a sufficiently public character" even if it was not exercising a power that arises from a statute.

[48] As stated in *Martineau v. Matsqui Disciplinary Bard*, [1980] 1 S.C.R. 602 at 628, *certiorari* is available as a general remedy "for supervision of the machinery of government decision-making". It is a remedy that may be granted against a public authority "with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person". It is not available in the absence of a decision: *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 at para. 58, leave to appeal to SCC ref'd, 37449 (15 June 2017).

## The Petitioners' Argument

[49] The petitioners rely on s. 2(2)(a) to support their judicial review of CaRMS and AFMC's decisions. They argue, essentially, that CaRMS and AFMC are integrated into the decision-making process that led to the adoption of the two-stream system and in the administration of that system which implements the government policy to exclude the petitioners from the Domestic Stream. They assert, in respect of CaRMS:

> 34. While CaRMS acts in an immediate sense under contract with AFMC, the matter is not purely private. CaRMS is engaged in an activity intended to further a specific government objective, and the Province directs CaRMS' activities.
>
> 35. CaRMS acts within a framework which is strongly conditioned by the exercise of statutory, regulatory and executive power…

And in respect of AFMC:

> 40. While AFMC itself does not operate directly under statutory authority, it exercises its authority, by delegation, licence, agency or otherwise, within a field that is strongly conditioned by the exercise of statutory and regulatory power and the Province's spending power.
>
> 41. In contracting with CaRMS for the matching service, AFMC implements the Ministry's decisions about the eligibility criteria for residency. It advances the Minister's objectives and acts as the Minister's *de facto* agent.

[50] The petitioners argue that CaRMS and AFMC, as participants in the process that led to the adoption of the two stream system and in its ongoing operation, are agents of government or significantly influenced by it.

## Analysis

[51] On the face of the petition and accepting its allegations as true, I find it is plain and obvious that it does not disclose a type of claim that may be brought by petition for judicial review against CaRMS and AFMC. I agree with the petitioners that the general decision to adopt the two-stream system and the specific decisions to exclude the petitioners from the Domestic Stream are arguably decisions in relation to matters of a public nature. However, apart from the Province's suggestion of a "collective" decision-making process by which the two-stream system was adopted (which I will address later), there is nothing in the petition or in law to suggest that either CaRMS or AFMC exercise state authority over how graduates of International Medical Schools are treated in the matching program. Nor have they been granted any authority to do so. Neither has any power to make a decision in respect of the two-stream system that would affect "the rights, interests, property, privileges, or liberty of any person", including the petitioners: *Martineau* at 628. Thus,

neither has made a decision that is subject to *certiorari* or reviewable under s. 2(2)(a) of the *Judicial Review Procedure Act*.

[52] I will address each applicant in turn. I will then address whether the Province's suggestion of a "collective" decision-making process makes CaRMS' and AFMC's decisions subject to review. Finally, I will address the petitioners' submission on the need for an effective remedy before I turn to the *Charter* claims.

**CaRMS**

[53] The petition discloses that CaRMS "administers" the two-stream matching program on terms directed by the Minister, UBC, or AFMC and that it operates "[a]t the direction of the Minister". It runs the matching program based on eligibility requirements and rules set by others and information about available residency positions provided to it by others. It receives rankings of applicants and residency programs that have been prepared by others and, through an algorithm, matches the rankings of the applicants and the programs. CaRMS has no say in who is given entry to this matching system or what conditions will be applied to applicants if they are given entry. Even if this system is fundamentally public in nature, CaRMS simply does not have a power, and has been given no authority by the state, to make a decision as to what class of medical school graduates should be placed in which stream.

[54] Thus, even if CaRMS wanted to grant the petitioners' request to be placed in the Domestic Stream, it has no authority to do so. That decision is made by others. Likewise, CaRMS has no lawful authority to stop others who have that decision-making authority from directing CaRMS to accept the petitioners in the Domestic Stream. It has no power to make a decision, one way or the other, affecting the rights, interests, or privileges of the petitioners as it relates to the two-stream matching system. While there is some uncertainty in the pleadings as to who exactly has that authority, it is clearly not CaRMS.

[55] Thus, the request that the petitioners made of CaRMS did not invoke an exercise of state authority because no state authority has been conferred on CaRMS

to make the decision the petitioners asked of it. To the extent that CaRMS' email response of July 20, 2018 can be characterized as a "decision", it is not one that is reviewable under s. 2 of the *Judicial Review Procedure Act*.

[56] The petitioners argue that if the Province had directly contracted with CaRMS to provide the residency matching program, there is "no doubt that the Province's acts would be subject to judicial review." They argue CaRMS cannot escape judicial review because it is performing a government function. They rely on *Nova-BioRubber.*

[57] In that case, the respondent Investment Agriculture Foundation was a provincially-incorporated society that administered a variety of provincial and federal grants and contribution programs targeted at the agriculture and agri-food industry. The Foundation was not a government body and its powers were not derived from statute. However, it administered a program that was jointly funded by the federal and provincial governments and it adjudicated upon grant applications applying criteria established by both levels of government. The petitioner sought judicial review of the Foundation's decision to reject its funding application.

[58] The Court of Appeal found the character of the Foundation's activities to be sufficiently public in nature that the decision was reviewable under s. 2(2)(a). Writing for the court, Horsman J.A. said:

> [56] If the Program was directly administered by the Province, there is no question that decisions on funding applications would be amenable to judicial review. From a rule of law perspective, it cannot be the case that a government can immunize the administration of a public program from the scope of the court's supervisory review by assigning adjudicative duties to a contractor.

[59] However, the circumstances in *Nova-BioRubber* are quite different to this case in that the Foundation was exercising an adjudicative function that was assigned to it by the two levels of government. Moreover, while the criteria for funding was set by the governments, it was ultimately up to the authority to decide whether an applicant should receive a grant or not based on that criteria.

[60] Here, the state has not assigned CaRMS any responsibility to decide how graduates of International Medical Schools should be treated in the match program. It is told what to do by others. CaRMS is given the names of qualified medical students who may apply for a residency and told which stream they are to be placed in. It then runs the match. It is contracted to be a service provider, not a decision-maker.

[61] Put simply, CaRMS exercises no state authority over the subject matter of the judicial review. It has not and cannot make a reviewable decision on that matter.

**AFMC**

[62] The role of AFMC is more complicated but I am still persuaded that the petition does not disclose a type of claim that may be brought by petition for judicial review against it.

[63] The petition alleges that AFMC has "worked with the Minister, UBC or CaRMS" to create the matching program and has passed motions which "confirm or direct" that the program prioritize graduates of the Domestic Stream. It also alleges that the Minister, UBC, or AFMC or one or more of them determine, confirm or direct the terms on which CaRMS is to administer the matching program.

[64] Taking these assertions as true may suggest the claim against AFMC cannot be struck. If AFMC is involved in determining, confirming, or directing the terms on which CaRMS administers the matching program, its exercise of that authority may be reviewable.

[65] However, there is nothing in the petition, and nothing was pointed out in argument, that asserts or explains how AFMC holds any decision-making power over the matching program. While a reviewable decision need not be one that emanates from a statutory power, there must be some conferral on the decision-maker to exercise state authority over the subject matter of the judicial review. There are no facts asserted in the the petition that support the notion that AFMC has been given any such authority.

[66] AFMC is a not-for-profit corporation. While the petitioners assert that AFMC exercises authority over the matching program "by delegation, licence, agency or otherwise", they have pleaded no material facts and pointed to no legal basis that, if proven, would establish any such delegation, licence or agency. This is not like *Nova-BioRubber* where the Investment Agriculture Foundation was contracted by the two levels of government to exercise an adjudicative function in the administration and delivery of a government program. The petition alleges no facts that elevate AFMC's authority beyond that of a not-for-profit corporation with a particular interest in the matching program. It exercises no state authority, at least not in respect of the two-stream matching system.

[67] The petition also asserts that AFMC has "passed motions which confirm or direct" that the matching program prefer graduates of Domestic Medical Schools, but a not-for-profit corporation passing a motion is not an exercise of state authority if that corporation has not been given authority by the state to decide a matter that affects the rights, interests or privileges of a person. The motion is not binding on the state or on the petitioners and is not a reviewable decision. The petition asserts no facts and identifies no legal basis by which AFMC might hold such authority. At most, the petition discloses that AFMC has influence with the Province and (obviously) UBC but that is not a basis for judicial review.

[68] In short, the petition discloses no facts that support the contention that AFMC is a delegate, licensee, or agent of the Province or any other respondent or that it has a power to decide a matter affecting the rights or interests or privileges of the petitioners: *Martineau,* at p. 628. In my view, since AFMC has no such power, it is plain and obvious that its (implied) decision in response to the petitioners' request is not subject to judicial review for the simple reason that AFMC had no power to grant or refuse that request.

[69] I emphasize that I am not being critical of the petitioners or their counsel for how they have pleaded the judicial review. The Province in its own statements and in its response to the petition has said the other respondents, including CaRMS and

AFMC, were part of the decision-making process to adopt the two-stream system. This made it ambiguous as to what, if any, authority CaRMS and AFMC might have to make reviewable decisions about the program. In view of the Province's statements, the petitioners had little choice but to plead very generally that CaRMS and AFMC have some decision-making role even without knowing what that authority is or how it came to be. As I discuss next, the Province has now clarified this point and, with that clarity, I am satisfied that CaRMS and AFMC have been conferred no state authority to make decisions about the two-stream system that affect the rights, interests or privileges of the petitioners.

**The "Collective" Decision-Making Process**

[70] I have found that neither CaRMS nor the AFMC exercise state authority and neither has a power to decide a matter that affects the rights, interests, or privileges of the petitioners as it relates to the two-stream system. However, I must address the fact that the Province has asserted and even pleaded that CaRMS and AFMC were part of the "collective" decision to adopt the two-stream system. If that is true, it may well make them necessary parties to the judicial review since the petitioners challenge that very system. It may even suggest they have, through some unspecified way, been given some power to exercise state authority.

[71] The petition alleges that the decision to adopt the two-stream system was, according to the Province, made in a "collective process through the AFMC, CaRMS, and provincial jurisdictions." The fact that the Province states in its own response to petition that the adoption of the two-stream system was "not the product of a single administrative decision" but was "the product of numerous funding, policy, and administrative decisions made by the respondents *including* the Ministry" patently reinforces the notion that CaRMS and AFMC were decision-makers and thus necessary parties to this judicial review.

[72] In the face of the Province's statements and especially its response to the petition, it is perfectly understandable that the petitioners have named CaRMS and AFMC as respondents. If they succeed in the petition while failing to name a

necessary party, they might find themselves with an ineffective remedy. As I understand it, one of the challenges the petitioners have faced in advancing this proceeding is their own uncertainty as to who made the decision to adopt the two-stream system and who has the authority to change it. The Province's statements and response to petition has done nothing to assist the petitioners in finding the clarity they need.

[73] During the hearing of this application I invited counsel for the Province to explain its position and identify precisely who is the lawful decision-maker that adopted the two-stream system. Counsel responded by stating that, factually, it cannot be distilled to a single decision. However, he conceded that while AFMC and CaRMS were consulted and even involved in the process leading to the adoption of the two-stream system, the Province does not suggest that either of them participated in the decision itself. He said, "to the extent that the Province made any decision in this process, it did so on its own." He said the Province is the "major player" and that whatever orders the Province makes with respect to the matching program can be made without CaRMS' or AFMC's formal participation.

[74] I took counsel's statement to be confirmation that, notwithstanding what it stated in its response to petition, the decision to adopt the two-stream system was made by the Province alone, albeit after considering the views and submissions of other respondents, including AFMC. To the extent this conflicts with the Province's response to petition, counsel's in-court concession takes precedence.

[75] I also asked each respondent, including the Province, to state its position on whether the absence of CaRMS or AFMC from this proceeding would limit any of the relief that that the petitioners seek in their petition. Each stated that it would not. In other words, while each respondent maintains there are many reasons why the petitioners are not entitled to the remedies they seek, all agreed that striking the claims against CaRMS and AFMC would not be a basis to deprive the petitioners' of any of those remedies.

[76] In view these clarifications, and particularly those of counsel for the Province, I find that the pleadings respecting a collective decision-making process are no longer a basis on which to continue the judicial review proceeding against CaRMS and AFMC. The decision to adopt the two-stream system was, as counsel says, made by the Province alone, or at least without CaRMS and AFMC. The fact the Province had input from others, including CaRMS and AFMC, before it made the decision does not make those others decision-makers whose actions are reviewable in this proceeding.

**Efficiency of Remedy**

[77] The petitioners argue that even if CaRMS and AFMC have not made reviewable decisions, they should remain as parties because if the court grants the petitioners a remedy, it can be enforced more efficiently if CaRMS and AFMC are directly bound by the court's order. The petitioners have not cited authority for the proposition that the court has jurisdiction on a judicial review to make orders against parties who have not made reviewable decisions under s. 2 of the *Judicial Review Procedure Act* and who were not parties to an administrative process that led to a reviewable decision. Regardless, there is nothing to suggest that those remaining respondents who have lawful authority over the matching system would not respect and implement the Court's decision without delay. I am not persuaded this is a basis to order that CaRMS and AFMC remain parties.

## The *Charter* Challenge

[78] I turn next to whether the *Charter* claims against CaRMS and AFMC are bound to fail. Again, I am considering only whether the *Charter* claims against these two respondents may proceed and I am not making any findings about the claims against other respondents, including the Province.

[79] The petitioners argue, based on *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 42-43, that a private entity is subject to *Charter* review for its acts in implementing a specific governmental policy or program and for inherently governmental actions. At issue in *Eldridge* was whether hospitals

and the Medical Services Commission were bound by the *Charter* to provide sign language interpretation to hearing impaired patients seeking hospital or medical services. The Supreme Court of Canada found that since the hospitals and the Commission delivered services under what were fundamentally public government programs, namely government-funded medical and hospital services, they were bound by the *Charter* in their delivery of those services. The petitioners argue that is what CaRMS does here.

[80] However, *Eldridge* is distinguishable because the nature of the delegated authority exercised by the hospitals and the Commission in *Eldridge* is very different to the functions of CaRMS and AFMC. The hospitals had an obligation to deliver "hospital services" as delegated by the *Hospital Insurance Act* and the Commission had the obligation to deliver "medically required services" under the *Medical Health Care Services Act*. In both cases there was scope for the delegated authorities to decide what fell within the services they were to provide.

[81] In the present case, CaRMS has no scope to determine whether the petitioners should be admitted into or excluded from the Domestic Stream. That decision was made by others. To the extent that placing the petitioners in a different stream than graduates of Domestic Medical Schools is a *Charter* breach, CaRMS is not the party responsible for that breach.

[82] In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, the plaintiffs challenged the exclusion of women's ski jump from the 2010 Vancouver Olympics. The decision to exclude women's ski jump was made by the International Olympic Committee and implemented by the Vancouver Organizing Committee ("VANOC"). At trial, Justice Fenlon said:

> [121] VANOC cannot be held to be in breach of the *Charter* in relation to decisions that it cannot control. VANOC did not make the decision to exclude women's ski jumping from the 2010 Games. VANOC did not support that decision. VANOC does not have the power to remedy it.

[83] The Court of Appeal upheld Justice Fenlon's decision (2009 BCCA 522) albeit on a different basis but it did not say her conclusion was wrong.

[84] CaRMS stands in the same position VANOC. It merely implements the direction of others. If the petitioners succeed in their *Charter* challenge against the remaining respondents, those respondents will be required to direct CaRMS to apply different, constitutionally-compliant, criteria in its administration of the matching program.

[85] This is not a case where the government might escape *Charter* scrutiny by delegating the implementation of its policies. Nor is it a case, like *Sagen*, where the party who directs the constitutionally-impugned conduct is not subject to the *Charter.* The Province is a party to these proceedings and its counsel acknowledged the Province's responsibility for adopting to the two-stream system. The petitioners' constitutional challenge to the two-stream system is properly against the Province and that challenge will proceed.

[86] With respect to AFMC, it has no authority to do anything that affects the rights, interests, or privileges of the petitioners. As I have found earlier, there is nothing specific in the petition to support the general assertion that AFMC exercises authority over the matching program "by delegation, licence, agency or otherwise". In short, the petition does not support an assertion that AFMC is implementing a specific governmental policy or program or exercising inherently governmental actions as was the case in *Eldridge*.

[87] Striking the *Charter* claim against CaRMS and AFMC does not affect the petitioner's ability to challenge the two-stream system or the requirement for a Return of Service agreement on constitutional grounds. It simply means that CaRMS and AFMC will not be parties to those proceedings. If anything, that is to AFMC's detriment. It has actively and successfully promoted priority access to residencies for graduates of Canadian medical schools, yet, by its own choice, it does not wish to be a party to these proceedings which challenge that priority access. It will have to

live with the outcome, whatever that may be. Based on the petition and counsel's submissions, I can find no reason to compel them to remain a party.

## Conclusion and Costs

[88] For the foregoing reasons, I would grant the applications of CaRMS and AFMC to strike the claims against them.

[89] The parties asked for an opportunity to address the issue of costs after my judgment. If they wish to do so, they may provide written submissions of not more than five pages each within 30 days of this judgment. However, I make the following observation that may guide the parties in their consideration of costs.

[90] As I have said earlier, in view of the Province's ambiguous position (until the hearing) as to who made the decision to adopt the two-stream system, I find it was perfectly understandable that the petitioners named CaRMS and AFMC as respondents. The Province specifically identified both as having been participants in that decision. It was only on the last day of the hearing that the Province resiled from this position and accepted responsibility for the decision. Thus, even though the Province took no position on the applications to strike, it seems to me that it bears at least some responsibility for these applications being necessary. That may have some bearing on the issue of costs.

"Kirchner J."