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,* 2026 BCSC 1723

Date: 20260910
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, and The University of British Columbia

Respondents

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

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I. Introduction

[1] Medical education in Canada requires successful completion of an undergraduate medical degree and post-graduate medical training in a specific discipline or speciality. Post-graduate medical training is typically referred to as a "residency" or "residency training." The Petitioners in this judicial review challenge the system by which medical school graduates are matched to available residency training positions in British Columbia. Specifically, they take issue with the fact that graduates of Canadian medical schools (and, at the relevant time, accredited U.S. medical schools) are given substantially better opportunities to match to a residency training position in British Columbia than Canadians who attend medical school outside of Canada (or the accredited U.S. schools).

[2] The individual Petitioners, Oliver Kostanski and Harris Falconer, are Canadian citizens and residents of British Columbia who attended medical schools outside of Canada. Dr. Kostanski completed his medical degree (hence the title "Dr.") in Poland while Mr. Falconer attended medical school in Barbados. Both returned home to British Columbia where they sought to apply for residency training with the hope of practising medicine here. Neither of them pursued residency training in the countries where they attended medical school.

[3] Both Dr. Kostanski and Mr. Falconer attended accredited medical schools that are recognized by the respondent, College of Physicians and Surgeons of British Columbia (the "**College**"). Both have also passed the Medical Council of Canada Evaluating Examination (now called the Qualifying Examination Part 1) and the National Assessment Collaboration Objective Structured Clinical Examination (the "**Qualifying Exams**") thereby demonstrating that their education, knowledge, and skills equate with what is expected of a graduate of a Canadian medical school.

[4] However, unlike the vast majority of their contemporaries who graduated from Canadian medical schools, neither Dr. Kostanski nor Mr. Falconer secured a residency position. That outcome is common for most Canadians who study medicine outside of Canada or the United States because most residency positions

in British Columbia and across Canada are designated for graduates of Canadian or, at the relevant time, accredited U.S. medical schools.

[5] Under the resident match program as it stood in 2018 when the individual Petitioners sought to apply for post-graduate medical training, graduates of Canadian or designated American medical schools (referred to as "**CMGs**" or "Canadian Medical Graduates") were placed in one stream for being matched with available residency positions (the "**Domestic Stream**") while graduates of medical schools outside of Canada or the designated U.S. schools (usually referred to as "**IMGs**" or "International Medical Graduates"), like the Petitioners, were placed in a separate stream (the "**International Stream**"). That two-stream system continues largely unchanged today with the exception that now only graduates of Canadian medical schools are qualified to apply in the Domestic Stream and graduates of U.S. medical schools are treated as IMGs.

[6] There are far fewer residency opportunities in the International Stream than in the Domestic Stream and far more medical grads competing for that smaller number of positions. Thus, the success rate for CMGs matching to a residency position in the Domestic Stream is substantially higher than for IMGs matching to a position in the International Stream. The vast majority of IMGs, like the individual petitioners, are unable to secure a residency position in British Columbia and are therefore unable to enter the medical profession, at least through that route.

[7] In fact, some 80% of the 1,000 or so IMGs who seek residency positions in British Columbia each year do not even qualify to apply for a position. Only those who score amongst the top 200 people writing the Qualifying Exams are permitted to apply in British Columbia for one of 58 residency positions designated for IMGs. By contrast, substantially all of the CMGs who apply in the Domestic Stream match for one of the 294 CMG residency positions.[1]

[1] In 2018, when the Petitioners sought to be included in the match program, there were 288 CMG positions. That number has since increased to 294.

[8] Even if an IMG matches to a residency position, it is almost certain to be in family medicine. Of the 58 IMG residency positions, 52 are in family medicine and only six are in specialties (internal medicine, pediatrics, and psychiatry). There are none in any other specialties. By contrast, the Domestic Stream offers CMGs some 30 different disciplines or specialties.

[9] Further, an IMG who beats the odds to secure a residency position must sign a "return of service" agreement which commits them to practice medicine for two years (for family medicine) or three years (for specialties) in an underserviced area of the province as directed by the Minister of Health following completion of their residency. CMGs are not subject to this obligation. There are substantial financial penalties for breaching a return of service agreement. For example, in 2017, the penalty was $480,375 for family medicine practitioner and $897,581 for psychiatry.

[10] The two-stream system and the return of service requirements are imposed by the Province of British Columbia through Minister of Health (the "**Minister**"). Each year, the Minister commits to funding a specified number of residency positions for CMGs and a much smaller number for IMGs. The number of CMG positions typically matches the number of students graduating in that year from the University of British Columbia's Faculty of Medicine, although the positions are not reserved for UBC grads specifically. UBC operates the postgraduate residency training program for both CMGs and IMGs and decides who to accept to the program from both streams. However, UBC is constrained by the Minister's funding formula and must abide by the two-stream system, although that is not a burden for UBC since it clearly supports favouring its medical school graduates for residency positions.

[11] The Petitioners challenge the two-stream system and the return of service obligation on jurisdictional, administrative and constitutional grounds. They argue the Minister (with one narrow exception) and UBC have no jurisdiction to impose the two-stream system on admissions to residency training. They argue that residency training is the practice of medicine and, under the *Health Professions Act,* R.S.B.C.

1996, c. 183,[2] only the College has jurisdiction to set terms and conditions for entry to the medical profession, including for medical residents. They acknowledge there is a narrow exception in the *Act* by which the Minister could intervene to set admissions criteria, but that authority has not been invoked here.

[12] The Petitioners further argue the *Health Professions Act* does not permit the College (or the Minister under the narrow power to intervene) to draw a distinction between CMGs and IMGs for the purpose of admission to the practise of medicine, including for residency training. They further argue the differential treatment accorded to CMGs and IMGs is inconsistent with rights and values under the *Charter of Rights and Freedoms* relating to equality, liberty and security, mobility, and freedom from cruel and unusual treatment.

[13] The Petitioner, the Society for Canadians Studying Medicine Abroad (which styles itself with the acronym "**SOCASMA**"), is a non-profit society incorporated in 2010 whose stated purpose is to "identify, document, and inform IMGs of non-transparent and unfair barriers they face in gaining access to residency training and hence licencing in the medical profession." SOCASMA also advocates for immigrant physicians who, unlike the individual Petitioners, are from other countries and have studied medicine, completed post-graduate residency training, and perhaps practised medicine in their home country. However, this case concerns only Canadian citizens who, like Dr. Kostanski and Mr. Falconer, went abroad to study medicine and have returned home in the hopes of completing residency training.

[14] In 2018, SOCASMA wrote to each of the College, UBC, and the Minister asking that the individual Petitioners and other IMGs be considered for admission to residency training on an equal footing with CMGs and without the burden of a return of service contract. The College and UBC responded that they have no authority to remove those restrictions. The Minister responded, through counsel, who denied that the Minister has authority under the *Act* to change the selection process and

[2] As of April 1, 2026, the *Health Professions Act* was repealed and replaced with the *Health Professions and Occupations Act*, S.B.C 2022, c. 43.

maintained the current process is not discriminatory, unreasonable, arbitrary or contrary to the asserted *Charter* rights. The petitioners sought a review of the College's decision with the Health Professions Review Board (the "**Review Board**") which dismissed that review application.

[15] The whole matter now comes before this Court on two applications for judicial review: one from the purported decisions of the Minister, the College and UBC refusing the relief sought by SOCASMA and the other from the decision of the Review Board.

[16] The Petitioners essentially seek relief that would compel the respondents to treat them and other IMGs on an equal footing with CMGs in the residency matching program. They seek to dismantle the two-stream system so that CMGs and IMGs would compete together on the same terms for all the presently available residency positions.

[17] For the reasons that follow, I find that the *Health Professions Act* has no application to the admissions criteria for post-graduate residency training such that the College has no jurisdiction over it. I find that the two-stream system is the product of a policy decision of the Minister and is largely immune from judicial review. The exception is the imposition of the return of service requirement which I find is regulatory in nature and requires statutory authorization. I also find that the two-stream system does not limit *Charter* rights, again save for the return of service requirement which may engage a liberty interest of persons to decide where to live, free from state interference. With the exception of the return of service obligations, I would dismiss the applications for judicial review.

[18] A summary of my conclusions may be found near the end of these reasons, starting at para. 346.

II. Background

A. The Petitioners

[19] Oliver Kostanski is a Canadian citizen and a graduate of Poznan University of Medical Sciences which is an American-affiliated medical school in Poland. He chose to study medicine there because it is close to his grandparents who were physicians in Poland and because it has a reputable program. Tuition was also lower than UBC's. Dr. Kostanski hoped to specialize in internal medicine with a subspecialty in cardiology, gastroenterology, or preventative medicine. On his return to Canada after medical school he was unable to obtain a residency in British Columbia or any other province in which he applied.

[20] Harris Falconer is also a Canadian citizen who attended medical school at American University of Integrated Sciences in Barbados. He applied for a residency through UBC in 2017 before he completed medical school but did not match. He applied again in 2018 but his application was not considered. To date he has not secured a residency. He has some $350,000 of medical school debt.

B. Residency Training

[21] The College has prescribed post-graduate residency training as a mandatory prerequisite for admission to the College as a fully licenced physician.

[22] Post-graduate residency training in British Columbia consists of on-the-job training in hospitals under the supervision of fully licensed physicians. It also includes a half day of classroom learning per week. A residency can be as short as two or three years to qualify as a family physician, four years for an internal medicine specialist, five years for a surgical resident, and seven or more for subspecialty training.

[23] The specific requirements of training and experience for family physicians is mandated by the College of Family Physicians and the requirements for specialist residency programs is set by the Royal College of Physicians and Surgeons of Canada. Those bodies have accredited UBC's residency training programs in the

family medicine and specialized fields respectively. The College has adopted the requirements and standards of both bodies as applicable to British Columbia.

[24] Residents are physicians who are employed by the regional health authorities in which they work. They see patients, take histories, conduct examinations, make diagnoses, prescribe treatments, give orders, and admit and discharge patients from the hospital. They have the responsibility and authority to provide a vast array of medical services to the public but they do so under the supervision of fully-licenced physicians. Resident physicians often work on their own without the supervising physician looking over their shoulder, but the supervisor is always responsible for overseeing their work. The degree of supervision varies from person to person depending on the resident's demonstrated capabilities.

[25] At present, the only postgraduate residency training programs in British Columbia are managed and operated by UBC's Faculty of Medicine. Each residency program has a director who is responsible for overseeing selection and performance of the residents and for ensuring that residents receive the necessary educational experiences for their area of training.

[26] A 2006 memorandum of understanding between the Ministry of Health and UBC's Faculty of Medicine sets out the basic elements of the residency program and its funding, including:

a) an "academic" component known as the "Postgraduate Medical Education program", which is provided by the Faculty of Medicine; and

b) an "employment" component in which the residents are employed by "third party health care agencies" to enable to them to obtain specialized training in a clinical setting.

[27] The residency program is funded through annual allocations to UBC from the Ministry of Health with contributions from the federal government.[3] UBC disburses a portion of that funding to the regional health authorities which employ the residents. This funding structure is reflected in memoranda of understanding between the Ministry and UBC and annual funding letters that the Minister provides to UBC for residency positions. The memoranda of understanding stipulate that the Province will annually approve the number and type of residency positions it has decided to fund for that year. The type of position refers to the area of specialty, the location of the position within the province, and whether it is for a CMG or an IMG.

[28] Although post-graduate residency training is established and administered by UBC's Faculty of Medicine, the UBC Senate, which is responsible for academics at the University, has resolved that medical residents are not "students" of UBC. In resolution passed February 15, 2012, the Senate resolved that medical residents are to be "removed from the Classification of Students as laid out in the UBC Vancouver Academic Calendar". The discussion as recorded in the minutes indicates that the Faculty of Medicine requested the change because residents are "employees of the health authority and are not in the traditional sense students of UBC."

C. History of Residency Training in Canada

[29] Dr. Dale Stogryn, the former Director of Medical Education at Royal Columbian Hospital in New Westminster, deposed that postgraduate training has been a condition of licensing for independent medical practice by all the Colleges of Physicians and Surgeons in Canada since 1952. In that year, all the provincial medical regulatory bodies agreed that "interning", as it was then called, should be a condition of licensure.

[30] Interning was a one-year post graduate training program that had to be completed by a medical school graduate or an immigrant physician whose training

[3] Within the provincial government structure, the Ministry of Advanced Education and Labour Market Development is responsible for undergraduate medical education whereas the Ministry of Health is responsible for postgraduate residency training.

was not recognized by the College before they could be licensed for independent practice. An intern spent the year in a hospital rotating through fundamental areas of medical practice as prescribed by the College.

[31] Intern programs were run by the hospitals themselves which selected and employed the new medical graduates or immigrant physicians they wished to hire into that hospital's intern program.

[32] Upon successful completion of the one-year internship, the intern became eligible to apply to the College to be a licenced general practitioner. From there, the practitioner could decide whether to pursue a specialty, in which case they entered a residency training program for that specialty. Unlike the intern programs, the specialized residency training programs were run by faculties of medicine, including UBC's.

[33] In July 1993, interning was abolished and replaced with today's model of postgraduate residency training. Under the current model, medical graduates choose a preferred area of practice before they graduate from medical school. Thus, family medicine is, in effect, a type of specialization that is pursued through a two or three year residency. If a medical student wishes to pursue a specialty such as internal medicine, pediatrics, or psychiatry, they make that choice while still in medical school and will seek out a residency position in that specialty upon graduation.

[34] With the 1993 change, faculties of medicine, which had previously administered only the specialized residencies that followed an internship, came to manage and operate all postgraduate medical training. Thus, starting in 1993, hospitals no longer directly hired graduates for postgraduate medical training. Instead, the universities came to select the candidates for the residency positions administered under their own residency programs.

[35] Around this time, faculties of medicine across the country, represented by the Association of Faculties of Medicine in Canada ("**AFMC**"), strongly advocated that

preference be given to graduates of Canadian medical schools for available residency positions. This advocacy was successful such that, starting in 1993, IMGs were not permitted to compete at all in a first iteration of the residency matching program (discussed below). IMGs were only welcomed in for a second iteration of the match to fill any positions that remined vacant after the first iteration.

[36] In 2007, most Provinces, including British Columbia, adopted the present two-stream system which reserves a relatively small number of residency positions for IMGs who compete with one another in a first round match within the International Stream. The vast majority of the available residency positions are reserved for CMGs who compete separately with one another for a much larger pool of positions available in the Domestic Stream.

D. The College's Role in Residency Training

[37] The College is the regulator of the medical profession in British Columbia: *Medical Practitioners Regulation* BC Reg 416/2008, s. 1.1. It is an incorporated body, continued under s. 15.1(3) of the *Health Professions Act* and is governed by its Board, which includes elected members who are also physicians. Under the *Health Professions Act*, which is discussed more fully below, the College is empowered to regulate the medical profession and set the criteria for obtaining a medical licence. A person can only practice medicine in British Columbia if they have been admitted as a member of the College with a licence to practice. Thus, the College is the "gatekeeper" to the medical profession.

[38] As working physicians (albeit under supervision), residents must be licenced by the College. The College has established a specific class of licence for residents called the "educational – postgraduate (resident)" (the "**Resident Class**").

[39] Through its bylaw 2-25, the College has set pre-conditions for registration in the Resident Class, including that applicants must be enrolled in UBC's residency training program:

> **2-25** (1) For the purposes of section 20(2) of the Act, to be granted registration in the educational - postgraduate class as a postgraduate resident, an applicant must
>
> (a) have a medical degree,
>
> (b) be enrolled in postgraduate training in the Faculty of Medicine, UBC,
>
> (c) provide a request for registration to the registrar from the Associate Dean of Postgraduate Medical Education, Faculty of Medicine, UBC, and
>
> (d) be legally entitled to live and work in Canada.

[40] As I will discuss below, the Petitioners argue that admission to UBC's residency training program and admission to the Resident Class are legally co-extensive because there cannot be one without the other. The crux of the Petitioner's jurisdictional argument is that the College, as gatekeeper of medical licensure, has exclusive statutory authority to set eligibility criteria for resident training. It argues the College has assigned the administration and management of the program to UBC through Bylaw 2-25 but the College retains legal control over the program and admissions to it. Consequently, the Petitioners argue, neither the Minister nor UBC has jurisdiction to regulate access to resident training, whether it be through the imposition of the two-stream system or otherwise. Only the College could do that and only in a manner that is authorized by and consistent with the *Health Professions Act*.

E. The Resident Match Program and the Two-Stream System

[41] Resident physicians are selected and hired through a nation-wide match program operated by the Canadian Residency Matching Service ("**CaRMS**"). Faculties of medicine across Canada, including UBC, submit their available residency positions and eligibility requirements to CaRMS, which posts those positions on its website. Applicants for residency positions then apply through CaRMS which screens those applicants to ensure they meet the provincial government requirements for the resident positions they are applying for and distributes those applications to the specific programs applied for. Each applicant ranks the various positions and programs they are applying for in order of their preference. Each program has a selection committee which selects their preferred

candidates from the pool of applicants provided to it by CaRMS and ranks those selections in its order of preference. CaRMS then runs its program which matches applicants with residency positions using the ranked preferences of both applicants and program selection committees.

[42] The match in British Columbia occurs in two iterations. In the first iteration IMGs can only compete in the International Stream for one of the 58 IMG positions within British Columbia (and, presumably, any IMG positions available in other provinces) while CMGs may only compete in the Domestic Stream for one of the 294 CMG positions in British Columbia, plus any CMG position available in another province. In the second iteration, anyone who did not match in the first iteration, be it CMGs or IMGs, compete against each other for the remaining positions in both streams. In other words, the two streams converge into one for the second iteration, but the number of available positions is substantially diminished because most have been taken up in the first iteration.

[43] There is no statute, regulation, or bylaw that establishes the two-stream system in British Columbia. As I will discuss below, it is effectively imposed through annual funding decisions by the Minister who determines the number of residency positions the Ministry of Health will fund and decides how to allocate those funded positions as between CMGs and IMGs. This allocation is then communicated to UBC through an annual funding letter. UBC and CaRMS structure admission to the residency training program and the match based on that allocation decision.

F. International Medical School Graduates

[44] In 2016, there were 1,001 IMGs who applied to UBC in the International Stream for one of the 58 available IMG residency positions. (Half of those positions are reserved for residents of British Columbia who are IMGs.) In the same year, there were 288 CMG residency positions which roughly equates with the number of students graduating from UBC's Faculty of Medicine that year. Presently, the Province funds some 294 CMG residency positions and 58 IMG positions. In 2024, the Province started funding an additional 20 residency positions in remote or

underserviced areas of the province and those positions are open to both CMGs and IMGs.

[45] To qualify for the residency matching program, IMGs must pass the Qualifying Exams which serve to ensure that an IMG has the same learning outcomes that can be expected of a graduate of a nationally accredited medical school in Canada. IMG applicants are also screened through a one-day Clinical Assessment Program that is designed and run by UBC. It involves a file review and a set of oral interviews which assess IMGs' clinical experience and skills and their suitability for practising in rural, remote, or underserviced areas of the province. CMGs do not have to take the Clinical Assessment Program.

[46] Given the very large number of IMGs who seek residency positions and the limited number of available IMG positions in the International Stream, only those IMGs who score amongst the top 200 candidates on the Qualifying Exams are admitted into the Clinical Assessment Program and permitted to apply for a residency. Thus, some 80% of the IMGs who wish to seek residency position in British Columbia do not even make through the initial screening process. Neither Dr. Kostanski nor Mr. Falconer fell within that top 200 IMGs so neither qualified for the Clinical Assessment Program or were permitted to apply for a residency in British Columbia.

G. The Rationale for the Two-Stream System

[47] The rationale for the two-stream system – and the clear favouring of CMGs under that system – has not been well articulated in this judicial review. The Minister suggests it is grounded in "a number of interrelated public policy considerations" and provides the following rationale:

> These considerations include a desire to ensure that the Province's substantial public investment in undergraduate medical education results in licensed physicians who can practice in the public healthcare system; finite clinical training capacity; workforce planning objectives tied to service delivery needs; and the fact that training costs for International Medical Graduates may be higher than those for Canadian Medical Graduates (due to

> internationally trained residents needing more overall academic time from faculty, teachers and administrators).

[48] The first of these rationale – ensuring the Province's investment in undergraduate medical education results in a licenced, practising physician in British Columbia – seems to be the driving factor for favouring CMGs in the residency match, at least according to the Minister's submissions. The Provincial Government contributes significant amounts of money towards putting a student through medical school at UBC and it is understandable that it would want to protect that financial investment by ensuring the student matches to a residency position to complete their medical education at the post-graduate level.

[49] That said, simply because the Province contributes significantly to a medical student's undergraduate education expenses at UBC does not mean the student will seek a residency position in British Columbia or practise medicine here. That student is free to pursue a residency and practice in another province or country. On the other hand, graduates from other medical schools in Canada are also free to apply to UBC's residency program and, since the number of CMG residency positions funded by the Province equates with the number of medical students who graduate from UBC's medical school each year, the Province will benefit from the financial investment of other provinces in medical students who were educated in that Province but take up a CMG residency position in British Columbia.

[50] The Petitioners suggest this is not a compelling factor that justifies differential treatment between CMGs and IMGs. They point out that the Province pays no portion of an IMG's undergraduate costs yet receives the benefit of their overseas education if they train as a resident and subsequently practice in British Columbia. In other words, the Petitioners argue that the Province's investment in medical education is not compromised by treating CMGs and IMGs on the same footing because, at the end of the day, there will be the same number of residents and the same number of new practitioners in British Columbia.

[51] The Petitioners make a logical point on the numbers, but one can understand the value in having as many of those who receive their medical education in British Columbia and who become familiar with British Columbia hospitals through their undergraduate clinical studies, stay in this province to do their post-graduate residency training and ultimately practise here. I accept that investing in undergraduate medical education at UBC (and, as of this year, at Simon Fraser University), cultivates doctors who will practise medicine in British Columbia and those new doctors will have direct experience in British Columbia clinical settings from their undergraduate work. (There is a substantial clinical element to undergraduate medical education, particularly in third and fourth year.) That is a good reason to invest in medical education within the Province and I find it is reasonable to structure residency training opportunities to maximize opportunities in British Columbia for those who have studied here.

[52] Further, maximizing the chances for UBC medical graduates to match with a residency positions is undoubtedly pivotal in attracting high-calibre students to UBC's undergraduate medical program and ultimately into the practice of medicine in British Columbia. It would seem illogical to attract good calibre students to UBC's Faculty of Medicine and invest in their education only to cut them loose when it comes time apply for the necessary post-graduate residency training.

[53] Another factor that has driven the two-stream system throughout Canada is AFMC's advocacy. Understandably, AFMC has pressed provincial governments across the country to ensure residency positions are available for all the graduates of the faculties of medicine AFMC represents. In 2019, AFMC released a report that found the number of CMGs who failed to match to a residency position after the second iteration had grown from 11 (nation-wide) in 2009, to 46 in 2016, to 68 in 2017. The provinces, and certainly British Columbia, have been responsive to this advocacy and, at least in recent years, have maintained a two-stream system that strongly favours positions for CMGs on at least a 1 to 1.1 ratio of residency positions to domestic medical graduates from UBC. That means there are now slightly more CMG residency potions available each year than there are persons who graduates

from UBC's Faculty of Medicine. That does not guarantee that each graduate will match to a residency position since the match is open to graduates of all Canadian and (at least in 2018) accredited American medical schools. Moreover, the positions are distributed amongst family medicine and several different specialties such that the number of graduates seeking a position in a particular specialty may outnumber the available positions for that specialty. Nevertheless, the prospects for a CMG matching to a residency position of some sort are very high.

[54] Again, I find there is value in trying to ensure that graduates who attend medical schools in Canada with substantial funding from the Provinces will have the opportunity to complete their post-graduate resident training in Canada. It makes no sense to facilitate and fund an undergraduate medical education for students only to leave them hanging for the final phase of their medical training. It would undoubtedly be difficult to attract the best students to Canada's faculties of medicine if those students could not expect to secure a residency in Canada after completing their four-year medical degree.

[55] It is not for the Court to assess whether favouring CMGs in the resident match program is good or bad policy, except perhaps in assessing whether it has a compelling and substantial objective for the purposes of *Charter* issues. However, for the reasons I have given, I find there is at least a reasonable basis for structing a resident matching program to maximize opportunities for CMGs.

[56] I would add, however, that the Minister has not persuaded me that higher training costs for IMG residents is a reasonable explanation for limiting IMG access to residency positions. According to a 2010 Provincial Government briefing note, the additional costs associated with IMG training in that year was estimated to be $1,700 in the first year of residency and $850 in the second year. That is a relative drop in the bucket (about 1.3%) compared to the annual cost in that year of funding a single resident position for a CMG (around $96,500 per year in 2010). The evidence before me does not suggest the Province's cost for training an IMG resident is materially more than a CMG resident.

[57] In fact, the evidence is to the contrary. Dr. David Wensley, who is a Clinical Professor at UBC at B.C. Children's Hospital and a Director of SOCASMA states:

> I am not aware of any difference in cost of training CMGs vs. IMGs. In my experience, there is no difference in the time it takes to train CMGs versus IMGs. In our residency and sub-specialty training programs at Children's Hospital IMGs receive the same education and training as CMGs. We have the same expectations of all our trainees. If a physician is struggling at the beginning of residency or sub-specialty training (s)he will receive extra support. In my experience, it is no more likely that a CMG than IMG will require extra support.

[58] Further, none of the respondents has offered a reasonable explanation for why, at the relevant time for this case, graduates of most U.S. medical schools were treated as CMGs in Canada, should they wish to seek a residency here. I understand that practice has recently come to an end, such that now only graduates of Canadian medical schools may apply in the Domestic Stream and all U.S. graduates are now considered IMGs. However, I heard no explanation for why British Columbia and other provinces have considered it acceptable in the past (and at the relevant time for this case) to treat graduates of U.S. medical schools as CMGs but not graduates of accredited medical schools in other countries.

[59] There is reference in AFMC's 2019 report to a reciprocity agreement that permits Canadian citizens or permanent residents of Canada who have graduated from accredited U.S. medical schools to compete in the first iteration of the CaRMS match in Canada and graduates of Canadian medical schools to compete in the United States' match for residency positions in that country. Presumably, the reciprocal nature of that agreement is thought to support the interests of CMGs, although the AFMC report found that more U.S. medical graduates matched to Canadian residency positions each year than graduates of Canadian medical schools matched to U.S. programs.

[60] Finally, the rationale for the return of service requirement which obligates all IMGs, but not CMGs, to practice medicine in a rural or underserviced area of the Province as directed by the Minister for a period of two (for family medicine) or three (for specialties) years is said to be necessary to fill persistent physician shortages in

those parts of the province. As I will discuss later in these reasons, that objective is compelling, but the Minister has offered little to explain why IMGs are singled out for this obligation.

III. History of the Proceedings

[61] On May 14, 2018, SOCASMA wrote to the College's Registrar requesting that the College:

a) allow Dr. Kosatanski, Mr. Falconer, and all other Canadian IMGs to compete for all available residency positions (CMG and IMG) on the same conditions as CMGs;

b) eliminate the mandatory Clinical Assessment Program imposed on IMGs; and

c) direct the Ministry of Health to cease imposing return of service contracts as a condition of residency for IMGs.

[62] SOCASMA maintained that under the *Health Professions Act,* only the College could set eligibility criteria for residency training and the College had unlawfully delegated that authority to UBC. It further argued that the differential treatment accorded to CMGs and IMGs was contrary to the *Health Professions Act* which, under s. 16(2)(i.1), requires that College registration procedures be "transparent, objective, impartial and fair". It said the two-stream system arbitrarily discriminated between Canadian IMGs and CMGs in an inequitable manner without regard to the IMGs' knowledge, skills or abilities as physicians. It argued this limitation was done for an improper purpose, namely to give preferential access to CMGs. It also argued the two-stream system infringed s. 6 (mobility rights), s. 7 (life, liberty and security of the person), and s. 15 (equality) of the *Charter*.

[63] The College's Registrar responded on June 19, 2018, stating that the College had no authority to grant these requests. She wrote:

> The number of residency positions across Canada is a function of government funding. There are general as well as provincial eligibility criteria for residency positions. These criteria do change from time to time. The general and provincial criteria are not determined by the College of Physicians and Surgeons of BC (the College). The College's statutory mandate does not include making determinations of general and or provincial eligibility criteria for competing in the CaRMS process.

She added that the Clinical Assessment Program is outside the College's statutory mandate and the return of service requirements are mandated by the provincial government. She said the College "is not in a position to direct the government on funding matters or contracts."

[64] The Petitioners sought a review of this decision before the Health Professions Review Board which, on April 29, 2019, found it had no jurisdiction because the Registrar's letter was not a "registration decision" under the *Health Professions Act*.

[65] On May 1, 2019, the Petitioners wrote to the College's Registration Committee and the College's Board asking for the relief set out in their May 14, 2018 letter. The Petitioners also wrote to UBC, the Minister, CaRMS, and AFMC with similar requests and similar arguments.

[66] The College's Registration Committee responded on August 16, 2019 and the College Board responded on December 19, 2019. In both cases they stated the College has no authority over the two-stream system and that authority lies with UBC which administers the residency process with the Ministry of Health. The College Board acknowledged its authority to set eligibility requirements for the various classes of registration with the College, including the Resident Class, but said it does not have authority under the *Health Professions Act* to set criteria for admissions to UBC's residency training as a post-graduate education program. It also rejected SOCASMA's argument that the admissions criteria under Bylaw 2-25 was discriminatory or that it ran afoul *Charter* rights or values.

[67] The College further said it has no regulatory authority under the *Health Professions Act* to direct UBC to eliminate the Clinical Assessment Program or to

direct the Province to eliminate the return of service requirement which is a policy decision that lies exclusively with the provincial government.

[68] The Dean of the Faculty of Medicine responded to SOCASMA on behalf of UBC on July 24, 2018. He stated that the Petitioners' requests "relate to matters that are not within UBC's jurisdiction and neither UBC nor the Faculty of Medicine can grant these requests." He said UBC does not direct the two-stream system and cannot unilaterally change it. He further said the Faculty of Medicine administers the Clinical Assessment Program on behalf of the Ministry of Health and has no authority to eliminate it. Finally, he said UBC is not a party to the return of service contracts and has no authority to eliminate them.

[69] The Minister did not reply to the Petitioners until January 28, 2019 (eight months after the request was made). By then, the Petitioners had already started this proceeding. The Minister's response came through counsel who advised that since the Petitioners had commenced court proceedings "before a response by the Minister could be finalized", the Minister would not be providing a substantive response. However, counsel's letter went on to state that the selection process for UBC residency training is "based on a nationally coordinated system of admissions reflecting the interests of multiple stakeholders" and that the Minister has no jurisdiction under the *Health Professions Act* to change that selection process. Counsel went on to assert that the admissions criteria, including the two-stream system, are not discriminatory, unreasonable, or arbitrary and do not offend the *Charter* or *Charter* values.

[70] The Petitioners applied to the Review Board for a review of the decisions of the College Board and the Registration Committee. On December 14, 2020, the Review Board dismissed the application for review from the College Board, finding that it only has jurisdiction to review decisions of the College Board where the Registration Committee has referred a registration decision to the Board. Since that had not happened here, the Review Board was without jurisdiction.

[71] On February 23, 2022, the Review Board issued its decision on its review of the College's Registration Committee. Essentially, the Review Board held that neither Dr. Kostanski nor Mr. Falconer had met the requirements of Bylaw 2-25 for admission into Resident Class in that neither was enrolled in postgraduate training in the Faculty of Medicine at UBC as required by para. (b) of the bylaw and neither had provided a request for registration from the Associate Dean of Postgraduate Medical Education, Faculty of Medicine, UBC as required under para. (c) of the bylaw. The Review Board held that it and the Registration Committee had to accept the bylaw as written and neither had jurisdiction to look behind it, rewrite it, read it down, disregard it, or grant any exception to it.

[72] The Petitioners applied for judicial review of the Review Board's decisions and, in a separate petition, for judicial review of the decisions, or purported decisions, of the Minister, UBC, and the College to reject SOCASMA's request to dispense with the two-stream system. The two petitions were heard together.

[73] SOCASMA had also submitted requests to CaRMS and AFMC to stop applying the two-stream system and both responded that they had no jurisdiction to do so. SOCASMA also sought judicial review of those purported decisions but, in an interlocutory judgment dated March 11, 2024, I concluded that neither CaRMS nor the AFMC had legal authority over the two-stream and I granted their applications to strike the Petitioners' claims against them: *The Society for Canadians Studying Medicine Abroad v. The College of Physicians and Surgeons of British Columbia*, 2024 BCSC 406 (the "**Strike Reasons**").

IV. Issues

[74] A host of issues arise on these judicial reviews but I have determined that not all need to be addressed. Broadly speaking, the following issues require determination:

1. Does the *Health Professions Act* apply to the admissions criteria for post-graduate residency training in British Columbia? Put another way, does

the College have jurisdiction under the *Health Professions Act* to end the two-stream system and allow IMGs to compete for all available residency training positions on an equal footing with IMGs, free from the Clinical Assessment Program and return of service requirements?

2. If the College does not have jurisdiction over the two-stream system (and I find that it does not), who does, how was it implemented, and is there any conduct or decision in respect of its implementation or refusal to end it which is reviewable under the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241?

3. Who is responsible for imposing the return of service requirement and is there a reviewable decision with respect to its imposition?

4. Who is responsible for imposing the Clinical Assessment Program and is there a reviewable decision with respect to its imposition?

5. Does the imposition of the two-stream system or the return of service obligations limit a right under the *Charter* or a fundamental value that underlies that right? If so, did the administrative decision maker who imposed the two-stream system or who refused to end it reasonably balance that right or value with the objectives of the two-stream system?

[75] There is also an issue as to the standard of review, particularly with respect to the determinations that the *Health Professions Act* does not govern admission to residency training. The Petitioners say that determination is reviewable on a standard of correctness while the Respondents say it is reviewable on a reasonableness standard.

[76] I will briefly mention what is <u>not</u> in issue in this judicial review. The Petitioners do not seek to expand the number of residency positions funded in British Columbia to accommodate more IMGs (although I am sure they would welcome that). They

only seek to eliminate the differential treatment between IMGs and CMGs in accessing those positions that are presently funded.

[77] Establishing more residency positions to grow the number of IMGs who are integrated into British Columbia's health care system seems like a logical way to grow the number of physicians in a province where there is presently a shortage. However, there are inherent constraints in doing so. As stated in the Minister's submission, "residency training depends on the availability of clinical supervisors, patient volumes, accredited training sites, and hospital resources" such that "residency positions cannot be expanded indefinitely, even where demand exists."

[78] Also not in issue, at least at this stage, is whether the two-stream system unjustifiably infringes a *Charter* right. The Petitioners' application for judicial review includes a *Charter* challenge to the program but, by consent (or at least unopposed), the full *Charter* challenge was severed to be determined in a future proceeding, if necessary. What is left at this stage is whether any reviewable decisions limit a right or fundamental value under the *Charter* and, if so, whether the decision maker appropriately balanced the *Charter* right with the objective of the two stream system in accordance with the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12 and *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12.

V. Standard of Review

1. The Parties' Positions

[79] The parties largely agree on the standard of review save for one fairly significant issue. The Petitioners argue the standard of review for decisions relating to the application and interpretation of the *Health Professions Act* is reviewable on a correctness standard, and not the reasonableness standard that applies more conventionally in judicial review. They argue the *Health Professions Act* establishes concurrent first instance jurisdiction as between administrative decision-makers and the court on the matters arising under that *Act*. Thus, they argue this is one of the rare exceptions to the reasonableness standard of review that would ordinarily apply.

[80] The respondents dispute that and argue all decisions under the *Health Professions Act* are subject to a reasonableness standard.

[81] If Petitioners are wrong on the question of concurrent first instance jurisdiction, the parties are in agreement that the following standards of review are applicable:

a) reasonableness on the interpretation of the *Health Professions Act* and whether it authorizes the two-stream system;

b) reasonableness on who has jurisdiction to impose the two-stream system and return of service contracts;

c) correctness on whether the treatment accorded to IMGs under the two-stream system engages *Charter* rights or values; and

d) reasonableness on how the decision-makers balanced any *Charter* rights or values under the *Doré/Loyola* framework.

2. Correctness and Concurrent First Instance Jurisdiction

[82] In *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at paras. 23, 25, and 33-68, a majority of the Supreme Court of Canada held that administrative decisions are generally subject to a reasonableness standard on judicial review but identified five exceptions to this general rule where decisions are reviewed for correctness. Those are: where a different standard of review is prescribed by legislation, where a statutory appeal mechanism sets a different standard of review, for constitutional questions, for general questions of law of central importance to the legal system as a whole, and for questions related to the jurisdictional boundaries between two or more administrative bodies.

[83] In *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 (“***SOCAN***”), the court added a sixth exception for “concurrent first instance jurisdiction” which arises where a statute provides that both the administrative decision maker and the court have first

instance jurisdiction over a matter under a statute. At issue in *SOCAN* was whether the *Copyright Act* required a user to pay two royalties to access work online. The *Act* empowers the Copyright Board to consider the issue in setting tariffs but also provides that proceedings for an infringement of the *Act* are to be brought before a court. The court may be called upon in an infringement proceeding to consider the scope of rights available under the *Act*. Thus, both the Copyright Board and the court could be asked at first instance in different proceedings to decide legal issues that arise under the *Act*. Thus, they have concurrent first instance jurisdiction over certain matters that arise under the *Act*.

[84] The majority in *SOCAN* held that a correctness standard of review must apply where concurrent first instance jurisdiction exists. Writing for the majority, Justice Rowe explained the rationale as follows:

> [37] …[W]hen there is concurrent first instance jurisdiction, the legislature has expressly involved the courts in the interpretation of a statute. While one may contemplate a degree of inconsistency within an administrative body regarding the interpretation of a statute, no such inconsistency can be tolerated when a court interprets a statute. When the legislature confers first instance concurrent jurisdiction, that necessarily carries with it the implication that, absent legislative direction to the contrary, courts will operate by their settled standards, as explained in *Vavilov*, at para. 37.

[85] The Petitioners submit that concurrent first instance jurisdiction exists for matters under the *Health Professions Act*. They point out that the *Act* empowers a college board to adopt and apply bylaws that establish the conditions and requirements for registration as a member of that college. It also empowers the board under s. 52 to apply to the Supreme Court "for an interim or permanent injunction to restrain a person from contravening any provision of the *Act*, the regulations or its bylaws." As the Petitioners point out, the Court may be asked on an application under s. 52 to decide whether the bylaw sought to be enforced is valid and binding. It may also be asked to definitively interpret the bylaw as a question arising at first instance. If the application is for a permanent injunction, the Court may be called upon to make a final determination of these issues at first instance.

[86] I have determined it is unnecessary to decide this very clever argument on standard of review because, as I will explain in the next section, I have determined that the respondents have correctly interpreted their jurisdiction (or lack of jurisdiction) under the *Health Professions Act* and that the *Act* does not apply to the admissions criteria for post-graduate residency training. Since the Petitioner's argument based on concurrent first instance jurisdiction could have far reaching effects, I find it is best to leave that question to another day where the outcome of a judicial review turns on the appropriate standard of review.

VI. Issue #1 – Jurisdiction over Admissions to Residency Training

A. The Petitioners' Argument

[87] The Petitioners argue that admission to post-graduate residency training is fundamentally about medical licensure, not medical education, because residency is the practice of medicine (albeit under supervision). Under the *Health Professions Act,* the College has near exclusive jurisdiction to set the standards and criteria for licensure to practise medicine in British Columbia. Thus, say the Petitioners, the College also has near exclusive jurisdiction to set the entry requirements for residency training. They argue only the College could impose the two-stream system, if that system was permissible under the *Health Professions Act*, because that system determines who may and may not practise medicine as a resident physician. However, the Petitioners also argue that the *Health Professions Act* does not permit the two-stream system.

[88] The narrow exception to the College's otherwise exclusive jurisdiction over medical licensure is found in s. 19(6) of the *Act* which allows the Minister to amend or repeal a College bylaw or enact a new bylaw. The Minister may exercise that authority if satisfied it is necessary or advisable to do so and if the College has not complied with a request from the Minister under s. 19(5) to make or change the bylaw itself. However, the Minister has not exercised that authority in this case.

[89] Key to the Petitioners' submission is their theory that Resident Class and resident training are one in the same. They argue:

> Registration in resident class and registration in residency training are two sides of the same coin.[4] A person cannot register in one without registering in the other. No one may train as a resident in UBC's residency training program unless they are registered as a resident with the College. And, no one may register as a resident unless they are enrolled in UBC's residency training program.

[90] It follows from this, say the Petitioners, that a restriction on entry to residency training is a restriction on entry to the College's Resident Class, and vice versa. A person whom UBC does not admit into residency training is necessarily excluded from Resident Class. Thus, the College, as gatekeeper of admission to the profession, must have implied jurisdiction to regulate or at least oversee entry into UBC's resident training programs.

[91] On this argument, UBC's Faculty of Medicine is not an independent academic institution in the way it is for undergraduate medical degrees. Rather the Petitioners view it as a service-provider that has been designated by the College to manage and operate residency training for members of the Resident Class. They posit that UBC's authority to operate postgraduate residency training comes not from the *University Act*, R.S.B.C. 1996, c. 468 or any another statute but from the College's Bylaw 2-25 enacted under the authority of the *Health Professions Act.* Thus, the Petitioners argue, the College has the power to revoke UBC's authority to provide residency training and otherwise supervise the admissions procedures and criteria:

> The College, as gatekeeper to the profession, must … supervise the entry criteria for UBC residency training to ensure they are consistent with the *Health Professions Act* and with the College's statutory object that the registration process be transparent, objective, impartial, and fair, are free from unauthorized discrimination, and consistent with *Charter* protections.

[92] The Petitioners argue that UBC may *administer* the enrolment process but, under the *Health Professions Act,* only the College has the authority to set the criteria and standards for enrollment and those criteria must be within the scope of the *Health Professions Act* and consistent with *Charter* values.

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[4] In oral argument, counsel for the Petitioners refined this analogy to suggest a more apt metaphor is a Möbius Strip, which is a two-dimensional surface with only one side.

[93] The Petitioners acknowledge the Minister has a role in directing Provincial funding to residency positions in British Columbia, including through UBC, but claim the Minister lacks jurisdiction, except under the narrow exception in s. 19(6) of the *Health Professions Act*, to impose any conditions on who may apply for those positions because the Legislature has given that authority (almost) exclusively to the College. They argue:

> The Minister has a legitimate role with respect to funding, but once the government decided, through legislation, to make medicine a self-regulated profession by giving to the College control over its regulation (subject to the narrow exception with respect to amendment of the Bylaws), the Minister must then take a "hands off" approach where doing otherwise defeats the intent of the *Health Professions Act*.

[94] Similarly, the Petitioners argue that UBC has no authority to impose the Clinical Assessment Program on IMGs as a tool to prioritize or exclude IMG applicants for residency training. That has the effect of creating conditions of entry to residency training which lay exclusively with the College under the *Health Professions Act*. The Petitioners argue that UBC may only establish screening mechanisms to manage the volume of applicants under the supervision of the College.

B. The *Health Professions Act*

[95] The *Health Professions Act* establishes a comprehensive framework for the regulation of designated health professions by various self-governing colleges: *College of Physicians and Surgeons of British Columbia v. Health Professions Review Board*, 2018 BCSC 2021 at para. 83 (var'd on other grounds, 2022 BCCA 10); *Klop v. College of Naturopathic Physicians of British Columbia*, 2022 BCSC 2086 at para 8, leave to appeal denied, 2023 BCCA 125. The College is one of those self-governing colleges. Some 27 different regulated health professions are captured under the *Act*.

[96] Section 16(1) of the *Act* sets out two overarching duties of a college: one is to "serve and protect the public" and the other is "to exercise its powers and discharge its responsibilities in the public interest". Although not about the *Act* or a health

profession, in *Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32 [***"LSBC v. TWU"]*** at para. 33*,* a majority of the Supreme Court of Canada said that language under the *Legal Profession Act,* R.S.B.C. 1998, c. 9 that is similar to s. 16(1) of the *Health Professions Act* is stated in the broadest possible terms and "manifests the legislature's intention to 'leave the governance of the legal profession to lawyers'" (citing *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 888). The majority further said at para. 37:

> …where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body's particular expertise and sensitivity to the conditions of practice.

The same can fairly be said of the College and the medical profession under of s. 16(1).

[97] Section 16(2) of the *Health Professions Act* sets out the objects of a college, including to "establish the conditions or requirements for registration of a person as a member of the college" (subs. (c)) and to establish and employ registration, inquiry, and discipline procedures that are "transparent, objective, impartial and fair" (subs. (i.1)).

[98] In *B.C. College of Optics Inc. v. The College of Opticians of British Columbia*, 2016 BCCA 85 at para. 46, the Court of Appeal found that s. 16(1) of the *Act* creates a primary duty on the part of a health college to serve and protect the public by registering and overseeing properly qualified practitioners and s. 16(2)(c) creates a secondary duty to candidates for admission to the profession by establishing "the conditions or requirements for registration of a person as a member of the college". The petitioners argue, and I agree, that s. 16(2)(i.1) compels the College to exercise its secondary duty to individual candidates for College admission in a manner that is transparent, objective, impartial and fair when setting registration procedures.

[99] Section 18(1) of the *Act* provides that the Board "must govern, control and administer" the affairs of the College in accordance with the *Act*, the regulations and the bylaws.

[100] Section 19(1) empowers college boards to make bylaws establishing classes of registrant and the conditions or requirements for registration as a member of the College. As it relates to the College's authority to govern admissions into the medical profession, s. 19(1) includes the following express bylaw-making authority:

> **19** (1) A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:
>
> …
>
> (i) establish a class or classes of registrants…;
>
> …
>
> (m) establish conditions or requirements for the registration of a person as a member of the college, including the following:
>
> (i) standards of academic or technical achievement;
>
> (ii) competencies or other qualifications;
>
> (iii) requirements for providing evidence of good character;
>
> (m.1) specify academic or technical programs that are recognized by the college as meeting a standard established under paragraph (m)(i);
>
> (m.2) provide for the examinations that may be required, used or relied on by the registration committee in satisfying itself under section 20 that a person meets the conditions or requirements for registration as a member of the college;
>
> (m.3) establish conditions or requirements for eligibility to take examinations referred to in paragraph (m.2) and procedures respecting the conduct of examinations, and authorize a committee established under paragraph (t) or the registrar to establish additional examination procedures consistent with the bylaws;
>
> (m.4) confer discretion on the registration committee, in satisfying itself under section 20 that a person meets the conditions or requirements for registration as a member of the college, to consider whether the person's knowledge, skills and abilities are substantially equivalent to the standards of academic or technical achievement and the competencies or other qualifications established under paragraph (m), and to grant registration on that basis;

[Emphasis added]

[101] Section 19(2) provides that a college board may treat "different classes of registrant" differently in enacting bylaws. Thus, registrants in the Resident Class may be treated differently than registrants in other classes. The Petitioners argue the *Act* does not permit the College Board to treat members *within* the same class differently or applicants to that class differently. They argue that is the effect of the two-stream system.

[102] As I have said, the Minister has certain supervisory powers in respect of the College's bylaws. Under s. 19(3), a bylaw has no effect unless it is filed with the Minister. The Minister may disallow most bylaws under ss. 19(3.2) and must disallow a bylaw under 19(4) if the Minister is not satisfied that appropriate provision has been made respecting, among other things, the objects referred to in s. 16. The Minister may also request a college board to amend or repeal an existing bylaw or make a new bylaw for its college and, if the college board fails to comply with that request within 60 days, the Minister may, by order, amend or repeal the existing bylaw or make a new bylaw. Since the conditions and criteria for admission to a college is to be established through a bylaw, the Minister could alter the conditions or requirements for registration as a member of the College if the statutory conditions in s. 19 were met.

[103] Thus, the *Act* serves to protect the public in the delivery of health care services by establishing a scheme for health professions to regulate themselves through their respective colleges which establish standards for admission into their professions and for practice within the respective health disciplines. Those standards are enforced through a system of registration for membership in the college, required under s. 20 of the *Act,* and by subjecting those members to a system of enforcement and professional discipline by the college as contemplated in the statutory objectives of the colleges and, for the College of Physicians and Surgeons specifically, through statutory powers under s. 25.2 to investigate ongoing

competency of its registrants and potentially suspend a registrant based on that investigation.

[104] Although the *Act* sets broad requirements for these mechanisms, the details of standards for admission and practice, qualifications for registration, and enforcement of professional standards are left to the colleges themselves to define through their expansive bylaw-making authority under s. 19 and, for the College specifically, s. 25.5.

[105] The public is further protected by preserving for the Minister the ability to amend a college bylaw or make a new bylaw. That authority allows the Minister to step in with bylaw-making authority when the Minister determines a new or amended bylaw is necessary to protect the public interest (although the legislation does not necessarily or expressly confine the exercise of the authority to those circumstances).

C. Analysis

1. Jurisdiction of the College under the Health Professions Act

[106] There is no doubt that the College is given broad authority under the *Health Professions Act* to regulate entry into the practice of medicine and that a person cannot do residency training in the UBC program unless the College admits that person to its Resident Class. Residents are supervised practising physicians employed by the regional health authorities. Their professional regulation by the College is essential to the overarching objectives of the *Health Professions Act*.

[107] It is squarely within the core functions of the College's regulation of the medical profession to set standards and conditions for admission to the practice of medicine, including the requirement to complete post-graduate residency training. It is also in keeping with the objectives of the *Health Professions Act* to require residents to be registered with the College to ensure they provide a level of competency required to protect the public through the delivery of medical services. As the College's registrar, Dr. Heidi Oetter, stated, licencing of residents by the

College ensures that residents "provide services in accordance with the standards and ethical requirements that are imposed on all physicians in the province to ensure protection of the public."

[108] However, I do not read the *Act* as conferring exclusive (or any) jurisdiction on the College to establish and operate residency training programs, or to dictate the requirements for admission to those programs.

[109] The objects of a college as set out in s. 16(2) speak to the *regulation* of the *profession*, not to the education or training of health professionals. They include things like: superintending the practice of the profession; governing its registrants according to the *Act,* regulations, and the college's bylaws; establishing conditions or requirements for registration in the college; establishing, monitoring and enforcing standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants; and establishing and maintain a continuing competency program to promote high practice standards amongst registrants.

[110] Nor does the colleges' bylaw-making authority under s. 19 of the *Act* contemplate a college making bylaws to establish and operate programs for educational or training of its members. Bylaw-making authority generally relates to matters of board governance for the college, registration requirements and procedures, establishing standards for practice by registrants, regulation of practice within the discipline, establishing professional ethics, establishing conditions or requirements for renewal, and suspension or cancelation of an individual's registration. Under s. 19(1)(m), the College may make bylaws establishing conditions or requirements for registration "as a member of the college", not for registration in an academic or technical program.

[111] The bylaw-making authority does specify that the College may establish "standards of academic or technical achievement" necessary for registration as a member of the College, but that does not suggest that the College itself will establish and administer the programs or deliver academic or technical training. In fact,

s. 19(1)(m.1) provides that the College may "specify academic or technical programs that are recognized by the college as meeting a standard established under paragraph (m)(i)" (my emphasis). *Recognizing* specific programs that deliver the required academic and technical training does not confer exclusive jurisdiction to establish and administer those programs.

[112] The *Act* also empowers the colleges to make bylaws that establish different classes of membership in their respective colleges. It is under this authority that the College has established the Resident Class. Other classes of registrant under the College's bylaws include two classes of "full" registration (family and specialty), provisional and various forms of conditional registration, five classes of "educational" registration (including Resident Class) and several others. I note that one of the prescribed educational classes under the bylaw is "medical student" which is an undergraduate medical student, but there is no suggestion that the College controls admission to medical schools.

[113] I accept that residency training is the (supervised) practise of medicine and that a person cannot receive residency training in a clinical setting without being admitted to the College's Resident Class. Likewise, pursuant to the College's Bylaw 2-25(b) and (c), a person cannot be admitted to the College's Resident Class without being accepted into UBC's residency training. They are indeed two sides of the same coin, but the two sides remain distinct with each having its own role and serving its own purpose. UBC decides who to admit to its residency training programs (constrained by the Minister's funding allocation decision which I discuss in a moment), and the College must be satisfied that those whom UBC accepts meet the College's admissions criteria for Resident Class. The College does not, and need not, become involved with selecting candidates for residency training. Its function is to ensure that those who are selected also meet the College's criteria for Resident Class[5]

[5] Thus, while I agree with the Petitioners' counsel that a Möbius Strip is a better analogy for their view of how residency training and Residency Class are structured, I am unable to agree with their

[114] Nor do I read the College's bylaws as *establishing* residency training programs and *delegating* authority to run those programs to UBC, as the Petitioners suggest. Bylaw 2-25 makes it a condition for admission to the Resident Class that applicants be enrolled in UBC's residency training. The Bylaws also require completion of residency training as a condition for admission to the College as a fully-licenced practitioner. However, these requirements do not make the College responsible for residency training programs.

[115] The Petitioners further argue that residency training is the practice of medicine and not academic education. Thus, they argue, residency training is not part of the degree-granting function of a university. They point to the fact that residents are employed by the Health Authorities and that the UBC Senate has resolved that residents are not "students" of UBC.

[116] While I accept that residency training is practising medicine (albeit under the supervision, the fact that residents are not "students" under UBC's calendar or even under the *University Act* does not mean the College must have jurisdiction over residency training programs or its admissions. Further, the fact that the College has established a specific class of registrant to capture resident physicians and prescribe their role in a manner that is distinct from other classes, including from "full" registrants, does not make the College responsible for residency training or to determine who is to be admitted to a residency training program.

[117] Being the "gatekeeper" to a profession does not mean the regulator must select the candidates who might become practising physicians (full or residents), although it can exclude from practice those who do not meet its standards for admission to the profession. Nor does it mean the College decides who will work as a physician in a particular clinic or hospital. Hospitals, health authorities, or medical clinics are free to hire the physicians they choose so long as those physicians are registered with the College. Being the gatekeeper to the medical profession does not

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conception of that structure. That said, the metaphor, complete with a physical aid to the Court in the form of a Möbius Strip, was greatly appreciated.

mean the College is responsible for setting a hospital's criteria for hiring or dismissing a fully qualified physician. I see no reason why characterizing residency training as the practice of medicine rather than academic education would extend the College's jurisdiction to deciding who may be accepted to residency training any more than it can decide who may be hired to work in a particular hospital as a fully qualified and licenced physician.

[118] The role of the gatekeeper is to set and enforce the criteria that must be met by prospective resident physicians and ensure those criteria are met before the candidate passes through the gate. The College can close the gate to any applicant who does not meet the criteria or usher someone out of the gate if they fail to uphold the practice or ethical standards set by the College. However, none of that entails selecting the candidates for residency training.

[119] The College's gatekeeping function could potentially have the effect of the College dictating certain admission requirements for residency training programs, even if the College does not operate or administer those programs. There is no point in UBC admitting a candidate for residency training if that person does not meet the College's criteria for admission to the Resident Class. Thus, admission criteria for a residency training program must incorporate the College's criteria for admission to Resident Class, but that does not make the College responsible for residency training or admissions to that program.

[120] Thus, I find that neither UBC nor the Minister was acting under (or contrary to) the *Health Professions Act* by adopting the two-stream system to allocate the limited number of residency training positions among the hundreds of CMGs and IMGs who seek those positions. The *Health Professions Act* simply has no application to those decisions. The *Act* might have some incidental impact on admissions to residency training if the College were to set criteria for admission to Resident Class beyond what UBC already requires for admission to residency training, but there is nothing in the text, context, or purpose of the *Act* to suggest it governs the residency training

programs or admission to those programs, including whether the Minister or UBC may prioritize access to residency training for CMGs.

2. The Petitioners' (principal) Authorities

[121] The Petitioners rely heavily on *LSBC v. TWU* to suggest the College has broad powers to set admissions criteria for residency training. At issue in that case was the scope of the Law Society's authority under the *Legal Profession Act* to deny recognition of a proposed law school at Trinity Western University as meeting the requirements for legal education necessary to be admitted to the Society as a practising lawyer. Under the *Law Society Rules*, which were adopted pursuant to the *Legal Profession Act,* enrollment in its bar admission program required proof of "academic qualification". This requirement could be met with a law degree from an "approved" common law faculty of law in a Canadian university. The Law Society declined to approve TWU's proposed law school because the university required all its students to sign a covenant committing not to engage in "sexual intimacy that violates the sacredness of marriage between a man and a woman." A majority of the Supreme Court of Canada held that the Law Society could consider this as a factor in deciding not to approve the proposed law school, even though it was not strictly a matter of academic qualifications or competence of individual graduates.

[122] *LSBC v. TWU* clearly recognizes a broad authority on the part of the Law Society to establish admission requirements to the legal profession. However, it does not suggest that the *Legal Profession Act* confers on the Law Society jurisdiction to specify admission requirements for TWU's proposed law school. Rather, the Law Society was entitled to consider TWU's admissions requirements in deciding whether to recognize TWU's proposed law school as an institution that satisfies the academic criteria for a person's admission to the legal profession. As Justice Abella explained for the majority, approving TWU's law school "as a route of entry to the legal profession in British Columbia" is "a decision that falls within the core of the LSBC's role as the gatekeeper of the profession": *LSBC v. TWU* at para. 29. The issue before the Court was whether the Law Society was "entitled to

consider factors apart from the academic qualifications and competence of individual graduates in making this decision to deny approval to TWU's proposed law school."

[123] The equivalent in the present case would be that the College could consider UBC's criteria for admitting medical graduates into its residency training programs, and that criteria might dictate whether College recognizes UBC's residency training as satisfying the College's own requirements for admission to the Resident Class. However, that does not mean that the College has established the residency training program or its admissions criteria, or that it has exclusive jurisdiction to do so.

[124] The Petitioners further argue that *LSBC v. TWU* affirms that a professional body that is the "gatekeeper" to the profession must "ensure there are no inequitable barriers to admission." I do not read the majority decision in *LSBC* as going that far. Justice Abella held at para. 38 that where the legislature has delegated regulation of the legal profession to the Law Society, the Law Society's interpretation of the public interest is owed deference. Further, she noted the Law Society interpreted its duty to uphold and protect the public interest by withholding its approval of the proposed law school because the requirement for students to sign the covenant as a condition of admission imposed an inequitable barrier on entry to the law school. She said at para. 39 that the Law Society "was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession" (my emphasis). She did not say the Law Society was obligated to ensure there were no inequitable barriers to admission.

[125] Assuming for the moment that the two-stream system amounts to an inequitable barrier to admission to resident training for IMGs, I am not persuaded that *LSBC* stands for the proposition that the College has a duty to cause the Province or UBC to change that. Nor am I persuaded it has the jurisdiction to do so. At most, it may be able to withdraw its endorsement of UBC's resident training program just as the Law Society declined to approve TWU's proposed law school, but that does not give it jurisdiction over admissions to the residency training program.

[126] The Petitioners also rely on *College of Optics* which suggests a college must have meaningful oversight over a program it approves under s. 19(1)(m.1) of the *Health Professions Act.* I find that *College of Optics* does not assist the Petitioners. At issue there was a requirement in the College of Opticians' bylaws that made entry to the profession conditional upon an applicant successfully completing optician training at an institution that had been accredited by the National Association of Canadian Optician Regulators (NACOR). The petitioner, B.C. College of Optics (not to be confused with the respondent, College of Opticians) was a private opticianry education institute that had not been accredited by the NACOR and had refused to seek such accreditation. It argued the College of Opticians had fettered its discretion to accredit educational programs by deferring the accreditation process to NACOR, a separate body. It argued the College of Opticians had no authority under the *Health Professions Act* to defer accreditation decisions in this manner.

[127] The Court of Appeal rejected this argument. It held that the College of Opticians has broad authority under the *Act* to accomplish the objectives of serving and protecting the public through the regulation of opticians. Those include powers that are implicit as necessary to achieve those legislative objectives and that may entail relying on outside bodies to evaluate educational institutions for purposes of accreditation. Writing for the Court, Justice Neilson said:

> [59] By implication, the *HPA* has left the question of what evaluative measures and tools should be used in considering educational programs in the discretion of the appellant [College of Opticians]. This is consistent with the legislative deference generally shown to the expertise embodied in a college of health professionals. The appellant's authority to set such parameters is also consistent with the public interest in having meaningful oversight of training programs for health professionals.

[128] The Petitioners argue that in the context of medical residency training, meaningful oversight of the residency training:

> …requires the College to set the admissions criteria for the program so that the College determines who may practise medicine. Each component is necessary for a college to meet its paramount object to serve and protect the public. The [College] Board consequently has implied authority over the entry conditions for UBC residency training under section 19(1)(m.1).

[Emphasis is the Petitioners']

[129] I do not read *College of Optics* as going this far. Certainly the College of Opticians and the College of Physicians and Surgeons have broad authority to set standards for admission to the profession which are necessarily imposed as admission criteria for programs that educate and train candidates for admission to the professions. However, I see nothing in *College of Optics* or any authority cited by the Petitioners which suggests or implies that the College has exclusive jurisdiction to set *all* admissions criteria for a residency training program.

3. Conclusion on Jurisdiction under the Health Professions Act

[130] In summary, I accept that the *Health Professions Act* confers on the College a very broad discretion to set the requirements for admission to its Resident Class and thus to decide who may or may not practise medicine in British Columbia as a resident physician. I also accept that the College's jurisdiction to set those admission standards for Resident Class could, of necessity, dictate baseline admission criteria for residency training. As a practical matter, one cannot be enrolled in residency training unless they are accepted to Resident Class.

[131] However, it does not follow from this structure that the College is responsible for establishing or administering residency training programs, even if the College makes such training mandatory for entry into the profession. Nor does bylaw 2-25 purport to create such programs or delegate their administration to UBC. It simply recognizes UBC's residency training as meeting the College's standards for academic or technical achievement necessary for admission to the profession.

[132] There is nothing in the *Health Professions Act* or bylaw 2-25 that precludes UBC or the Province from imposing their own admission requirements for residency training beyond those which are necessarily imposed incidentally by the College's admission criteria for Resident Class.

[133] I would not give effect to this ground of judicial review.

[134] Having concluded that the *Health Professions Act* does not govern the residency training program, including the two-stream system, it follows that the College, which receives its authority from the *Act*, has no jurisdiction over the two-stream system. The *Health Professions Act* empowers the College to set the standards for admission to the medical profession, not to decide whether IMGs and CMGs should be placed on an equal footing when applying for residency training, or whether IMGs should be subject to burdens not imposed on CMGs, including the Clinical Assessment Program and the return of service requirement. It cannot force UBC or the Province change or rescind the two-stream system.

[135] It follows that I find the College was correct (and certainly not unreasonable) in finding that it lacks the jurisdiction to grant the relief sought by the Petitioners. As a result, the Petitioners' applications for judicial review against the College, including the application for judicial review from the decisions of the Review Board, must be dismissed.

[136] As I will discuss in the next section, it is the Minister who has imposed the two-stream system. I will therefore consider whether the Minister has jurisdiction to do so and whether the decision to impose that system in the year that the Petitioners sought to be included in the CaRMS match is a reviewable one.

VII. Issue #2 – Is the Two-Stream System Lawful?

A. Who imposed the two-stream system?

[137] I have just concluded that the College has no jurisdiction under the *Health Professions Act* or otherwise over the two-stream system and, in the Strike Reasons, I held that CaRMS and AFMC have no authority over it either. That leaves Minister and UBC as the potentially responsible parties.

[138] During the hearing of the application to strike, counsel for the Minister accepted that the Minister ultimately bears legal responsibility for establishing the two-stream system in British Columbia. As I will describe below, I find that to be the case. Although UBC is responsible for residency training programs, it can only offer

residency positions that the Province decides to fund. Thus, the Minister is the only respondent against whom the petitioners might be granted relief.

B. What decision of the Minister is impugned?

[139] The origins of the two-stream system are murky. In its Petition Response, the Minister provides this explanation for how it was adopted:

> 42. The Parallel Streams approach to matching medical graduates to [residency] positions was the result of a pan-Canadian decision-making process involving the provinces, medical schools, and the AFMC.
>
> …
>
> 65. … 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.

[140] I accept that the two-stream system has developed over the course of many years, driven largely by historical practice and the AFMC's position that CMGs should have priority access to residency positions in Canada. Further, it is an integrated system across Canada where, in the Domestic Stream, graduates from medical schools across Canada may apply to be matched to residency positions in any province where positions are offered, subject to some regional variations such as some provinces reserving a certain number of spots for applicants who live in that province.

[141] The precise decision of the Minister that the Petitioners challenge is the Minister's failure to respond to the Petitioner's May 17, 2018 request that the Minister direct CaRMS to permit Dr. Kostanski, Mr. Falconer, and other Canadian IMGs to compete on an equal footing with CMGs for all residency positions and eliminate the Clinical Assessment Program and the return of service obligations.

[142] The Petitioners characterize the Minister's failure to substantively respond to this request as a reviewable decision that implicitly rejected their request. The Minister argues that even if the absence of a substantive response can be characterized as a refusal, that is not a reviewable decision under the *Judicial*

Review Procedure Act, R.S.B.C. 1996, c. 241 because the Petitioners cannot "manufacture" a reviewable decision by making an unsolicited request.

[143] In my view, the operative decision is found in the Minister's annual funding letter to UBC setting out the number of CMG and IMG residency positions that the Province will fund for UBC's residency training for that year. UBC can only offer residency positions that the Minister agrees to fund. By specifying the number of funded positions for CMGs and a number for IMGs, the Minister essentially requires UBC to implement the two-stream system for that year.

[144] For the year at issue in this case (i.e. for the match that occurred in 2018 which Dr. Kostanski and Mr. Falconer sought to participate in), the funding letter is dated January 9, 2019. That is after the 2018 match occurred but it is the date on which the number and type of funded residency positions for the 2018 match was formally confirmed in writing by the Minister. (I gather the decision itself was communicated verbally to UBC earlier so that the match could be held in 2018.)

[145] The funding letter also stipulates that the memorandum of understanding between the Ministry and UBC "describes the responsibilities between the parties". In short, the annual funding letter directs, if only perhaps by implication, that the two-stream system will be continued for the 2018 residency match. Further, although not stated expressly in the funding letter, the continuation of the two-stream system for the 2018 match implies a continuation of the return of service obligations for any IMGs who are admitted to residency training following the match.

[146] Thus, I will treat the annual funding letter for 2018-2019 as the Minister's decision for the purpose of this judicial review.

[147] That is not the specific decision that the Petitioners challenged but I find there is no prejudice to any party in treating it as such. As I discussed at para. 32-33 of the Strike Reasons, it was far from clear who was responsible for the adoption of the two-stream system let alone what decision implemented it. The Petitioners can hardly be faulted for failing to identify the precise decision at issue when even the

Minister could not articulate how the two-stream system came to be imposed. The petition and the correspondence that preceded it leave no doubt that the legality of the two-stream system, the return of service requirements, and the Clinical Assessment Program are at issue in this proceeding, and the Minister conceded legal responsibility for at least the two-stream system and the return of service requirements. Nothing would be served by dismissing this judicial review on the ground that the Petitioners did not identify the correct decision in their pleadings.

[148] I therefore turn next to whether the Minister's decision to give effect to the two-stream system for the 2018 match is a reviewable one. I will deal with the return of service obligations and the Clinical Assessment Program as separate issues.

C. Is the Minister's Decision Reviewable?

1. Legal Principles

[149] Section 2(2) of the *Judicial Review Procedure Act* establishes two avenues of relief in challenging an exercise of public authority. It reads:

> 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.

[150] Remedies under s. 2(2)(a) reflect the superior courts' inherent supervisory jurisdiction over inferior tribunals and may, in some circumstances, apply to non-statutory exercises of public authority where the impugned decision is of a sufficiently public character: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia,* 2022 BCCA 247 at paras. 50-51.

[151] *Certiorari* is available where a public body decides a matter that affects the "rights, interests, property, privileges or liberty" of a person and is an exercise of state authority that is of a sufficiently public character: *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 at 628; *Nova-BioRubber* at para. 52; and

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26 at para. 14.

[152] Relief under s. 2(2)(b) is available only where the challenged conduct is an exercise or a refusal to exercise a statutory power: *Nova-BioRubber* at para. 51.

2. The Two-Stream System is a Policy Decision

[153] The Petitioners state that if the authority to establish the two-stream system is not found in the *Health Professions Act* (and I have found it is not), the Minister has failed to identify any authority that allows for the imposition of the system. They state in their reply:

> The Minister's submissions do not clearly address the authority upon which [then] Minister Dix relied in continuing the two-stream system for 2019. That question has been put in issue in these proceedings. It fell to the Minister to respond.

[154] The Minister's position is that the imposition of the two-stream system for 2018-2019 is not an exercise of a statutory power but is a "funding and allocation policy" decision of the Minister that is grounded in executive authority and not an exercise of a statutory power. The Minister argues:

> The parallel stream system described above is the product of a long-standing Ministry-designed funding and allocation policy framework. This framework governs how the finite number of publicly funded residency positions are planned, financed, allocated, and contractually implemented each year (the "Residency Funding Framework").

[155] The Minister argues that decisions of this nature are not reviewable because they are not an exercise of statutory power and they do not adjudicate the rights, interests, property, privileges or liberty of a person.

[156] Not all decisions of a minister are grounded in a statute. As Justice Newbury explained in *Pharmaceutical Manufacturers Association of Canada v. British Columbia (Attorney General)*, 1997 CanLII 4597, 38 BCLR (3d) 175 (C.A.):

> [27] …the Crown has the capacities and powers of a natural person and a natural person has the capacity to establish programs for public benefit and to define or restrict the distribution of such benefits. A philanthropically-

> minded billionaire, for example, could establish a program for the reimbursement of drug costs for such classes of persons as he or she thought appropriate. Obviously, such a philanthropist would be entitled to restrict the type of drug or the amount of money to be paid to beneficiaries of his largesse as he or she saw fit, or to impose conditions on eligibility. Equally clearly, he or she could decide to terminate the program — all without invoking any law or regulation, or any privilege or power available only to the Crown. Cannot the Crown do the same?
>
> [28] The answer must be that it can, subject to the same proviso that limits the exercise of the royal prerogative in its narrow or historical sense: the Crown may not interfere with the "rights, duties or liberties" of its subjects without legal authority. If it does so, it will like any other person be held accountable in a court of law.
>
> [Emphasis added]

[157] In that case, the petitioners challenged a government policy which limited Pharmacare funding largely to generic drugs unless a patient was granted an exemption by the Ministry of Health. There was no statutory provision or regulation that governed the policy. The petitioners argued the *Continuing Care Act*, R.S.B.C. 1996, c. 70 precluded the government from implementing the policy because that *Act* “occupied the field” with respect to Pharmacare funding. Writing for the Court of Appeal, Newbury J.A. held that since there was no conflict between the policy and what was regulated by the *Act*, the government was not precluded from implementing the policy.

[158] In *Hospital Employees’ Union v. Health Authorities (British Columbia)*, 2003 BCSC 778, Justice Macaulay considered whether the Minister of Health Services was exercising a statutory power of decision under the *Health Authorities Act* by incorporating a society under the *Society Act* to administer certain province-wide health services. It was argued this was prohibited by the *Health Authorities Act* which required that health services be provided by regional health authorities established under that *Act*. Justice Macaulay disagreed and found there was nothing specific in the *Health Authorities Act* that precluded the Minister from establishing the society and empowering it to do what the Minister prescribed it to do.

[159] In the present case, I find the Minister’s decision to implement or maintain the two-stream system for 2018-2019 is a policy decision made under the government’s

executive authority and is not precluded by any statute. (I exclude from this the imposition of the return of service obligations which I address later.) The Legislature annually approves an amount of funding for the Ministry of Health and, subject to any legal or constitutional constraints such as the *Charter*, the Minister has discretion over how to allocate those funds. As a minister of the Crown, the Minister may establish a program for the public benefit and "define or restrict the distribution of such benefits": *Pharmaceutical Manufacturers* para. 27. Here, the Minister determined as a matter of public policy to fund a certain number of residency positions and to allocate those positions between CMGs and IMGs in a way that favours CMGs. In my view, that policy decision does not require a specific statutory authority, and it is not precluded by any statute.

[160] That leads to the question of whether the decision is reviewable under s. 2 of the *Judicial Review Procedure Act*.

[161] There is no bar on judicial review of "policy decisions." Speaking for the Court of Appeal in *Nova-BioRubber*, Justice Horsman said at para. 57: "Policy decisions may be, and frequently are, subject to judicial review. There is no general bar on an application for judicial review of policy decisions." She went on to say in para. 58:

> [58] There is a narrow category of decisions which are not amenable to judicial review because they raise issues that are non-justiciable. The issue of justiciability is contextual. The court must consider whether it has the institutional capacity and legitimacy to adjudicate the matter: *Highwood* at para. 34. By way of example, in *Highwood*, the Supreme Court of Canada held that matters such as the merits of a religious tenet are not justiciable. This is because the courts have neither legitimacy nor institutional capacity to determine the merits of theological or religious doctrine: *Highwood* at paras. 36–37.
>
> [Emphasis added]

[162] Several cases have held that government funding decisions are not amendable to judicial review. A leading authority on this point is *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)*, 1991 CanLII 7099, 78 D.L.R. (4th) 289 (Ont. Div Ct) which was a judicial review of the Minister of

Transpiration's decision to withdraw funding that was previously been committed for a new highway. The Divisional Court dismissed the judicial review. It held:

> The evidence leads to the conclusion that the decision was one announced by the Minister after approval of the Cabinet and in substance constitutes an expression of the intention of the government not to provide any further funding for construction of the project. The government has the right to order its priorities and direct its fiscal resources towards those initiatives or programs which are most compatible with the policy conclusions guiding that particular government's action. This was simply a statement of funding policy and priorities and not the exercise of a statutory power of decision attracting judicial review.
>
> … It is in substance a decision for the disbursement of public funds. It has been a constitutional principle of our parliamentary system for at least three centuries that such disbursement is within the authority of the legislature alone.
>
> [Emphasis added]

[163] *Hamilton-Wentworth* has been widely applied, including in British Columbia. In *Volansky and Cowan v. Reid*, 2002 BCSC 580, the petitioners sought judicial review of a decision of the Minister of Transportation and Highways to reduce inland ferry services in the Kootenays. They applied for an interim stay of the cuts pending the hearing of their petition. The Minister argued the decision was not reviewable because it was a funding and allocation decision. Justice McEwan held that the question of whether the decision was reviewable should be decided on the petition and not on the stay application but said on the material before him the petitioners had not demonstrated that the minister had made a reviewable decision. Citing *Hamilton-Wentworth,* he said government funding decisions are not ordinarily reviewable by the courts and nor do the courts have a general power to direct the expenditure of money by the Legislature.

[164] In *Hospital Employees' Union,* Macaulay J. held that the Minister's exercise of authority to establish a society to administer certain health services was not precluded by statute and was a policy decision that is not reviewable under the *Judicial Review Procedure Act*. Citing *Hamilton-Wentworth* and *Volansky,* he said at para. 72, that "[p]olicy statements about funding and government priorities are not ordinarily amenable to judicial review." He also noted that the minister's exercise of

authority did not affect the legal rights, powers, privileges, immunities, duties, or liabilities of any person within the meaning of a "statutory power of decision" under the *Judicial Review Procedures Act.*

[165] In *Kuki v. Ministry of Training, Colleges and Universities*, 2013 ONSC 5574, the applicant sought judicial review of the Ministry's refusal to fund the applicant's proposed master's degree under a discretionary government program created to retrain laid-off workers for specified in-demand occupations. The Ministry denied funding because the applicant's proposed degree would not lead to one of the specified occupations. The Court held at para. 13 that the decision was not reviewable because the Crown "has the authority to establish programs for the benefit of the public as it sees fit" and "[p]rograms that are created without statutory authority at the discretion of the government are not reviewable by courts of law unless they violate the *Canadian Charter of Rights and Freedoms.*" The Court added at para. 14 that the Ministry's decision to define who was eligible to receive funding under the program is not reviewable because "it is a decision for the disbursement of public funds and as such is within the authority of the legislature alone".

[166] In *Dlugosz v. Attorney General of Québec,* 1987 CanLII 1115 (QCCA), a case with strong parallels to this one, the Court considered a ministerial directive similar to the funding decisions made here. At the time, Québec was managing an oversupply of physicians in the Province overall but an undersupply of physicians in certain remote communities. To address this dual problem, the Minister issued a 1984 directive limiting the number of medical internships (the precursor to residencies) for IMGs to 50 positions and imposed what amounts to a return of service condition that required those physicians to serve three years in a remote community following completion of their internship.

[167] The Court also considered a related 1985 cabinet directive that fixed the number of intern positions the Province would fund and broke those down into specified areas of practice or speciality. It also stipulated that priority for specialized internships should be given to physicians who have practised in remote areas. Thus,

the policy favoured a segment of the physician population, namely those who had practised medicine in remote areas and gave those physicians better opportunities to secure a specialty internship.

[168] The Court found the 1985 cabinet directive was a policy decision that was not reviewable by the Court. The effect of the directive was to allocate financial resources by setting the number of internships and to pursue a policy that gave priority for specialty training to physicians who practised in remote areas. The Court said at para. 20 that the cabinet directive:

> [translation] …sets out how, and for what purposes, the budget allocated to public health will be used for medical training and for the paid clinical placement of candidates. It creates no legal rule of conduct and alters no right or obligation of any class of persons subject to the administration. To be sure, the government limits the funds available for interns and their remuneration, but it is fully entitled to do so by way of directive.

[169] As I discuss below, while the Court in *Dlugosz* found the allocation of internship opportunities was not reviewable, it found the imposition of a return of service obligation on IMGs was reviewable and set that requirement aside. I will return to that part of the decision when I deal with the return of service obligations.

[170] Putting these cases in the terms framed by Horseman J.A. in *Nova-BioRubber*, at para. 58, the court in each case determined that it lacks the legitimacy to adjudicate the matters in issue because it was for the government to decide what initiative to fund and how to set priorities.

[171] In the present case, it is not disputed that the Minister's decision to fund a specified number of residency positions is a policy decision that is not amendable to judicial review. Rather, it is the allocation of those positions as between CMGs and IMGs that the petitioners argue is reviewable. As stated in *Kuki,* a decision of this nature could be challenged on constitutional grounds if the allocation of benefits offends the *Charter*. It may also be impugned on human rights grounds if it amounts to discrimination prohibited by the *Human Rights Code*, R.S.B.C. 1996, c. 210. It may also be challenged under s. 2(2)(a) of the *Judicial Review Procedure Act* if it

affects the rights, interests, or liberties of a person. I will address those points below. However, outside of those circumstances, I find the Minister's allocation of residency positions between CMGs and IMGs is a type of policy decision for which the Court does not have legitimacy to adjudicate. As stated in *Pharmaceutical Manufacturers,* the government may establish a program for the public benefit and may define or restrict the distribution of those benefits.

[172] Here, the Minister has made a policy decision to allocate a greater number of residency positions to CMGs than to IMGs, both in real terms and in proportion to the number of applicants from each category. That allocation is not arbitrary. It is based on a policy to maximize the opportunity for those who gradate from a Canadian medical school to secure a residency position over those who graduate from medical schools outside of Canada (and, at the applicable time, outside the United States). There are policy reasons for that allocation which I have discussed earlier at paras. 47-60. It is not for the Court to assess whether that is wise policy. It is a policy the Minister is entitled to implement and, subject to considering any constitutional constraints (which I address below), I can find no legal constraint on this policy-making authority that would give this Court the legitimacy or capacity to judicially review it.

[173] The petitioners cite *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062 for the proposition that the Court can look behind funding decisions to determine if the Minister has strayed into directing operational aspects of a larger policy. In that case, the Province wound down a subsidy program for consumers who bought electric cars but announced a two-month extension of the subsidy for some vehicle orders that had been placed before the cancellation was announced. However, the Province purported to restrict this extension of the program to orders for cars made only by franchised dealerships and excluded orders that the consumer placed directly with the manufacturer. Since Tesla dealerships are owned by Tesla itself and not franchised, Tesla consumers did not qualify for the extended subsidy. There was evidence that the franchised dealership requirement

was a façade to permit the government to exclude Tesla from the extended program for extraneous reasons, including that it had no manufacturing plant in Ontario.

[174] Justice Myers considered *Hamilton-Wentworth* and acknowledged that government funding decisions are typically not justiciable. However, he also observed that "it is very much the role of the court to inquire into the *propriety* or the lawfulness of a payment or withholding of a payment under statutory or regulatory laws." He held at para. 40 that the government's exclusion of Tesla from the extension of the program was not lawful because the government "changed its role from policy-setting at a high level of abstraction to executive program administration." He observed at para. 45 that an exercise of executive power will be justiciable if the subject matter "affects the rights or legitimate expectations of an individual" and at para. 47 that a court will review executive action taken for improper purposes. He wrote:

> [61] … Whether the goal was wise or not, the means implemented by the exercise of statutory and regulatory discretion was arbitrary; it was unrelated to the achievement of the supposed policy goal. It was also not related to any of the conservationist purposes of the electric car subsidy program. It was not related to any purpose under the *Public Transportation and Highway Improvement Act.* Therefore, it cannot stand.

[175] The Petitioners argue that the "high-level policy" in this case is the decision to fund residency training, in how many positions, and in what disciplines, all to best serve the health needs of British Columbia. However, they say the decision to allocate a specific number of those positions between CMGs and IMGs is an operational decision that the Court may review on the principles set out in *Tesla*.

[176] I disagree. In my view, it is very much a matter of policy for the Minister to prescribe a certain number of resident training positions for graduates of Canadian medical schools. As stated in *Pharmaceutical Manufacturers,* it is within the government's authority to define or restrict the *distribution* of a benefit. That is what the Minister has done here. Unlike *Tesla,* that distribution was neither arbitrary nor unrelated to the purposes of the program. It is a policy choice maximize the resident training opportunities for graduates of Canadian medical school.

[177] The Petitioners also refer to *Valley Rubber Resources Inc. v. British Columbia (Minister of Environment, Lands and Parks)*, 2002 BCCA 524 which was a challenge to a government program to recycle tires. The program provided for payments to registered participants who collected and processed used tires. Valley Rubber's business depended on receiving a supply of used tires but it was not a registered participant under the program and thus the program interfered with its supply of tires. It challenged the program as being unauthorized by applicable legislation.

[178] Speaking for the Court of Appeal, Justice Ryan observed that if the program was a legitimate exercise of the government's expenditure power, it would not be reviewable under the *Judicial Review Procedure Act*, absent a challenge based on fairness. However, if it was a regulatory scheme, it would fail a judicial review because it would have been implemented without passing authorizing regulations. Justice Ryan noted that the hallmarks of a regulatory scheme include the creation or imposition of obligations enforceable by sanctions. She found that the program was not a regulatory scheme because no one was *required* to participate in it and no sanctions were imposed on those who choose not to participate.

[179] Justice Ryan rejected Valley Rubber's argument that the program was a "coercive application of incentives" in that it essentially forced businesses to fall in line with the program because they could not otherwise compete with participants who received subsidies for collecting and processing used tires. In rejecting that argument, Ryan J.A. said:

> [30] … There can be no doubt that the program has an impact on the conduct of scrap tire processors. Government policy is often devised to change the way different sectors of the economy operate. But even if all in the industry change their practices to conform with the program, the program itself still does not have the force of law if there is no enforceable obligation to participate in it. Without that, the program cannot be said to constitute a regulation.

[180] The Petitioners argue that the two-stream system is regulatory in nature because it is imposed on UBC by the Minister. I disagree. The Minister has made a policy decision to fund a specified number of residency positions and allocate those

positions amongst CMGs and IMGs in a way that strongly favours all, or close to all, CMGs securing a position. The two-stream system then becomes necessary to give that policy decision as to how to allocate benefits amongst different segments of society.

[181] The Petitioners argue that the two-stream system and the return of service agreement interfere with the rights, interests, and liberties of IMGs. They argue the program specifically limits their rights or interests in applying for the full scope of residency positions funded by the government.

[182] Again I disagree. The petitioners have no legal entitlement to a particular configuration for residency matching program. Outside of the *Charter* or human rights context, they have no right to receive the same treatment as graduates of Canadian medical schools. As Ryan J.A. observed in *Valley Rubber,* allocation of opportunities provided through a government program may have a particular impact on certain segments of society. A benefit may be extended to some members of society that is not conferred on others.

[183] In a broad sense, any person who is part of a segment of society who does not receive a benefit extended to other segments of society may be “interested” in the decision but that does not mean it has an adjudicative interest at stake. The fact that a segment of society does not receive that benefit does not amount to a determination of the rights, interests and liberties of *a person* who is part of that segment of society.

[184] For those reasons, I find that the imposition of the two-stream system (putting aside for the moment the return of service and Clinical Assessment Program requirements) is an exercise of government policy making that is not prescribed by statute, does not affect the rights, interests or liberties of a person, and is not reviewable under s. 2 of the *Judicial Review Procedure Act*. I would dismiss this aspect of the judicial review.

VIII. Issue #3 – The Return of Service Requirement

A. The Parties' Positions

[185] As with the imposition of the two-stream system, the Minister acknowledges responsibility for requiring IMGs who secure a residency training position in British Columbia to sign a return of service contract as a condition of receiving that position. As a reminder, that contract binds the IMG resident to practising medicine for two to three years following their residency in a location designated by the Minister. If the physician breaks that return of service agreement by leaving the designated place before the expiry of the two or three years, there are substantial contractual penalties. In 2017, the penalty was $480,000 for family physicians and almost $900,000 for specialists. These amounts are *not* prorated based on how far into the two or three year term the physician breaches the return of service agreement. Return of service obligations are not imposed on CMGs.

[186] A return of service contract undoubtedly places burdensome obligations on an IMG. It can be especially hard for IMGs who have family obligations. For example, Mr. Falconer has a child for whom he shares parenting responsibilities with his former spouse. If he was required to move away from the Lower Mainland, he would be unable to regularly parent his child.

[187] The Petitioners challenge two aspects of the return of service requirement. First, they challenge the requirement itself, namely that all IMGs must accept a return of service contract as a condition for receiving a residency position. Second, they seek an order setting aside any return of service agreements that are currently in force between the Province and an IMG, whether that IMG is a resident who is yet to begin practising in the location designated by the Minister or is a practising physician who has completed their residency but is still bound by the return of service obligation because the term of the obligation has expired.

[188] The Minister argues that the return of service requirement is not reviewable under s. 2(2)(a) of the *Judicial Review Procedure Act* because it is an exercise of the Minister's "natural person's" power to enter into contracts. The Minister argues:

> 152. It is well-established that when the Crown acts in its capacity as a contracting party, it does so as a "natural person" and not pursuant to statutory authority, unless a statute governs the formation, variation, or termination of the contract: [citations omitted]. Contractual disputes with the Crown are therefore presumptively matters of private law, remediable through ordinary civil proceedings rather than judicial review.
>
> …
>
> 155. … The Return of Service contracts at issue were entered into pursuant to the Crown's general contracting capacity and governed by their own terms. The petitioners do not identify any statutory provision that confers on the Minister a power to rescind those contracts, let alone one that imposes a duty to do so in response to correspondence from concerned third parties.

[189] The Petitioners reply that IMGs are given no choice in the matter. If they are fortunate to be one of the IMGs who matches to an IMG residency position but refuse to sign the return of service agreement, they lose the residency spot and the opportunity to practice medicine in British Columbia. The Petitioners argue the return of service requirement is a coercive tool used by the state to regulate where an IMG must practice for the applicable period and not a matter of a contract freely entered into by two private parties.

B. Standing

[190] None of the respondents has argued (at least not directly) that the Petitioners lack standing to challenge the return of service requirements. The Minister raised the issue in its Amended Petition Response (para. 68A) but did not advance the argument in written or oral submissions. The extent of the Minister's submissions on standing was to point out that the Petitioners seek to set aside existing return of service agreements to which they are not parties and without naming the individuals who are parties to those agreements as respondents. However, this argument is advanced as part of the Minister's larger argument that private contractual relationships involving the Crown are not subject to judicial review. It is not directly framed as a standing argument.

[191] Neither Dr. Kostanski nor Mr. Falconer were among the 200 IMGs who qualified to apply for an IMG match based on their Qualifying Exams. Thus, neither reached a stage where they would have been required to accept the return of

service obligation and their standing to challenge that obligation would seem questionable.

[192] SOCASMA, however, is a society that advocates for and assists Canadians who are currently studying medicine abroad or who have graduated from international medical schools. Among its purposes, as stated in its constitution, are to remove barriers for Canadian IMGs to return to Canada to practise medicine. The return of service obligations is specifically identified in the constitution as one such barrier. Undoubtedly, there are individuals who SOCASMA represents who have matched to an IMG residency position and are presently bound by a return of service contract; and all IMGs who consider seeking residency positions in Canada must accept that they will be subject to return of service obligations should they secure a residency.

[193] The court has discretion to grant public interest standing in appropriate circumstances: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 25. In considering whether to do so, it must consider three factors: “(1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts”: *Downtown Eastside Sex Workers* para. 37. These three factors are not a checklist but rather are “interrelated considerations to be weighed cumulatively, not individually”: *Downtown Eastside Sex Workers* para. 36.

[194] I am satisfied that SOCASMA and this proceeding satisfy the criteria for public interest standing. The lawfulness of the return of service obligations, both on administrative/jurisdictional grounds and constitutional grounds, is a serious justiciable issue in which SOCASMA and those who it represents have a genuine interest. Some of its members undoubtedly have a real stake in the issue. This proceeding is a reasonable and effective way to bring this issue to court. And the issue has been thoroughly argued by experienced counsel on both sides of the

issue. A factual foundation for the dispute has been well laid out in the affidavit evidence, including that of Dr. Rachel Rothbart who had to fulfill return of service obligations in exchange for a psychiatry residency she matched to. She describes the hardship she faced in uprooting her family to fulfill the obligation. Dr. Kostanski and Mr. Falconer's evidence also addresses the hardship they would face as IMGs should they have to commit to return of service obligations. Furthermore, none of the concerns that have traditionally limited standing are present in this case: *Downtown Eastside Sex Workers* para. 25.

[195] Since the Province and no other respondent has directly argued against the SOCASMA's standing to challenge the return of service obligations, it may not be strictly necessary for me to decide the issue. Regardless, for the reasons just outlined, I am satisfied that SOCASMA has public interest standing to challenge the return of service obligations.

C. Analysis

[196] It is undisputed that governments have the capacity to enter into private contracts and doing so does not fall within the definition of a "statutory power" under the *Judicial Review Procedure Act*: *The Redeemed Christian Church of God v. New Westminster (City)*, 2021 BCSC 1401 at para. 40, aff'd 2022 BCCA 224; *Highwood,* para. 14. That is true even where the authority to enter into the contract stems from a "general statutory power to contract": *Redeemed Christian Church,* para. 40.

[197] Sometimes, however, governments use their powers of contract as a form of regulation to coerce citizens into a particular course of action, such as paying fees or providing some benefit to the government. In those circumstances, the Crown's purported exercise of a contracting power may be subject to judicial review.

[198] The issue arose in *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, 2019 ABCA 468, albeit not in the context of a judicial review. In that case, Steam Whistle challenged the constitutionality of a mark-up on beer charged by the Alberta Liquor and Gaming Commission to alcohol retailers in the province.

Under statute, the Commission is the only wholesale dealer of alcohol in Alberta. Steam Whistle, as an alcohol manufacturer, can only distribute its product in Alberta through the Commission, and alcohol retailers can only acquire product for retail sale from the Commission as wholesaler. The Commission imposed a universal mark-up on beer at $1.25 per litre but provided a grant to Alberta craft brewers to offset that mark-up. Steam Whistle, an Ontario brewer which did not get the benefit of the offsetting grant, challenged the mark-up asserting that it was a tax that violated ss. 21 and 53 of the *Constitution Act, 1867.* The Commission responded that the mark-up was a fee the Commission charged under private contracts that were freely entered into and was therefore immune from constitutional scrutiny.

[199] The Alberta Court of Appeal found the mark-up was not lawful. It held that in charging the mark-up, the Commission was "acting in a hybrid capacity as both a private owner of beer and through the exercise of its statutory duties and powers". This is because, by statute, the Commission is the only wholesaler of liquor in the province and liquor retailers have no choice but to buy their product from the Commission and pay the mark-ups demanded by the Commission. The Court explained:

> [74] …the justification for immunizing Crown exercises of its natural person powers to contract from constitutional regulation does not apply in this case. As we have noted, the justification is that the contract counterparty's obligations are voluntarily assumed rather than unilaterally imposed. That justification does not apply to the Commission charging the 2015 and 2016 Mark-ups in contracts with retailers for the sale of beer. It is true that the Commission does not have legal power to obligate retailers to buy beer from it at certain prices. However, it does have a statutorily-created status as the sole wholesaler of beer in Alberta. This has two aspects. All manufacturers and importers of liquor into Alberta must sell to the Commission and all retailers of liquor must buy from the Commission.
>
> [75] The Commission has a dominant bargaining position over those retailers who wish to sell liquor in Alberta because there are no other wholesalers. This derives from the Commission's statutory right to be the sole wholesaler of beer in the province and it enables the Commission to impose contractual terms, including Mark-ups, on those who retail beer in Alberta. One might also say the Commission has a *de facto* ability to impose contractual terms on retailers without any real consent. Whichever description is used, the Commission's statutory power to be the sole wholesaler of beer in Alberta distinguishes it from most natural persons whose contractual bargaining position is not bolstered by statutory authority.

[200] In *Prairie Community Developments Corp v. Okotoks (Town)*, 2011 ABCA 315, the respondent municipality purported to use its general statutory natural-person power to enter into contracts with developers to collect development levies for off-site infrastructure that the municipality could not otherwise collect under its statutory power to issue development permits. The municipality made the granting of a development permit conditional upon the developer entering into such a contract. The Court held that the contract was not a valid exercise of the municipality's statutory natural person power because it was used to coerce developers into paying for off-site infrastructure under the guise of a voluntary obligation.

[201] In *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, two student federations challenged an Ontario government funding framework for universities and colleges that made their funding conditional upon allowing students to opt out of paying student ancillary fees charged by student associations. The universities had made the collection of those fees mandatory. The Ontario Court of Appeal held that universities are self-governing entities under Ontario's various University Acts and, although those Acts did not expressly prohibit the funding framework, the Province's imposition of the optional student fee condition was an incursion into the universities' statutory autonomy. Ontario went on to argue that, despite the legislation, it was free to contract with the universities over their public funding of the institutions and there is no principled reason why Ontario could not impose a contractual condition on the universities' funding that compelled them to make the collection of student fees optional.

[202] The Court rejected that submission finding that the Ontario government is not an ordinary private contracting party given the universities' dependence on public money and their practical inability to refuse it:

> [66] This is another example of the difference between spending done by executive action and spending done by a natural person. The government can, like a natural person, enter contracts, and the framework is in some ways analogous to a contract, <u>but there is a significant difference: public universities are dependent on the monies they receive annually as part of their operating budgets.</u> This dependence is one of the things that gives rise to the need for operational independence from government that the University

> Acts establish. Although government funding has decreased significantly as a percentage of university budgets over the course of the last generation, its contribution to university operating expenses remains significant. It is simply unrealistic to suggest that universities could refuse these operating grants if they were unwilling to implement the ancillary fees framework.
>
> [Emphasis added]

[203] From these authorities, I conclude that where the Crown, or a Minister of the Crown, purports to use its power to enter contracts to coerce a person or segment of society to act or refrain from acting in a particular way, with penalties for non-compliance, it is not treated as an ordinary private contracting party. While the Crown is free to bind persons to obligations through a contract, where that person has no effective choice but to enter into that contract and the contract restricts the person's behavior, the Crown's actions stray from being a mere contracting party into being a regulator. As we shall see in a moment, regulating behavior in that sense requires statutory authority.

[204] In the present case, I find that the Minister does not act under a purely private-person contracting authority in requiring IMGs to sign a return of service agreements as a condition of receiving an IMG residency spot. Rather, the Minister uses or purports to use a contracting power to compel IMGs to accept the obligations under the return of service contract if they accept an IMG residency position. IMGs have no real choice in matter because accepting the return of service obligations is their only pathway to residency training in British Columbia, and ultimately to practice medicine. Their position is no different than the brewery who could only avoid the Alberta mark-up on its beer if it stopped selling beer in that province or the university that could only continue to collect student fees if it opted out of the essential government funding.

[205] Thus, I find that the Minister is not acting in a purely private contractual sense in imposing the return of service obligations as a condition to an IMG receiving a residency position that they match to. Rather, the Minister is purporting to regulate a segment of society – IMGs who complete residency training in British Columbia – to compel them to practise medicine in a part of the province as directed by the

Minister. As we shall see next, that regulatory conduct requires statutory authorization.

[206] Here, I return to the Québec Court of Appeal's decision in *Dlugosz* which is very much on point. In that case, the Court considered a return of service obligation which the Québec government imposed on IMGs to serve three years in a remote community following completion of an internship. The Court found the requirement went beyond a general policy decision and purported to impose specific burdens on a category of persons. The Court noted that while there is merit to the policy objective of addressing the shortage of physicians in remote areas, imposing the return of service obligation on one class of persons – IMGs – amounts to a *regulatory* act that requires a legislative enabling provision. The Court stated:

> [Translation]
>
> [28] The respondent [Attorney General] submits that the Minister, through his general power to promote programs "based on needs" of citizens and to establish "standards applicable to (…) personnel in the administration of subsidies granted", may develop policies to guide the exercise of his discretionary power in allocating resources. I agree. But through Decision 84-226 the government did far more: it created a class of individuals upon whom it imposed a particular obligation and prescribed, in advance, a sanction for non-performance. This goes beyond the exercise of discretionary power to establish budgetary rules or to design policies limiting the number of medical candidates or intended to increase the number of professionals practising in the regions.
>
> [29] For these reasons, I am of the view that the impugned government decision is not a policy or directive, but an act of a regulatory nature whose validity requires clear legislative authorization.
>
> [Emphasis added]

[207] Our Court of Appeal similarly discussed the difference between policy and regulatory decisions in *Valley Rubber* where Ryan J.A. noted at para. 21 that policy decisions do not require specific statutory authority but regulatory decisions do. She characterized regulatory schemes as including the creation or imposition of obligations enforceable by sanctions (para. 25). She held at paras. 29-30 that the tire recycling program in that case was not regulatory because participation in it was not mandatory and no sanctions attach to those who do not participate. This was so

despite the fact there would be adverse economic impacts to Valley Rubber's business because of its non-participation.

[208] However, I view the present case to be very different. First, as I have found, IMGs have no effective choice but to accept the residency position they are offered, and thus no choice but to accept the compulsory return of service obligation that accompanies it. Second, the economic impacts on a company not participating in a tire recycle program are vastly different to the very personal impacts on an individual being compelled by the state to live and practise medicine in a specific part of the province for a two- or three-year term. As the Québec Court of Appeal found in *Dlugosz*, the return of service obligation creates a class of individuals upon whom the Minister imposes a particular obligation to live and work in a specific location with significant financial sanctions for non-performance. Third, there are significant sanctions imposed on IMGs who breach the return of service obligations. In my view, as found in *Dlugosz,* this amounts to a regulatory scheme that requires a specific statutory authorization.

[209] I wish to be clear that I make no comment at this point on whether the imposition of the return of service obligation on IMGs is a fair or reasonable way to address the problem of physician shortages in underserviced areas. Clearly there is a need to ensure that residents of underserviced areas receive necessary medical services and tying a return of service obligation to a medical graduate's receipt of a provincially-funded residency position may be entirely reasonable. The problem is that this state-imposed action is regulatory in nature and lacks the necessary statutory authorization. Subject to any *Charter* concerns, which I discuss below, or human rights issues, which is the domain of the Human Rights Tribunal, the return of service obligations could be implemented with the proper statutory backing.

[210] I therefore find that the Minister had no lawful authority to impose the return of service obligations on those IMGs who matched to an IMG residency position in the 2018/2019 match. I will discuss what remedy might flow from that finding at the conclusion of my reasons.

IX. Issue #4 – The Clinical Assessment Program

[211] The Petitioners also challenge the imposition of the Clinical Assessment Program on IMGs. It will be recalled that the Clinical Assessment Program is a one-day assessment of IMGs for the purpose of assessing their clinical abilities, including their suitability for practice in rural, remote or underserved areas of British Columbia. The assessor generates a report for each participating IMG that is submitted to CaRMS for consideration in the selection process of the match. Only those IMGs who score within the top 200 examinees on the Qualifying Exams are admitted into the Clinical Assessment Program and, since the program is mandatory for IMGs seeking a residency, this admission criterion excludes some 80% of IMGs from applying for a residency. CMGs are not required to participate in the Clinical Assessment Program.

[212] According to a briefing note prepared by the Ministry of Health for the Assistant Deputy Minister, Health Sector Workforce, the reason for the Clinical Assessment Program is that “rigorous assessments are required on all internationally educated doctors (IMGs) to ensure they meet Canadian Standards.” The note states that the Clinical Assessment Program was developed in this context “to evaluate and select the best applicants for postgraduate medical education” and serves to ensure that IMG candidates selected for residency “have the required skills and training to succeed in residency”. The note also says the Program is a “necessary screening tool for UBC to identify the best applicants” from a growing number of IMGs who apply to UBC’s residency training programs.

[213] The source of the Clinical Assessment Program is unclear. According to UBC, the Ministry of Health requires it and UBC simply administers. According to the Minister, the program was developed by UBC in consultation with the Province.

[214] The Petitioners have not specifically addressed the Clinical Assessment Program outside the context of the two-stream system. They have argued that the program is part of the two-stream system and that it was imposed without lawful authority.

[215] Neither the Province nor UBC has suggested why only IMGs are required to undergo a clinical assessment. I gather it is because IMGs did their undergraduate clinical work outside of Canada and the Minister and/or UBC find it necessary to assess their clinical skills in a Canadian medical setting before inviting them to take a residency position. By contrast, since a significant part of undergraduate medical education in Canada involves clinical work, CMGs will have had much exposure to clinical work in a Canadian medical setting by the time they graduate from medical school.

[216] I do not find that the Clinical Assessment Program is coercive in the same sense as the return of service requirement. It is a one-day assessment of an IMG's clinical skills and does not seem particularly onerous in its present form. I find it is reasonable for UBC to assess the clinical abilities of IMGs in a Canadian clinical setting and it is reasonable for the Minister to require that assessment as a matter of public policy.

[217] The Petitioner's real complaint is not with the program itself but with its threshold for admission which precludes most IMGs from applying for a residency. The evidence clearly shows that, in addition to assessing IMGs' clinical skills, the program, or at least its admission criteria, helps UBC reduce the number of IMG applicants for residency training down to a more manageable number (from approximately 1,000 to 200).

[218] I am not able to find anything unlawful or unauthorized about the Clinical Assessment Program or its admission criteria. Having accepted that the two-stream system is a matter of policy that is not reviewable by this Court outside of *Charter* grounds, I find nothing unreasonable or reviewable about winnowing down the 1,000 or so IMGs to a manageable number of applicants who compete for the 58 IMG residency positions. Nor has it been shown that doing so based on how potential applicants score and rank following the Qualifying Exams is unreasonable or open to judicial review. Nor have the Petitioners persuaded me that further winnowing down

the 200 IMGs based on their performance in the Clinical Assessment Program is something this Court can review.

[219] Later I will consider whether the *Charter* or *Charter* values have any bearing on this issue but, on administrative and jurisdictional grounds, I find nothing unlawful about the Clinical Assessment Program or its entry requirements and I would dismiss this aspect of the judicial review.

X. Issue #5 – Charter Considerations

A. The *Doré/Loyola* Framework

[220] The Petitioners claim the imposition of the two-stream system and the return of service obligation infringes their rights under ss. 6, 7, 12, and 15 of the *Charter*, and the values that underlie those rights. By agreement of the parties (or at least unopposed by the respondents), it was ordered that the substantive *Charter* challenge would be severed for determination in a future phase of this proceeding but that *Charter* rights would still be considered in this phase as part of the administrative decisions that were challenged.

[221] The unopposed order for severance provides that the matter will proceed as follows:

> (a) the judicial review applications, inclusive of the framework established in *Doré v. Barreau du Québec*, 2012 SCC 12 as applicable and the restraint of trade claims will proceed first; and
>
> (b) the remaining constitutional claims will be severed and stayed pending the determinations of the judicial review applications and restraint of trade claim.

[222] The framework established under *Doré* applies to discretionary administrative decisions that engage *Charter* rights or the values that underlie those rights. It serves to determine whether the decision-maker has exercised their discretion in accordance with *Charter* guarantees and values. The framework has been supplemented by *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12 and hence it is often referred to as the *Doré/Loyola* framework.

[223] The first question under the *Doré/Loyola* framework is whether the impugned decision engages the *Charter* by limiting a *Charter* right or a fundamental value it protects: *Loyola,* at para 39; *LSBC v. TWU,* at para 58; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, para 61. *Charter* values are the values that "underpin each right and give it meaning": *Loyola,* para. 36; *LSBC v. TWU,* para 57; *Commission scolaire*, para 75. In identifying whether *Charter* values apply, the court must consider the purpose of the *Charter* right, its underlying values, and whether the decision "could have an impact on those values" considered in context: *Commission scolaire*, para 78; *Loyola,* para 37.

[224] The second question is to determine whether "in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter*-protections at play": *Loyola* at para. 39.

B. Preliminary Points

[225] The scope of my consideration of the *Charter* issues is impacted by my findings on the Petitioner's arguments on the jurisdiction and administrative law issues discussed above. Specifically, since I have found that the College and UBC did not impose the two-stream system and do not have jurisdiction over it under the *Health Professions Act* or otherwise, it is unnecessary to consider *Charter* values as they relate to those respondents.

[226] Thus, the *Charter* issues and the application of the *Doré/Loyola* framework need only be considered in respect of the Minister's decision to impose the two-stream system for the 2018-2019 match year, including the imposition of the return of service obligation and the Clinical Assessment Program. I need not consider the College's or UBC's purported decisions.

C. Does the Two-Stream System Limit *Charter* Rights?

[227] I will address the *Charter* issues in the same order they were presented by the Petitioners, starting with s. 15, followed by ss. 7, 6, and 12 in that order.

1. Section 15 – Equality Rights

[228] Section 15 of the *Charter* reads:

> **15**(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[229] Section 15 specifically protects substantive equality, which the Supreme Court of Canada has described as the provision's animating norm: *R. v. Sharma*, 2022 SCC 39 para. 37. It does so through a two-part test:

a) does the law (or in this case the decision), on its face or in its impact, create or contribute to a distinction based on a protected ground, namely one or more grounds enumerated within s. 15(1) or that is analogous to one of those grounds; and

b) if so, does the law or the decision impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[230] Under the first step, a claimant must show a disproportionate effect on the protected group, as compared to non-group members: *Sharma*, para. 40. A disproportionate effect engages the notion of adverse impact discrimination, which occurs when seemingly neutral state action disproportionately impacts members of a protected group: *Sharma,* para. 29. The inquiry "necessarily entails drawing a comparison between the claimant group and other groups of the general population": *Sharma*, para. 31.

[231] The two-stream system clearly creates a distinction between IMGs and CMGs by offering CMGs more opportunity for residency positions both real numbers and

proportion to the number of applicants. It also imposes burdens on IMGs that are not imposed on CMGs in the form of the return of service obligations and the Clinical Assessment Program.

[232] However, I do not accept that this distinction is based on an enumerated or analogous ground. The Petitioners are Canadian citizens who left Canda to attend medical school in another country. Enumerated and analogous grounds capture distinctions that are based on personal characteristics that are immutable or that can only be changed at an unacceptable cost to personal dignity: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para.13. Where a person chooses to attend medical school and the accreditation status of that school are not immutable personal characteristics of the individual.

[233] The Petitioners argue that the two-stream system draws a distinction between IMGs and CMGs on the basis of “national origin”, an enumerated ground. They argue there is a strong correlation between a person’s place of origin and where they attend medical school. Thus, they argue, imposing a burden or denying a benefit to someone based on where they attended medical school amounts to differential treatment based on that person’s national origin. Further, while the Petitioners’ own national origin does not correspond with where they attended medical school, they argue the two-stream system treats them as though they are from the country where they attended medical school and that gives them standing to raise national origin as a ground of discrimination.

[234] This argument cannot succeed for two broad reasons. First, there is no factual basis in this proceeding for the premise of the Petitioners’ argument, namely that where a person attended medical school equates with their national origin. Second, even if that correlation could be established, I am not persuaded that the Petitioners, who are Canadian citizens, can rely on that correlation as a proxy to support their own claim. I will address each of these two points in turn.

(a) No Correlation Between Place of Study and National Origin

[235] The Petitioners argue that a correlation between national origin and the place where a person attended medical school is established by a decision of the British Columbia Human Rights Tribunal in *Bitonti v. British Columbia (Ministry of Health) (No. 3)*, 1999 CanLII 35189. That case concerned a human rights complaint about the system by which medical practitioners were once trained and licenced in British Columbia.

[236] Under that system, which has since been replaced by the present two-stream system, the College's criteria for admission to the medical profession, found in its former "Rule 73", recognized two categories of medical graduates: those who graduated from medical schools in "Category I" countries, namely Canada, the United States, Great Britain, Ireland, Australia, New Zealand, and South Africa; and graduates from medical schools in Category II countries, which are all countries other than Category I countries. Graduates from Category I countries had to complete a one-year rotating internship before qualifying as a full general practitioner whereas graduates from Category II countries had to complete two years of post-graduate training in a Category I country, one year of which had to be a rotating internship and one year of which had to be in Canada. To obtain one of the limited number of rotating internship in Canada, graduates of Category II countries had to compete with graduates of Canadian medical schools. In practice, Category I graduates were heavily favoured by Canadian hospitals.

[237] Rule 73 was based on the College's relative knowledge of the system of medical training that existed in Category I and II countries. Due to the patterns of immigration and medical training in British Columbia, the physicians who developed the standards for admission to the medical profession were familiar with a level of medical training based on the "English model" that was followed in Category I countries; but they were not familiar with models followed elsewhere. Requiring graduates of Category II countries to complete two years of post-graduate training in a Category I country helped to ensure that applicants from Category II countries (1) had similar practical experience to what the College knew the Category I applicants

had undergone; and (2) had the ability to practise in the British Columbia health care system with an understanding of Canadian standards and methods. It also gave the College a more precise measure of a Category II applicant's knowledge and experience.

[238] The Human Rights Tribunal found the distinction drawn between Category I and II had the effect of placing a disproportionate burden on Category II applicants because of their place of origin, a prohibited ground of discrimination under the *Human Rights Act,* S.B.C. 1984, c. 22. On its face, the burden was imposed based on the place where the applicant completed medical school but since the evidence showed a strong correlation between the place where a Category II medical graduate was born and where they attended medical school, the Tribunal found the distinction was effectively based on place of origin. The Tribunal Member summarized his analysis on this point as follows:

> [176] In summary, the complainants are all physicians whose place of origin was a Category II country and whose medical training was in a Category II country. There is a high correlation between place of training and place of origin. The College implemented a Rule that required persons with Category II medical training to complete a year of internship in Canada. It was a requirement that was virtually impossible for them to meet. The result was that physicians seeking registration with the College having trained in Category II countries had a burden imposed on them that was not imposed on those who trained in Category I countries. Though the two groups are distinguishable by their place of training, due to the high correlation between place of origin and place of training, they are also distinguishable by their place of origin.

[239] The Tribunal Member went on to find at paras. 177-180 that the distinction was discriminatory because it was based on assumptions that medical training under the English model (in Category I countries) resulted in a level of competence that is equivalent to standards in Canada, while training under other models of education (in Category II countries) did not. He stated that the rule:

> …placed an obstacle to membership in the College for persons with a Category II medical education, <u>almost all of whom have a Category II place of origin</u>. This barrier was not based on qualifications. […] In short, it did not

> consider the "educational and professional qualifications or the other attributes or merits of individuals in the group."[6]
>
> [Emphasis added]

[240] Putting aside, for the moment, the fact that the Petitioners' own national origin or place of origin is Canada (an obstacle I will address in a moment), I am not able to find that *Bitonti* applies to this case.

[241] First, the high correlation between place of origin and place of medical training in *Bitonti* was based on the evidence before the Tribunal in that case. I do not accept the Petitioners' argument that this factual finding can be transposed onto this case.

[242] For this proposition, the Petitioners rely on *British Columbia (Attorney General) v. Malik,* 2011 SCC 18 where the Supreme Court of Canada held that findings of fact made in an application brought by Mr. Malik for state funded legal counsel (a *Rowbotham* application) when he was an accused person in a criminal proceeding were admissible in a related civil proceeding in which the Attorney General sought to recover $5.2 million it paid to fund the accused's defence. The Attorney General applied for an Anton Pillar order in the civil case which would authorize it to search the business and residences of the Mr. Malik's family for evidence that they helped to conceal his assets. Among the elements the Attorney General had to establish for the Anton Pillar order were a strong *prima facie* case and convincing evidence that the defendant has incriminating evidence in its possession.

[243] The Court held that the Attorney General could rely on the findings of fact in the *Rowbotham* application for these elements of the Anton Pillar order application. The Court's finding applied to subsequent interlocutory proceedings (although it did not necessarily rule out the possibility of it applying in trials or other proceedings

[6] The internal quote is from *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 183

where a final order was sought) where the parties were the same and the issues were related. The Court summarized its conclusion in the following summary:

> [7] …a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight.
>
> [Emphasis added]

[244] The Court specifically explained the direct links between the *Rowbotham* findings and the Attorney General's Anton Pillar application:

> [49] … The earlier [*Rowbotham*] proceeding had been initiated by Mr. Malik and involved the other respondents. The same series of family transactions, and allegations of asset manipulation, had earlier been examined by a judge of the Supreme Court of British Columbia. The underlying issue in the *Rowbotham* case, as it is here, is whether the Malik family was playing games with the Province (and the B.C. courts) with respect to their financial affairs.

[245] Here, apart from the Minister, the parties in this proceeding are not the same as in *Bitonti*. Further, and more importantly, the circumstances under consideration in *Bitonti* are entirely different to the present case. The discrimination in *Bitonti* was based on favourable assumptions about the medical education and training in the seven Category I countries that used the English method. Those assumptions were not extended to Category II countries. Here the issue is a program that gives preferential access to residency training positions to graduates of Canadian medical schools. Unlike the system at issue in *Bitonti*, graduates of medical schools in most of the Category I countries other than Canada and the U.S. are no longer given privileged consideration for post-graduate medical training. They are IMGs like the Petitioners.

[246] Second, the findings of fact in *Bitonti* concerned a system that existed in the 1990s and are not probative of the current composition of the 1,000 or so IMGs who apply for a residency position in British Columbia. I was taken to no evidence that

outlined how or to what extent the national origin of those 1,000 applicants corresponded to the country in which they attended medical school.

[247] Third, the Petitioners made no submissions about whether the Human Rights Tribunal's fact-finding process in *Bitonti* equates with what that followed in this Court.

[248] The Petitioners argue the Minister concedes a correlation between place of origin and place of medical school with this passage from its Petition Response:

> The main difference between CSAs [Canadians studying abroad] and Immigrant IMGs is that CSAs left Canada to pursue international medical education whereas Immigrant IMGs generally received their international medical education in their country of origin and then relocated to Canada.
>
> [Emphasis is the Petitioners']

[249] I do not agree that this statement advances the Petitioner's case because it does not provide evidence of what proportion of the 1,000 or so IMGs who apply for residency positions each year are so-called "Immigrant IMGs" versus "CSAs". It may be there is *generally* a high correlation between country of origin and country of medical education but that does not necessarily identify the characteristics of the group said to be discriminated against through the two-stream system.

[250] For those reasons, I find that the Petitioners have not established that the two-stream system draws a distinction based on national origin.

(b) Petitioners Cannot Rely on National Origin by Proxy

[251] Even if the two-stream system drew a distinction between CMGs and IMGs on the basis of national origin, I do not accept that the Petitioners have standing to make that claim since their place of national origin is Canada and not the country where they chose to attend medical school.

[252] The Petitioners argue they may rely on national origin as a ground of discrimination because, despite their own place of origin being Canada, discrimination based on national origin is what drives the differential treatment to which they are exposed, and that is not a lawful basis on which to draw a distinction

between them and CMGs. The Petitioners rely on *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, 2000 SCC 27 and *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201, leave to appeal denied 2005 CanLII 39611.

[253] *Montreal (City)* was a human rights case where the claimants were denied employment because they had medical conditions which their employers subjectively believed prevented them from performing their jobs. In fact, while the medical conditions were real, the perceived functional limitations were not. The claimants alleged discrimination under the *Québec Charter of Human Rights and Freedoms* based on a disability (or "handicap" as the term appeared in *Québec Charter*), but the employers argued the claimants had no standing to raise that ground because, by their own account, they were not disabled.

[254] Writing for the Court, Justice L'Heureux-Dubé held that a disability under the *Québec Charter* could not be interpreted as narrowly as the employers suggested. She said it must also encompass a perception of an ailment:

> [81] It is important to note that a "handicap" may exist even without proof of physical limitations or the presence of an ailment. The "handicap" may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial. Further, the *Charter* also prohibits discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.

[255] Earlier, L'Heureux-Dubé J. wrote:

> [40] It would be strange indeed if the legislature had intended to enable persons with handicaps that result in functional limitations to integrate into the job market, while excluding persons whose handicaps do not lead to functional limitations. Such an approach appears to undermine the very essence of discrimination.

[256] On its own, *Montreal (City)* does not advance the Petitioners' claim because the claimants in that case had medical conditions which brought them within the definition of "handicap" and distinguished them from other employees. It was the employers' misperceptions about the claimants' abilities in light of those medical

conditions that resulted in the discrimination. Here, the Petitioners have no personal characteristics that distinguish them from CMGs on the basis of national origin.

[257] The Petitioners rely on *Jubran* to overcome this problem. There, the claimant brought a human rights complaint against a School District over homophobic bullying he was exposed to at school. He claimed the School District's failure to control the bullying constituted discrimination on the prohibited ground of sexual orientation. The issue was whether he had standing to raise that ground because he was not gay and the students who bullied him did not believe that he was. Writing for the Court of Appeal Justice Levine wrote:

> [41] It is common ground that a person who is perceived to have the characteristics of a person who falls within one of the enumerated grounds in s. 8 may be the object of discrimination although he does not actually have those characteristics.

She referred in some detail to *Montreal (City)* and then continued:

> [45] The "subjective component" of discrimination focuses not on the actual characteristics of the person but on the attitudes, prejudices and stereotypes of others that impose limitations on that person's human dignity, respect and right to equality (see *Québec v. Montréal (City)* at § 77). The emphasis of the analysis is on "the effects of the distinction, exclusion or preference rather than the precise nature" of the person's condition (at § 81).
>
> [46] The interpretive obstacle in this case is that Mr. Jubran's harassers denied that they subjectively perceived Mr. Jubran as homophobic [*sic*], despite the persistent and consistent homophobic taunts. They maintained that their language was neutral, not discriminatory; they used homophobic epithets equally with friends and with those students they did not like as a form of insult.
>
> [47] The effect of their conduct, however, was the same whether or not they perceived Mr. Jubran to be homosexual. The homophobic taunts directed against Mr. Jubran attributed to him the negative perceptions, myths and stereotypes attributed to homosexuals. His harassers created an environment in which his dignity and full participation in school life was denied because the negative characteristics his harassers associated with homosexuality were attributed to him.

[258] Justice Levine went on to find that the subjective intent of those who discriminate against a person in a manner that contravenes human rights legislation is not what matters. It is the consequences of their conduct, not their intent or

perception. She also found it significant that the *Human Rights Code* prohibited discrimination on the grounds of "sexual orientation" generally and not a particular orientation.

[259] From these principles, the Petitioners argue they were subjected to the same discriminatory effects that IMGs whose national origin equates with the place outside of Canada or the United States where they studied medicine. The Petitioners argue this gives them standing to raise national origin as a ground of discrimination.

[260] I am not persuaded. Preference is given to CMGs under the two-stream system not because of assumptions about the quality of their education over those who were educated outside of Canada or (at the time) qualified U.S. schools, as was the case in *Bitonti*, but rather to maximize the opportunities for graduates of Canadian medical school to complete their medical training in Canada. Ensuring that those who attended medical school in Canada can *complete* their medical training in Canada does not imply that those who were educated in their place origin outside of Canada are less qualified or less worthy of practising medicine. Nor does it project such assumptions on Canadian IMGs.

[261] Thus, I find the Petitioners have not met the first branch of the analysis for a s. 15(1) violation. They have not shown that the two-stream system creates or contributes to a distinction based on a protected ground. It is therefore unnecessary to consider second branch of the s. 15 analysis. It follows that the Minister's decision does not engage the *Charter* by limiting a s. 15(1) right or value underlying that right and the first stage of the *Doré/Loyola* Framework is not engaged by s. 15.

2. Section 7 – Liberty and Security of the Person

[262] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[263] To establish a violation of s. 7, a claimant must first show that the impugned law or state action interferes with or deprives them of their life, liberty, or security of their person. If that is established, they must next show that the deprivation is not in accordance with the principles of fundamental justice.

[264] For the first stage of the analysis, the Petitioners rely on the rights to liberty and security of the person. They argue the two-stream system interferes with their "right to make fundamental life decisions and to be free from state-imposed psychological stress, without arbitrary or grossly disproportionate interference by the state."

(a) Liberty

i. The Two-Stream System Generally

[265] The Petitioners argue the right to liberty protects their ability to make personal choices free from state interference, including what and where to study, what career to attempt to pursue (though not a right to a particular career), where to live, and with whom they will be in community. They argue the conditions for IMGs entering residency training deprived Dr. Kostanski and Mr. Falconer of the ability to make the fundamental life decision to return to British Columbia to become physicians because:

a) they likely could not become physicians because 80% of IMGs are "instantly deprived of the right to compete for a residency position" since only those IMGs who rank in the top 200 in the Qualifying Exams may apply for an IMG residency position;

b) even if they were able to secure one of those few IMG residency positions, they likely would be confined to family medicine and unable to specialize; and

c) under the return of service obligations, they would have to live where the Minister sent them to practice for the first two or three years following their residency.

[266] I note at the outset that the right to generate business revenue by one's chosen means is not protected under s. 7: *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 para. 46. Nor does s. 7 extend to a right to exercise a person's chosen profession: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1179. I see little difference between a purported right to "attempt to pursue" a particular profession, as asserted by the Petitioners, and the purported right to exercise a chosen profession which was rejected in *Re s. 193*. It strikes me as a distinction without a difference. In my view, s. 7 does not protect a "right to attempt to pursue" a profession.

[267] Further, it is not the right to attempt to pursue a profession that the Petitioners seek. Rather, it is right to do so on an equal footing with CMGs. Granting that relief would not result in all medical graduates having the freedom to attempt to pursue a medical career.

[268] The global number of residency positions (CMG and IMG combined) is finite at around 350 positions. Even if CMGs and IMGs competed on an equal footing for all those positions, the vast majority of medical graduates would not receive a residency. The number of unmatched CMGs would probably be greater in a combined match than it is under the two-stream system, but a very large number of graduates, both CMGs and IMGs, would still be deprived of the opportunity to attempt to pursue a career in medicine in British Columbia.

[269] Thus, I find that the imposition of the two-stream system in general does not engage a liberty interest under s. 7 of the *Charter,* but as I will now explain, I view the return of service obligation differently because it engages a person's ability to choose the place where they live, free from government interference. As a majority of the Ontario Court of Appeal recently held, that engages the s. 7 liberty interest.

ii. Return of Service Obligations

[270] The effect of the return of service obligation is to deprive an IMG who matches to a residency position of their ability to choose where they live for the two

or three years after they finish their residency when they must practise medicine in a location prescribed by the Minister. Clearly, a physician must live within a manageable distance of where they practise.

[271] Section 7 protects a liberty interest to make "fundamental life choices" free from state interference: *Blencoe v. British Columbia (Human Rights Commission,* 2000 SCC 44 at para. 49). The Supreme Court of Canada has not determined whether a person's choice of where to live falls within the ambit of this protection but a majority of the Ontario Court of Appeal recently held that it does: *Drover v. Canada (Attorney General)*, 2025 ONCA 468.

[272] *Drover* concerned a requirement under the *Canada Elections Act* that the Returning Officer for an electoral district must live in that district. The applicant had been appointed Returning Officer for the Rideau Carleton electoral district for a 10-year term but moved outside the district during that term. The Chief Electoral Officer advised him that his position was terminated as a result of the move. The applicant challenged the termination arguing the choice of where to live is a fundamental life decision that is protected from state interference under s. 7. Justice Gomery, writing for the majority, agreed.

[273] She analyzed the Supreme Court of Canada's jurisprudence on the scope of s. 7 and paid particular attention to *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 which was a challenge to a city bylaw that required its employees to live within the municipal boundaries. Writing for himself and two others in that case, Justice La Forest held that the bylaw infringed s. 7 because it interfered with the applicant's individual choice of residence. He found the matter fell within the ambit s. 7 because a person's choice of residence is a "quintessentially private decision going the very heart of personal or individual autonomy". He further found the restriction was not in accordance with the principles of fundamental justice because there was no evidence that the applicant was unable to perform her job while living outside the municipality.

[274] The majority in *Godbout* invalidated the residency requirement because it offended the *Quebec Charter.* They found it was unnecessary and, at least in Justice Magor's view, "perhaps imprudent" to consider the s. 7 argument. Thus, La Forest J.'s judgment on s. 7 did not attract a majority.

[275] Justice Gomery noted that in the jurisprudence since *Godbout,* a majority of the Supreme Court had neither accepted nor rejected the notion that a person's choice of residence is captured by s. 7 but had endorsed La Forest J.'s "analytical approach to defining the sphere of the liberty interest protected under s. 7": *Drover* at para. 196. Specifically, she noted that majorities of the Supreme Court had accepted that the liberty interest in s. 7 captures:

a) an individual's freedom to make "fundamental personal choices" (*Blencoe)*,

b) decisions about matters that are "fundamentally personal such that, by their very nature, they implicate basic choices going to what it means to enjoy individual dignity and independence": *R. v. Malmo-Levine*, 2003 SCC 74 at para. 85; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 at para. 49; and

c) "fundamentally important and personal medical decision-making": *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 65-66.

[276] Justice Gomery found that a person's choice of where to live is the kind of decision described in these passages. She wrote:

> [216] In general, the choice of where to live is a deeply personal, deeply consequential decision that affects an individual's life, opportunities, health, personal development and quality of life. It determines an individual's proximity to family members and friends; their access to groceries, employment opportunities, medical facilities, schools, religious, cultural and leisure amenities; the nature and extent of their immediate social circle; and their physical environment.

[277] She found that an "individual's right to decide where to live is essential to maintain personal autonomy and dignity, and it therefore falls within the core sphere

of deeply personal decisions protected by s. 7." She adopted La Forest J.'s minority reasons from *Godbout*:

> [220] I agree with and adopt La Forest J.'s conclusion at para. 68 of *Godbout* that "the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy". It implicates "the very essence of what each individual values in ordering his or her private affairs". Given its profound implications, a person's decision about where to live is an inherently personal decision that goes "to the core of what it means to enjoy individual dignity and independence": *Godbout*, at para. 66; see also *Malmo Levine* at para. 85.

[278] Justice Gomery found that the residency requirement in the *Canada Elections Act* does not conform to the principles of fundamental justice because it is overbroad. The evidence showed that it was not necessary to live in the electoral district to fully perform the functions of the job. She also found the requirement was not saved by s. 1.

[279] Justice Miller dissented in *Drover.* In his view, s. 7 has no application to claims of a right that do not arise from interactions with the administration of justice. In his view, s. 7 protections only arise from interactions with law enforcement, broadly conceived to include "an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. This is not confined to the criminal justice system but applies more broadly to "the state's conduct in the course of enforcing and securing compliance with the law": *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84. Thus, in *G.(J.),* the Court found a mother had a s. 7 right to state funded counsel for a child protection hearing in which the state enforcing child protection laws against the mother by seeking custody of her child.

[280] Justice Miller found that *G.(J.)* is a binding authority for the proposition that s. 7 does not extend beyond interactions with the administration of justice. He acknowledged that in *Gosselin,* Chief Justice McLachlin said the question of whether s. 7 protects rights or interests wholly unconnected with the administration of justice

"remains unanswered". However, he interpreted this to mean that the question is open to reconsideration by that apex court and, until that happens, *G.(J.)* binds lower courts to the proposition that s. 7 rights apply only in respect of the administration of justice. Since the residence requirement in the *Canda Elections Act* clearly does not engage even a broad conception of the administration of justice, he found it does not offend the applicant's s. 7 rights.

[281] Justice Gomery disagreed with Miller J.A. that a liberty interest is only engaged by interactions with the administration of justice. She found that *Gosselin* expressly left that question unanswered and, to the extent that *G.(J.)* is binding as a majority judgment, it only concerns security of the person and not liberty. She observed at para. 144 that a "progressive and purposive" interpretation of the *Charter* is called for and held at para. 185 that an administration of justice threshold is "out of step with contemporary s. 7 jurisprudence."

[282] *Drover* is now before the Supreme Court of Canada, which granted leave to appeal on June 18, 2026. That means Gomery J.A.'s word will not be the last on this issue and there is little point in adding my own analysis to the debate between the majority and dissent in *Drover*. I would therefore follow Gomery J.A.'s majority judgment and, subject to the Supreme Court of Canada saying otherwise, accept that a person's choice of where to live is inherently and fundamentally a private one that goes to core of what it means to enjoy individual dignity and independence.

[283] I also find that the return of service obligations imposed by the Minister deprive IMGs who match to a residency position of that fundamental personal choice. The return of service requirement is mandatory for all IMGs who match to and accept a residency positions and the sanction for non-compliance is substantial. In a strict sense, the Minister is not actually forcing the IMG to practise in the designated region since the IMG could decline the residency position. But as I have discussed earlier at para. 204, they have no *effective* choice but to accept it. Having completed four years of undergraduate medical education with the aspiration of becoming a practising physician in their home province, an IMG who is fortunate

enough to beat the one in 17 odds and match to a residency spot is in no real position to reject that opportunity. Doing so would amount to throwing away years of personal and financial sacrifices they have made in their efforts to become a doctor. They could no more be expected to turn down the offer than the Returning Officer in *Drover* or the municipal employee in *Godbout* could be expected to quit their employment so they may live outside the strict residential boundaries, even though it has no impact on their ability to do their prescribed jobs.

[284] Justice La Forest addressed this very point in *Godbout*:

> [70] … the appellant essentially contended that even if a right to choose where to establish one's home existed under s. 7, there could be no "deprivation" on the facts of this case because the respondent waived that right when she signed the residence declaration. Put another way, the imposition of the residence requirement did not, in the appellant's view, "deprive" the respondent of her right to decide where to live because she chose to sign the residence declaration and, thereby, renounced any right of that nature that she might otherwise have enjoyed.
>
> …
>
> [72] …I find the appellant's contentions in respect of waiver to be entirely unpersuasive, inasmuch as they fail to recognize that the respondent had no alternative but to accept the residence requirement if she wanted to assume permanent employment with the municipality.
>
> [Emphasis added]

[285] Precisely the same may be said of an IMG who is offered a residency position. They have no alternative but to accept the return of service requirement if they want to accept the residency position and complete their medical education to become a fully qualified physician in British Columbia. LaForest J. described this as the imposition of an "unfair choice" and added:

> Stated simply, the respondent in this case had no opportunity to negotiate the mandatory residence stipulation and, consequently, she cannot in any meaningful sense be taken to have freely given up her right to choose where to live. In civilian parlance, her acquiescence in signing the residence declaration was (as Baudouin J.A. found in the course of his public order analysis) tantamount to accepting a contract of adhesion and, as such, it cannot properly be understood to constitute waiver.
>
> [Emphasis added]

See also *Drover* at para. 243.

[286] It is important to note that this is not a matter of the residency position itself being in a particular location. There are residency positions at hospitals throughout British Columbia. If an IMG matched to the residency position in a hospital in, say Terrace or Fort St. John, it would not engage their liberty interest to have to live in that community to take up that position. Section 7 does not compel the Minister or anyone else to accommodate a person by moving a residency position to where the person wishes to live. The issue here is the requirement to practise in a designated location *after* the residency is finished. The residency position might be in Vancouver or Surrey where an IMG lives but the return of service obligation might then have to be carried out in another part of the province.

[287] In summary, I find that while the two-stream system itself does not interfere with or deprive the Petitioners or IMGs more broadly of their liberty interests, the Minister's requirement that those IMGs who secure an IMG residency position must accept the return of service obligation as a condition of receiving the residency position deprives them of the fundamentally personal choice of where to live for the two or more years following their residency. It remains to be determined whether that deprivation accords with the principles of fundamental justice but first I will address the Petitioners' arguments on security of the person.

(b) Security of the Person

[288] The Petitioners argue that the imposition of the two-stream system amounts to state-imposed psychological stress that impinges upon their personal security. They point to their acute personal struggles with coming to terms with the fact that they are unable to pursue their chosen profession in British Columbia.

[289] The individual Petitioners' inability to secure a residency position in British Columbia has clearly taken a toll on their personal and family lives. Both face considerable debt from their medical education and they have experienced bouts of depression. Their family relationships have broken down which they attribute to

coping with disappointment and financial consequences of not being able to complete their medical training and become fully qualified physicians. Embedded within these struggles are feelings of low self worth because the Petitioners perceive their government as considering them to be less worthy and less capable than those who graduated from a Canadian or qualified American medical school and does not regard their goals and aspirations to be as important as CMGs.

[290] I accept the individual Petitioners' psychological struggles are genuine but I am unable to accept that this is the product of *qualitative* state conduct that rises to the level of a s. 7 breach of their security. As stated in *Blencoe*:

> Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 *(G. (J.)*, at para. 59).

[291] The "qualitative" state interference in *G.(J.)* that engaged s. 7 was the removal of a child from a parent under child protection legislation. Chief Justice Lamer described this as a "direct state interference with the parent-child relationship" and added that not every state action which interferes with that relationship would trigger s. 7: *G.(J.)* paras. 61 and 66.

[292] The Minister's choice as to how to allocate a limited number of residency positions through the two-stream system is not the kind of "direct state interference" contemplated by security of the person. As I have said, I find nothing objectionable about the Minister, for public policy reasons, giving medical graduates who have attend medical school at UBC or elsewhere in Canada priority in accessing the residency training to complete their medical training. It simply follows on the four years of undergraduate education they have just completed. A byproduct of this policy decision is that substantially fewer provincially-funded residency positions are available to IMGs. That undoubtedly has profound impacts on IMGs who do not

match to or cannot apply for one of the 58 available IMG residency positions but that does not amount to “serious state-imposed psychological stress”.

[293] The right to security of the person does not protect against the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action: *G.(J.)* at para. 56. In my view, the imposition of entry requirements for admission to a program with a limited number of positions is just that. This is not a case where the Minister pulled the rug out from underneath the Petitioners just as they were completing four years of medical school. The evidence shows that IMGs have always faced greater challenges and far fewer opportunities than CMGs in securing residencies and (before 1993) internships in British Columbia and throughout Canada. Dr. Kostanski and other IMGs who provided evidence for this judicial review say they were unaware of the two-stream system when they decided to study medicine overseas but the Minister cannot be faulted for that. Nor can the Minister be accused of imposing serious psychological stress. In fact, the Province has *increased* opportunities for IMGs since 1993 by expanding the number of IMG residency positions that it funds.

[294] I find the Petitioners’ security interests are not engaged by the two-stream system.

(c) Principles of Fundamental Justice

[295] I have concluded that the Minister’s imposition of the return of service obligation on those IMGs who match to a residency position deprives those IMGs of their fundamental personal choice of where to reside without state interference. It remains to be seen whether that deprivation accords with the principles of fundamental justice. I need not consider the other alleged s. 7 interferences which I have rejected.

[296] In *Canada (Attorney General) v. Bedford*, 2013 SCC 7, Chief Justice McLachlin explained the principles of fundamental justice as follows:

> [94] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 512).
>
> …
>
> [96] The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values.

[297] In *Bedford*, the Court was concerned with "basic values against arbitrariness, overbreadth, and gross disproportionality". Those do not exhaust the values engaged by s. 7, they are just the ones that were in issue in *Bedford*. However, they have come to be a point of focus in subsequent s. 7 jurisprudence and were the Petitioners' focus in this case.

[298] A law is arbitrary when there is no connection between the effect and the object of the law or if it imposes a limit on life, liberty, or security of the person that has no connection to the law's purpose: *Bedford* para. 98; *R. v. Smith*, 2015 SCC 34; *R. v. Kloubakov*, 2025 SCC 25 at paras. 138.

[299] A law is overbroad when it is "so broad in scope that it includes *some* conduct that bears no relation to its purpose": *Bedford*, at para. 112 (emphasis in original). A claimant must show that there is "no rational connection between the purposes of the law and *some*, but not all, of its impacts": *Bedford*, at para. 112 (emphasis in original).

[300] A law is grossly disproportionate only in "extreme cases", if the seriousness of the s. 7 deprivation is "totally out of sync with the objective of the measure", such that the law "cannot rationally be supported": *Bedford*, at para. 120; *Malmo-Levine*, at para. 143.

[301] The Petitioner's submissions in this case have focused on arbitrariness and gross disproportionality.

[302] There are several difficulties in addressing how the principles of fundamental justice might apply to the Minister's deprivation of certain IMGs' liberty to choose where they live. First, the Petitioners' submissions focused on the two-stream system as a whole and did not separately address the imposition of the return of service obligations as a stand-alone interference with some IMGs' s. 7 liberty interests.

[303] Second, in an effort to show that the two-stream system is arbitrary and grossly disproportionate, the Petitioners measured it against the objectives of the *Health Professions Act,* which I have determined does not govern the two-stream system. The relevant objective against which the liberty deprivation I have found must be weighed is addressing physician shortages in underserviced areas. The Petitioners only addressed this objective in a single paragraph that merely restates the importance of the liberty interests they say are at stake (including some I have now rejected).

[304] Third, I have found that the Minister's imposition of the return of service obligation amounts to a regulatory act that lacks statutory authorization. The parties have not made submissions on whether state action that regulates a person in a manner that interferes with their liberty interests without specific statutory authority can accord with the principles of fundamental justice.

[305] Fourth, at this stage of the proceeding, I am dealing only with a judicial review to which the *Doré/Loyola* framework applies. This is not the Petitioners' direct constitutional challenge to the two-stream system or to the return of service requirement specifically. The question at this stage is not whether the return of service obligations are constitutionally valid, but rather whether the Minister's exercise of discretion to impose the return of service obligation accords with *Charter* guarantees and values, and reflects a proportionate balancing of the *Charter* protections at play.

[306] At no point in the process leading up to this judicial review has the Minister considered whether the imposition of the return of service obligation limits the s. 7 liberty interests of those whom it is imposed on. Nor has the Minister considered whether the imposition of the return of service obligation achieves a proportionate balance with the *Charter* interests at stake. There is no evidence that the Minister considered the *Charter* issue either when setting conditions for IMGs in the 2018/2019 match or after the Petitioners' May 17, 2018 letter requesting the Minister to, among other things, eliminate the return of service obligations. (In fairness to the Minister, while the May 17, 2018 letter referred to s. 7 of the *Charter*, it contained no submissions or explanation as to how the return of service obligations or the two-stream system more broadly infringes s. 7.)

[307] These four difficulties complicate the remedy that might be granted for this *Charter* issue. The usual remedy on judicial review, at least on a review for reasonableness, is to refer the matter back to the decision-maker to reconsider: *Vavilov* at para. 79. The question of whether the return of service obligation accords with the principles of fundamental justice is considered at the first stage of the *Doré/Loyola* framework, which is reviewable on a correctness standard: *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para. 63. That is because a s. 7 *Charter* right is only engaged if the restriction on life, liberty, or security does not accord with the principles of fundamental justice. However, there is considerable overlap between that question (particularly when arbitrariness and gross disproportionality are invoked) and the proportionate balancing at the second stage of the *Doré/Loyola* framework, which is reviewed on a reasonableness standard: *Sikora v. Deputy Director Community Safety Unit,* 2025 BCSC 57 at para. 59.

[308] Despite the different standards of review that apply to these two questions, I find it appropriate to end my analysis of the s. 7 issue here so that the Minister can consider the return of service obligations afresh with the benefit of my findings to this point on s. 7. In my view, even though the application of the principles of fundamental justice is reviewable on a correctness standard, the Minister should

have the opportunity to address that issue at first instance with the benefit of these reasons and submissions from the petitioners (and perhaps others) that speak directly to that issue. The Minister should also have the opportunity to address the second stage of the *Doré/Loyola* framework with the benefit of these reasons and relevant submissions.

[309] I would, however, make this brief observation which may provide some assistance in reconsidering the issue. The Minister argues that the purpose of the return of service requirement is to "address persistent [physician] shortages in rural and underserviced regions". That is a compelling and substantial objective. It is crucial that reasonable medical care be accessible to all residents of British Columbia and ensuring that necessary services are distributed throughout the province with physicians living and working in all regions is critical to an equitable system of publicly-delivered health care and to the life and health of those who live in under-serviced areas.

[310] Where there are regional gaps in medical services and physician availability, it seems logical and perhaps necessary for the Minister to seek commitments from medical graduates to practice (and therefore live) for a time in an underserviced area of the Province as a *quid pro quo* for receiving the financial benefit of the Province's contribution to those graduates' residency training. That distinguishes this case from La Forest J.'s reasons in *Godbout* and Gomery J.A.'s reasons in *Drover* where there was no compelling reason to require the claimants to live within the municipality or the electoral district.

[311] But the Minister has not explained in this judicial review why that burden is shouldered solely by IMGs. Since CMGs are not required to make a return of service commitment in exchange for their residency positions to be funded, it appears that the Minister views a CMG residency more in the nature of an entitlement that flows as a matter of course from graduating from a Canadian medical school, whereas an IMG position is viewed as a privilege. This is reflected in a 2021 "Fact Sheet" prepared for the Minister's use during the Legislature's budget estimates process:

> To ensure there are a sufficient number and appropriate mix of physicians now and in the future, the Province agrees to fund a designated number of postgraduate medical education (PGME) positions for International Medical Graduates (IMGs) in exchange for a practice commitment in a health authority-identified community in BC.
>
> [Emphasis added]

[312] Perhaps there is good reason to view the allocation of opportunities between CMGs and IMGs in this way, but the Minister has not led evidence (or at least has not directed me to evidence in the extraordinarily large record in this case) that explains why addressing the problem of regional physician shortages falls only (or largely) to IMGs.[7]

[313] Nor has the Minister explained why it must be mandatory for all IMGs to commit to return of service obligations regardless of their personal circumstances. There appears to be no room in this system for exceptions if, for example, an IMG needs to be in a particular location to co-parent a child (like Mr. Falconer), or perhaps, care for an aging parent or access resources for a special needs child that are not available in the place where the IMG is directed to practice.

[314] In my view, these are among the factors that merit consideration in the assessment of whether the restriction on an IMG's choice of where to live accords with the principles of fundamental justice and to the proportionate balancing called for by the *Doré/Loyola* framework. The Minister should have the opportunity to consider and address these and other issues, even if the first point (principles of fundamental justice) is ultimately reviewable on a correctness standard.

[315] That said, as I will discuss at the end of these reasons, I would not set aside any decision at this stage but rather I would make a declaration as to return of service obligation's potential inference with a liberty interest as well as to the lack of

[7] To be clear, this is not the *only* way that the Province is addressing physician shortages in certain areas of the Province. For example, there are residency positions spread throughout the province. In fact, the Province recently added an additional 20 residency positions in underserviced areas of the province and those new positions are open to both CMGs and IMGs.

statutory authorization for it as discussed earlier. First, however, I will address the remaining *Charter* issues.

3. Section 6 – Mobility Rights

(a) Legal Principles

[316] Section 6 of the *Charter*, read as a whole, protects a right to move freely within Canada including across provincial boundaries. In *Taylor v. Newfoundland and Labrador,* 2026 SCC 5, Justices Karakatsanis and Martin, writing for the majority, said:

> [67] Section 6 protects the foundational interest of a person's freedom to choose where to be at any given time. Freedom of movement, without constraint or coercion, is essential to individual autonomy, dignity, and self-realization. It lies at the heart of the Canadian understanding of a free and democratic society — a political tradition that does not curtail movement, impose curfews, or require people to carry identity papers in public. Freedom of movement also supports national unity within the diverse Canadian federation. Section 6 recognizes that the freedom of Canadians to move freely within Canada, subject to the distinct laws of different provinces, promotes a sense of national unity and kinship, furthering the nation-building objective of the *Charter* itself. All of these interests unite s. 6's guarantees of rights to move, whether for travel, residence, or work.
>
> [68] Applying a purposive methodology, we conclude that s. 6 guarantees a right to move freely within Canada, including across provincial borders, to both citizens and permanent residents. Generally, any law that limits, in a non-fleeting or non-trivial fashion, these persons' ability to move within Canada, or which makes such movement contingent on state authorization, will infringe s. 6.

[317] Section 6 is divided into four subsections. The freedom to move within Canada underlies ss. 6(1) and (2). Justices Karakatsanis and Martin explained this as follows in *Taylor*:

> [105] We conclude the broad right of movement is guaranteed by both s. 6(1) and (2). A broad right to mobility is ancient — much older than the *Charter* — and would have been presumed to be part of any specific mobility rights the *Charter* enshrined as supreme law. The right is an underlying assumption that infuses both provisions. A right to free movement is a feature of s. 6(1) because history, international law, other related *Charter* provisions, and legislative debates all suggest that a right to "remain in" Canada includes a right to free movement within it. And it is a condition of s. 6(2) because an entitlement to go where you please to work or

> take up residence makes little sense unless you can, *in general*, go where you please.

[318] The broad mobility right that underlies ss. 6(1) and (2), as described by the majority in *Taylor*, applies simply to moving about the country and across provincial boundaries. In response to a concern of that provinces would have to provide social services to temporary travelers within a provincial boundary, the majority wrote:

> [165] This concern is unfounded. A right to travel is just that — a right to travel. In holding that governments cannot restrain citizens from travelling within the country, we do not hold that provinces are positively obligated to provide specific social services to travelers.

[319] While ss. 6(1) and 6(2) collectively affirm this broad right of movement throughout Canada, each also serves its own specific purpose. The Petitioners challenge the two-stream system under both provisions.

(b) The Petitioners' Claim under s. 6(1)

[320] Section 6(1) addresses the rights of citizens to enter and leave the country and protects them against exile and banishment: *Taylor* para. 153. It reads:

> 6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

[321] The Petitioners argue their right to enter and remain in Canada under s. 6(1) is infringed because they cannot pursue their residency training in Canada. They point to *Bjorkquist et al. v. Attorney General of Canada*, 2023 ONSC 7152 at para. 181 where the Court held that the imposition of an "unreasonable, unrealistic, and impractical" limit on mobility rights will violate s. 6(1). They argue the two-stream system makes it unrealistic and impractical for them to remain in Canada to complete residency training and practice medicine such that they are essentially forced find another country in which to practice. They argue this amounts to "being exiled" from Canada and being "forced to move to another country."

[322] In my view, the Petitioners have rather dramatically overstated the reach of s. 6(1).

[323] The unreasonable restriction in *Bjorkquist* was a provision of the *Citizenship Act*, R.S.C. 1985, c. C-29 that precluded Canadian citizens who were born abroad from passing on automatic citizenship to their children if those children were also born abroad. The Court found this restriction interfered with the Canadian parents' ability to enter and remain in Canada because their dependent children may not receive permanent residency or citizenship. There was a clear link between the citizenship restriction and the ability to enter and remain in Canada. No such restriction applies to the Petitioners.

[324] In *Brar v. Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1168 at para. 101, the Court held that placing a citizen on a "no-fly list" under the *Secure Air Travel Act*, S.C. 2015, c. 20 violated their s. 6(1) rights because air travel is "an essential part of modern life" and restricting a citizen from "leaving the continent by plane" was an unreasonable, unrealistic, and impractical restriction on their ability to leave Canada. Again, there is a clear nexus between the law and the ability to leave the country.

[325] The present case is not comparable to either of these circumstances. Here, the Petitioners are suggesting that if the Province does not provide them with a residency position, they are exiled from Canada. It is not a mobility right they are claiming but a right to pursue the practice of medicine in Canada or at least to compete on an equal footing with CMGs for residency positions necessary to pursue a medical practice in Canada. Neither of these constrains them from crossing the border into or out of and plainly does not engage s. 6(1).

(c) The Petitioners' Claim under s. 6(2)

[326] Section 6(2) protects the right of citizens and permanent residents to establish residency and pursue a livelihood in any province or territory, and preserves the ability of the provinces and territories to regulate those matters provided they do not discriminate on the basis of a person's present or previous place of residence: *Taylor* para. 153. In this respect, s. 6(2) is read together with

6(3), as the Supreme Court of Canada directed in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. Those provisions read:

> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

[327] In *Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357 at para. 28, Justice Estey said the right that emerges from these two provisions is:

> …to earn a living in any province subject to the laws and practices of "general application" in that province which do not discriminate primarily on the basis of provincial residency.

[328] In *Canadian Egg Marketing Board* at para. 59, Iacobucci and Bastarache JJ., for the majority, explained that the discrimination element of s. 6(3)(a) injects the notion of equality of treatment into the overall interpretation of s. 6(2) and (3). They further explained at para. 60:

> [60] The freedom guaranteed in s. 6 embodies a concern for the dignity of the individual. Sections 6(2)(*b*) and 6(3)(*a*) advance this purpose by guaranteeing a measure of autonomy in terms of personal mobility, and by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present. The freedom to pursue a livelihood is essential to self-fulfilment as well as survival. Section 6 is meant to give effect to the basic human right, closely related to equality, that individuals should be able to participate in the economy without being subject to legislation which discriminates primarily on the basis of attributes related to mobility in pursuit of their livelihood.
>
> [Emphasis added]

[329] The approach is to identify a comparator group to assess whether the claimant is being discriminated against on the basis of residency:

> [68] … Section 6(3)(*a*) specifically foresees discrimination under these circumstances, prohibiting laws "that discriminate among persons primarily on the basis of . . . previous residence" (emphasis added). In such cases, the new resident of a province will be compared with longer-term residents to determine if there is discrimination.
>
> [Emphasis in original]

[330] The Petitioners' submissions on s. 6(2) are exceedingly brief and, with respect, underdeveloped. They argue the two-stream system benefits CMGs in a manner that is "baldly discriminatory". They argue they have been targeted for differential treatment compared to CMGs because their previous place of residence is overseas where they attended medical school.

[331] One concern I have with the Petitioners' brief submissions is they have not addressed whether s. 6(2) even applies to these circumstances. Section 6(2) appears to be about movement between provinces and not discrimination based on international residence. It may well apply in these circumstances but the parties' submissions on that point are too sparse to substantively engage in that question. I am disinclined to wade into the scope of s. 6(2) without full submissions on the point.

[332] I would observe, however, that, insofar as the differential treatment accorded to IMGs amounts to discrimination in the context of s. 6(2), it is primarily based on where they attended medical school and not their place of residence. I acknowledge the two go hand-in-hand, but s. 6(3)(a) refers to discrimination that is "primarily" based on present or previous residence. Here, the place of residence is incidental (albeit necessarily so) to the place of education, but it is the place of education that is the primary basis for the distinction. Again, the parties' very brief submissions on s. 6(2) do not address these potentially complex points.

[333] In the absence of more thorough submissions on s. 6(2), the Petitioners have not persuaded me that their rights under this provision were engaged by the Minister's decision and they have not satisfied me that the first step of the *Doré/Layola* framework is met for this right.

4. Section 12 – Cruel or Unusual Treatment

[334] The final *Charter* right the Petitioners argue is engaged by the Minister's imposition of the two-stream system is the s. 12 right to be free from cruel and unusual punishment or treatment.

[335] The purpose of s. 12 is to protect human dignity, by precluding "the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment": *Quebec (Attorney General) v. 9147-0732 Québec inc.,* 2020 SCC 32. There is a "high bar" for demonstrating a breach of s. 12: *R. v. Lloyd*, 2016 SCC 13 at para. 24.

[336] The Petitioners frame their argument under two categories. First, with respect to the two-stream system generally, they argue the differential treatment accorded to them compared to CMGs is "degrading and dehumanizing" in that it communicates to them that IMGs are "not worthy of fair and humane treatment", "inflicts mental pain and suffering" on them, and punishes them for their choice to attend medical school outside of Canada. They also argue the two-stream system is contrary to Canada's obligations under the *Universal Declaration of Human Rights* and other international instruments including with respect to equality of opportunity and treatment in employment, occupation and access to vocational training; the availability of technical and professional education; the right of opportunity to gain a living by work freely chosen or accepted; the right to just conditions of work including remuneration; the right to choose a residence; and potentially the right to protection of the family unit.

[337] I reject these submissions. I acknowledge the personal hardship that the individual petitioners and other IMGs have experienced by their inability to secure one of the limited residency positions for IMGs and their perception of being treated as less worthy than CMGs. However, the two-stream system is simply a way of prioritizing residency opportunities for graduates of medical schools in British Columbia and elsewhere in Canada. It helps to ensure that those who started their medical education in this jurisdiction can complete that education with the required

post-graduate residency training in the same place. On no reasonable and objective standard can that be characterized as "inhumane" treatment for those who are given a lower priority for residency training because they attended medical school outside of Canada. Nor does it amount to inflicting mental pain or suffering on IMGs or "punishing" them for their choice of attending medical school overseas.[8]

[338] Cruel and unusual punishment or treatment arises most frequently in cases where mandatory minimum sentences of incarceration impose grossly disproportionate terms of imprisonment: *R v. Smith*, [1987] 1 S.C.R. 1045; *R v. Hills*, 2023 SCC 2; *R v. Bissonnette*, 2022 SCC 23. In that context, "grossly disproportionate" refers to a sentence that is "so excessive as to outrange standards of decency": *Lloyd* at para. 24. It has also been found where a victim impact surcharge, which is a form of punishment, is grossly disproportionate: *R. v. Boudreault*, 2018 SCC 58.

[339] The only case the Petitioners cite where cruel and unusual treatment has been found outside of a penal context is *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 where it was found that the executive branch infringed the s. 12 right of certain classes of refugee claimants by cancelling medical benefits previously available to them through the government. In considering whether this conduct amounted to "treatment" within the meaning of s. 12, Justice Mactavish first noted that the refugee claimants were under special administrative control of the state in that some were subject to reporting requirements and others may be detained. The Petitioners in this case face nothing like that.

[340] She then observed that the executive branch's withdrawal of medical care intentionally targeted this group with the express purpose of inflicting predictable and preventable physical and psychological suffering with the objective of encouraging them to leave Canada more quickly once their refugee claims are rejected. She

[8] I would further observe that "punishment" under s. 12 applies to penal sanctions (*R v. Hills*, 2023 SCC 2 at para. 31) not to conduct that one metaphorically characterizes as punishment.

explained that this fact distinguished the case from more conventional policy decisions where governments draw lines in setting qualifying criteria for social benefit programs:

> [590] … For the purpose of my section 12 analysis, however, this intentional targeting of a vulnerable, poor and disadvantaged group distinguishes this case from the usual situation involving the assigning of priorities and the drawing of lines by government in relation to the availability of social benefit programs. In the unusual circumstances of this case, I am thus satisfied that the actions of the executive branch of government at issue here constitute "treatment" for the purposes of section 12 of the Charter.

[341] The Minister in this case has not "intentionally targeted" IMGs with the imposition of the two-stream system. The system is not designed to discourage IMGs from coming to Canada, even if the limited availability of IMG residency positions has that effect. The purpose of the policy is to prioritize a finite number of residency positions for those who took their undergraduate medical degree in Canada so that they may complete their training in this jurisdiction and, it is hoped, remain here for practice. There is simply no comparison to *Canadian Doctors for Refugees*.

[342] The second aspect of the Petitioners' claim under s. 12 relates to the return of service obligation which they characterize as "indentured servitude" and "forced compulsory labour" because IMGs are compelled to works as full-time physicians for two or three years in the location chosen by the Minister. They argue the financial penalties for breaching a return of service agreement are crippling in that they amount to approximately two or three years' salary.

[343] Earlier I found that IMGs who match to an IMG residency position have no real choice but to accept the return of service obligation. However, to suggest that results in "indentured servitude" or "forced compulsory labour" is hyperbolic. The contract imposes a burden on the IMG to practice in a particular location. That may impose a heavy burden on an individual with potentially significant life consequences, but "forced compulsory labour" it is not.

[344] Further, I acknowledge that the penalties for breaking a return of service agreement are arduous, but I do not agree they are "so excessive as to outrage standards of decency" or that they are "abhorrent or intolerable" to society: *Boudreault,* at para. 45. Depending on the circumstances, it is conceivable that these terms might render a return of service agreement unconscionable in a civil context (*Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 69) but I am not persuaded they approach anything close to cruel and unusual treatment as contemplated by s. 12.

[345] I do not accede to the Petitioners' submission under s. 12.

XI. Conclusion and Remedy

A. Summary of Findings

[346] In summary, I dismiss the application for judicial review against the College on that basis that the *Health Professions Act* does not apply to the two-stream system for admissions to post-graduate residency training. The College has no jurisdiction to end the two-stream system or compel UBC or the Minister to do so. It follows that I also dismiss the application for judicial review of the decisions of the Health Professions Review Board.

[347] I also dismiss the application for judicial review against UBC as I have concluded that the Minister is responsible for imposing the two-stream system as a necessary consequence of the policy decision to fund a finite number of residency positions and allocate a specific number of those positions for CMGs and IMGs. UBC did not make the decision to implement the two-stream system, even if it supports it.

[348] I find the decision to impose the two-stream system generally (excluding the imposition of the return of service obligations) is a policy decision of the Minister that is not founded in a statutory power and is not reviewable under s. 2(2) of the *Judicial Review Procedure Act*. It is a decision about how to allocate government resources and to prioritize access to residency positions in British Columbia for those who

graduated from Canadian medical schools. While there is no general bar on judicial review of policy decisions, I conclude that the Court lacks the institutional capacity and legitimacy to review this decision, apart from any *Charter* implications.

[349] However, I find the Minister's imposition of return of service obligations on those IMGs who match to an IMG residency position constitutes an exercise of a regulatory power that requires statutory authorization, for which there is none. IMGs who are fortunate enough to match to one of the available IMG residency positions have no real option but to accept that position with the accompanying requirement to commit to the return of service obligations. Through those obligations, the Minister compels the IMG to practise medicine (and live) for two or three years in a location determined by the Minister and imposes significant financial penalties for breach of that obligation. The regulatory nature of this obligation is not shielded under the guise of ordinary contractual dealings because the state is purporting to use a contractual power in a coercive way against a segment of society who is given no real choice but to comply. The imposition of the return of service obligations on IMGs might be a reasonable way of addressing regional physician shortages (a point that is not for me to decide on this judicial review), but it requires statutory authorization.

[350] I find the Clinical Assessment Program, which all IMGs who apply for a residency position must complete, is not regulatory or otherwise objectionable. It does not impose onerous obligations on IMGs and it is not unreasonable to assess the clinical abilities of IMGs who, unlike CMGs, do not receive clinical experience in a Canadian health care setting as part of their undergraduate education. I also find it is not unreasonable to use the Clinical Assessment Program and its admission criteria as a tool to winnow down the number of applicants for IMG residency positions to a manageable number.

[351] I find the two-stream system, apart from the return of service obligation, does not engage any *Charter* rights. The distinction drawn between IMGs and CMGs is not based on an enumerated or analogous ground under s. 15, including national origin, directly or by proxy, as the Petitioners argue. Nor does that differential

treatment engage a liberty or security interest under s. 7, save for the return of service obligation. The claim under s. 6 is undeveloped to the point it cannot be adjudicated in this case and the claim under s. 12 is wholly without merit.

[352] However, I find that the imposition of the return of service obligation on those IMGs who match to an IMG residency position engages their liberty interest to decide where to live free from government interference. A person's choice of where to live is a fundamentally personal decision which engages what it means to enjoy individual dignity and independence. It therefore falls within the scope of s. 7. However, I am unable to determine on the evidence and arguments in this proceeding whether that limitation is inconsistent with the principles of fundamental justice. Since the issue arose as a judicial review applying the *Doré/Loyola* framework and not as a direct constitutional challenge, and since the issue as I have framed it has not been fully addressed in submissions before me or to the Minister, I find it is appropriate refer the matter back to the Minister to assess, firstly, whether the imposition of the return of service obligation is consistent with the principles of fundamental justice and, secondly, to reconcile any liberty interest at stake with the objectives of the return of service obligation.

B. Remedy

[353] With that I turn to the question of what is the appropriate remedy for the successful aspects of this judicial review respecting the return of service obligation. The remedy is challenging in that neither individual Petitioner matched to a residency position so neither was required or invited to commit to a return of service obligation. There is no decision applicable to the two individual Petitioners to quash.

[354] SOCASMA speaks for IMGs more broadly and it led evidence of at least one IMG who was compelled to enter into a return of service contract. She provided evidence as to the difficulties the return of service obligation imposed on her and her family, but her obligations under the agreement have now been fulfilled and the issue from her perspective is now moot. However, since no respondent challenged SOCASMA's standing to argue against the return of service obligations and since I

am satisfied it has public interest standing to do so, there should be a remedy on this issue.

[355] That said, I agree with the Minister that the Petitioners cannot obtain the relief of setting aside any return of service contracts that have been entered into between the Minister and persons not before the court. SOCASMA has no standing to obtain that kind of relief.

[356] In my view, the appropriate remedy is to make a declaration that the return of service obligations can only be imposed on IMGs who match to an IMG residency position if:

a) it is authorized by a statutory instrument (be it a statute or a regulation if the necessary regulation is itself authorized by a statute); and

b) after the Minister has assessed whether the deprivation of an IMGs' liberty to choose where to live accords with the principles of fundamental justice (which may subsequently be reviewed on a correctness standard) and has reconciled that liberty interest with the objectives of the return of service obligation.

[357] Section 2(2)(b) of the *Judicial Review Procedure Act* allows the court to make a declaration on judicial review where there is an "exercise, refusal to exercise, or proposed or purported exercise, of a statutory power". I have found that the imposition of the return of service obligation is a power that can only be exercised with statutory authority for which there is presently none. Where a public official acts without jurisdiction to exercise a power that requires statutory authority and that authority is lacking, the supervisory role of the court necessitates intervention and, in my view, it is open to the Court in such circumstances to grant declaratory relief under s. 2(2)(b).

[358] I appreciate this declaration may impact on existing and certainly on future return of service obligations. That, in turn, may impact on physician availability in

remote or underserviced areas of the province. This may be an appropriate case to stay or suspend the effect of my declaration so the Minister has an opportunity to address the issues in the declaration I have outlined. However, since I have not received submissions on that question, I will order only a brief suspension of the effect of my declaration for now so that the parties can make full submissions on that issue, including whether a longer suspension is necessary and ought to be granted. For the time being, a 60-day suspension should suffice to allow time for submissions on this issue.

[359] The balance of the relief sought in these petitions is dismissed.

C. Costs

[360] The parties asked for the opportunity to address the Court on costs after judgment. I direct the parties to contact Supreme Court Scheduling to arrange a 45-minute judicial management conference (by Teams if that is their preference) to discuss the issue and set a schedule for submissions on costs and on a potential suspension of my declaration relating to the return of service obligations.

[361] I wish to thank counsel for the high quality of their submissions, both written and oral, their professional courtesy to one another, and their immense assistance to the Court.

"Kirchner J."