SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Llewellyn v. College of Registered Nurses of P.E.I.*, 2022 PESC 36

Date: 20220825
Docket: S1-GS-29080
Registry: Charlottetown

Between:

Tonya Llewellyn

Appellant

And:

College of Registered Nurses of Prince Edward Island

Respondent

Before: The Honourable Justice Terri A. MacPherson

Appearances:
Marcus R. Davies, on behalf of the Appellant
Douglas R. Drysdale, Q.C., on behalf of the Respondent

Place and date of hearing	-	Charlottetown, Prince Edward Island March 3, 2022
Place and date of written decision	-	Charlottetown, Prince Edward Island August 25, 2022

STATUTES CONSIDERED: ***Regulated Health Professions Act***, R.S.P.E.I.1988, Cap. R-10.1; ***Judicature Act***, R.S.P.E.I. 1988, Cap. J-2.1.

CASES CONSIDERED: ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65; ***Housen v. Nikolaisen***, 2002 SCC 33; ***Burke v. Taylor and Attorney General***, 2021 PESC 4; ***Abrametz v. Law Society of Saskatchewan***, 2020 SKCA 81; ***Mitelman v. College of Veterinarians of Ontario***, 2020 ONSC 3039; ***Strom v. Saskatchewan Registered Nurses Association***, 2020 SKCA 112; ***Kupsar v. Regina Provincial Correctional Centre***, 2020 SKCA 142; ***Ontario (Labour) v. Cobra Float Service Inc.***, 2020 ONCA 527; ***Guindon v. Canada***, 2015 SCC 41; ***Quaidoo v. Edmonton (Police Service)***, 2015 ABCA 381.

MacPherson, J.:

I. Introduction

[1] The ***Regulated Health Professions Act***, ("the ***Act***") R.S.P.E.I.1988, Cap. R-10.1 is mandated to enforce standards of practice amongst its members in the Province of Prince Edward Island. A discipline process is set forth in the ***Act*** which commences with a written complaint, provide opportunity for written responses, enables review and possible investigation of the complaint and ultimately, authorizes the conduct of a hearing into the complaint by the Hearing Committee, followed by a written decision and order, where warranted. (the ***Act***, ss. 35-38).

[2] The purpose of the ***Act***, stated at s. 2, is to provide for the regulation of certain health professions where it is in the public interest and where self-regulation of the health professionals is appropriate, taking into consideration relevant circumstances and factors.

[3] The College of Registered Nurses of P.E.I. ("the **College**") is the entity responsible for the regulation of the nursing profession in this province. Part of the College's mandate under the Act is to enforce standards of practice among its members. Complaints against members for professional misconduct or incompetence may be lodged with the College and the College is required to conduct the discipline process as described above.

[4] A member who has been the subject of a complaint may appeal in accordance with the provisions of s-s. 59(2) of the ***Act***:

> 59(2) A respondent may appeal
>
> (a) an order of a council made under subsection 53(1);
>
> (b) a determination of a hearing committee made under subsection 58(1); or

> (c) an order of a hearing committee made under subsection 58(2),
>
> to the Supreme Court within 30 days after being served with notice of the determination or a copy of the order.

[5] The court's powers on appeal are set out in s-s. 59(4):

> 59(4) On hearing an appeal, the court may
>
> (a) confirm, revoke or vary the dismissal, determination or order appealed from;
>
> (b) refer the matter, or any issue, back to the investigation committee or the hearing committee for further consideration; or
>
> (c) provide any direction that it considers appropriate.

[6] This is the statutory framework which governs the facts and issues before this court for consideration and determination.

II. Background

[7] During all relevant times, the appellant Tonya Llewellyn ("the **appellant**") was a registered nurse and a member of the College. A complaint was brought against the appellant on February 4, 2019 and a hearing committee ("the **Committee**") conducted a hearing on February 10, 11, 12 and 13, 2020. A written decision, dated June 16, 2020 resulted in several findings being made against the appellant and penalties were imposed.

[8] An Amended Notice of Appeal is before this court asking that the College's order be set aside and that an order be granted substituting with a determination that the appellant is not guilty of professional misconduct and/or professional incompetence.

[9] The grounds for appeal are:

> 1. The College erred in law by failing to appropriately assess witness credibility and by failing to articulate the reasons for doing so;
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> 2. The College erred in law by failing to address significant and numerous contradictions in witness testimony;
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> 3. The College erred in law by assessing the credibility of witnesses as groups, rather than individuals;
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> 4. The College erred in law by failing to undertake a contextual analysis;

5. The College erred in law by failing to consider the rights of the patient under s. 7 of *The Canadian Charter of Rights and Freedoms*;

6. The College erred in law by failing to consider the Appellant's rights under s. 7 of *The Canadian Charter of Rights and Freedoms* as the patient's next of kin;

7. The College erred in law by failing to consider the issue of spoliation;

8. The College erred in law by failing to draw a negative inference as a result of the destruction of evidence which would have assisted the Committee in its deliberations; and

9. The College erred in law by considering the Appellant's lack of remorse when assessing guilt and remedy.

[10] A copy of the Committee's written decision ("the **decision**") is before this court as well as several other pieces of documentary evidence. The court also had the benefit of written and oral submissions presented by counsel. I am satisfied with the completeness of the Appeal Record so will proceed to consider and determine the issues before the court.

III. Standard of Review

[11] The first determination which must be made relates to the standard of review which this court is to apply to the decision. This complicated issue is one which has been recently clarified by the Supreme Court of Canada in the decision of ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 ("***Vavilov***"). In ***Vavilov***, the court harkens back to its 2002 decision in ***Housen v. Nikolaisen***, 2002 SCC 33 for its determination of what standard of review applies in cases where a statute provides for a right of appeal from an administrative tribunal, as in the case at bar. The court states, at para. 37:

> [37] ... This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen* ... Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable)...

[12] ***Vavilov*** further clarifies that, when courts are examining the merits of an administrative decision, a presumption of reasonableness is the applicable standard of review (para. 16). However, the presumption is rebuttable in two specific circumstances:

first, where the legislature indicates a difference standard or set of standards apply or if the legislature has provided a statutory appeal mechanism directly to a court; second, if the rule of law requires that the standard of correctness be applied. (***Burke v. Taylor and Attorney General***, 2021 PESC 4).

[13] The appellant's position on standard of review is that both rebuttable presumptions are present in this case, requiring the standard of correctness to be applied to all aspects of the appeal grounds. The appellant points to the statutory right of appeal to the court, but also submits that, in this case, circumstances exist which support the conclusion that the rule of law demands a higher standard than reasonableness and therefore, the correctness standard should apply.

[14] The College submits that the conclusion from the court at para. 37 of ***Vavilov*** is that which governs in this case, such that the correctness standard applies to questions of law, but in relation to questions of fact or mixed questions of fact and law, the standard of review is palpable and overriding error.

[15] The College relies upon a decision of the Saskatchewan Court of Appeal as support for its position and refers this court to para. 74 of the decision of ***Abrametz v. Law Society of Saskatchewan***, 2020 SKCA 81, which states:

> [74] ... Questions of statutory interpretation and other questions of law – including as to the scope of the decision-maker's authority – are reviewed on the correctness standard. Where, as here, the right of appeal extends to questions of fact, the standard of review relating to those questions is palpable and overriding error. Absent an extricable error of law, that deferential standard applies to mixed questions of fact and law. A deferential standard also applies to discretionary decisions, . . .

[16] A clear explanation of what is a palpable and overriding error is found in a decision of the Ontario Superior Court in ***Mitelman v. College of Veterinarians of Ontario***, 2020 ONSC 3039, (***"Mitelman"***) where the court states, at para. 16:

> [16] A "palpable and overriding" error is an error that is "plainly seen" or "unreasonable or unsupported by the evidence." Findings of mixed fact and law, where a legal principle is not readily extricable, are also reviewed on the palpable and overriding error standard. Where an appeal raises a pure or an extricable issue of law, that issue is reviewed on a correctness standard.

[17] The Saskatchewan Court of Appeal also provides direction regarding how a reviewing court should treat an alleged error in a discretionary decision. It concludes in the decision of ***Strom v. Saskatchewan Registered Nurses Association***, 2020 SKCA 112, at para. 60, that the appellate court will only intervene if the decision maker erred in principle, misapprehended or failed to consider material evidence, failed to act judicially or reached a decision so clearly wrong that it would result in an injustice.

[18] On the question of how an appellate court should review a decision on penalty, ***Mitelman*** provides guidance and direction at para. 18:

> [18] It is well established that in order to overturn a penalty imposed by a regulatory tribunal, it must be shown that the decision-maker made an error in principle or that the penalty was "clearly unfit." The courts in the criminal context have used a variety of expressions to describe a sentence that reaches this threshold, including "demonstrably unfit", "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate" or representing a "substantial and marked departure" from penalties in similar cases. This high threshold applies equally in the administrative law context. To be clearly unfit, the penalty must be disproportionate or fall outside the range of penalties for similar offences in similar circumstances. A fit penalty is guided by an assessment of the facts of the particular case and the penalties imposed in other cases involving similar infractions and circumstances, *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420 at para. 56.

[19] I am satisfied that, in accordance with ***Vavilov***, the applicable standards of review in this case must be determined by applying appellate standards to the decision (para. 37). This means that, in considering questions of law, including statutory interpretation and scope of authority, the standard of correctness is to be applied. For questions of fact, or those of mixed fact and law where the legal principle is not readily extricable, the standard of review is palpable and overriding error.

IV. Application to the Case at Bar

[20] The hearing in this matter was held on February 10-13, 2020 before the Committee. The appellant was self-represented. Two counsel adduced evidence for the hearing and one separate counsel acted as legal counsel and advisor for the Committee. In addition to the evidence, the Committee considered the applicable legislation as well as the Standards for Nursing Practice and the Code of Ethics. The Committee heard viva voce evidence from fifteen witnesses (seven adduced by counsel and eight adduced by the appellant, including herself). The Committee also considered numerous records and documents presented by counsel and the appellant.

[21] The summary of factual circumstances is that the appellant's mother was ill and attended at the emergency department of King's County Memorial Hospital ("**KCMH**") in Montague, P.E.I. on December 14, 2018. The appellant's mother was a non-medical staff member at the hospital and the family had further history at KCMH as the appellant's father had been treated and passed away there several years previous. The appellant's mother ("the **mother**") was admitted to the inpatient unit in room 1044 and placed on infection control precautions. The etiology of her illness was unknown. During the course of her stay at KCMH, the mother's symptoms and condition worsened. The mother remained as a patient at KCMH until she was transferred to the Queen Elizabeth Hospital on the morning of December 16, 2018. Thankfully, she ultimately recovered.

[22] The circumstances relating to the first two allegations set forth in the formal complaint relate to the appellant's conduct while she was at the KCMH with the mother on December 15 and 16, 2018. The circumstances of the third allegation relate to conduct of the appellant in the form of a voicemail left by her with a director of nursing on December 20, 2018. It is clear from the record that, although the appellant was a registered nurse on December 15 and 16, 2018, she was not on staff at KCMH and was not acting in an official capacity. Nevertheless, as a member of the College, she was bound by the Standards of Practice and Code of Ethics at all times relevant to these events, as was correctly determined by the Committee in the decision.

[23] I note that, at the outset of the hearing, the appellant raised a procedural objection with respect to the process undertaken by the Committee in hearing and deciding the complaint. The Committee concluded that its process had provided the appellant with a fair hearing and I conclude that this was a correct determination on that issue. The appellant and her counsel have not raised this specific procedural fairness issue as a ground of appeal.

[24] I will now undertake a review and analysis of the grounds of appeal.

1. The College erred in law by failing to appropriately assess witness credibility and by failing to articulate the reasons for doing so.

[25] The College heard evidence from a total of 15 witnesses. These included the appellant and six members of her family who were present and/or involved in the relevant events. Also testifying were Sandra MacKay, R.N., the director of nursing from KCMH (who filed the complaint), Dr. Scott Campbell, and three registered nurses and a personal care worker who were present and/or involved in the relevant events. Sandra MacKay also testified regarding the voicemail which the appellant left for her. A recording and transcript of the voicemail were also entered into evidence.

[26] In its decision, the Committee initially identified factual circumstances which were not in dispute and then proceeded to review the contested evidence. The decision addresses each individual allegation separately, reviews the evidence provided in relation to each allegation and identifies when and how the various witness accounts match up and vary. On points where the variations were irrelevant, the decision states so. One example of this relates to the evidence given by several of the appellant's family members regarding presence or absence of labels relating to isolation precautions. The Committee concluded that, whether or not each family member had been informed or notified of the necessary precautions, the appellant was aware, either through her communications with KCMH staff or by virtue of her knowledge as a registered nurse. The fact that the appellant wore personal protective equipment (PPE) was highlighted as proof of this conclusion.

[27] On the issue of starting an IV, the decision similarly reviews all of the versions of events, including the appellant's admission, and makes a finding which is supported by the evidence presented.

[28] The decision sets forth a similar analysis relating to the second allegation, which focuses on the appellant's conduct and interactions with the other RNs and hospital staff. It notes that the hospital staff described a chaotic scene, while the family members described a fairly calm scene. The Committee decided to accept the versions from the hospital staff, noting that they were supported by health records which were prepared at or close to the time of the events and which were confirmatory of the testimony of the staff. The decision notes that the records were made under a legal duty to accurately record events and that they were made before anyone knew that a complaint would be made to the College. The evidence relating to the second allegation is the most conflicting and contentious. The Committee undertook an extensive review of the details testified to, reviewed the relevant documentation, parsed out the conduct of the individual family members from that of the appellant, and made findings specifically pertaining to the appellant and her actions and behaviours.

[29] As indicated, the evidence relating to the third allegation is uncontested. The Committee heard a recording of the voicemail, determined it was threatening and unprofessional and found that the appellant's behaviour constituted professional misconduct.

[30] In all of the circumstances, I find that the College correctly undertook credibility assessments of all of the witness testimony presented in the hearing and extensively articulated the reasons for the findings which were made. The appellant has failed to establish palpable and overriding error. The first ground of appeal fails.

2. The College erred in law by failing to address significant and numerous contradictions in witness testimony.

[31] I find that, for the reasons set out above, the second ground of appeal fails as well. As stated, the decision correctly identifies and addresses relevant contradictions and resolves them appropriately in a reasoned manner. The appellant has failed to establish palpable and overriding error.

3. The College erred in law by assessing the credibility of witnesses as groups, rather than individuals.

[32] I find that, for reasons set out above, the third ground of appeal fails. The decision makes several references to the testimony of individual witnesses from both sides of the story. The decision also notes similarities in the details testified to. Again, the decision correctly undertakes the credibility assessments required and I conclude that, in all regards, the conclusions reached on factual findings are reasonable and supported by detailed

reasons. No palpable and overriding error has been established by the appellant on any question of fact.

4. The College erred in law by failing to undertake a contextual analysis.

[33] The appellant did not spend much time building upon this ground of appeal so it is not clear what is relied upon for the allegation that a contextual analysis was not undertaken in the decision. If I am correct in my understanding that a contextual analysis is one which required a focus on the context and environment within which a series of events takes place, then I have no hesitation in concluding that this fourth ground of appeal fails. The Committee in its decision acknowledges and refers to much detail about the circumstances which were visited upon all of the participants, including the appellant, and clearly sets forth the environment within which all were operating. No error in law has been established.

5. The College erred in law by failing to consider the rights of the patient under s. 7 of *The Charter of Rights and Freedoms.*

and

6. The College erred in law by failing to consider the appellant's rights under s. 7 of *The Charter of Rights and Freedoms.*

[34] I will consider and determine the fifth and sixth grounds together as the issues are similar. I begin by noting that these *Charter* issues first appear on appeal, as they were not raised nor argued by the appellant before the Committee, either in written submissions or at the hearing itself.

[35] The general rule on appeal is that issues not raised at the hearing cannot be raised for the first time on appeal. Several courts have previously noted there is a reluctance to decide constitutional issues in a vacuum, in the absence of adjudicative facts. (***Kupsar v. Regina Provincial Correctional Centre***, 2020 SKCA 142). In the case at bar, no submissions of any kind were made to the Committee about section 7 rights to life, liberty or security of the person. I pause to prematurely note that no submissions were made of the issue of spoliation of evidence identified in the appellant's seventh and eighth grounds of appeal. As a consequence, the Committee had no reason or opportunity to consider and make decisions on these issues.

[36] In the 2020 decision of ***Ontario (Labour) v. Cobra Float Service Inc.***, 2020 ONCA 527, the Ontario Court of Appeal discusses the question of hearing new arguments on appeal and sets forth the test to be applied. The Court states, at paras. 19 and 20:

> [19] Generally speaking, appeal courts will decline to hear new arguments on appeal, including constitutional arguments: *R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96, at para. 6. As this court explained in

> *R. v. L.G.*, 2007 ONCA 654, 228 C.C.C. (3d) 194, at para. 43, the reluctance to hear new issues on appeal stems from:
>
> > concerns about prejudice to the other side arising from an inability to adduce necessary responding evidence at trial, the lack of a sufficient record to make necessary findings of fact, and society's overarching interest in the finality of litigation.
>
> [20] The test for whether new issues should be considered on appeal is stringent. The discretion to hear a new constitutional issue on appeal "should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties": *Guindon* at para. 23. When determining whether to exercise this discretion, a judge should consider "all of the circumstances", including the state of the record, fairness to all parties, the importance of having the court resolve the issues, and the broader interests of the administration of justice: *Guindon*, at para. 20.

[37] The Ontario Court of Appeal further states at para. 29 that, even if the record before the appeal court is sufficient, it does not follow that the appeal court is obligated to hear the issue on appeal. It reiterates the rule against hearing new issues on appeal is stringent and the discretion to hear a new constitutional issue on appeal should only be exercised **exceptionally and never lightly**. (emphasis added).

[38] The Supreme Court of Canada provides direction specifically pertaining to newly raised constitutional issues in its decision in ***Guindon v. Canada***, 2015 SCC 41. The court states, at para. 23:

> [23] New constitutional issues engage additional concerns beyond those that are considered in relation to new issues generally. In the case of a constitutional issue properly raised in this Court for the first time, the special role of the attorneys general in constitutional litigation – reflected in the notice provisions – and the unique role of this Court as the final court of appeal for Canada must also be carefully considered. The Court must be sure that no attorney general has been denied the opportunity to address the constitutional question and that it is appropriate for decision by this Court. The burden is on the appellant to persuade the Court that, in light of all the circumstances, it should exercise its discretion to hear and decide the issue. There is no assumption of an absence of prejudice. The court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties.

[39] The College strongly asserts this court should not consider and adjudicate upon the *Charter* issues set forth in the fifth and sixth grounds of appeal. The College states the record discloses no indication that the Attorney General of PEI was given notice of the *Charter* issues. It further states there is nothing in the record which suggests the appellant was prevented from raising these issues at the hearing, and that the Committee had the full

statutory authority by virtue of s. 56(1)(a) of the ***Act*** to rule on those issues, had they been raised. It states the appellant's decision not to raise these *Charter* concerns at the hearing deprived the Committee of the opportunity to provide a full and proper hearing in respect of the complaint. By the appellant choosing not to raise the issues until the appeal, the Committee argues that this court is being asked to perform the Committee's function without the benefit of seeing the witnesses and hearing the evidence or hearing the Committee's views on the issues. The Committee states, had the issues been raised, questions could have been put to witnesses in order to elicit relevant evidence and ensure a full understanding of the issues.

[40] The appellant's position is that this court should view these *Charter*-based grounds of appeal as exceptional and move forward to adjudicate upon them as new issues raised on the appeal. The appellant states her rights under section 7 were suppressed, as both an advocate and as the next-of-kin of her mother, who was unable to advocate for herself. The appellant states, on December 15 and 16, 2018, her mother's health prevented her from speaking for or advocating for herself. As the mother's next-of-kin, the appellant states it fell to her to advocate for her mother, to be her mother's voice and to speak up for her when she could not speak for herself. She states the advocacy work of nurses has a direct impact on the lives of hundreds of thousands of Canadians every day, arguably an even greater direct impact on the lives and personal security of Canadians than the advocacy work done by members of the legal profession. She argues that this role cannot be overlooked when assessing a disciplinary decision which seeks to limit expressive advocacy.

[41] I have decided not to exercise my discretion so I will not decide the issues which the appellant has newly raised under the fifth and sixth grounds of appeal. In deciding this way, I am mindful of the comments from the Supreme Court of Canada and the Ontario Court of Appeal. There are competing interests which require balancing. However, in the end, the appellant has failed to persuade that, in light of all the circumstances, I should hear and decide the newly raised issues. I am not satisfied the appellant has demonstrated an absence of prejudice to the College. I am not satisfied the issues in question rise to the level of those which would trigger the principles of fairness to the parties or broader interests of the administration of justice. I am bound by the stringent requirement that new issues not be heard on appeal. Nothing presented to me in this case causes me to waiver from that clear direction.

[42] The fifth and sixth grounds of appeal fail.

7. The College erred in law by failing to consider the issue of spoliation.

and

8. The College erred in law by failing to draw a negative inference as a result of the destruction of evidence which would have assisted the Committee in its deliberations.

[43] I will consider and determine the seventh and eighth grounds together, as the issues are similar and connected. I begin by concluding the principles set out in relation to the fifth and sixth grounds also apply to the seventh and eighth grounds, as the issues set out therein were never raised before the Committee. The questions of spoliation and negative inferences to be drawn are therefore new issues raised on appeal. I am again mindful of the jurisprudence which directs only exceptional circumstances should lead an appeal court to consider questions which were not before the initial decision maker. I have weighed all of the circumstances and interests engaged and decided I will not exercise my discretion to adjudicate upon the spoliation of evidence questions in grounds 7 and 8. Most compellingly, upon reviewing the record before me, I conclude not only that the issues are newly raised, but also that the fact of spoliation was not established by the evidence before the Committee.

[44] The seventh and eighth grounds of appeal fail.

9. The College erred in law by considering the Appellant's lack of remorse when assessing guilt and remedy.

[45] The Committee referenced the issue of the appellant's remorse twice in the decision. It stated, at p. 27:

> ... This was a volatile situation and KCMH staff felt threatened and at risk, and we empathize with them. There was no evidence that Tonya supported her colleagues, or took steps to prevent risk. She used poor judgment and decision-making when she told the staff to leave and decided that her family would stay. In particular, the Committee heard nothing from Tonya that sounded like remorse or even an acknowledgement that she had done anything wrong with respect to her involvement in this altercation.

[46] And further, at p. 31:

> Tonya Llewellyn's lack of remorse is of significant concern for the Committee. She did not take responsibility or accountability for her conduct. Even when given the opportunity to address the penalty which might be imposed if the Committee found her guilty of anything, she could not bring herself to suggest an appropriate penalty.

[47] I note in the decision the Committee decided to hear submissions on penalty prior to making a determination on the issue of guilt. At p. 6 of the decision, it is explained that available hearing time expired at the end of four scheduled days. The prosecutor requested an opportunity to make submissions on penalty but the Committee decided it was too late in the day and adjourned the matter to a date to be fixed for the Committee to deliver its decision and hear submissions on penalty. The date of April 15, 2020 was set, but then the appellant questioned whether that date was "beyond the 60 day deadline". She referenced a section of the ***Act*** which requires a decision within a fixed time after completion of the

hearing. The Committee decided and notified the parties that they required them to provide written submissions on penalty by April 8, 2020, with responding submissions due by April 24, 2020. A single written decision covering the issues of guilt and penalty was issued on June 16, 2020. In its decision, the Committee states: "We would have preferred to issue our decision on guilt or innocence first, and then to discuss penalty, but that simply was not workable".

[48] I agree that it was not optimal but the process undertaken requiring written submissions on penalty in advance of a finding of guilt was reasonable in all of the circumstances and is certainly not an unprecedented approach. Most importantly, the parties were provided with reasonable opportunity to make submissions on the question of penalty, which were to be considered in the event of findings of guilt. This procedural right was properly respected and was balanced against the Committee's desire to provide a decision within a reasonable period of time. I conclude this was the correct approach in all of the circumstances.

[49] With respect to the Committee's second reference to "remorse" in its decision, I am satisfied it is a correct and proper consideration for the Committee to have been mindful of as it decided the appropriate penalty to be imposed. This is affirmed by the Alberta Court of Appeal decision in ***Quaidoo v. Edmonton (Police Services)***, 2015 ABCA 381, wherein the court states, at para. 43: "... Moreover, the presence or absence of insight, acceptance of responsibility and remorse at a hearing are properly considered at sentencing...".

[50] With respect to the first reference to "remorse", if viewed in isolation, a possible interpretation is that the Committee factored a lack of remorse into its guilt determinations. However, I conclude that a proper interpretation requires a broader, more contextual reading. In highlighting a finding that the appellant demonstrated poor judgment and decision making in her conduct, the Committee commented, in conjunction, she expressed nothing which sounded like remorse or an acknowledgment that her actions had been wrong or contributed to the circumstances in any way. This in no way undermines or taints the Committees findings of guilt in relation to the three allegations of misconduct and incompetence. Those conclusions were correctly reached after an extensive and detailed review and consideration of the large volume of evidence presented.

[51] The ninth ground of appeal fails.

V. Penalty

[52] I will give consideration to the penalty imposed by the Committee in accordance with the principles and factors highlighted in ***Mitelman***. In order for this court to overturn the penalty imposed by the Committee, I must be satisfied it made an error in principle or that the penalty was clearly unfit. A finding of "clearly unfit" requires that the penalty be disproportionate or fall outside the range of penalties for similar offences in similar circumstances. ***Mitelman*** describes a fit penalty as one which undertakes an assessment of

the facts of the particular case, and the penalties imposed in other cases involving similar infractions and circumstances.

[53] The decision does not refer to any case precedents which may have been relied upon by the parties or considered by the Committee in reaching its decision on penalty. This court is therefore left with little understanding of what led the Committee to impose the penalty which it did. The decision correctly enunciates the reasons why a penalty is necessary, including elements of specific and general deterrence and the protection of the public, and the need for nurses to be held accountable for their actions at all times, and particularly in a health care setting.

[54] Unfortunately, in the absence of reasons which reference case precedents, I am unable to find that the penalty is fit or unfit by comparison to a range of other penalties. This is problematic and something which tribunals should be mindful of in future cases.

[55] I am prepared to make a determination on the question of proportionality. The ***Act*** sets forth at ss. 58(2), orders which were available for the Committee to impose, upon determination that the appellant's conduct was unprofessional and incompetent. The subsection states that "one or more" of the potential orders is available, so I am satisfied the Committee had the statutory authority to make the penalty order it did. However, I will take one further step to determine whether the penalty, in its totality, is proportionate in all the circumstances.

[56] The penalty imposed by the Committee has five main components:

1. Registration to practice nursing was suspended for two months;

2. Within 6 months of the decision, complete ethics training with a nursing expert at the appellant's own expense;

3. Fine in the amount of $5,000.00, payable no later than March 1, 2022;

4. Pay to the College $10,000.00 in respect of the investigation and adjudication of the complaint, no later than March 1, 2022; and

5. Provide a copy of the written decision to her employer or to any employer who offers her employment as a registered nurse, with proof in writing. This remains in place until all conditions have been removed.

After much consideration, I have concluded that the penalty imposed is disproportionate in all of the circumstances and therefore, clearly unfit. One of the options available to this court under s-s. 59(4) of the ***Act*** is to vary the order appealed from and I have determined I will exercise my discretion in that regard. It is instructive to see that the court in ***Mitelman*** makes reference to the criminal context and measures which are applied in a criminal case to determine whether a sentence is clearly unfit. I make this observation in light of my

understanding that, within a criminal context, imposing a sentence which includes a period of incarceration, a financial penalty in the form of a fine, and a period of probation designed to address rehabilitative and restitutional factors is deemed to be an illegal sentence. It is impermissible to impose all three sanctions in a single sentence. Within the context of the matter before this court, I draw some comparison to such a situation. Again, I reiterate, the penalty imposed was statutorily permissible. However, I conclude that the totality of its financial impact is disproportionate to the circumstances it was designed to address. The appellant in the employment context, was unlicensed to practice as a registered nurse for, at minimum, two months. In addition, she was ordered to pay a fine of $5,000.00, pay $10,000.00 toward procedural costs and bear the financial expense of a rehabilitation and ethics training to be provided by an expert. I conclude that, at the penalty stage, it would have been fair and appropriate for the Committee to make some recognition of the fact that, particularly relating to the first and second allegations, the appellant was in a circumstance of personal distress, dealing with a critically ill parent. Those are the sort of personal circumstances which are also properly factored into the determination of a fit and proper sentence. In reviewing the penalty in the entire context of the matter, I have decided to vary the order by removing the $5,000 fine which was imposed. I also reduce the amount which the appellant is required to pay to the College in respect of the investigation and adjudication of the complaint to $5,000.

[57] In all other aspects, the decision of the Committee is affirmed.

VI. Costs

[58] Section 60 of the ***Judicature Act***, R.S.P.E.I. 1988, Cap. J-2.1 states that costs are in the discretion of the court and the court may determine by whom and to what extent costs shall be paid.

[59] In this case, each party has achieved a measure of success. Each party shall bear their own costs in the matter.

J.

August 25, 2022