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CASE SUMMARY: THE RIGHT TO FREE SPEECH FOR REGULATED PROFESSIONALS IN THEIR PERSONAL TIME

A registered nurse (Ms. Strom) appealed a disciplinary decision made by the respondent regulatory authority (Saskatchewan Registered Nurses Association). The Association had found some of Ms. Strom's online comments on her personal facebook page, in her personal time, to constitute professional misconduct in spite of her right to freedom of expression. A Chambers judge had dismissed her appeal. The Court of Appeal granted the appeal and set the disciplinary decision aside.

Administrative law – Decisions reviewed – Registered Nurses Association – Judicial review – Appeals – Standard of review – Correctness – Reasonableness – Nurses – Disciplinary proceedings – Professional misconduct or conduct unbecoming – Off-duty conduct – Human rights – Charter – Freedom of expression

Strom v. Saskatchewan Registered Nurses' Association, [2020] S.J. No. 370, 2020 SKCA 112, Saskatchewan Court of Appeal, October 6, 2020, R.K. Ottenbreit, N.W. Caldwell and B. Barrington-Foote JJ.A.

The Appellant, Ms. Strom, is a registered nurse who was living and practising in Saskatchewan. She was licensed to practice by the Respondent, the Saskatchewan Registered Nurses' Association (the "Association").

In January 2015, Ms. Strom's grandfather died at St. Joseph's Health Centre (St. Joseph's) where he had been in long-term care for several years. Her grandmother was also a resident at St. Joseph's. Ms. Strom lived nearly 4 hours from St. Joseph's but visited her grandparents a few times per year and spoke to them on the phone from time to time.

Ms. Strom had worked as a registered nurse for 13 years. She had not worked in long-term care and had minimal experience in palliative care. Ms. Strom was on maternity leave when her grandfather died. A few weeks after he died, Ms. Strom posted comments on her personal facebook page about the care received by her grandfather and the care provided in long-term care facilities. The posts were only available to her friends on facebook, but she then used twitter to share the posts with Saskatchewan's Minister of Health and the opposition leader.

The post primarily included the following:

My Grandfather spent a week in "Palliative Care" before he died and after hearing about his and my family's experience there (@ St. Joseph's Health Facility in Macklin, SK) it is evident that Not Everyone is "up to speed" on how to approach end of life care ... Or how to help maintain an Ageing Senior's Dignity (among other things!)

So ... I challenge the people involved in decision making with that facility, to please get All Your Staff a refresher on this topic AND More.

Don't get me wrong, "some" people have provided excellent care so I thank you so very much for YOUR efforts, but to those who made Grandpa's last years less than desirable, Please Do Better Next Time! My Grandmother has chosen to stay in your facility, so here is your chance to treat her "like you would want your own family member to be treated".

That's All I Ask!

And a caution to anyone that has loved ones at the facility mentioned above: keep an eye on things and report anything you Do Not Like! That's the only way to get some things to change.

(I'm glad the column reference below surfaced, because it has given me a way to segway into this topic.)

The fact that I have to ask people, who work in health care, to take a step back and be more compassionate, saddens me more than you know!

The post linked to a Vancouver Province article criticizing the training provided to and knowledge of Canadian physicians with respect to dying patients.

Some employees of St. Joseph's reported the comments to the Association and it initiated an investigation and then charged her with professional misconduct. The charge included four allegations, namely: (1) failure to follow proper channels such as complaining to the employees, manager, supervisors; (2) damaging the reputation of the facility and the staff; (3) failure to obtain all of the facts first; and (4) using her status as a registered nurse for personal purposes and thereby damaging the image of registered nurses in general.

In a 2016 hearing, the discipline committee reviewed caselaw relating to off-duty conduct (including from *Fountain v. British Columbia College of Teachers*, 2007 BCSC 830). The discipline committee applied the test and found Ms. Strom guilty of professional misconduct (the "Discipline Decision"). The discipline committee accepted Ms. Strom's submission that there would be some infringement of her *Charter* right to freedom of expression but found the infringement was justified. Ms. Strom was ordered to receive a reprimand, pay a fine of \$1,000, submit two reflective essays, and pay \$25,000 in costs to the Association.

Ms. Strom appealed the Discipline Decision to the Saskatchewan Court of Queens Bench. She appealed both the finding that she was guilty of professional misconduct and the finding that the infringement of her *Charter* right to freedom of expression was justified. The Chambers judge held the standard of review for the first ground of appeal was reasonableness, and the discipline committee's findings were within the range of reasonable outcomes. The Chambers judge held the standard of review for the *Charter* ground was also reasonableness, and the discipline committee's finding was not unreasonable. The Chambers Judge dismissed Ms. Strom's appeal. The Saskatchewan Nurses Union intervened in the case.

Ms. Strom then appealed the Chambers decision to the Court of Appeal. The Court of Appeal was tasked with deciding whether the Chambers judge chose the correct standard of review and correctly applied it. If the Chambers judge erred, the Court of Appeal had to assess the Association's decision pursuant to the correct standard of review.

The Court of Appeal held the Chambers judge used the wrong standard of review to assess the professional misconduct decision in part because the Supreme Court of Canada released its decision in *Vavilov* after the Chambers judge rendered the decision. The Court of Appeal held the discipline committee was deciding a question of mixed fact and law or making a discretionary decision, in deciding whether Ms. Strom was guilty of professional misconduct. The Court of Appeal held it was a discretionary decision and the correct standard of review was that the appellate court would only interfere 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 it would result in an injustice. The Court of Appeal then had to apply that standard of review to the Discipline Decision.

Ms. Strom had put forward evidence relating to the context and the personal nature of the posts – they were made when she was on maternity leave and were provoked by the death of her grandfather. She also argued the evidence did not support the inference that the posts were contrary to the interests of nurses or damaged the reputation of registered nursing and the discipline committee made no such finding of fact. She also argued that there was no evidence the posts were untrue. The Court of Appeal concluded the discipline committee erred in failing to act in accordance with the principle that off-duty conduct is not professional misconduct unless there is sufficient nexus with the profession. The discipline committee failed to take into account key factors relevant to the decision, such as the tone, content or purpose of the posts. For instance, the discipline committee did not consider that Ms. Strom's post linked to a newspaper article which was a policy argument, or the fact that she expressed gratitude in the post.

The Court of Appeal set aside the discipline committee's findings relating to the professional misconduct charge.

The Court of Appeal analyzed the *Charter* finding of the Chambers judge. The parties agreed that Ms. Strom's right to freedom of expression was infringed and agreed that, based on *Vavilov*, the applicable standard of review was correctness. The Chambers judge therefore erred in selecting the reasonableness standard because the *Vavilov* decision had not yet been released.

The Court of Appeal reviewed the caselaw regarding the appellate court's role when considering whether the decision of an administrative body unjustifiably infringed a *Charter* right.

The Court of Appeal characterized the statutory objective of the Association as "protecting the public interest and the standing of the profession by setting and enforcing standards as to public speech by registered nurses relating to healthcare". The Court of Appeal was satisfied this was a substantial and pressing objective and the Discipline Decision was rationally connected to this objective. The Discipline Decision did not satisfy the proportionality analysis because the discipline committee failed to consider the full spectrum of contextual factors before deciding whether she should be disciplined despite the infringement of her right to free expression. The infringement here was serious because Ms. Strom was trying to start a broader conversation – not just about staff at one institution. The expression was also during Ms. Strom's off-duty time in her private life. The Discipline Decision unjustifiably infringed Ms. Strom's *Charter* right to freedom of expression.

The Court of Appeal set aside the Discipline Decision that held Ms. Strom's conduct constituted professional misconduct, and the costs award. Ms. Strom was awarded costs.

This case was digested by [Scott J. Marcinkow](#), and first published in the LexisNexis® Harper Grey Administrative Law Netletter and the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Scott Marcinkow at smarcinkow@harpergrey.com.