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COURT OF QUEEN'S BENCH FOR SASKATCHEWAN	
JUDICIAL CENTRE	SASKATOON
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RESPONDENT	SASKATCHEWAN REGISTERED NURSES' ASSOCIATION
INTERVENORS	SASKATCHEWAN UNION OF NURSES and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Clerk's Stamp

BRIEF OF LAW ON BEHALF OF THE INTERVENOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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I. INTRODUCTION

1. This is the Brief of Law of the Intervenor British Columbia Civil Liberties Association ("BCCLA"). BCCLA was granted leave to intervene to comment on Ground of Appeal No. 3(2), addressing the application of section 2(b) the *Canadian Charter of Rights and Freedoms* ("*Charter*").

2. In brief, BCCLA's submissions are as follows:
   - The onus lies on a regulatory tribunal to justify an infringement of *Charter* freedoms pursuant to section 1 of the *Charter* under the circumstances of any professional discipline.
   - This justification should not consist merely of distinguishing cases in which *Charter* violations have been found, but should involve a detailed application of the Oakes test to the facts of the case.
   - While protecting the standing of a profession has been recognized as a valid objective for section 1 purposes, it should not be given undue weight and should be narrowly construed.
   - Consideration ought to be given to the detrimental effect on the standing of a profession where genuine complaints are suppressed through disciplinary processes. A profession's interest in ensuring its standing does not extend to a right to claiming a monopoly on criticism of the profession.
   - Freedom of expression should not be limited by professional discipline where the impugned expression arises in a personal capacity rather than a professional one, absent evidence of reprehensible conduct on the part of the member.
   - Freedom of expression should also be analyzed based upon the context in which expression is carried out. In this respect, a personal social media account represents an informal forum for discussion where professional standards should be applied only with extreme caution. Individual social media participation should not be subject to close regulatory scrutiny merely because of a professional body's warnings to its members regarding the use of social media.
   - Based on the above submissions, limitations on freedom of expression based on personal social media commentary should be applied with extreme caution absent either:
     - a direct connection to professional roles or duties, or
     - reprehensible conduct by the member within the meaning set out in other case law governing professional regulation.

II. FACTS

3. The within appeal addresses several procedural and substantive issues arising out of the decision of the Discipline Committee of the Saskatchewan Registered Nurses' Association dated October 18, 2016 (the "Decision").

4. One of the grounds of appeal involves the freedom of expression guaranteed by section 2(b) of the *Charter* – and the analysis required to justify any infringement on that freedom pursuant to section 1 of the *Charter* – in circumstances where a professional misconduct proceeding impinges upon individual freedom of expression.

III. ARGUMENT

A. General Principles

5. It was acknowledged by all parties that the expression at issue in the Decision was protected by section 2(b) of the *Charter*. Decision at para. 45. Accordingly, discipline in the present circumstances – and in analogous ones – could only be justified if permitted based upon the application of section 1 of the *Charter*.

6. The general principles required to be applied in assessing the application of these provisions were discussed by the Saskatchewan Court of Appeal in *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6 ("*Whatcott*") [Tab 1], and clarified in *Doré v. Barreau du Québec*, [2012] 1 SCR 395 ("*Doré*") [Tab 2].

7. The within intervention focuses upon the application of these principles to the circumstances of this case and comparable cases.

B. Onus to Justify Infringement of *Charter* Rights

8. The Decision recognized *Whatcott* in particular as a binding authority. However, its section 1 analysis distinguished the precedent based primarily on the question of whether an individual was initially identified as belonging to a particular profession: Decision at para. 49.

9. The identification of factual differences between a given case and another authority in which a *Charter* breach was found cannot serve on its own as a valid rationale for limiting *Charter* rights. Nor does the fact that *Charter*-protected activities may be interpreted to breach an established guideline serve as a valid basis for failing to engage in a full analysis as to whether enforcement is warranted.

10. Each step of a regulatory process, including the interpretation, application and enforcement of regulatory requirements, must be carried out with a view toward avoiding undue infringement upon freedom of expression: see e.g. *Alberta v AUPE*, 2014 ABCA 197 [Tab 3] at para. 63.

11. At all times, an actor seeking to justify a *Charter* violation under section 1 – including a regulatory body – bears the onus to proffer a valid justification for limiting a person's fundamental freedoms. Moreover, in order to be constitutionally valid, a regulatory tribunal's analysis must explicitly or implicitly engage in a proper section 1 analysis of the facts before it: *Whatcott* at para. 55.

C. Standing of a Profession

12. The necessary first step in a section 1 analysis is to identify a valid objective for the decision under appeal, which objective is then considered in the subsequent aspects of the Oakes test.

13. There is no dispute that the protection of the standing of a profession and its members may represent a valid objective for the purposes of this test: *Whatcott* at para. 60-61. However, the significance of this particular objective may vary based on the connection (or lack thereof) between the expression sought to be restricted, and the standing of the profession.

14. BCCLA takes the position that the infringement upon *Charter* rights based solely on the objective of upholding the standing of the profession or reputation of other members should be approached with particular caution.

15. To the extent members of a profession are subject to discipline for failing to err on the side of suppressing honestly-held concerns about the system in which they work, the result may be detrimental both to the members so disciplined, and to the regulatory system as a whole.

16. As Abella J. held in *Doré* at para. 66, 69, the standard to be applied in assessing the reasonableness of professional discipline must be grounded in public interests and expectations, which are to be considered alongside the individual member's freedom of expression:

> We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open

> discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.
>
> ...
>
> A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism...

17. The use of disciplinary processes to suppress good-faith discussions of public policy – even where these may include criticism of other professionals – should generally be seen as antithetical to the public interest role of a regulator.

18. The use of professional discipline for this purpose serves to favour the private interests of members in avoiding criticism over the public interest in transparency. But even this benefit may prove illusory to the extent the entire profession then bears the reputational costs of being perceived to impose a code of silence upon its members.

19. In this respect, the Decision makes specific reference to the possibility that the Appellant might have attempted to pursue a "whistle-blower" defence, but dismisses this possibility based on her failing to follow what it viewed to be the proper channels for reporting: Decision at para. 40-41. While it is not clear what role this alternative line of analysis may have played in the outcome of the Decision, any professional discipline based on the view that honestly-held criticism may be suppressed should be viewed with substantial skepticism.

D. Monopoly on Criticism

20. An individual's freedom to offer open criticism of public institutions should not be overridden merely by a desire to suppress that criticism: *Doré* at para. 66.

21. Indeed, it is questionable whether the limitation of expression aimed at issues of administration and policy can generally be seen as rationally connected to the goal of ensuring respect for the status and standing of a profession.

22. The use of a regulatory policy to assume a monopoly on debate as to the standards which ought to apply within a regulated profession fails both as a matter of rational connection and proportional response. See e.g. *Mooney v. Canadian Society for Immigration Consultants*, 2011 FC 496 [Tab 4] at para. 114 as to the dangers of allowing a professional regulatory body to monopolize debate about issues affecting a profession:

> The Letter is obviously composed by people who want to see improved protection of the public from unconscionable and unqualified immigration consultants and improved regulation of the profession. There can be legitimate

> disagreement about the best way to fulfill and further the regulator's mandate and governing principles, but the present officers of CSIC do not have a monopoly on that discussion. In disciplining Mr. Mooney in this way, they are attempting to prevent CSIC members from advancing opinion on how CSIC can better fulfill its mandate and governing principles if that opinion does not accord with their own. In my view, this is not a legitimate use of CSIC's Rules of Professional Conduct...

E. Professional and Personal Roles

23. Prior cases that have upheld professional discipline in the face of *Charter* arguments have generally involved fact scenarios in which the impugned speech results in specific harm by calling into question the member's suitability to perform work. See in this respect *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327 [Tab 5] at para. 79; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 [Tab 6] at para. 100.

24. In cases such as these, any limitations on expression are best seen as merely ancillary to a more fundamental issue of the member's ability to meet the standards of a profession without discrimination based on the matters discussed in the member's expression. The impugned statements serve primarily as evidence of a basis for concern about the public interest in the proper and unbiased performance of work.

25. Another relatively extensive line of cases has involved discipline for on-duty conduct of professionals. These cases identify that the standing of a profession may be legitimately and substantially affected by expression that is (a) made in a professional capacity, and/or (b) abusively or offensively calls into question the suitability of the member or of other members of the profession to carry on work in the public interest.

26. See in this respect *Histed v. Law Society of Manitoba*, 2007 MBCA 150 at para. 75 [Tab 7]; *Doré* at para. 69-70.

27. Infringements of a member's freedom of expression are less likely to be justified where professional discipline arises out of allegations that do not relate to the member's professional workplace, whether in their origin or their effect.

28. The distinction between conduct in a professional context and other conduct by a licensed professional has given rise to the requirement for a regulatory tribunal to find "reprehensible" behaviour in order to justify professional discipline for non-professional conduct: *Ratsoy v. Architectural Institute of British Columbia*, 1980 CanLII 662 (BC SC) [Tab 8] at para. 12.

29. In this respect, a distinction has been – and ought to be – drawn between a person being known to be a member of a profession, and commenting in a professional capacity. See *Nova Scotia Barristers' Society v. Morgan*, 2010 NSBS 1 [Tab 9], where the Hearing Committee expressly identified the respondent's comments at issue as offensive and contrary to the professional conduct guidelines governing lawyers, but held that they did not constitute professional misconduct since they were made in his personal capacity.

30. Moreover, an individual's profession should not be taken to require silence in the face of concerns about family or private matters, even where these intersect with the individual's fellow professionals.

31. In *Eggertson v. Alberta Teachers' Assn.*, 2002 ABCA 262 [Tab 10], the appellant had been found guilty of unprofessional conduct for making comments critical of her children's teachers from the previous year. The Alberta Court of Appeal held that decision to be unreasonable, holding as follows at para. 29-31:

> In our view, it was unreasonable for the Committee and the PCAC to adopt a literal interpretation of s. 13 in these circumstances. That interpretation effectively deprived the appellant of her parental right under the *School Act*, the orders and regulations made pursuant to it, and the regulations of the C.B.E. to participate fully in the education of her children. It is a handicap not shared by parents who are not also teachers. In short, an interpretation and application of s. 13 which deprives parents of their right to participate fully in their children's education simply because they are also teachers and members of the ATA is unreasonable and cannot be sustained.
>
> We do not say that s. 13 has no application to teachers who happen to also be parents and who may feel they have reason to speak critically of their children's teachers. It is a question of context. In this case, the critical comments were made on occasions which were exclusively devoted to issues of the educational well-being of the appellant's children. The appellant's comments were directed to the subject-matter of the meetings, that is, they were in respect of her children's academic progress. The comments were not intemperate. The individuals in whose presence the comments were made shared the appellant's concern for the children's progress. They were not disinterested members of the public.
>
> The PCAC implied a parent - teacher may only criticize his or her child's present or former teacher by following the procedure fixed by s. 13. That would place parents who are also teachers at a disadvantage in communicating with their children's teachers and discourage the free and candid exchange of information and ideas between parents and teachers which is recognized by the *School Act* and the C.B.E. as a vital part of the education process.

32. These authorities recognize that in extreme cases supported by a complete Section 1 analysis, non-professional speech may give rise to valid professional discipline.

33. However, a strong presumption should be applied – both by regulatory tribunals and courts reviewing their decisions – to the effect that personal and *Charter*-protected activity will not be treated as giving rise to routine disciplinary consequences.

F. Social Media Context

34. The Decision makes some reference to the social media context of the comments at issue, and does so primarily in relation to its expectation that members will consider themselves bound to follow a restrictive approach to all posting on social media platforms: para. 56-57. BCCLA takes the position that such an expectation is not reasonable in light of the ubiquity of social media as a developing forum for discussions of personal and public importance.

35. It is well established that the nature of social media may facilitate the dissemination of posted materials, and that users may be taken to be aware of that reality. See e.g. *Pritchard v. Van Nes*, 2016 BCSC 686 [Tab 11] at para. 80-83, cited with approval in *Law Society of Saskatchewan v Siekawitch*, 2016 SKQB 345 at para. 19.

36. Other cases have similarly applied basic knowledge of specific online media as a matter of either judicial notice or expert evidence. See *R. v. Elliott*, 2016 ONCJ 35 [Tab 12] in a criminal law context, and *Baglow v. Smith*, 2015 ONSC 1175 [Tab 13] ("*Baglow*") in a defamation context.

37. *Baglow* is of particular note in identifying the attributes of online discussion fora that require the relaxation of expectations which apply to other media. At para. 170, Polowin J. cited the following from Eady J. in *Smith v. ADVFN Plc & Ors* [2008] EWHC 1797 (QB):

> This has been explained in the material before me and is, in any event, nowadays a matter of general knowledge. Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject-matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take".

38. The need to avoid undue limitations upon individual speech in social media is particularly strong in the case of speech regarding the operation of public institutions, which is at the core of the section 2(b) protection: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 [Tab 14] at p. 1336.

39. BCCLA takes the position that notifications sent to members of a profession regarding their use of public media (such as those relied upon in the Decision) should not be taken

as displacing an individual's ability to engage in expression in a medium commonly used for the discussion of issues of public importance. To the contrary, the reality that social media platforms are predominantly a venue for casual conversation rather than professional discourse ought to militate against their being policed strictly by professional regulatory bodies.

IV. REMEDY SOUGHT

40. Based on the foregoing, BCCLA reiterates that limitations on freedom of expression based on personal social media commentary should be applied with extreme caution absent either a direct connection to professional roles or duties, or reprehensible conduct by the member within the meaning set out in other case law governing professional regulation.

41. BCCLA seeks that the above principles be taken into account in this Honourable Court's assessment of the Decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan this 8th day of December, 2017.

Gerrand Rath Johnson LLP

Per: _____
Greg D. Fingas
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LIST OF AUTHORITIES

No.	Description
1.	*Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6
2.	*Doré v. Barreau du Québec*, [2012] 1 SCR 395
3.	*Alberta v AUPE*, 2014 ABCA 197
4.	*Mooney v. Canadian Society for Immigration Consultants*, 2011 FC 496
5.	*Kempling v. British Columbia College of Teachers*, 2005 BCCA 327
6.	*Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825
7.	*Histed v. Law Society of Manitoba*, 2007 MBCA 150
8.	*Ratsoy v. Architectural Institute of British Columbia*, 1980 CanLII 662 (BC SC)
9.	*Nova Scotia Barristers' Society v. Morgan*, 2010 NSBS 1
10.	*Eggertson v. Alberta Teachers' Assn.*, 2002 ABCA 262
11.	*Pritchard v. Van Nes*, 2016 BCSC 686
12.	*R. v. Elliott*, 2016 ONCJ 35
13.	*Baglow v. Smith*, 2015 ONSC 1175
14.	*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326