CACV3249

IN THE COURT OF APPEAL FOR SASKATCHEWAN

Between:

CAROLYN STROM

Appellant (Appellant)

and

THE SASKATCHEWAN REGISTERED NURSES' ASSOCIATION

Respondent (Respondent)

and

SASKATCHEWAN UNION OF NURSES, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and CANADIAN CONSTITUTION FOUNDATION

Intervenors (Intervenors)

FACTUM ON BEHALF OF THE INTERVENOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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I. INTRODUCTION

1. This is the Factum of the Intervenor, British Columbia Civil Liberties Association ("BCCLA").

2. This 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 "Discipline Decision"). The Appellant's application for judicial review of the Discipline Decision was dismissed in *Strom v Saskatchewan Registered Nurses' Association*, 2018 SKQB 110 (the "QB Decision").

3. The BCCLA was granted leave to intervene to comment on the guarantee of freedom of expression in section 2(b) the *Canadian Charter of Rights and Freedoms* ("*Charter*"), a ground of appeal summarized at paragraph 24.iv-v of the Appellant's factum. Freedom of expression is "one of the highest constitutional values": *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 156 [Tab 1], at para 32. The Supreme Court of Canada has consistently reiterated the fundamental importance of this right. It "is . . . 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual": *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 968. It is the "the matrix, the indispensable condition, of nearly every other form of freedom'": *Irwin Toy* at 968, quoting *Palko v Connecticut*, 302 US 319, 327 (1937).

4. In brief, the BCCLA's submissions are as follows:

    a) 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.

    b) When reviewing an administrative decision that justifies a *Charter* infringement, the reviewing court must be satisfied that the decision proportionately balances the statutory objectives with the *Charter* protections at stake, such that the *Charter* protections are affected as little as reasonably possible in light of the applicable statutory objectives. A proportionate balance in this case required consideration of the following principles:

        i. While the protection of the standing of a profession has been recognized as a valid objective for section 1 purposes (*Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6, ("Whatcott")

[Tab 3], leave to appeal refused [2008] S.C.C.A. No. 114, at paras. 60-61), it should not be given undue weight and should be narrowly construed.

ii. 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 its reputational standing does not extend to a right to claim a monopoly on criticism of the profession: *Mooney v. Canadian Society for Immigration Consultants*, 2011 FC 496 [Tab 4] ("*Mooney*") at para. 114.

iii. 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: *Eggertson v. Alberta Teachers' Assn.*, 2002 ABCA 262 ("*Eggertson*") [Tab 5] at paras. 29-31.

iv. Freedom of expression should also be analyzed based upon the context in which the expression is carried out. A personal social media account is an informal forum for discussion where professional standards limiting freedom of expression 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.

v. In light of the above, limitations on freedom of expression based on personal social media commentary should not be applied absent either:
    1. A direct connection to professional roles or duties, or
    2. Reprehensible conduct by the member within the meaning set out in other case law governing professional regulation.

5. These submissions are expanded upon below.

II. JURISDICTION AND STANDARD OF REVIEW

6. This Court has jurisdiction to hear this appeal pursuant to section 7(2)(a) of *The Court of Appeal Act*, 2000, SS 2000, c C-42.1.

7. The standard of review of the QB Decision is correctness. This Court does not owe any deference to the QB Decision either in terms of the standard of review applied to the

Discipline Decision or the application of that standard. If the lower court applied the wrong standard, then this Court may assess the Discipline Decision in light of the correct standard. If the lower court applied the proper standard, then this Court must assess whether the lower court correctly applied that standard: *Canadian Union of Public Employees, Local 59 v City of Saskatoon*, 2014 SKCA 14 [Tab 6] at para. 21 and 22.

III. SUMMARY OF FACTS

8. The BCCLA does not generally take issue with the facts as set out in the Discipline Decision and QB Decision.

9. In brief, the Appellant Strom posted a media article on her personal Facebook page, together with her own comments about the nursing care received by her father.

10. The Discipline Committee concluded that the comments posted by Strom constituted professional misconduct, notwithstanding the agreement of all parties that such a finding limited Strom's freedom of expression. The BCCLA's interest in this appeal relates to the factors that ought to be considered by a regulator before making a finding of professional misconduct that limits freedom of expression and, in particular personal expression.

IV. POINTS IN ISSUE

11. The BCCLA's submissions address the following points:

a) Did the lower court apply the correct standard of review and apply it correctly?

b) What onus lies upon a regulatory body to explain and justify a breach of the *Charter* guarantee of freedom of expression?

c) What significance ought to be ascribed to the standing of a profession as a consideration in restricting freedom of expression?

d) To what extent is a proportional *Charter* analysis compatible with a monopoly on criticism of a self-regulated profession?

e) How does the context of personal expression (as distinct from professional expression) impact upon the appropriate *Charter* analysis?

f) How should a proportional analysis of personal expression treat commentary on matters of public interest on social media?

V. ARGUMENT

A. General Principles

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

13. The general principles applicable in these circumstances were discussed by the Saskatchewan Court of Appeal in *Whatcott*, and clarified in *Doré v. Barreau du Québec*, [2012] 1 SCR 395 ("*Doré*") [Tab 7] and *Law Society of British Columbia v. Trinity Western University*, [2018] 2 SCR 293 ("*Trinity Western*") [Tab 8].

14. The BCCLA's intervention focuses upon the application of these principles to the circumstances of this case and comparable cases.

B. Lower Court's Standard of Review

15. The standard of review that a lower court must apply to a discipline decision is generally one of reasonableness. This standard requires intervention where the conclusion reached by the tribunal is not reasonably open to the tribunal: *Groia v Law Society of Upper Canada*, 2018 SCC 27 [Tab 9] at para. 122-125, 127.

16. This Court's review of the lower court's determination respecting section 1 of the *Charter* must be based upon the principle that the Discipline Committee was obliged to conduct a proportional balancing of factors in the interest of ensuring that *Charter* rights be "affected as little as reasonably possible": *Trinity Western* at para. 79-80.

17. Consideration of the factors discussed below is necessary to arrive at a proportional balancing of the interests at stake in this matter. To the extent the Discipline Decision failed to consider and weigh these factors, it reached a decision that was not open to it and therefore could not withstand judicial review. The BCCLA agrees with and adopts the submissions at para. 8-14 of the factum of the Intervenor Canadian Constitution Foundation as to the need for a robust review of administrative decisions that implicate limitations upon *Charter* freedoms.

C. Onus to Justify Infringement of *Charter* Right

18. The Discipline Decision recognized *Whatcott* in particular as a binding authority. However, its section 1 analysis distinguished the precedent based solely on the question

of whether an individual was known to belong to a particular profession: Discipline Decision at para. 49.

19. The identification of factual differences between a given case and another authority in which a *Charter* breach was not justified cannot serve on its own as a valid rationale for limiting *Charter* rights. A decision that infringes *Charter* rights in reliance upon section 1 must provide a reviewing court with a basis to evaluate the analysis conducted, not merely state a conclusion: *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 [Tab 10] at para. 50-51.

20. Nor does the fact that *Charter*-protected activities may be interpreted as breaching an established guideline serve as a valid basis for failing to engage in a full analysis as to whether a *Charter* breach is justified.

21. 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 11], leave to appeal refused [2014] S.C.C.A. No. 387 (QL), at para. 63.

22. 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. In order to be constitutionally valid, a regulatory tribunal's analysis must engage in a proper section 1 analysis of the facts before it: *Whatcott* at para. 55. This includes a proportional balancing of the factors in assessing the right at stake and the proposed limitation upon it to ensure that any violation is limited to what is reasonably necessary to achieve the actor's purpose: *Trinity Western* at para. 80; *Baars v. Children's Aid Society of Hamilton*, 2018 ONSC 1487 [Tab 12] at para. 179.

D. Standing of a Profession

23. The necessary first step in a section 1 analysis is to identify a valid objective for the proposed infringement upon a *Charter* right, which objective is then considered in relation to the deleterious effects of the infringement.

24. 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 varies based on the connection (or lack thereof) between the expression sought to be restricted, and the standing of the profession.

25. The BCCLA takes the position that the infringement of *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. 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 would be detrimental both to the members so disciplined, and to the regulatory system as a whole.

26. Indeed, he advocacy for systemic improvements as a means of achieving the goals of a profession is a key form of expression that ought not to be silenced. See by way of analogy *Canada Without Poverty v. AG Canada*, 2018 ONSC 4147 [Tab 13] at para. 39-42. In that case, Morgan J. concluded that a limitation on political speech imposed by the *Income Tax Act* on registered charities could not be justified, particularly as the limitation in issue was based on no purpose other than limiting freedom of expression for its own sake: para. 62.

27. As Abella J. held in *Doré* at para. 66 and 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...

28. The use of disciplinary processes to suppress good-faith discussions of public policy – even where these may include criticism of other professionals – is thus antithetical to the public interest role of a regulator.

29. The use of professional discipline for this purpose serves to favour the private interest of regulatory bodies 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.

30. In this respect, the Discipline Decision makes specific reference to the possibility that the Appellant might have attempted to pursue a separate "whistle-blower" defence, but dismisses this possibility based on her failing to follow what it viewed to be the proper channels for reporting: Discipline Decision at para. 40-41.

31. It is not clear what role this alternative line of analysis may have played in the outcome of the Discipline Decision. However, the alternative defences that might be theoretically available to a member accused of professional misconduct should not be treated as a basis for dispensing with the proportionality analysis necessary to justify a breach of *Charter* freedoms.

E. Monopoly on Criticism

32. 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.

33. Indeed, it is questionable whether a limitation of expression on issues of administration and policy is even rationally connected to the goal of ensuring respect for the status and standing of a profession, let alone proportional to the purpose.

34. In this respect, see *Mooney* 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...

35. See to a similar effect *Waddell v. Weeneebayko Area Health Authority*, 2018 ONSC 4535 [Tab 14] at para. 21-22. There, Swinton J. distinguished between concerns with respect to the sharing of confidential patient information, which might properly form the subject matter of a professional complaint, and comments on issues of health care in the community whose curtailment could not be justified (there through an injunction application).

F. Professional and Personal Roles

36. Prior cases that have upheld professional discipline in the face of the *Charter* guarantee of freedom of expression 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, leave to appeal refused [2005] S.C.C.A. 381 [Tab 15], at para. 79; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 [Tab 16] at para. 100.

37. In cases such as these, any perceived limitations on expression are best seen as ancillary to the 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 member's proper and unbiased performance of work within the profession.

38. Another line of cases has involved discipline for the on-duty conduct of professionals. These cases conclude that the standing of a profession may be substantially affected by expression (a) which is made in a professional capacity, and/or (b) which 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. See in this respect *Histed v. Law Society of Manitoba*, 2007 MBCA 150 at para. 75, leave to appeal refused 2008 S.C.C.A. No. 67 [Tab 17]; *Doré* at para. 69-70.

39. These particular circumstances may result in a finding that limitations on free expression are justified. The BCCLA submits, however, that infringement upon an individual's freedom of expression will rarely be justified on a proper proportional analysis where professional discipline arises out of expression that does not relate to the member's professional workplace, whether in its origin or its effect.

40. 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 18] at para. 12, recently adopted with approval by the Alberta Court of Appeal in *Erdmann v. Complaints Inquiry Committee*, 2013 ABCA 147 at para. 28, leave to appeal refused [2013] S.C.C.A. No. 230.

41. In this respect, a distinction has been – and ought to be – drawn between a person being known to be a member of a profession but commenting in a personal capacity and a

professional commenting in a professional capacity. See in particular *Nova Scotia Barristers' Society v. Morgan*, 2010 NSBS 1 [Tab 19], 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.

42. Fundamentally, an individual's profession should not be taken to require silence in the face of concerns about personal matters, especially family or private matters, even where those concerns intersect with the individual's fellow professionals.

43. In *Eggertson*, 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.

44. The authorities cited above recognize that in extreme cases supported by a complete proportionality analysis, non-professional speech may give rise to valid professional discipline. However, they also recognize that a strong presumption should be applied – both by regulatory tribunals and courts reviewing their decisions – to the effect that personal expression will not be treated as routinely calling for the use of disciplinary sanctions on a proper proportionality analysis.

45. In light of all of the above, professional discipline that limits freedom of expression based on personal social media commentary should not be applied 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.

G. Social Media Context

46. Finally, the Discipline Decision discusses an expectation that members will consider themselves bound to follow a restrictive approach to all posting on social media platforms: para. 56-57. The 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 and ought not to be a relevant factor in a section 1 proportionality analysis.

47. Whether they make or receive communications on social media, users are aware that social media is a means to facilitate the sharing of information and news among family, friends and acquaintances, much like a discussion over a cup of coffee. In that regard, cases have applied basic knowledge of specific online media as a matter of either judicial notice or expert evidence. See e.g. *Pritchard v. Van Nes*, 2016 BCSC 686 [Tab 20] at para. 80-83, cited with approval in *Law Society of Saskatchewan v Siekawitch*, 2016 SKQB 345 at para. 19; *R. v. Elliott*, 2016 ONCJ 35 [Tab 21] in a criminal law context, and *Baglow v. Smith*, 2015 ONSC 1175 [Tab 22] ("*Baglow*") in a defamation context.

48. *Baglow* is of particular note in identifying the attributes of online discussion fora that require the relaxation of expectations that 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".

49. A defensible analysis of an infringement upon free expression in the social medial context must thus recognize the distinction between the standards of formality and restraint expected in workplace communications between regulated professionals, and those of "people chatting in a bar".

50. 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 23] at p. 1336.

51. The BCCLA takes the position that notifications sent to members of a profession regarding their use of personal social media (such as those relied upon in the Discipline Decision) should not be taken as displacing an individual's ability to engage in personal expression in a medium commonly used for the casual, informal discussion of issues of public importance.

52. 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, or treated as a basis for professional discipline 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.

IV. REMEDY SOUGHT

53. Freedom of expression is recognized as one of the most fundamental rights in Canadian society. Professional discipline that limits freedom of expression based on personal social media commentary should not be applied 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.

54. The BCCLA seeks that the above principles be taken into account in this Honourable Court's determination of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan this 21st day of June, 2019.

Gerrand Rath Johnson LLP

Per: _____
Gregg D. Pingas
Solicitor for the Intervenor
British Columbia Civil Liberties Association

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VII List of Authorities

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2	*Baars v. Children's Aid Society of Hamilton*, 2018 ONSC 1487
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23	*Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6