Court of Appeal for Saskatchewan

Docket: CACV3249

Citation: *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112

Date: 2020-10-06

Between:

Carolyn Strom

Appellant
(Appellant)

And

Saskatchewan Registered Nurses' Association

Respondent
(Respondent)

And

Saskatchewan Union of Nurses and British Columbia Civil Liberties Association

Intervenors
(Intervenors)

And

Canadian Constitution Foundation

Intervenor
(Non-party)

Before:	Ottenbreit, Caldwell and Barrington-Foote JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Mr. Justice Barrington-Foote
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Caldwell
On appeal from:	2018 SKQB 110, Saskatoon
Appeal heard:	September 17, 2019
Counsel:	Marcus Davies for the Appellant Roger Lepage and Jonathan Martin for the Respondent Ronni Nordal, Q.C., for the Intervenor, Saskatchewan Union of Nurses Gregory Fingas for the Intervenor, British Columbia Civil Liberties Association Alexander Shalashniy for the Intervenor, Canadian Constitution Foundation

Barrington-Foote J.A.

I. INTRODUCTION

[1] The Saskatchewan Registered Nurses' Association [SRNA] licenses and regulates registered nurses in Saskatchewan. Carolyn Strom is a registered nurse who, at the time of the events that gave rise to this appeal, lived and practiced nursing in Prince Albert, Saskatchewan. On January 27, 2015, Ms. Strom's grandfather died at St. Joseph's Health Centre [St. Joseph's] in Macklin, Saskatchewan, where he had been in long-term care for 13 years. On February 25, 2015, Ms. Strom, who was on maternity leave, posted comments on her personal Facebook page [posts] about the care her grandfather had received in his last days at St. Joseph's. Her initial post also included a link to a newspaper article about end-of-life care. She then used Twitter to tweet the posts to Saskatchewan's Minister of Health and the Saskatchewan Opposition Leader.

[2] Some St. Joseph's employees took exception to the posts and reported them to the SRNA, which charged Ms. Strom with professional misconduct [Charge]. On October 18, 2016, the Discipline Committee of the SRNA found Ms. Strom guilty of professional misconduct [*DC Decision*]. She was reprimanded, fined $1,000, required to submit two self-reflective essays, and ordered to pay $25,000 in costs. Ms. Strom appealed the *DC Decision* to the Court of Queen's Bench pursuant to s. 35 of *The Registered Nurses Act, 1988*, SS 1988-89, c R-12.2 [*Act*]. On April 11, 2018, a judge of that Court [Chambers judge] dismissed her appeal [*Strom QB*].

[3] Ms. Strom has now appealed the decision in *Strom QB* to this Court pursuant to s. 36.1 of the *Act*. Her appeal raises questions at the intersection between professional regulation, Ms. Strom's private life, and the s. 2(b) *Charter* guarantee of freedom of expression in the age of social media. Those questions are not unique to Ms. Strom or to registered nurses. Further, Ms. Strom asks for relief at a time when those who believe freedom of expression is threatened by "cancel culture", and those who believe too little heed has been paid to the ability of speech to inflict wounds and cause division, can often be heard debating in the virtual public square.

[4] Ms. Strom asserts that the *DC Decision* breached her freedom of expression, which serves three key purposes: democratic discourse, truth finding and self-fulfillment: *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968–971 [*Irwin Toy*]; *Montréal (City) v 2952-*

1366 Québec Inc., 2005 SCC 62 at paras 68 and 74, [2005] 3 SCR 141. She also relies on the body of law that ensures that those who are granted authority by the Legislature exercise that authority in accordance with the law. The Saskatchewan Union of Nurses [SUN], which represents registered nurses and many other nurses in Saskatchewan, the Canadian Constitution Foundation, and the British Columbia Civil Liberties Association, support her position and have joined the fray as intervenors.

[5] I have concluded that the Chambers judge erred in upholding the decision of the Discipline Committee, and that the Discipline Committee erred in finding Ms. Strom guilty of professional misconduct. I would accordingly allow Ms. Strom's appeal. My reasons follow.

II. BACKGROUND

[6] On the day she posted and tweeted the posts, Ms. Strom had been practicing as a registered nurse in Saskatchewan for 13 years. She had worked in various settings, but not in long-term care, and had limited experience in palliative care. She had been a public health nurse since 2005, with a particular interest in disease prevention. She had also been an active user of social media for about ten years.

[7] Ms. Strom's grandmother was a resident of St. Joseph's when her husband died, and she continued to reside there after his death. Ms. Strom lived 3 ½ hours from Macklin and had a busy life. She testified that she visited her grandparents at St Joseph's about five times a year, and that they had occasionally visited her until her grandfather's deteriorating health and mobility intervened. She also spoke to her grandmother on the telephone from time to time.

[8] Ms. Strom testified that the views about St. Joseph's reflected in her online comments were based on what she saw and what she heard from her grandparents and from family members. She raised only one issue – that a hand sanitizer had expired – directly with St. Joseph's staff. She said she posted her comments on Facebook because she was upset at what had happened to her grandfather, and in pursuit of proper care for everyone, including her grandmother.

[9] The content of the posts is central to this appeal. The newspaper article to which the link was provided in the initial post was authored by a psychiatry professor and titled "We have right to die but not to quality palliative care". The article, which had been published in Vancouver's *The Province*, criticized the training provided to and knowledge of Canadian physicians. It asserted that "ignorance and lack of skill in attending to the needs of dying patients are still tragically common in Canada" and that "at their time of licensure, physicians have been taught less about pain management than those graduating from veterinary medicine". It advocated large investments by governments in hospice and palliative care.

[10] Ms. Strom's initial post, which generated an online conversation with two of her Facebook friends, was as follows:

> 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!
>
> (underlining added)

[11] This post elicited a response from "Nicole", who said she had worked in extended care. Nicole said that she had complained almost daily about co-workers and that some nurses who had dealt with Nicole's mother in palliative care were "horrid". She spoke of her love for the job and the importance of helping those who could no longer take care of themselves. Ms. Strom responded as follows:

> …Thank you for being such an amazing health care worker and advocate. I appreciate your comments So Very Much.

> The difference with Long Term Care, is that this is people's Home now. And those "Residents", well, they should be treated as such. So again Nicole, your compassion for those families will always be remembered, I am certain!
>
> At my Grandpa's funeral, the priest actually talked about his experience visiting in long term care and how he connected with a particular gentleman who got no visitors and didn't even speak the same language. And Yes he spoke of that "sparkle" in the eyes, you also refer to. I felt so sad for this man he spoke of, but the gratitude I felt for that priest can't even be measured.
>
> This is someone's Husband/Wife, Dad/Mom, Grandparent, Brother/Sister we are talking about … AND Being treated well/fairly is A HUMAN RIGHT FOR GOODNESS SAKES! They are NOT A ROOM NUMBER OR A CHART NUMBER!
>
> I am so grateful for the people who EXCEL at this type of work and they should be recognized and commended every single day!
>
> I am so sorry that you had some similar experiences with your own Mother, Nicole. It is just unthinkable how horrible some people can be.
>
> We are advocating for our loved ones here and that's where our passion comes from. There IS NO FAULT IN THAT and it will Not Stop!

[12] "Alex", another of Ms. Strom's Facebook friends, then responded, expressing agreement with the point made in the newspaper article that, if assisted suicide is an option, "adequate – if not exceptional – end-of-life care … should also be a viable option". Alex also expressed her hope that Ms. Strom's family had brought their concerns about staff at St. Joseph's to the attention of the St. Joseph's Board or the health region, noting that those who had fought to keep St. Joseph's in Macklin would expect employees "to share the same concern for the care and well-being of its residents". She closed with this comment: "Isn't it unfortunate that we have to have this discussion at all?"

[13] Ms. Strom responded with a further post:

> It is VERY UNFORTUNATE Alex. <u>And this has been an ongoing struggle with the often subpar care given to my Hollman Grandparents (especially Grandpa) for many years now … Hence my effort to bring more public attention to it (As not much else seems to be working).</u>
>
> <u>As an RN and avid health care advocate myself, I just HAVE to speak up! Whatever reasons/excuses people give for not giving quality care, I Do Not Care, It. Just. Needs. To. Be. Fixed. And NOW!</u>
>
> (underlining added)

[14] This led to a further response from Alex, who commented that "there should never be a reason or excuse for not providing quality care" and that "we all deserve to be treated with respect". Ms. Strom's response was as follows:

> Absolutely, and that's why I am also now asking people to just rethink … "Why do you do your job?" "Do you actually care about the people you WORK FOR/Care For?" "Or is it JUST A JOB, WITH A PAYCHEQUE?" … If so, maybe it's time to take a step back.
>
> Either way I just want my Grandmother (and everyone else in that facility) to be treated well, ALWAYS!
>
> (underlining added)

[15] That is the entire content of the posts. The underlined portions were the statements alleged to constitute professional misconduct by the Charge.

[16] Ms. Strom's Facebook posts were available only to her Facebook friends. However, as noted above, she tweeted the posts to the Minister of Health and the Opposition Leader, using the following title and hashtags: "Our family's experience with #LongTermCare in #Sask #Health #TheyDeserveBetter". She testified that she had done so because she thought they should be aware of concerns with long-term care and might be interested in the story. At that point, the posts became public. Ms. Strom claimed that she had made the posts public inadvertently.

[17] The contents of Ms. Strom's Facebook page came to the attention of staff at St. Joseph's by early March 2015. A copy was circulated among St. Joseph's staff and was brought to the attention of the St. Joseph's Board and the health region. A registered nurse practicing at St. Joseph's reported the matter to the SRNA, which interviewed other employees who said they had taken offence at the posts. In the result, the SRNA issued the Charge, which alleged that Ms. Strom had committed professional misconduct contrary to:

(a) ss. 26(1) and (2) of the *Act*;

(b) the *Code of Ethics for Registered Nurses, 2008* [*Code*] and, more particularly, Part I: Nursing Values and Ethical Responsibilities A1,3; B3; D1,10; E1,3,4,5,7; F2; and G1; and

(c) the *Standards & Foundation Competencies for the Practice of Registered Nurses, 2013* [*Standards*] and, more particularly, Standard I – Competencies 1, 5, 8 and 15;

Standard III – Competencies 62 and 71; and, Standard IV – Competencies 76(a)(f) and 78.

[18] The Charge specified five particulars, the following four of which were pursued by the SRNA:

> **Failure to follow proper channels**
>
> 2. You publicly posted on Facebook information about the healthcare provided to your grandparents in order to criticize the health care given to them at a specific named healthcare facility. You publicly criticized the care provided by the staff. This violates your obligation as a professional to take concerns you may have to the appropriate channels starting with the individual care providers and if matters cannot be resolved at that level then to report it to their manager. If that does not result in a positive change, raise it with the director of the facility and ultimately the health board of the facility and the health region and the minister. It is only if all of those efforts have not led to a positive change would you be able, with the consent of your grandparents or their power of attorney to take the matter to the public. You have failed to take your concerns to the appropriate people using the appropriate channels.
>
> **Impact on reputation of facility and staff**
>
> 3. By communicating your concerns to the general public rather than to the appropriate people using the appropriate channels you have publicly called into question the capacity of that health facility and its employees and directors to deliver appropriate healthcare. This has an impact on the reputation of the facility and its employees and directors. You have alleged that the facility and its employees are not "up to speed" on how to approach end of life care or how to maintain a senior's dignity. You have alleged that they lack compassion and that your grandparents were not treated well or fairly. You have stated that "this has been an ongoing struggle with the often subpar care given to my Hollman grandparents (especially grandpa) for many years now ..." You have charged that some employees are not giving quality care and implied that they are simply there for the paycheck. All of these are serious allegations that tarnish reputations.
>
> **Failure to first obtain all the facts**
>
> 4. As a registered nurse you made accusations in a public forum by publishing them on your personal Facebook without having first obtained all of the facts directly from the facility and the care providers. You have made public your conclusions without first having obtained all of the relevant facts.
>
> **Using status of registered nurse for personal purposes**
>
> 5. The publication in your personal Facebook on February 25, 2015 discloses that you are a registered nurse. By so doing you engage the professional image of registered nurses in general as well as your personal professional obligations. A registered nurse is required to conduct herself in a professional manner towards not only patients but also colleagues. You made negative comments about other registered nurses and other healthcare providers and management. By identifying yourself as a registered nurse you have engaged your obligation to abide by the standards and code of ethics of your profession. You have failed to protect your

integrity and your profession's integrity when you used inappropriate communication channels to discuss, report and resolve workplace issues. Your conduct has fallen below the standards established by the SRNA.

[19] Section 26 of the *Act*, which is the basis for all three charges, is as follows:

26(1) For the purpose of this Act, professional misconduct is a question of fact but any matter, conduct or thing, whether or not disgraceful or dishonourable, that is contrary to the best interests of the public or nurses or tends to harm the standing of the profession of nursing is professional misconduct within the meaning of this Act.

(2) Without restricting the generality of subsection (1), the discipline committee may find a nurse guilty of professional misconduct if the nurse has:

(a) abused a client verbally or physically;

(b) misappropriated a client's personal property;

(c) inappropriately used the nurse's professional status for personal gain;

(d) influenced a client to change the client's last will and testament;

(e) wrongfully abandoned a client;

(f) misappropriated drugs;

(g) misappropriated property belonging to a nurse's employer;

(h) failed to exercise discretion with respect to the disclosure of confidential information about a client;

(i) falsified a record with respect to the observation, rehabilitation or treatment of a client;

(j) failed to inform an employer of the nurse of the nurse's inability to accept specific responsibility in areas where special training is required or where the nurse does not feel competent to function without supervision;

(k) failed to report the incompetence of colleagues whose actions endanger the safety of a client;

(l) failed to comply with the code of ethics of the association;

(m) failed without reasonable cause to respond to inquiries from the association regarding alleged professional misconduct or professional incompetence;

(n) an addiction to the excessive or habitual use of intoxicating liquor, opiates, narcotics or other habit forming substances;

(o) conspired to do any professional misconduct or counselled a person to do any professional misconduct;

(p) obtained registration by misrepresentation or fraud;

(q) contravened any provision of this Act or the bylaws.

III. DECISION OF THE DISCIPLINE COMMITTEE

[20] In the *DC Decision*, the Discipline Committee, having described the Charge and cited the relevant provisions of the *Code*, dealt with two issues. First, it asked whether Ms. Strom was obliged to comply with the *Code* and the *Standards* in her off hours or "outside of a nursing practice environment" (at para 28). It noted that while many provisions of the *Code* and the *Standards* refer to nursing practice or nursing care, many do not. It found that the *Code* "should be interpreted broadly in order to meet the intent of the *Act* and the purpose of the SRNA, which is to protect the public and promote the public standing of the profession of registered nursing" (at para 29).

[21] Having adopted that interpretive principle, the Discipline Committee addressed what it described as "the principles of responsibility for off duty conduct", commenting that regulated professionals are investigated and disciplined for such conduct (at para 30). It cited Taylor J.'s statement in *Ratsoy v Architectural Institute of British Columbia* (1980), 113 DLR (3d) 439 (BCSC) at para 10 [*Ratsoy*], that "[i]t is well settled … that a professional man may expose himself to disciplinary proceedings for conduct entirely outside the actual practice of his profession, if the conduct reflects on him in a professional way". It stated that *Erdmann v Complaints Inquiry Committee*, 2013 ABCA 147, 544 AR 321 [*Erdmann*], was to the same effect, and adopted the following statement by the Court in that case:

> [20] Professionals in every walk of life have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. A chartered accountant's status in the community at large means that his/her conduct will from time to time be the subject of scrutiny and comment. While acknowledging the legitimate demands of one's personal life, and the rights and privileges that we all enjoy, private behaviour that derogates from the high standards of conduct essential to the reputation of one's profession cannot be condoned. <u>It follows that a chartered accountant must ensure that her conduct is above reproach in the view of reasonable, fair-minded and informed persons.</u>
>
> (Emphasis added)

[22] The Discipline Committee then referred to the following framework for the analysis of off-duty conduct (*DC Decision* at para 35), which it erroneously attributed to the Supreme Court of Canada in *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 65, [2001] 1 SCR 772 [*Trinity*]:

> In summary, the framework for the analysis of off-duty conduct that arises from the case law is:

> (a) some, but not all, off-duty conduct can give rise to discipline for professional misconduct or conduct unbecoming;
>
> (b) in considering whether the particular conduct at issue is such as to give rise to discipline, the Panel should consider whether the conduct evidences direct impairment of the ability to function in the professional capacity or impairment in the wider sense as described in the case law;
>
> and
>
> (c) direct evidence of impairment is not always required. In an appropriate case, impairment can be inferred. In the absence of direct evidence of impairment, the Panel will need to consider whether it is appropriate to draw on inference of impairment in the circumstances.

This statement is, in fact, from *Fountain v British Columbia College of Teachers*, 2007 BCSC 830 at para 65, [2007] 11 WWR 281 [*Fountain 2007*].

[23] The Discipline Committee also found that the following factors specified by Ross J. in *Fountain 2007* – which were cited with approval in *Fountain v British Columbia College of Teachers*, 2013 BCSC 773 at para 20, a second appeal arising from the same facts – should be considered in determining whether off-duty conduct demonstrated "impairment" in the appropriate sense:

> [59] In summary, the case law establishes that in appropriate circumstances it is permissible to draw an inference of direct impairment or of impairment in the wider sense in the absence of direct evidence. Relevant factors to be considered include:
>
> > (a) the nature of the conduct at issue; [derived from *Attis v. New Brunswick District Board of Education No. 15*, [1996] 1 S.C.R. 825 [*Ross*], *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455 [*Fraser*]];
> >
> > (b) the nature of the position; [*Ross* and *Fraser*]
> >
> > (c) whether there is evidence of a pattern of conduct; [*Kempling v. British Columbia College of Teachers*, [2004] B.C.J. No. 173, 2004 BCSC 133 [*Kempling 1*] and [*Kempling 2*]
> >
> > (d) evidence of controversy surrounding the conduct; [*Ross* and *Kempling 1*]
> >
> > (e) evidence that the private conduct has been made public; [*Ross* and *Kempling 1*] and
> >
> > (f) evidence that the private conduct has been linked by the member to the professional status of the member. [*Kempling 1 and 2*]
>
> (Case references added by the Discipline Committee)

[24] The Discipline Committee applied these principles to the off-duty conduct which was the subject of the Charge. It found that Ms. Strom had identified herself as a registered nurse to give

credibility and legitimacy to her comments, thereby establishing a link between her views as to the care given to her grandfather and her position as a registered nurse. It did not believe her claim she did not know that tweeting the posts would make her Facebook page fully public, finding that she was a sophisticated user of social media. It noted she did not use appropriate organizational channels. It rejected her evidence that she did not know to whom she should report her concerns. It found that she had "engaged in a generalized public venting about the facility and its staff and went straight to social media to do that", rather than raising her concerns with her grandparents' healthcare team (at para 42).

[25] The Discipline Committee dealt next with Ms. Strom's submission that a determination that her posts constituted professional misconduct would infringe her *Charter* right to freedom of expression. It agreed there would be infringement. However, it found that the infringement would be justified under s. 1 of the *Charter*. It referred to a single case in its *Charter* analysis, that being *Whatcott v Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6, 289 DLR (4th) 506 [*Whatcott*]. In *Whatcott*, this Court set aside a finding of professional misconduct against Mr. Whatcott, a licensed practical nurse, who had participated in a vocal public demonstration against abortion. The Discipline Committee referred to the following statement by Jackson J.A.:

> [66] Is there a rational connection between the objective and the decision? Will the public have greater respect for licensed practical nurses because Mr. Whatcott can no longer work as a practical nurse? There is no evidence of this. There is no suggestion that Mr. Whatcott held himself out as a licensed practical nurse while picketing. Few persons would have known that he held a licence as a practical nurse. It was only after PPR filed a complaint with the SALPN that Mr. Whatcott issued a press release that referred to him as a licensed practical nurse.

[26] The Discipline Committee distinguished *Whatcott* on the basis that, unlike Mr. Whatcott, Ms. Strom had identified herself as a registered nurse. It then found as follows:

> 50. The purpose and objective of the SRNA is to protect the public by investigating complaints of professional misconduct and professional incompetence. Section 26(1) of the *Act* contains a broad definition of professional misconduct as being conduct that is contrary to the best interests of the public or nurses or tends to harm the standing of the nursing profession. The Discipline Committee finds that Ms. Strom's comments harmed the reputation of the nursing staff at St. Joseph's and undermined the public confidence in the staff at that facility. Ms. Strom argues that nowhere in her post does she refer to nursing staff directly. While strictly speaking that may be true, the Discipline Committee finds that her intentions were to direct criticisms at those providing direct care to her grandparents meaning the nursing staff.

> 51. The Discipline Committee finds that the infringement of Ms. Strom's right to free expression under section 2(b) of the *Charter* by finding her guilty of professional misconduct is justified under section 1 of the *Charter*.

[27] In the result, the Discipline Committee found Ms. Strom guilty of professional misconduct pursuant to s. 26(1) of the *Act* and of failing to comply with the following provisions of the *Code* as required by s. 26(2)(l):

> A1. Nurses have a responsibility to conduct themselves according to the ethical responsibilities outlined in this document and in practice standards in what they do and how they interact with persons receiving care as well as with families, communities, groups, populations and other members of the health-care team.
>
> …
>
> A3. Nurses build trustworthy relationships as the foundation of meaningful communication, recognizing that building these relationships involves a conscious effort. Such relationships are critical to understanding people's needs and concerns.
>
> …
>
> B3. Nurses collaborate with other health-care providers and other interested parties to maximize health benefits to persons receiving care and those with health-care needs, recognizing and respecting the knowledge, skills and perspectives of all.
>
> …
>
> D1. Nurses, in their professional capacity, relate to all persons with respect.
>
> …
>
> D10. Nurses treat each other, colleagues, students and other health-care workers in a respectful manner, recognizing the power differentials among those in formal leadership positions, staff and students. They work with others to resolve differences in a constructive way.
>
> …
>
> F2. Nurses refrain from judging, labelling, demeaning, stigmatizing and humiliating behaviours toward persons receiving care, other health-care professionals and each other.
>
> …
>
> G1. Nurses, as members of a self-regulating profession, practise according to the values and responsibilities in the *Code of Ethics for Registered Nurses* and in keeping with the professional standards, laws and regulations supporting ethical practice.

[28] The Discipline Committee also found that the provisions of the *Standards* relating to professional responsibility and accountability, ethical practice and service to the public applied to Ms. Strom in this case. However, it did not find that she had breached those provisions. The *DC Decision* concluded as follows:

> 58. The Discipline Committee accepts that Ms. Strom's Facebook post and the subsequent online communication she engaged in was motivated by perhaps grief and anger. It is accepted that Ms. Strom was not driven by malice. Carolyn Strom is a

> professional bound to act with integrity and in accordance with the *Code of Ethics*. The Discipline Committee does not seek to "muzzle" registered nurses from using social media. However, registered nurses must conduct themselves professionally and with care when communicating on social media.

[29] In the result, the Discipline Committee fined Ms. Strom $1,000 and ordered her to pay costs of the investigation and hearing in the amount of $25,000. It also ordered her to review the *Standards*, review and complete training on the *Code,* and write two-self reflective essays.

IV. THE QUEEN'S BENCH DECISION

[30] Ms. Strom appealed both the Discipline Committee's determination that she had been guilty of professional misconduct within the meaning of the *Act* [professional misconduct ground] and its conclusion that the resulting infringement of her *Charter* right to freedom of expression was justified under s. 1 of the *Charter* [*Charter* ground]. She also appealed the costs award.

[31] The standard of review, which is an important issue on this appeal, was central to the decision in *Strom QB*. The Chambers judge carefully considered that issue, anchoring his analysis in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], and *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. He was fully aware that he must abide by the rules relating to the standard of review – arcane as they might appear to a non-lawyer concerned with the substance of Ms. Strom's appeal – which limit the role of appellate courts. It is for that reason he said this:

> [4] Ms. Strom's right to freedom of expression is indeed one of the subjects of this appeal. Freedom of expression is not the focus of the appeal, however. The focus of the appeal is whether the discipline committee made the kind of mistake that requires the court to interfere with the committee's decisions.

[32] Dealing first with the standard of review relating to the professional misconduct ground, Ms. Strom had argued that the Discipline Committee did not have the authority pursuant to the *Act* to find her guilty of professional misconduct for this off-duty conduct or to award costs of the proceeding. The Chambers judge summarized his conclusions as to the standard of review relating to these issues as follows:

> [35] In making its decisions…, the discipline committee was interpreting its empowering legislation, the *Act*, to the end of administering an area in which it is knowledgeable and has expertise -- namely, the rules governing the conduct of registered nurses. All of the members of the discipline committee, except the public representative,

> were registered nurses. In determining whether certain of the rules apply to members of the association, those members were setting the rules for all registered nurses, including themselves. Likewise, when the committee members considered whether Ms. Strom's conduct amounted to professional misconduct, they were using a measure that applies to all registered nurses, including themselves. The same applies to the committee's determination of costs.
>
> [36] These are issues that are best determined by the people who are most familiar with all aspects of being a registered nurse. As Justices Bastarache and LeBel said in *Dunsmuir* at paras 53 and 54:
>
> > [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically …
> >
> > [54] … Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.…

[33] In the result, the Chambers judge found that the reasonableness standard applied to all aspects of the professional misconduct ground. As to the nature of the reasonableness analysis, the Chambers judge cited the following statement by Bastarache and LeBel JJ. in *Dunsmuir*:

> [47] … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[34] However, in a theme he referred to several times, the Chambers judge also described his task as relating only to the "ultimate decision", commenting as follows:

> [54] When I review each decision of the discipline committee in this case, I am to apply the reasonableness standard to the committee's final decision -- not to the elements of that decision. That is, I am not to examine the reasonableness of the various approaches that the committee took in getting to its ultimate decision. Rather, I am to consider the committee's final decision on the issue, to determine whether that decision meets the requirements of a reasonable decision: *Pillay v College of Physicians and Surgeons of Saskatchewan*, 2018 SKQB 54 at paras 5–11.

[35] As to the standard of review relating to the *Charter* ground, the Chambers judge relied on *Doré*. In his view, *Doré* confirmed the conclusion in *Dunsmuir* that while the correctness standard of review applies if the appeal relates to a decision as to the constitutionality of a law, it does not apply where the appeal is, as here, of a decision of an administrative body that *affects Charter* rights. He cited Abella J.'s explanation of the standard of review question in the latter context in *Doré* at paragraph 3, where she said this:

> This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test [*R v Oakes*, [1986] 1 SCR 103], the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[36] In *Doré*, Abella J. concluded the administrative law framework did not have to be replaced. Rather, she held that the administrative law reasonableness analysis and the *Oakes* test could be reconciled "in a way that protects the integrity of each", thereby ensuring "rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom" (*Doré* at para 4). In her view, that reconciliation could be achieved "by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality" (*Doré* at para 5). The Chambers judge cited (at para 43) the following paragraphs from *Doré* where Abella J. more fully explained this standard of review:

> [6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
>
> [7] As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[37] The Chambers judge also quoted the following portions of Abella J.'s reasons in *Doré*:

> [36] … When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference. …
>
> …

> [47] An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. …

[38] In the opinion of the Chambers judge, the decisions of the Discipline Committee at issue were discretionary decisions and, as such, were subject to the presumption that they were entitled to deference. In the result, he held that the standard of review relating to the *Charter* ground – which he characterized as "the interaction of a professional association's rules of conduct with the *Charter* right to freedom of expression of a member of the association" (*Strom QB* at para 50) – was "reasonableness as described in *Doré*" (*Strom QB* at para 51).

[39] Turning next to the application of the reasonableness standard to the professional misconduct issue, the Chambers judge dealt first with the issue of whether Ms. Strom's off-duty conduct was subject to discipline. Ms. Strom asserted that she made these comments as a private individual rather than as a registered nurse. The Chambers judge noted her evidence that she had communicated her comments online as an advocate nurse who was providing feedback in order to improve things as she thought registered nurses were obliged to do. He also referred to the Discipline Committee's reasoning that Ms. Strom had, by identifying herself as a registered nurse, created the link between her profession and her concerns as a granddaughter.

[40] The Chambers judge held that it was "logical and reasonable, and … within the range of available decisions" (at para 65) for the Discipline Committee to adopt paragraph 20 of *Erdmann*, which is reproduced above. He rejected submissions that the Discipline Committee should have considered other factors, commenting that he was "not to determine the reasonableness of individual elements of the committee's decision … [but] … to determine the reasonableness of the decision itself -- the decision that Ms. Strom's off-duty conduct is subject to discipline" (at para 66). He characterized the decision as to whether off-duty conduct is subject to discipline as one which the Legislature had decided should be made by people with knowledge and expertise in the area. Finally, he held that the *DC Decision* was reasonable, as it was justified, transparent and intelligible, and fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[41] The Chambers judge then addressed the Discipline Committee's decision that Ms. Strom had engaged in professional misconduct. He noted there was direct evidence that Ms. Strom's

comments had caused registered nurses to be distraught and demoralized and that community members had approached nurses to ask about the posts and what was going on at St. Joseph's. On that basis, he found it was open to the Discipline Committee to draw the inference that the posts had "harmed the reputation of the nurses at the facility, thereby undermined public confidence in those nurses, and thereby harmed the standing of the nursing profession" (*Strom QB* at para 76). As he put it, "[t]his is especially so in light of the breadth of s. 26(1) of the *Act*, particularly the reference to conduct that '*tends* to harm the standing of the profession of nursing'" (*Strom QB* at para 76, emphasis in original).

[42] The Chambers judge also found that publications for nurses that had been distributed by the intervenor SUN were properly taken into account by the Discipline Committee. He referred to the following portions of those publications at paragraph 77:

> … It is vital registered nurses always remember they remain bound by the same ethical and professional standards that have always applied — even when posting to their personal social media accounts.
>
> … Online content and behavior has the potential to enhance or undermine not only an individual's career, but also the registered nursing profession.
>
> …
>
> Never make disparaging remarks about employers, patients or co-workers, even if they are not identified.
>
> …
>
> Remember your options for reporting workplace, patient safety or nursing practice issues — social media is not a place to vent about your work life. …
>
> …
>
> If you are identifying yourself as a RN/RN(NP), maintain the integrity of the profession of registered nursing by ensuring photos, videos and comments are respectful.

[43] The Chambers judge found that there was evidence on which the Discipline Committee could conclude that Ms. Strom had posted her comments "without knowing the facts, and without endeavouring to know the facts" (*Strom QB* at para 82). As to SUN's argument that damage to the reputation of a handful of nurses is not damage to nurses as a whole or to the nursing profession, the Chambers judge concluded that while that would be a reasonable interpretation of s. 26(1), so too was the interpretation adopted by the Discipline Committee; that is, that damage to the reputation of some, but not all, of the nurses in the province was within the scope of s. 26(1).

Further, he found that the Discipline Committee had inferred that this sort of damage to the reputation of some nurses harmed the reputation of the profession.

[44] The Chambers judge also rejected Ms. Strom's argument the Discipline Committee should have found that off-duty conduct cannot constitute professional misconduct within the meaning of s. 26(1) unless there is an element of reprehensible conduct. He commented that this was one of several paths available to the Discipline Committee and reiterated that his focus was "not on the particular path that the committee took, or could have taken … [but] the reasonableness of the decision reached at the end of that path" (*Strom QB* at para 88). Further, the Chambers judge rejected Ms. Strom's submission that the Discipline Committee should have distinguished between the conduct of a person who is *known* to be a registered nursing professional and the conduct of a person who is *commenting* as a registered nursing professional. He noted that the Discipline Committee had found as a fact that Ms. Strom had been commenting as a registered nurse. In addition, he held that "this element of the committee's decision is not subject to review on its own. It was part of the path taken to the final decision" (*Strom QB* at para 89).

[45] In the result, the Chambers judge summarized his conclusions relating to the professional misconduct aspect of the appeal as follows:

> [92] It was within the range of possible, acceptable outcomes for the committee to conclude that Ms. Strom chose to criticize other registered nurses publicly, rather than through the avenues described in the *Code*. It was within that range for the committee to conclude that Ms. Strom's comments could be and were understood by the public to mean that registered nurses working at the facility were not competent and were unprofessional. It was within that range for the committee to conclude that the public consequently would hold a lower opinion of those registered nurses and of registered nurses generally, so that the comments were contrary to the best interests of the public or nurses, or tended to harm the standing of the profession.
>
> [93] It was within the leeway allowed the discipline committee to find that these conclusions established that Ms. Strom was guilty of charges 2, 3 and 4, being "failure to follow proper channels"; "impact on reputation of facility and staff"; and "failure to first obtain all the facts".
>
> [94] It also was within the leeway allowed the discipline committee to find that these conclusions established that Ms. Strom had committed the breaches identified in the particulars, namely:
>
> > (a) breach of s. 26(1) of the *Act* -- engaging in "conduct that is contrary to the best interests of the public or nurses or tends to harm the standing of the profession of nursing"; and
> >
> > (b) breach of s. 26(2)(l) of the *Act* -- breaching the *Code* provisions identified by the committee.

[46] The Chambers judge turned next to the *Charter* ground. He noted that there was no dispute that Ms. Strom's right to freedom of expression had been infringed. Accordingly, the issue was whether the infringement was justified under s. 1 of the *Charter*. He stated that he was guided by the following remarks by Abella J. in *Doré*, which are to the same effect as her introductory comments cited above:

> [57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
>
> (Emphasis added in *Strom QB*)

[47] The Chambers judge then restated the test and standard of review as follows:

> [105] The discipline committee's decision -- that the infringement was justified -- can only be reasonable if the committee proportionately balanced the right to freedom of expression with the objectives of the *Act*, in the context of Ms. Strom's circumstances. As with other reviews on the reasonableness standard, within this requirement the committee is allowed deference. The committee's balancing of the rights and objectives is not required to be correct. It is required to be reasonable.

[48] The Chambers judge found that the SRNA was obliged to balance the fundamental importance of open and forceful criticism of public institutions with the need for civility in the regulated profession, in the same manner as those charged with regulating lawyers. He concluded that the Discipline Committee had done exactly that:

> [111] In the end, when the discipline committee balanced the objective of governance of the profession with the right to freedom of expression, the committee concluded that the infringement of the right to freedom of expression was justified, in part because of the nature and extent of the harm to the profession and in part because the infringement still left Ms. Strom with another avenue of expressing her concerns. In effect, the committee concluded that Ms. Strom still was in a position to be an advocate nurse, to exercise her right to freedom of expression, by advancing her criticisms in a way that would not harm registered nurses and the nursing profession.
>
> [112] In this way the discipline committee addressed, as Justice Abella put it at para. 56 of *Doré*, "how the *Charter* value at issue will best be protected in view of the statutory objectives". Bearing in mind the deference that is to be given to the committee in its balancing of the *Charter* right and the statutory objectives, I conclude that the committee's decision falls within the range of possible, acceptable outcomes that could arise from a proportionate balancing.

[49] Having so concluded, the Chambers judge found that the Discipline Committee's decision that the infringement of Ms. Strom's *Charter* right to freedom of expression was justified was not unreasonable and, accordingly, that he could not interfere with it.

[50] Finally, the Chambers judge dealt with the Discipline Committee's decision to award costs. He found that s. 31 of the *Act* was unambiguous and imposed no limitation on the nature of costs that could be awarded. He found that the Discipline Committee had conducted a thorough review of the considerations relating to both the fine and the award of costs. He concluded the costs decision fell within a range of possible, acceptable outcomes and was accordingly not unreasonable.

V. JURISDICTION AND STANDARD OF REVIEW

[51] The *DC Decision* was appealed to the Court of Queen's Bench pursuant to s. 35 of the *Act*. The decision in *Strom QB*, in turn, was appealed to this Court pursuant to s. 36.1 of the *Act*. These provisions are as follows:

> 35 A nurse who is the subject of a decision or an order of the council pursuant to section 34 may appeal that decision or order to a judge of the court within 30 days of the decision or order of the council and section 34 applies mutatis mutandis.
>
> …
>
> 36.1 A nurse who makes an appeal pursuant to section 35 or the association may appeal a decision of the court on a point of law to The Court of Appeal for Saskatchewan within 30 days of the decision.

[52] Accordingly, on this appeal, this Court is a secondary appellate court. The task of a secondary appellate court is to determine whether the court that reviewed the decision of the administrative body chose the correct standard of review and correctly applied it. These are questions of law, reviewable on the correctness standard. If the reviewing court erred in law, the secondary appellate court must assess the administrative body's decision pursuant to the correct standard of review: *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 43–44, [2003] 1 SCR 226.

VI. ANALYSIS: THE PROFESSIONAL GROUND

[53] Ms. Strom alleges that the Chambers judge made three errors. First, she submits he erred in upholding the Discipline Committee's conclusion that she was guilty of professional misconduct within the meaning of s. 26(1) of the *Act*. Second, she submits he erred in concluding that the Discipline Committee did not err in finding that the infringement of Ms. Strom's *Charter* rights was justified under s. 1 of the *Charter*. Third, she submits that he erred in finding that the Discipline Committee had the authority pursuant to s. 31 of the *Act* to award costs in the amount of $25,000.

[54] I will deal first with the professional misconduct ground. As noted above, the initial question is whether the Chambers judge chose the wrong standard of review. Given that I have concluded that he did, I will then apply the correct standard of review to the alleged errors relating to that ground. After disposing of the professional misconduct ground, I will deal separately with the *Charter* ground. Given that I have decided that the finding of professional misconduct cannot stand, I need not deal further with the appeal of the costs award, as it cannot stand.

A. Did the Chambers judge select the correct standard of review relating to the finding of professional misconduct?

[55] The Chambers judge based his standard of review analysis on *Dunsmuir* and *Doré*. That was the correct approach at the time he made his decision, which was before the release of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*]. Further, the case law relied on by the Chambers judge continues to be a rich source of guidance for courts considering the standard of review, regardless of *Vavilov*. That point has been resoundingly made by Stratas J.A. in *Entertainment Software Association v Society Composers*, 2020 FCA 100 at paras 22–41, where he analyzed the jurisprudence of the Federal Court of Appeal relating to the reasonableness standard of review.

[56] That said, the law relating to the standard of review that applies to judicial review of or an appeal from a decision of an administrative body was changed in key respects by *Vavilov*, which was decided after this appeal was heard. In Saskatchewan, that is so as to both the correct approach to reasonableness review and, as in this case, as to the presumptive standard of review on a

statutory appeal. For that reason, the Court invited the parties to make supplementary submissions as to the impact of *Vavilov* on this appeal.

[57] Prior to *Vavilov*, it was settled law that the presumptive standard of review on statutory appeals was the same as that on judicial review: see, for example, *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras 29–30, [2016] 2 SCR 293 [*Edmonton East*]. In *Vavilov*, the majority changed that standard, finding that "where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision" (at para 37). In the result, those appellate standards apply in this case. For that reason, and through no fault of his own, the Chambers judge erred in selecting the reasonableness standard.

[58] I must add that while the Chambers judge's choice of the reasonableness standard was understandable, he erred in describing and applying that standard. As is noted above, it was his view that he was not to examine the approach taken by the Discipline Committee to make its decision, but only its final or ultimate decision. That is incorrect. The reasonableness analysis described in *Dunsmuir* is concerned not only with outcome, but with how the decision was made. Justice Brown's summary of the *Dunsmuir* reasonableness analysis in *Canada (Attorney General) v Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 SCR 80, succinctly makes the point:

> [18] Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47. The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14. While the adequacy of a tribunal's reasons is not on its own a discrete basis for judicial review, the reasons should "adequately explain the bases of [the] decision": *Newfoundland Nurses*, at para. 18, quoting from *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, at para. 163 (per Evans J.A., dissenting), rev'd 2011 SCC 57, [2011] 3 S.C.R. 572.

[59] The appellate standards are specified in *Housen v Nikolaisen*, 2002 SCC 33 at para 37, [2002] 2 SCR 235, and do not include reasonableness. Alleged errors of law – including as to the scope of the decision-maker's authority – are reviewed on the correctness standard. Alleged errors of fact are reviewed on the palpable and overriding error standard. Absent an

extricable question of law, the palpable and overriding standard also applies to alleged errors in the answer to a mixed question of fact and law.

[60] If an alleged error relates to a discretionary decision, the standard of review as it is generally expressed in Saskatchewan is that an appellate court will intervene only 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: *Rimmer v Adshead*, 2002 SKCA 12 at para 58, [2002] 4 WWR 119 [*Rimmer*]; *Saskatchewan Crop Insurance Corporation v McVeigh*, 2018 SKCA 76 at para 26, 428 DLR (4th) 122 [*McVeigh*]; *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 74. Other courts have used different language to describe the standard relating to discretionary decisions. In *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125 [*Penner*], for example, Cromwell and Karakatsanis JJ. said this:

> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76–77.

[61] The *Penner* formulation of this standard has been adopted by courts of appeal in several provinces: see, for example, *1944949 Ontario Inc. (OMG ON THE PARK) v 2513000 Ontario Ltd.*, 2019 ONCA 628 at para 13; *Kish v Sobchak Estate*, 2016 BCCA 65 at para 34, 394 DLR (4th) 385; *Lamb v Canada (Attorney General)*, 2018 BCCA 266 at paras 46–47, [2018] 9 WWR 1; *Twinn v Twinn*, 2017 ABCA 419 at para 14. See also, to the same effect, *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 31, [2017] 2 SCR 205.

[62] I read the test described in *Penner* as the same in substance as that described in *McVeigh*. *McVeigh* is helpful in explicitly making the point that a misapprehension of or failure to consider material evidence – which constitutes an error of law or principle – may justify appellate intervention. *Penner* is helpful in explicitly stating that a failure to give any or sufficient weight to a relevant consideration may also do so, although it must be kept in mind that the allocation of weight is, within the limits of the discretion granted, for the initial decision-maker. An appellate court is not entitled to substitute its own discretion for that of the trial court or chambers judge

merely because it would have exercised the original discretion differently: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77.

[63] I also note the formulation of the discretionary standard of review adopted by LeBel J. in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*], which is also the same in substance as *McVeigh* and *Penner*:

> 43 As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-5, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

[64] The question, then, is which of these appellate standards of review applies to the professional misconduct ground. In her supplementary submissions, Ms. Strom argues that *Vavilov* means that all of the issues raised on this appeal are reviewable on a correctness standard. The SRNA takes the opposite position, submitting that as the Legislature has specified in s. 26(1) of the *Act* that professional misconduct is a question of fact, *Vavilov* means that the palpable and overriding error standard applies. It says there are no extricable errors of law which would call for the application of the correctness standard.

[65] With respect, I am of a different mind than both parties.

[66] To explain, I will first address the question raised by the SRNA. Does the statement in s. 26(1) that professional misconduct is a question of fact conclusively settle the standard of review question? The effect of using that phrase in s. 26(1) was not considered by the Chambers judge and has not otherwise been judicially considered. However, the use of this curious language to describe decisions as to professional misconduct is not unique to the *Act.* It appears to have first been used in Alberta in 1928: *An Act to amend The Medical Profession Act*, SA 1928, c 33, s 9. It no longer appears in this context in that province. In Saskatchewan, it appeared in s. 17 of *An Act respecting The Institute of Chartered Accountants of Saskatchewan*, SS 1934, c 41. See also, for example, s. 18 of the British Columbia *Legal Professions Act Amendment Act, 1948*, SBC 1948, c 36.

[67] It presently appears in this context in many Saskatchewan professional regulatory statutes: see, for example, *The Agrologists Act, 1994*, SS 1994, c A-16.1, s 28; *The Registered Psychiatric Nurses Act*, SS 1993, c R-13.1, s 28; *The Accounting Profession Act*, SS 2014, c A-3.1, s 26. The standard of review has been considered in relation to some of these statutes. In *Davies v Council of The Institute of Chartered Accountants of Saskatchewan* (1985), 19 DLR (4th) 447 (CanLII) (Sask QB), the Institute argued that a provision that stated the issue of professional misconduct was "a question of fact for the sole and final determination of the council or the disciplinary committee" (*The Chartered Accountants Act*, RSS 1978, c C-7, s 18(2)) meant that it had an "unfettered right to determine the existence of what unprofessional conduct amounts to" (at para 49). Justice MacLeod rejected that argument, commenting as follows:

> [50] … Taken at face value, the provision would defeat any appeal. This could not have been intended. Rather, I hold that s. 18(1) is a declaration of the responsibilities of the Institute or Discipline Committee, but it is not intended to frustrate the right of appeal.

[68] Justice MacLeod did not specify a standard of review. However, he found that the Institute erred by failing to consider the effect of a fundamental concept of partnership law, resulting in a finding of liability for which there was no evidentiary foundation. It is apparent he applied a correctness standard to that question of law.

[69] There are also several decisions touching this issue that were made after *Dunsmuir*, but prior to *Vavilov*, and thus at a time when it was settled law that the standard of review on statutory appeals was the same as that on judicial review: *Edmonton East* at paras 29–30. As such, the choice was between reasonableness and correctness. In each of those cases, the Court adopted the reasonableness standard. In *Cameron v The Saskatchewan Institute of Agrologists*, 2018 SKCA 91 [*Cameron*], for example, this Court applied a reasonableness standard to a finding that Mr. Cameron had been guilty of professional misconduct. The standard of review was not at issue, as the parties had agreed to that standard. However, the Court did refer to *Meier v Saskatchewan Institute of Agrologists*, 2014 SKQB 389 at para 27, [2015] 3 WWR 608 [*Meier*], where Layh J., having referred to the use of the phrase "question of fact" in the statute, commented that "[f]indings of fact are the purview of the discipline committee and command a high degree of deference when subjected to judicial review – thence the appropriateness of the 'reasonableness' standard". Justice Layh's reasoning on this point was not disturbed on appeal (*Meier v Saskatchewan Institute of Agrologists*, 2016 SKCA 116, 405 DLR (4th) 506).

[70] The reasonableness standard was also applied in *Sydiaha v Saskatchewan College of Psychologists*, 2014 SKQB 112 at paras 10–13, 443 Sask R 139, and *Pomarenski v Saskatchewan Veterinary Medical Association Professional Conduct Committee*, 2019 SKQB 264 at paras 11–13. In both cases, Currie J. referred to the use of the phrase "question of fact" in the statutes as one of several factors which supported that conclusion. He also referred to the fact that the regulators had been granted broad powers to decide whether a member was guilty of professional misconduct, that misconduct and incompetence are most familiar to those in the profession (the "expertise" factor which, post-*Vavilov*, is no longer relevant in determining the standard of review), and that these administrative bodies were interpreting their home statutes.

[71] Given that the appellate standard now applies, the bottom-line conclusion in these cases that the reasonableness standard applies is not authoritative. However, they are of interest in that these courts did not treat the phrase "question of fact" as having conclusively determined the standard of review, although both *Meier* and *Cameron* suggest that language might leave the court with "little choice" but to select the deferential reasonableness standard. Rather, the courts also considered other factors which confirmed that the Legislature had granted broad authority to the professional regulators that made the decisions being appealed.

[72] In my view, that is the correct approach. Indeed, it is self-evident that the exercise undertaken by the Discipline Committee cannot be characterized as deciding a question of fact *simpliciter* for standard of review purposes. Issues will arise on an appeal of a finding of professional misconduct that are not questions of fact. That is so in this case, where Ms. Strom and the SRNA have raised questions as to the interpretation of s. 26(1) of the *Act*. Questions of statutory interpretation are questions of law. Indeed, the statutory framework is always in play, regardless of whether there is an extricable question of law. This fundamental "rule of law" principle, which is central to this case, was reiterated in *Vavilov*:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v.*

> *Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[73] In the result, a discipline committee deciding whether a registered nurse is guilty of professional misconduct is not deciding a question of fact for standard of review purposes. It is either deciding a question of mixed fact and law or making a discretionary decision. As to which, there is no bright line which neatly divides these two categories. Both call for the decision-maker to find the facts and apply legal principles to those facts. As L'Heureux-Dubé J. said in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817:

> 54 It is … inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:
>
> > The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as" structured" discretion.

[74] Indeed, discretionary decisions are sometimes described as questions of mixed fact and law. I note, for example, the following comments by Karakatsanis J. in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, which describe a decision by a Chambers judge to exercise fact-finding powers in the context of a summary judgment application as both a question of mixed fact and law and a discretionary decision:

> [81] In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle,

> findings of mixed fact and law, should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.
>
> [82] Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.
>
> [83] Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

[75] Similarly, in *Grand Council of the Crees (Eeyou Istchee) v McLean*, 2019 FCA 185, which was an appeal from orders dismissing applications to intervene in a settlement approval process, Rennie J.A. commented as follows:

> [3] Leave to intervene under Rule 109 is discretionary and the standard of review applicable to a discretionary order of a motions judge is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. This Court's intervention will only be warranted on an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law.

[76] Notwithstanding the absence of a bright line between questions of fact and law and discretionary decisions, there are considerations that bear on the proper characterization of the professional misconduct issues in this appeal. I would begin with the obvious; that is, that the *Act* explicitly states that professional misconduct is a question of fact. In my view, the Legislature's choice of that phrase was intended to limit appellate review. Put differently, it confirms that the Legislature intended the Discipline Committee to have broad discretion to determine what constitutes professional misconduct.

[77] This conclusion accords with the language of s. 26(1), read in accordance with the modern principle of interpretation; that is, in its grammatical and ordinary sense and in light of the purpose of the *Act* and the intention of the Legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27; *The Legislation Act*, SS 2019, c L-10.2, s 2-10. In broad terms, that purpose is to provide for an independent professional regulatory body to license and regulate registered nurses, with an overriding objective or primary purpose of safeguarding the public interest: see, for example, the reasoning in *College of Nurses of Ontario v Dumchin*, 2016 ONSC 626 at para 19, 130 OR (3d) 602; *Saskatchewan College of Paramedics (Professional Conduct Committee) v Bodnarchuk*, 2015 SKCA 81 at para 31, 465 Sask R 36; *Simpson v Chiropractors' Association of Saskatchewan*,

2001 SKCA 22 at paras 38–39, 203 Sask R 231; and *Pharmascience Inc. v Binet*, 2006 SCC 48 at para 36, [2006] 2 SCR 513. As Simmons J.A. said in *Sazant v College of Physicians and Surgeons of Ontario*, 2012 ONCA 727, 113 OR (3d) 420:

> [101] The Supreme Court of Canada has consistently emphasized the need for courts to interpret professional discipline statutes with a view to ensuring that such statutes protect the public interest in the proper regulation of the professions: see, e.g., *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, [1990] S.C.J. No. 65, at p. 249 S.C.R.; *Finney v. Barreau du Qubec*, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31, 2004 SCC 36, at para. 40.
>
> [102] As the court put it unequivocally in *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, [2006] S.C.J. No. 48, 2006 SCC 48, at paras. 36–37:
>
> > The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them.
>
> …

[78] The public interest and effective professional regulation are, of course, not separate. As is noted in James T. Casey, *The Regulation of Professions in Canada*, loose-leaf (2020-Rel 6) vol 1 (Toronto: Thomson Reuters, 2019) at 2.5:

> … [T]he correct view is that the primary purpose of legislation regulating professions is the protection of the public. However, it is critical to appreciate that the public interest is also served by the protection and promotion of properly functioning, self-governing professions.

[79] I also note in this context that s. 44 of the *Act* provides that Association bylaws found by the Legislature to be prejudicial to the public interest are deemed to have been revoked, thereby affirming that the public interest is the overriding consideration. The *Code* is a bylaw passed pursuant to s. 15 of the *Act*.

[80] The grant of authority to discipline for professional misconduct must be interpreted in light of this overriding purpose. That authority is a key means of protecting and promoting the public interest. That is its purpose. Approached in this manner, an interpretation that concludes that the Legislature granted broad discretion to the Discipline Committee to deal with the myriad circumstances in which the conduct of a registered nurse could negatively impact the public interest or the proper functioning of the profession supports the Legislature's decision to grant self-governance, which lies at the heart of the regulatory scheme.

[81] Further, and in particular, interpreting the use of the phrase "question of fact" in s. 26(1) as having been intended to grant broad discretion to the Discipline Committee accords with the nature of the "facts" at issue when misconduct is alleged. Section 26(1) confirms that those facts include not only the particular conduct of the registered nurse – which includes but is not limited to the specific misconduct identified in s. 26(2) – but findings as to the impact of misconduct on the best interests of the public, nurses or the standing of the profession. These are inherently broad, policy-laden concepts.

[82] The discussion of the nature of a discretionary decision in *Pacific Centre for Reproductive Medicine v Medical Services Commission*, 2019 BCCA 315, [2020] 8 WWR 569 [*Pacific Centre*], is of interest. *Pacific Centre* was an appeal of a judicial review of a decision by the Commission to deny an application for approval of the appellant as a diagnostic facility. The parties disagreed as to whether that decision was a discretionary administrative decision which engaged *Charter* values as contemplated by *Doré*, or a question of statutory interpretation. Justice Garson commented as follows:

> [85] Neither *Doré* nor *Loyola* defines precisely what is meant by a "discretionary" decision, though Justice Abella emphasized in *Doré* that such decisions involve "a particular set of facts": at para. 36. In *Baker*, Justice L'Hereux-Dubé defined discretionary decisions as ones where "the law does not dictate a specific outcome, or where the decision maker is given a choice of options within a statutorily imposed set of boundaries": at para. 52. Similarly, Jones and de Villars define it as "the power to make a decision that cannot be determined to be right or wrong in any objective way": David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 182, quoting Julius Grey, "Discretion in Administrative Law" (1979), 17 Osgoode Hall L.J. 107.

[83] In the result, Garson J.A. found that the decision was a discretionary administrative decision. She noted that the Commission had some discretion in deciding whether criteria specified in the regulations had been met. She commented that while the issue was largely a fact-finding exercise, the overall decision involved a balancing of principles underlying the concept of universal healthcare and principles of sustainability. The same can be said in relation to the grant of authority pursuant to s. 26 of the *Act*, which must be exercised in light of the guidance provided by the purposes of the *Act*, including in particular the public interest and professional standing factors specified in s. 26(1). The notion of "palpable and overriding error" seems ill-suited to the appellate review of questions of this kind, as compared to the more encompassing standard of review for discretionary decisions.

[84] I also note that decisions by professional regulators as to whether there has been professional misconduct have often been *explicitly* described in the case law as discretionary decisions. Two examples will suffice. In *Doré*, which related to a finding of professional misconduct by a lawyer, the Court repeatedly referred to the issue before the it as relating to the review of a discretionary administrative decision, or to the exercise of a discretionary power. I note, for example, the following statement by Abella J. in *Doré* as to the need to balance freedom of expression and the professional requirement of civility:

> [66] 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.

[85] Similarly, Moldaver J. said this in *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772 [*Groia*]:

> [45] Setting threshold criteria for a finding of professional misconduct and assessing whether a lawyer's behaviour satisfies those criteria involve the interpretation of the Law Society's home statute and the exercise of discretion under it and are thus presumptively entitled to deference. …
>
> …
>
> [47] That presumption applies here. The Appeal Panel's approach to determining when incivility amounts to professional misconduct and its application of that approach in assessing Mr. Groia's conduct involve an interpretation of the *Rules of Professional Conduct* enacted under its home statute and the discretionary application of general principles to the facts before it. …

[86] Taking all of these factors into account, I conclude that the decision as to whether Ms. Strom's conduct amounted to professional misconduct within the meaning of s. 26(1) was a discretionary decision. As such, the standard of review is that described in *Rimmer, McVeigh*, *Okanagan* and *Penner*. That standard accommodates the review of the errors that have been alleged by Ms. Strom and SUN.

B. Professional misconduct: Application of the standard of review

[87] Given that the Chambers judge applied the wrong standard of review, this Court must apply the correct standard to the *DC Decision*. The parties' submissions relating to the professional misconduct ground were made in the context of a different standard of review and primarily in

relation to the *Charter* ground. However, the substance of those submissions is also relevant and can be framed pursuant to the discretionary standard of review. Approached in this fashion, Ms. Strom has raised the following grounds of appeal relating to the professional misconduct issue:

(a) Did the Discipline Committee err in law by interpreting "professional misconduct" in s. 26(1) of the *Act* as including off-duty conduct of a registered nurse that is not "reprehensible in anyone"?

(b) Did the Discipline Committee err in law by interpreting "professional misconduct" in s. 26(1) of the *Act* as including conduct that negatively impacts multiple individual nurses, rather than nurses as a collective group?

(c) Did the Discipline Committee err in law by failing to give sufficient or any weight to matters it was required to consider pursuant to s. 26(1)?

1. Section 26(1) and the requirement for reprehensible conduct

[88] Ms. Strom submits that the Discipline Committee misunderstood the case law relating to off-duty conduct by a professional and, as a result, misinterpreted s. 26(1). She relies on *Erdmann* and *Ratsoy* as authority for the proposition that the off-duty conduct of a regulated professional must be found to be "reprehensible in anyone" to attract professional sanction. In particular, she refers to the following comments in *Erdmann*:

> [28] The test for professional misconduct is set out in *Ratsoy v Architectural Institute of British Columbia* at para 11, where Taylor J endorsed the following reasons of Lord Parker CJ, speaking for a Divisional Court of the Queen's Bench Division in *Marten v Royal College of Veterinary Surgeons*, [1965] 1 All ER 949 at 953:
>
> > If the conduct, however, though reprehensible in anyone is in the case of the professional man so much more reprehensible as to be defined as disgraceful, it seems to me that it may, depending on the circumstances, amount to conduct disgraceful to him in a professional respect in the sense that it tends to bring disgrace on the profession which he practises.
>
> [29] Taylor J went on to say in para. 11:
>
> > I would paraphrase those words by saying that reprehensible conduct outside actual practice of the profession may render a professional person liable to disciplinary action if it can be said to be significantly more reprehensible in someone of his particular profession than in the case of others.

[89] The phrase “reprehensible in anyone” – which I take to mean conduct that would be reprehensible regardless of whether the person charged was a professional – has occasionally been referred to in decisions relating to off-duty conduct. However, I do not agree the jurisprudence reflects a general principle that conduct can constitute professional misconduct only if it is found to be reprehensible in this sense. Rather, off-duty conduct may be found to be professional misconduct if there is a sufficient nexus or relationship of the appropriate kind between the personal conduct and the profession to engage the regulator’s obligation to promote and protect the public interest. More specifically, I would state the issue this way: was the impugned conduct such that it would have a sufficiently negative impact on the ability of the professional to carry out their professional duties or on the profession to constitute misconduct? (See *The Regulation of Professions in Canada*, vol 2 at 13.4.)

[90] Indeed, I read the passages in *Erdmann* and *Ratsoy* relied on by Ms. Strom as making this very point, rather than that proposed by Ms. Strom. Although they refer to conduct being “reprehensible in anyone”, they do so to make the point that reprehensible conduct may bring disgrace to the profession due to the relationship between that conduct and the characteristics considered to be important for those in the profession. It is for that reason that factors such as the nature of the profession; the relationship of the misconduct to the work of the profession or the personal characteristics considered necessary to practice the profession; and whether the person charged is identified or purported to act as a member of that profession are relevant.

[91] These cases do not, on the other hand, stand for the proposition that conduct that would be considered reprehensible only because the actor was a member of a particular profession could not constitute professional misconduct. With respect, that proposition would not bear scrutiny in light of the purpose of discipline for misconduct in the context of professional regulation.

[92] This focus on the nexus between conduct and the impact on the profession or the professional is nicely illustrated by the following passage from the reasons of Iacobucci and Bastarache JJ. in *Trinity*:

> 37 … If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings. This Court has held, however, that greater tolerance must be shown with respect to off-duty conduct. Yet disciplinary measures can still be taken when

> discriminatory off-duty conduct poisons the school environment. As La Forest J. stated for a unanimous Court in *Ross*, *supra*, at para. 45:
>
> > It is on the basis of the position of trust and influence that we hold the teacher to high standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a "poisoned" environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

[93] In *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98, Slatter J.A. expressed this concept as follows:

> [45] Many factors can be considered to determine if private conduct amounts to professional misconduct: *Fountain v British Columbia College of Teachers*, 2013 BCSC 773 at paras. 32-3. The closer the conduct comes to the activities of the profession, the more possible it is that personal misconduct will amount to professional misconduct. That is the lesson of *Marten* and *Ratsoy*. It is, however, an error for a discipline committee to assume that because certain "events happened" that are in some sense undesirable or improper, that automatically amounts to "professional misconduct". An accountant may, as one member of the Discipline Tribunal put it, be an accountant "from the time you get up until you go to bed at night", but that does not make everything an accountant does a matter of professional discipline. Section 1(t), and the cases just cited, recognize that private actions can amount to professional misconduct, but they are not intended to allow the Institute to regulate every aspect of its members' private lives.

[94] It must also be kept in mind that the issue to be determined under this ground is not whether the case law identified by Ms. Strom means what she says. Although case law relating to other statutes is helpful, the issue is whether *this* legislation precludes the Discipline Committee from finding that off-duty conduct that is not reprehensible in anyone constitutes professional misconduct. In my view, there is no such limitation. To the contrary, and as noted above, the language of s. 26(1) confirms that the Legislature intended to grant the Discipline Committee broad discretion in determining what constitutes professional misconduct. For convenience, I will repeat s. 26(1):

> 26(1) For the purpose of this Act, professional misconduct is a question of fact but any matter, conduct or thing, whether or not disgraceful or dishonourable, that is contrary to the best interests of the public or nurses or tends to harm the standing of the profession of nursing is professional misconduct within the meaning of this Act.

[95] This provision expressly states that the conduct at issue is not only a question of fact but that it need not be disgraceful or dishonourable. That language weighs against the interpretation proposed by SUN. It provides that conduct that is contrary to the best interests of the public, nurses or the standing of the profession of nursing is misconduct and, by doing so, speaks directly to that nexus or impact. There is nothing to suggest that the issue is whether conduct is reprehensible in and of itself, regardless of a negative impact on the profession or the professional in a manner that would be contrary to the public interest. The phrase "reprehensible to anyone" has a moralistic flavour, disconnected from the purpose of professional regulation. The SRNA cannot sanction a registered nurse for misconduct. It can only sanction for *professional* misconduct.

[96] In the result, the Discipline Committee did not misdirect itself or err in principle by failing to find that conduct must be "reprehensible to anyone" before it can constitute professional misconduct within the meaning of s. 26(1). The question of whether Ms. Strom's conduct, considered in all the circumstances and in light of the purpose of the *Act* in general and s. 26(1) discipline in particular, was misconduct is a different issue. It is considered below.

2. Impact on nurses as a collective group

[97] SUN submits that the Discipline Committee erred by interpreting s. 26(1) as including conduct that does not harm the reputation of Saskatchewan registered nurses generally. It asserts this error is demonstrated by the fact the Discipline Committee found that the posts had harmed the reputation of particular nurses, being those practicing at St. Joseph's, and had undermined the reputation of only one health facility. It argues the Discipline Committee did not find, as the SRNA suggests, that the post had a negative impact on nurses who did not work at St. Joseph's or on nurses collectively.

[98] It is SUN's position that the words "public", "nurses", and "profession of nursing" are collective terms that refer to the groups caught by those expressions, rather than individual members of those groups. It argues that conduct may be against the best interests of individual nurses without being against the best interest of the public, nurses as a group, or the profession of nursing. As it put the matter in its factum, "[t]he SRNA is tasked with protecting the public and defending the standing of the Registered Nursing Profession generally. It is not tasked with defending the interests or reputation of individual nurses".

[99] As noted above, s. 26(1) of the *Act* must be interpreted in accordance with the modern principle of statutory interpretation. With that in mind, I would first note that the ordinary and grammatical meaning of the provision, read in context and in light of the purpose of the *Act* as a whole, does not suggest the words after "question of fact" are intended to be an exclusive definition. Section 26(1) says first that professional misconduct is a question of fact and then says *and* conduct of the kind specified *is* professional misconduct. This language is inclusive, not exclusive. In effect, it deems conduct with the impacts listed in s. 26(1) to be professional misconduct. Whether conduct has those impacts is, of course, to be decided by the Discipline Committee within the limits imposed by the *Act*.

[100] Section 26(2), which is an important part of the context that informs the interpretation of s. 26(1), supports an inclusive interpretation. The introductory phrase in s. 26(2) – "[w]ithout restricting the generality of subsection (1)" – confirms that the conduct of the kind listed in s. 26(2) is professional misconduct within the meaning of s. 26(1). The list includes a variety of acts that may constitute professional misconduct, such as verbally or physically abusing a client, which could occur privately between a single nurse and a patient. Similarly, it references misappropriation of drugs, misappropriation of an employer's property, and excessive use of habit-forming substances, which could also occur in private. There may be no awareness of events of this kind beyond a small group of health professionals and no evidence of a continuing risk of such behaviour. They would nonetheless constitute professional misconduct.

[101] I see no basis to conclude that the Discipline Committee can find that conduct of this kind is caught by s. 26(2) is professional misconduct only if it also finds that the evidence demonstrates an impact of the kind specified in s. 26(1). Although such an impact may be relevant on the facts – as it is in this case – that is a very different thing than effectively requiring that it be proved as an "essential element of the offence".

[102] On a related note, Ms. Strom appears to suggest that direct evidence is required to prove such an impact. I must respectfully disagree. The nature of the conduct, considered in light of the circumstances as a whole, may justify such an inference. That could be so where, as here, a person who identifies themself as a registered nurse publicly comments as to the conduct of an identifiable

group of other registered nurses. That does not mean the purpose of discipline is protecting individual nurses, as opposed to the profession and the public interest.

[103] All of this being so, it follows that the Discipline Committee may find professional misconduct within the meaning of s. 26(2), and within the meaning of s. 26(1), without also finding a broader impact of the kind specified in s. 26(1). This inclusive interpretation accords with the purpose of the *Act* and the role of the Discipline Committee in advancing that purpose. It bears emphasizing that here, as in every case, I must abide by the direction in s. 2-10(2) of *The Legislation Act*:

> 2-10(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

[104] In my respectful opinion, the inclusive interpretation is consistent with this principle, while the interpretation proposed by SUN is not. SUN's interpretation would unduly limit the ability of the Discipline Committee to fulfill its role.

[105] To reiterate, this does not mean that the Discipline Committee has unfettered discretion. No discretionary power is unlimited. As explained above, off-duty conduct is not professional misconduct absent the necessary nexus with the profession and thus with the purposes of the *Act*. Indeed, that is true of any kind of matter, conduct or thing alleged to constitute misconduct. As Cameron J.A. elegantly put the matter in *Rimmer* at paragraph 58, "the powers in issue are discretionary and therefore fall to be exercised as the judge vested with them thinks fit, having regard for such criteria as bear upon their proper exercise". For the reasons I will now explain, it is by failing to act in accordance with this principle that the Discipline Committee committed an error of law in this case.

3. Failure to accord sufficient or any weight to relevant factors

a. Positions of the parties

[106] Ms. Strom submits that the Discipline Committee failed to consider or grant sufficient weight to a variety of relevant factors. Those factors include the duty and unique value of professional advocacy and the importance of accountability relating to the healthcare system. In a similar vein, she asserts there was a failure to give sufficient weight to freedom of expression and the value of public discourse.

[107] Ms. Strom also points to various factors relating to the personal nature of the posts. She alleged that the Discipline Committee failed to give sufficient weight to what may be described as the right of a registered nurse to a private life and personal autonomy. On this note, she points to the fact that the posts were made when she was on maternity leave and were "provoked" by the death of her grandfather. She asserts that the evidence did not support the inference that the posts were contrary to the best interests of nurses or damaged the reputation of the profession of registered nursing and that the Discipline Committee made no such finding of fact.

[108] Finally, Ms. Strom points to factors relating to the content of the posts. She notes there was no proof the posts were untrue, as the parties agreed that the truth of their content was not in issue. Indeed, it is her position that the Discipline Committee should have accorded greater weight to the fact that the posts were balanced and mild in tone and that Ms. Strom had acted in good faith.

[109] The SRNA has a radically different perspective. As a general matter, it strongly emphasizes the breadth of the Discipline Committee's authority to decide whether professional misconduct is made out. It notes that Ms. Strom identified herself as a registered nurse. In the SRNA's view, there is evidence to support all of the findings made by the Discipline Committee, including the inference that the posts were contrary to the best interests of nurses or damaged the reputation of the profession.

[110] The SRNA also emphasized the theme that Ms. Strom was simply venting her anger. It characterizes the posts harshly, as an attack on the reputation of the small number of nurses who worked at St. Joseph's, rather than a comment on a matter of public policy. In its view, the posts criticized the integrity and competence of some, if not most, of those nurses, such that a reasonable person reading the posts could conclude that the majority of the small number of nurses who worked at St. Joseph's are incompetent, lack compassion and do not care about their patients. It asserts that she was negligent and thus unprofessional in failing to confirm the facts and point out that she had the option to pursue her concerns through appropriate channels before going public. It notes that she was aware of cautionary guidance that had been provided to nurses relating to the use of social media.

b. Analysis

[111] I would first note that the issue under this ground is not whether the Discipline Committee could have found Ms. Strom guilty of professional misconduct. Nor is it whether this Court would have done so. It is whether the Discipline Committee failed to accord any or sufficient weight to relevant criteria. Cast in the language of the standard of review, the issue is whether the Discipline Committee failed to apply or misapplied the criteria governing the exercise of its discretion, thereby committing an error of law.

[112] As is noted in *Regulation of Professions in Canada*, three groups have an interest in fair and effective professional self-governance; that is, the public, the profession, and the members of the profession who are subject to regulation and potential discipline. In this case, the central question is whether the Discipline Committee gave sufficient weight to Ms. Strom's right to freedom of expression and autonomy in her personal life, which is of particular importance to the third of these interests. There are also issues as to whether any or sufficient weight was given to the public interest connected to Ms. Strom's freedom of expression. As to the autonomy issue, the statement by La Forest J. in *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 [*Ross*], referred to above bears repeating in this context:

> 45 It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. …

[113] This statement reflects the central question in relation to the imposition of professional sanctions for off-duty conduct described above; that is, whether there is a nexus between the off-duty conduct and the profession that demonstrates a sufficiently negative impact on the profession or the public interest. This question calls for a contextual analysis. As Moldaver J. said in *Groia* at paragraph 83, "a law society disciplinary tribunal must always take into account the full panoply of contextual factors particular to an individual case" before making a finding of professional misconduct. The potential impact on personal autonomy – or as La Forest J. put the matter, on privacy and fundamental freedoms – is a key contextual factor when deciding whether *off-duty* conduct constitutes professional misconduct.

[114] It is difficult to generalize as to how these competing interests should be balanced when deciding whether professional misconduct has occurred other than by emphasizing, as courts must in many contexts, that the answer turns on all the circumstances of the case. Further, the balance to be struck between these potentially competing considerations is a matter to be decided by the Discipline Committee, provided that there is no reviewable error.

[115] For purposes of illustration, however, it is clear that the publication of a balanced Facebook post by a registered nurse about the need for improvement in the overall quality of palliative care provided by Saskatchewan nurses, without naming names or identifying a particular institution – would not justify a finding of professional misconduct. There would be no basis to conclude that the conduct in question – taking account of the tone, content and purpose of the post, being to generate or engage in political or social discourse – would damage the ability of the nurse to carry out their professional duties, negatively impact the interests of the public, or tend to harm the reputation of the profession. That is so despite the fact a public call for such change could be taken to be critical of nurses and doctors involved in palliative care. Moreover, the right to participate in social and political discourse is an important aspect of personal autonomy and free speech and is at the heart of a liberal democracy.

[116] Similarly, a single emotional outburst by a registered nurse at the deathbed of a child or spouse criticizing the treatment provided by medical staff would generally lack a sufficient nexus to justify a professional sanction. Such an outburst would be profoundly personal. Grief can bring people low or cause them to rage. Those hearing of such comments would understand that context, reducing their potential impact on other nurses or the profession. While those unfairly criticized in such a circumstance may suffer hurt feelings and deserve sympathy, a negative impact on the public interest, nurses or the profession is a horse of a different colour.

[117] Analyzed with these considerations in mind, the *DC Decision* discloses a series of omissions that together constitute an error in principle. For convenience, I will briefly reiterate the key elements of that decision. The Discipline Committee, having adopted the test suggested by *Fountain 2007*, noted that Ms. Strom had identified herself as a nurse to give credibility and legitimacy to her comments. On that basis, it found she had created the necessary link between her views and her position as a registered nurse. It then held that she chose to use Facebook as a

"generalized public venting" rather than raising her concerns with her grandparents' healthcare team (at para 42). In the course of their *Charter* analysis, it found that the posts criticized and harmed the reputation of nursing staff at St. Joseph's and undermined public confidence in that facility. It noted the dangers of social media posts. It referred finally to the fact the posts may have been motivated by "grief and anger" and were not malicious but made in good faith (at para 58).

[118] With the greatest respect, this reasoning did not take adequate account of key factors which were relevant to the decision. To begin, the Discipline Committee found that by posting and tweeting the comments specified in the Charge, Ms. Strom intentionally criticized those who cared for her grandfather. There is, however, no further analysis in the *DC Decision* of the tone, content or purpose of the posts as a whole. Self-evidently, that tone, content and purpose were an important contextual factor when answering the question of how the posts would be understood by readers and thus whether there was an impact of the kind necessary to establish a sufficient nexus to the purpose of the *Act*.

[119] There are several key aspects to this omission. Nothing is made of the fact that Ms. Strom's initial post included a link to the newspaper article, which was a policy argument related to improvements in and the allocation of additional resources to palliative care in Canada. Similarly, although the *DC Decision* refers to the fact that Ms. Strom testified that some of her comments had expressed gratitude, the Discipline Committee's analysis of the posts does not refer to her laudatory comments or to the fact that the posts were a conversation about long-term care in general. These aspects of the posts were part and parcel of their meaning and, as such, relevant to the potential impact of the portions specified in the Charge.

[120] In this respect, the *DC Decision* is consistent with the Charge, which cherry picked the most critical portions of the posts. I note, for example, that the Charge omitted the following portions of Ms. Strom's initial post:

> Don't get me wrong, "some" people have provided excellent care so I thank you so very much for YOUR efforts … 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!

[121] The second post did not mention St. Joseph's at all, responded to comments from a Facebook friend, and was directed to the long-term care system as a whole. Neither the comments

from friends nor the second post were referred to in the *DC Decision*. The second post included the following comment:

> This is someone's Husband/Wife, Dad/Mom, Grandparent, Brother/Sister we are talking about… AND Being treated well/fairly is A HUMAN RIGHT FOR GOODNESS SAKES! They are NOT A ROOM NUMBER OR A CHART NUMBER!
>
> I am so grateful for the people who EXCEL at this type of work and they should be recognized and commended every single day!

[122] Nor is there any mention of the fact that Ms. Strom self-identified as a grieving granddaughter, despite the connection between that fact and how a reader would tend to understand the meaning of the posts and thus their potential impact on the profession. To the contrary, the Discipline Committee harshly and simplistically summarized her statements as a generalized public venting. Although there was a passing comment that anger or grief may have motivated Ms. Strom, that fact is given no weight. Rather, the Discipline Committee disposed of it with the following statement:

> 58. … Carolyn Strom is a professional bound to act with integrity in accordance with the *Code of Ethics*. The Discipline Committee does not seek to "muzzle" registered nurses from using social media. However, registered nurses must conduct themselves professionally and with care when communicating on social media.

[123] Further, there is no mention of the fact that the posts were a brief online conversation with few participants that occurred in the course of a single day. Nor, for that matter, is there any reference to the fact that the posts had not been shown to be untrue or even to have been exaggerated. I do not agree with the SRNA's suggestion that the fact Ms. Strom did not prove the posts were true weighs heavily against her. In my opinion, it has the opposite effect; that is, the lack of proof that they were untrue weighs in her favour and against a finding of professional misconduct.

[124] Crucially, although the Discipline Committee did briefly address the s. 2(b) *Charter* argument as a separate issue, it did not otherwise refer to the impact on Ms. Strom's personal autonomy or freedom of speech. Nor did it refer to the related issue of public discourse relating to the healthcare system, including the possibility that participation by registered nurses in activity of that kind might, depending on the circumstances, enhance the reputation of registered nurses and advance the public interest. It is impossible to gainsay the significance of public accountability in relation to long-term care. Many long-term care residents lack the ability to speak for themselves and have no one to speak on their behalf. Canadians have learned that to their dismay during the

COVID-19 crisis. They have also learned that proper channels and the usual systems do not always work.

[125] In this context, it is important to keep the particulars of the "improper channels" element of the Charge in mind. One might rhetorically ask how many registered nurses could reasonably be expected to pursue the channels described in the Charge when complaining about the care of their aging parent in a facility where they do not work. As the Charge put it, referring to the choice to post on Facebook:

> … This violates your obligation as a professional to take concerns you may have to the appropriate channels starting with the individual care providers and if matters cannot be resolved at that level then to report it to their manager. If that does not result in a positive change, raise it with the director of the facility and ultimately the health board of the facility and the health region and the minister. It is only if all of those efforts have not led to a positive change would you be able, with the consent of your grandparents or their power of attorney to take the matter to the public.

[126] The *DC Decision* did deal briefly with whether the Discipline Committee could impose discipline for off-duty conduct, which is related to the personal autonomy issue. It rejected Ms. Strom's argument that her conduct was beyond its reach solely on the basis that she had self-identified as a registered nurse and healthcare advocate and did not follow proper channels. Here, too, it failed to refer to personal autonomy, freedom of speech and the potential benefits of public discourse to the public interest, nurses and the profession.

[127] I would reiterate that negative impact on the interests of the public or nurses or a tendency to harm the profession is a question of fact. I have found that it is not necessary to prove that impugned conduct impacts nurses or the profession as a whole. However, the question of whether damage of that kind occurred was certainly an important consideration in these circumstances. That is particularly so given that the evidence of impact was almost entirely limited to evidence that nurses at St. Joseph's were angry or upset by the comments. There was evidence a few people asked what was going on. There was no evidence – as opposed to speculation – that they, or, for that matter, the community, residents or their families lost confidence in St. Joseph's. The Discipline Committee found only that there were negative impacts on nursing staff at St. Joseph's as a result of their reaction to the criticism and, despite the absence of evidence, of a loss of public confidence in that facility. However, it did not decide whether, as a result, Ms. Strom's conduct had or tended to have an impact specified in s. 26(1). I must respectfully disagree with the SRNA's

submission that the Discipline Committee drew those broader inferences, assuming without deciding that it would have been open to them to do so.

[128] In the result, and with respect, I conclude that the Discipline Committee erred in principle by failing to accord sufficient or any weight to important criteria that governed the exercise of their discretion. Its analysis was one dimensional, referring repeatedly to the fact that Ms. Strom made critical comments on social media rather than through proper channels. It did not reflect the complete contextual inquiry necessary to determine whether professional misconduct had been made out on the evidence.

[129] For these reasons, the Discipline Committee's decision that Ms. Strom had committed the violations described in the particulars as "failure to follow proper channels" or "impact on reputation of facility and staff" must be set aside. That conclusion also effectively disposes of the third conviction, that being for failing to first obtain all the facts directly from the facility and the care providers. Absent a finding that the posts constituted professional misconduct, the allegation that Ms. Strom committed a breach by failing to corroborate the facts before making those posts falls away.

[130] In any event, the *DC Decision* does not address this "corroboration" ground, including the curious notion that it was professional misconduct for Ms. Strom – who spoke regularly to her grandparents – to complain about the care given by nurses at St. Joseph's to her grandfather without first obtaining "all of the facts" from those very nurses. The Discipline Committee did not refer to the evidence bearing on Ms. Strom's failure to obtain the facts from St. Joseph's and the staff at that facility. Nor was there any analysis of whether Ms. Strom was entitled to reach conclusions based on reports received from her grandparents and family while she was off duty and on maternity leave, about a facility with which she had no professional connection. Accordingly, I find the Discipline Committee failed to apply the criteria governing the exercise of its discretion in relation to this charge as well.

VII. THE *CHARTER* ISSUE

[131] Although I have decided that all findings of professional misconduct in the *DC Decision* must be set aside based on the professional misconduct ground, I will also address the *Charter*

issue. That is so for two reasons. First, this appeal was presented principally as a *Charter* case. The parties and other registered nurses should have an answer to the important question of whether the *DC Decision* infringed Ms. Strom's *Charter* rights. Second, it is arguable – despite the readily apparent gaps in the evidence – that the appropriate remedy, if the case is decided solely on the basis of the professional misconduct ground, would be to remit the matter to the Discipline Committee. In my view, that is not the appropriate result if the appeal is also disposed of on the basis of the constitutional ground.

A. Did the Chambers judge select the correct standard of review relating to the *Charter* issue?

[132] The parties agree that Ms. Strom's s. 2(b) *Charter* right to freedom of expression was infringed by the decision of the Discipline Committee. The question considered by the Discipline Committee was whether that infringement was justified pursuant to s. 1 of the *Charter*. As is noted above, the Chambers judge held that the standard of review was reasonableness and that the Discipline Committee's decision was entitled to deference.

[133] In their supplementary submissions as to the effect of *Vavilov*, both parties took the position that the standard of review that should be applied to the constitutional ground is correctness. I agree. As this Court said in *R v Lichtenwald*, 2020 SKCA 70 at para 22, 388 CCC (3d) 377, issues as to the scope and application of a *Charter* right raise questions of law on appeal, reviewable on the correctness standard pursuant to the appellate standard: *R v Kossick*, 2018 SKCA 55 at para 19, 365 CCC (3d) 186; *R v Ramos*, 2011 SKCA 63 at para 19, 371 Sask R 308; *R v Farrah*, 2011 MBCA 49 at para 7, 274 CCC (3d) 54; *Lac La Ronge (Indian Band) v Canada (Attorney General)*, 2017 SKCA 64. This is a statutory appeal and the appellate standard applies. It is not necessary to consider the question left unanswered by *Vavilov*, at paragraph 57; that is, what is the standard of review when the issue of whether an administrative decision has unjustifiably limited *Charter* rights is raised on judicial review, rather than on appeal?

[134] In the result, the Chambers judge – who did not have the benefit of *Vavilov* – erred by selecting the reasonableness standard of review. For that reason, and given that the applicable standard of review is correctness, it falls to this Court to decide whether the *DC Decision* unjustifiably infringed Ms. Strom's right to freedom of expression.

B. The *Charter* right to freedom of expression

[135] Section 2 of the *Charter* provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[136] The s. 2(b) right to freedom of expression is a core constitutional right. As Cory J.A. (as he then was) said in *R v Kopyto* (1987), 47 DLR (4th) 213 (WL) (Ont CA) at para 194 [*Kopyto*]:

> Considering now the purpose of s. 2(b), it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful, language may be the necessary touchstone to fire the interest and imagination of the public to the need for reform and to suggest the manner in which that reform may be achieved.

[137] In *R v Keegstra*, [1990] 3 SCR 697 at 810–811 [*Keegstra*], McLachlin J. (as she then was), in her dissenting reasons, affirmed the three values underlying the s. 2(b) guarantee seeks to promote, which were summarized in *Irwin Toy* at pages 976–977 as, "(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed". As Dickson CJC, for the majority, said, "[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy" (at 763–764). In *Groia* at paragraph 117, Moldaver J. described the importance of these core values when considering whether an unjustifiable infringement has been made out, noting that the "[t]he protection afforded to expressive freedom diminishes the further the speech lies from the core values of s. 2(*b*): *Keegstra*, at pp. 760–62; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 72–73".

[138] In *Kopyto*, Cory J.A. explained what has often been considered the most important reason freedom of expression cannot be unduly constrained to avoid offending others. Criticism will tend to upset the target of that criticism. Criticism, even blunt criticism, is essential to healthy debate. Indeed, it is when our expression may be objectionable to others that it needs protection. This fragile and crucial principle is reflected in this statement by La Forest J. in *Ross*:

> 59 Section 2(*b*) must to be given a broad, purposive interpretation; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. …
>
> 60 Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee of freedom of expression; see *Irwin Toy*, *supra*, at p. 969. The scope of constitutional protection of expression is, therefore, very broad. It is not restricted to views shared or accepted by the majority, nor to truthful opinions. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be; …

[139] Justice Abella spoke to this issue in *Doré* in the context of the professional discipline issue engaged in that case, being civility in the legal profession. Although her comments were directed to reasonableness review of a disciplinary decision, the substance of what she said as to the need to balance a proper regulatory purpose and freedom of expression applies equally on appellate review by a court. Having noted the importance of professional discipline to prevent incivility in the profession, she said this:

> [63] But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular …
>
> …
>
> [65] Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. …
>
> [66] 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. …

[140] What, then, is an appellate court's task when reviewing whether the decision of an administrative body unjustifiably infringed a *Charter* right? In substance, that task is summarily described in *Doré* at paragraph 6, despite the fact that the standard of review is correctness. The Court's task is to determine whether the decision-maker disproportionately limited the *Charter*

right or struck an appropriate balance between the *Charter* right and statutory objectives. In *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293 [*Trinity Western*], the majority – referring to *Doré* and to *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*] – put the matter this way:

> [58] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré*, at para. 57; *Loyola*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.

[141] I prefer to approach the analysis as relating to rights and freedoms, not values. I note in this regard the reasoning in the separate concurring reasons of McLachlin CJC and Rowe J. in *Trinity Western* at paragraphs 115 and 166–175; and of Côté and Brown JJ. (dissenting) at paragraphs 306–311.

[142] In *Loyola,* Abella J. defined a proportionate balancing as "one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (at para 39) and commented that "[s]uch a balancing will be found to be reasonable on judicial review" (at para 39). Correspondingly, an administrative decision that gives effect as fully as possible to the *Charter* protection at issue – here, freedom of expression – will be found to be *correct* on appeal. The analysis of whether this balance has been achieved is a highly contextual exercise and there may be more than one proportionate outcome: *Loyola* at para 41; *Trinity Western* at para 81. However, that does not mean deference is accorded to the administrative decision-maker. Rather, the analytical framework is analogous to that which applies on a judicial review or appeal where a breach of procedural fairness is alleged. There, the standard of review is also correctness despite the fact that participatory fairness may be achieved in more than one way: *Mercredi v Saskatoon Provincial Correctional Centre,* 2019 SKCA 86 at paras 26–29, [2020] 4 WWR 212.

[143] In *Trinity Western*, the majority summarized the purpose of the final stage of the proportionality analysis, being the impact of the administrative decision on the *Charter* right:

> [81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. …

> [82] The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

[144] In *Groia*, Moldaver J. made the important point that the proportionality analysis as to a finding of professional misconduct by the law society which impacts freedom of expression has two aspects. That finding must reflect a proportionate balancing of the law society's statutory objective with the lawyer's expressive freedom. In addition, the law society's "approach to assessing whether a lawyer's uncivil communications warrant law society discipline must allow for such a proportionate balancing to occur" (*Groia* at para 113). Justice Moldaver found that the law society appeal panel had met the second requirement by undertaking a "fundamentally contextual and fact-specific analysis" of the in-court statements by Mr. Groia impugning the conduct of opposing counsel. Justice Moldaver explained that conclusion:

> [118] The flexibility built into the Appeal Panel's context-specific approach to assessing a lawyer's behaviour allows for a proportionate balancing in any given case. Considering the unique circumstances in each case — such as what the lawyer said, the context in which he or she said it and the reason it was said — enables law society disciplinary tribunals to accurately gauge the value of the impugned speech. This, in turn, allows for a decision, both with respect to a finding of professional misconduct and any penalty imposed, that reflects a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory mandate.
>
> [119] In addition, the Appeal Panel's reasonable basis standard allows for a proportionate balancing between expressive freedom and the Law Society's statutory mandate. Allegations impugning opposing counsel's integrity that lack a reasonable basis lie far from the core values underpinning lawyers' expressive rights. Reasonable criticism advances the interests of justice by holding other players accountable. Unreasonable attacks do quite the opposite. As I have explained at paras. 63-67, such attacks *frustrate* the interests of justice by undermining trial fairness and public confidence in the justice system. A decision finding a lawyer guilty of professional misconduct for launching unreasonable allegations would therefore be likely to represent a proportionate balancing of the Law Society's mandate and the lawyer's expressive rights.
>
> (Emphasis in original)

[145] The specific contextual factors, including the concern with the reasonableness of Mr. Groia's allegations, reflect the facts in *Groia*. The requirement to undertake a complete

contextual analysis in assessing the impugned speech, on the other hand, would apply in every case. As Moldaver J. put the matter, "a law society disciplinary tribunal must always take into account the full panoply of contextual factors particular to an individual case before making that determination" (at para 83). The same is true of the Discipline Committee of the SRNA.

C. Analysis: The *Charter* issue

[146] Turning now to the application of this analytical framework, I will first briefly outline the key elements of the SRNA's position relating to the *Charter* issue. As the SRNA correctly notes, the *Charter* issue overlaps with the professional misconduct issue. Indeed, the SRNA suggests that the *Charter* adds little, as the analysis is contextual in either case. As to the issues of minimal impairment and proportionality, it submits that *Doré* demands nothing more than that the administrative decision reasonably advances a statutory objective, taking account of the severity of the *Charter* rights infringement.

[147] The SRNA also relies on the principle that the reviewing court must consider whether there were other reasonable and less intrusive options available to the administrative body. It submits that since this decision was a choice between two options – to either convict or acquit Ms. Strom – there was no other reasonable and less intrusive option, as doing nothing would not advance the statutory objective. In the result, it says that the decision was necessarily the least intrusive available. In this context, it relies on the following comments by McLachlin C.J.C. in *Trinity Western*:

> [114] I agree with the majority that on judicial review of a rights-infringing administrative decision, the analysis usually comes down to proportionality, and particularly the final stage of weighing the benefit achieved by the infringing decision against its negative impact on the right (para. 58). Proportionality requires that the state objective capable of overriding a right be rationally connected to the decision; in the administrative context, where the decision falls within the scope of an unchallenged law, usually this is the case. Minimal impairment — whether the administrative decision infringes a *Charter* right more than necessary or is broader than reasonably required — arises, but the question is not whether "the law" catches more conduct than it should, as under *Oakes*, but whether an alternative less-infringing decision was possible. Particularly where the decision is a choice between only two options (for example, to accredit or not), this step will also easily be met. This leaves the final stage of the proportionality inquiry — assessing the actual impact of the decision. It follows that in reviewing administrative decisions, the analysis almost invariably comes down to looking at the effects of the decision and asking whether the negative impact on the right imposed by the decision is proportionate to its objective.

[148] I must first identify the statutory objective of the disciplinary process against Ms. Strom. That statutory objective must be pressing and substantial to justify the infringing measure: *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 143 [*RJR-MacDonald*]. In doing so, it is necessary to take account of the facts, rather than simply restating the purpose of the *Act* as a whole or, for that matter, of the disciplinary process as a whole. As Lamer C.J.C. said in *RJR-MacDonald*:

> 144 Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is *the objective of the infringing measure*, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. …
>
> (Emphasis in original)

[149] Put differently, the objective should be defined in a fashion that is narrow enough to test the decision at issue and broad enough to enable the court to identify and assess other options that may have been available to the administrative body. In his majority judgment in *Groia*, for example, Moldaver J. described the statutory objective as "advancing the cause of justice and the rule of law by setting and enforcing standards of civility" (at para 140).

[150] On this appeal, the SRNA identified various possible statutory objectives. In its factum, the SRNA submitted that the objective was to ensure that nurses publicly advocate in a professional manner. In its supplementary factum, it argued – echoing the language of s. 26(1) – that the Discipline Committee's objective was to protect the best interests of the public, nurses and standing of the profession of nursing from unjustified harm by another registered nurse. That objective is so broad as to serve no useful analytical purpose. The SRNA also suggested that the pressing and substantial objective could be expressed as ensuring the protection of the standing of the profession of nursing by requiring a minimum standard of professionalism from nurses in the way they seek to advocate for change or address health issues.

[151] I have described the purpose of the *Act* as being to provide for a professional regulatory body to license and regulate registered nurses, with an overriding objective of safeguarding the public interest. Professional discipline serves the public interest by protecting the standing of the profession. The speech at issue is public speech relating to healthcare, including registered nurses. I would characterize the statutory objective 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. I am satisfied that is a pressing and substantial objective.

[152] The second question is whether the *DC Decision* was rationally connected to the advancement of this statutory objective: *Whatcott* at para 64. The *DC Decision* clears that hurdle. The SRNA has noted factors which demonstrate that connection. Among other things, it notes that raising concerns through designated channels rather than publicly could make those who are the subject of those concerns less defensive and more likely to work constructively toward a solution. Using those channels could reduce conflict and enhance camaraderie among health professionals, which the SRNA believes would raise public confidence. It could increase the public perception that registered nurses work together to address problems. It could reduce the publication of misinformation which could damage the reputation of the profession or other aspects of the healthcare system, with the result that the public might be less likely to use and rely on that system. That could negatively impact health outcomes.

[153] Having established a rational connection to a pressing and substantial objective, the SRNA submits that the *DC Decision* was a binary decision. On that basis, it says that the decision that Ms. Strom was guilty of professional misconduct was the least intrusive option available to promote this objective and, as such, infringed freedom of expression no more than was reasonably necessary.

[154] With respect, the SRNA's approach misses the point made in *Groia* that there is a second aspect to the proportionality analysis. The *DC Decision* was not a simple binary decision about misconduct. As the SRNA states in its factum, the Discipline Committee decided that Ms. Strom was subject to a rule that registered nurses who wish to make statements criticizing other nurses or healthcare institutions must first "gather the facts" (that is, they must corroborate the facts with those nurses or that institution); must make all criticisms through specified channels; and must exhaust all of those channels, including appealing to the Minister, before going public. The Discipline Committee also decided that little or no weight should be accorded to contextual factors such as anger or distress as a result of the personal connection of the accused nurse to a person harmed by a perceived failure to meet the standard of care; the extent of the professional connection between the nurse who is accused of misconduct and the institution where the care was

delivered; and whether the impugned public expression was true, or, for that matter, was made in good faith to advocate for systemic change.

[155] This, then, was the Discipline Committee's approach to assessing whether public expression by a registered nurse warrants SRNA discipline. Accordingly, it is subject to the second aspect of the proportionality analysis described in *Groia*, and with the greatest respect, does not pass muster. To paraphrase *Groia*, the Discipline Committee did not adopt an approach that provided for the consideration of the "full panoply of contextual factors" particular to Ms. Strom's case before deciding she should be disciplined despite the infringement of her right of free expression. The correct approach to assessing whether speech relating to healthcare constitutes professional misconduct would account for the unique circumstances of each case — such as what the registered nurse said, the context in which they said it and the reason it was said — thereby enabling the Discipline Committee to accurately gauge the value of the impugned speech. The relevant contextual factors might include, without limitation:

(a) whether the speech was made while the nurse charged was on duty or was otherwise acting as a nurse;

(b) whether the nurse charged identified themself as a registered nurse;

(c) the extent of the professional connection between the nurse charged and the nurses or institution the nurse charged has criticized;

(d) whether the speech related to services provided to the nurse charged or their family or friends;

(e) whether the speech was the result of emotional distress or mental health issues;

(f) the truth or fairness of any criticism levied by the nurse charged;

(g) the extent of the publication and the size and nature of the audience;

(h) whether the public expression by the nurse was intended to contribute to social or political discourse about an important issue; and

(i) the nature and scope of the damage to the profession and the public interest.

[156] I have characterized the statutory objective against which the *DC Decision* must be assessed 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". A fact-specific approach that takes account of all contextual factors would enable the Discipline Committee to proportionately balance the *Charter* right of registered nurses to free expression and the SRNA's legitimate concern with off-duty speech by registered nurses with a sufficient nexus to the profession. This approach would enhance respect for the SRNA and the disciplinary process and, by doing so, would more effectively advance this statutory objective.

[157] What, then, of the severity of the impact of the *DC Decision* on Ms. Strom's freedom of expression? The SRNA argues that the Discipline Committee took account of that issue. It emphasizes that Ms. Strom could have simply reposted the newspaper article and explained that she shared the concerns identified by the author, without targeting St. Joseph's or its staff. It says she could have privately raised her concerns about the care given to her grandfather with St. Joseph's and, if by doing so she obtained evidence confirming her suspicions, she could have filed a complaint.

[158] The SRNA argues that proceeding in this fashion would have been both professional conduct and more effective advocacy. In its view, the existence of this pathway meant that Ms. Strom was not meaningfully prevented from engaging in political advocacy relating to public healthcare. In its view, Ms. Strom engaged in "impulsive, gratuitous social media venting" which lacked a close connection to the core values freedom of expression was intended to protect, accomplishing nothing other than her self-fulfillment.

[159] I begin with the proposition that Ms. Strom had the right to criticize the care her grandfather received. Indeed, the SRNA does not take issue with that proposition. In *R v Guignard*, 2002 SCC 14, [2002] 1 SCR 472 [*Guignard*], the Court dealt with the related issue of the right to criticize goods and services supplied in the course of commerce. Such criticism contributes to society's store of information and to social and political decision-making, which are fostered by freedom of expression. As LeBel J. commented in *Guignard*:

> 23 … Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business. Given the tremendous importance of economic activity in our society, a consumer's "counter-advertising" assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.
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> 24 "Counter-advertising" is not merely a reaction to commercial speech, and is not a form of expression derived from commercial speech. Rather, it is a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens.
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> 25 In this respect, simple means of expression such as posting signs or distributing pamphlets or leaflets or, these days, posting messages on the Internet are the optimum means of communication for discontented consumers. …

[160] The freedom to criticize services extends equally to public services. Indeed, the right to criticize public services is an essential aspect of the "linchpin" connection between freedom of expression and democracy. In Canada, public healthcare is both a source of pride and a political preoccupation. It is a frequent subject of public discourse, engaging the political class, journalists, medical professionals, academics, and the general public. Criticism of the healthcare system is manifestly in the public interest. Such criticism, even by those delivering those services, does not necessarily undermine public confidence in healthcare workers or the healthcare system. Indeed, it can enhance confidence by demonstrating that those with the greatest knowledge of this massive and opaque system, and who have the ability to effect change, are both prepared and permitted to speak and pursue positive change. In any event, the fact that public confidence in aspects of the healthcare system may suffer as a result of fair criticism can itself result in positive change. Such is the messy business of democracy.

[161] The reasoning in *British Colombia Public School Employers' Association v British Columbia Teachers' Federation*, 2005 BCCA 393, 257 DLR (4th) 385, illustrates this point. The Court there was concerned with a ban imposed by school boards against teachers posting and distributing materials relating to class size and collective bargaining issues on school property, including in parent-teacher interviews. The Court noted that political expression and the promotion of participation in the democratic process are at the core of the *Charter* protection of freedom of expression. It asked whether permitting teachers to handle materials expressing their collective political views might risk undermining public confidence in the school system and in the ability

of teachers to foster an open education environment. Justice Huddart concluded it would not, commenting as follows:

> [50] However, while it may be reasonable to infer that the routine discussion of class sizes contemplated by the BCTF to advance its political agenda might tend to undermine public trust in the administration of the school system, it is difficult to see how discussion about class size and composition in relation to the needs of a particular child by an informed and articulate teacher could do anything but enhance confidence in the school system. Like the arbitrator, I cannot discern any potential harm from the posting of materials on a school bulletin board.
>
> [51] Political expression and the promotion of participation in the democratic process are at the core of the s. 2(b) protection of freedom of expression (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199). As the Supreme Court of Canada has said, an infringement of such expression will be more difficult to justify and arguments which seek to do so must be subjected to a "searching degree of scrutiny" (*Ross*, at para. 89). Through the various materials the BCTF asked its members to distribute, teachers voiced their concerns about government policies on issues of particular importance to them. This is, of course, political expression of a kind deserving of a high level of constitutional protection.
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> (Emphasis added)

[162] As is noted above, the Discipline Committee did not advert to this important theme. Having focused solely on the personally critical portions of Ms. Strom's post identified in the Charge, it failed to recognize that her comments were not only both critical and laudatory but were self-evidently intended to contribute to public awareness and public discourse. Ms. Strom spoke to the need for training and of the right of all residents to quality and compassionate care. She spoke to the need for the loved ones of residents in extended care to play a part in the accountability of the system. Remarkably, the only significance attributed by the Discipline Committee to the fact that the posts were tweeted to the Minister of Health and the Leader of the Opposition was that the tweets made the posts public. There was no connection drawn between this direct political action and the purpose of the posts, which, as noted, the SRNA characterizes as impulsive, gratuitous social media venting.

[163] As I have noted, the SRNA argues that there is minimal impairment of Ms. Strom's rights because she could have followed what the Discipline Committee considers to be proper channels. With respect, the process available through those channels is radically different in its scope and meaning than the route chosen by Ms. Strom. Ms. Strom sought to both disclose her concerns, and to publicly engage others in the conversation. Her expressed concerns did not relate only to nurses and other staff at St. Joseph's, but to all institutions, all residents and to broad public policy issues.

The inclusion of the newspaper article in the context of the posts made it clear that her concerns were not limited to the kind of issues that could have been pursued privately by talking to individual nurses at St. Joseph's or, for that matter, by pursuing such a complaint with management or the Board.

[164] In the result, the *DC Decision* not only denied Ms. Strom, and would deny other registered nurses, the right to choose their means of communication and audience, but would effectively preclude them from using their unique knowledge and professional credibility to publicly advance important issues relating to long-term care of the sort raised by Ms. Strom. That is so despite the fact that there was no finding the posts were untrue or unfair. Indeed, they appear on the face of it to present a balanced view of the care her grandfather received and of long-term care. They state that some of those who provide care to residents of long-term care do less than they should, could be more empathetic, could profit from more training, and are there for the paycheque. These "critical" statements are a matter of common sense. Ms. Strom also praised some caregivers and proposed constructive solutions to address what she perceives as shortcomings.

[165] This infringement is properly characterized as a serious impact on the type of speech that s. 2(b) of the *Charter* seeks to protect. The significance of that impact is increased by the fact that it related to Ms. Strom's freedom of expression while off duty and in relation to her private life. Essentially the same issue – although not the *Charter* right – was emphasized in the analysis of the professional misconduct ground. Becoming a member of a regulated profession comes with benefits but at a cost. Those who sign up as doctors, nurses, lawyers, engineers, or any other of the regulated professions that crowd the statute books choose to subject themselves to the requirements, rules and processes imposed by legislation, to applicable codes of conduct and professional standards, and to the authority of the regulator. It is entirely legitimate for a professional regulator to impose requirements relating to civility, respectful communication, confidentiality, advertising, and other matters that impact freedom of expression. Failing to abide by such rules can be found to constitute professional misconduct.

[166] However, to paraphrase La Forest J.'s comment in *Ross*, that does not mean the entire life of a professional should be subject to inordinate scrutiny on the basis of more onerous standards of behaviour, as that would lead to a substantial invasion of the privacy rights and fundamental

freedoms of professionals. The word “inordinate” can be understood as a shorthand expression of the need for proportionality. Nurses, doctors, lawyers and other professionals are also sisters and brothers, and sons and daughters. They are dancers and athletes, coaches and bloggers, and community and political volunteers. They communicate with friends and others on social media. They have voices in all of these roles. The professional bargain does not require that they fall silent. It does, however, allow the regulator to impose limits. The question as to whether it has imposed excessive limits is the proportionality question. Here, it is whether the Discipline Committee advanced its statutory objective in a manner that is proportionate to the impact on Ms. Strom’s right to freedom of expression. One aspect of that question is whether the impact on her freedom of speech in her private life was minimal or serious.

[167] In my view, and for substantially the reasons explored in relation to the professional misconduct ground, it was a serious impact. Ms. Strom posted as a granddaughter who had lost one grandparent and was concerned for the future of another. That fact was front and center for a reader of the posts. Although she identified as a nurse and an advocate, she was not and did not purport to be carrying out her duties as a nurse. She was on maternity leave and spoke to the quality of care provided by a distant facility with which she had no professional relationship. The private aspect of the posts was made clear and was significant. Further, and as has been noted, the posts have not been shown to be false or exaggerated and, on the face of it, would appear to be balanced.

[168] The denial of the right to speak in these circumstances is important. Proportionality, of course, is not concerned solely with the severity of the impact on *Charter* rights. It is concerned with the balance between rights and objectives. As noted above, there was evidence that some nurses and other staff at St. Joseph’s were angry and upset. There was, however, no evidence that the fact these nurses took offence negatively impacted the broader public interest or the public standing of the profession or, indeed, of St. Joseph’s and its staff. It bears repeating that speech cannot be unduly constrained to avoid offending others. Nor is there any evidence that punishing Ms. Strom would have a salutary effect, other than, perhaps, by providing some satisfaction to some staff at St. Joseph’s.

[169] For all of these reasons, the Discipline Committee was incorrect in finding that the infringement of Ms. Strom’s *Charter* right to freedom of expression was justified. Having

considered all of the relevant contextual factors, I have reached the opposite conclusion. The *DC Decision* unjustifiably infringed Ms. Strom's *Charter* right to freedom of expression.

VIII. CONCLUSION

[170] In the result, I would allow Ms. Strom's appeal and set aside the decision by the Discipline Committee that her conduct constituted professional misconduct, and the costs award. Ms. Strom shall have her costs of this appeal and of the proceedings in the Court of Queen's Bench in the usual way.

[171] In closing, I wish to make it clear that I, like the Discipline Committee, have made no findings as to whether those employed at St. Joseph's failed to provide appropriate care to Ms. Strom's grandparents. Nor have I made any findings as to whether any of the staff at St. Joseph's were ill-trained, lacked compassion or were there only for the paycheque.

"Barrington-Foote J.A."

Barrington-Foote J.A.

I concur. "Ottenbreit J.A."

Ottenbreit J.A.

I concur. "Caldwell J.A."

Caldwell J.A.